NEW DEVELOPMENTS IN IDEA LITIGATION

NEW YORK STATE EDUCATION DEPARTMENT
IDEA IMPARTIAL HEARING OFFICER TRAINING

VIRTUAL PROGRAM

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I. INTRODUCTION

These materials list and describe significant cases and selected U.S. Department of Education guidance materials on topics of concern to Individuals with Disabilities Education Act due process hearing decision makers. The period covered is approximately January 2019 through July 2020. The primary focus is on full, precedential opinions of the federal courts of appeals and guidance from the U.S. Department of Education that break new ground and have special bearing on matters likely to arise at due process hearings. However, a number of particularly noteworthy unpublished federal appellate opinions and decisions from district and other courts are also included. Cases concerning issues not of primary importance to IDEA due process decision makers, for example, those that focus on administrative exhaustion, class action status, Section 504-Americans with Disabilities Act claims, and attorneys' fees awards, are omitted.

II. CHILD-FIND

Independent Sch Dist. No. 283 v. E.M.D.H., 960 F.3d 1073, 120 LRP 17110 (8th Cir. June 3, 2020). This is the case of a 16-year-old high school student with diagnoses that included anxiety disorder, school phobia, autism with obsessive-compulsive traits, panic disorder with agoraphobia, ADHD, and severe recurrent major depressive disorder. The student frequently was absent from school, but performed well academically when there. In eighth grade she stopped attending altogether and was admitted to a day treatment program. School personnel did not refer her for special education, but instead disenrolled her, then in ninth grade reenrolled her, then disenrolled her yet again when she was readmitted to a day treatment program, then in tenth grade eventually disenrolled her twice for absences. After she had a second admission to an inpatient program, her parents requested a special education evaluation. The student reenrolled

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for eleventh grade, and the district conducted an evaluation. Before completion of the evaluation, the district offered an alternative learning environment and online program, but the student attended only two days of the alternative program. On the completion of evaluation, the district found the student not IDEA-eligible under the autism, emotional disturbance and other health impairment categories. The parents obtained an independent neuropsychological exam and partial functional behavioral analysis and invoked due process. The court of appeals affirmed the ALJ decision in favor of the parents, and reversed the district court's vacating of the compensatory education remedy imposed by the ALJ. The court of appeals supported its decision in favor of the parents by stating that the district evaluations were deficient under state law due to the absence of a systematic classroom observation and an FBA, and that the student's absenteeism did not excuse the failings when the student could have been evaluated away from school. The court held that the student met the emotional disturbance and other health impairment definitions. The court reasoned that the student's mental health problems caused the absenteeism. The court stated at 1082: "Despite this evidence, the District maintains that the Student is simply too intellectually gifted to qualify for special education. The District suggests the Student's high standardized test scores and her exceptional performance on the rare occasions she made it to class are strong indicators that there are no services it can provide that would improve her educational situation. The District confuses intellect for an education. . . . . The IDEA guarantees disabled students access to the latter, no matter their innate intelligence." The court went on to hold that the district failed its child-find obligations when it was aware no later than the spring of 2015 that the student stopped attending school due to mental health issues, and that limitations did not bar the claim because the failure to evaluate extended into the period two years before the filing of the due process complaint at the end of June, 2017. The court affirmed the award of reimbursement for the independent evaluations and privately provided educational services, and reversed denial of payment for private compensatory services, stating at 1084-85: "Whether the District is able to provide the Student a FAPE prospectively is irrelevant to an award of compensatory education. Because of this backward-looking nature, the purpose of any compensatory-education award is restorative–and the damages are strictly limited to expenses necessarily incurred to put the Student in the education position she would have been had the District appropriately provided a FAPE. . . . The administrative record supports the ALJ's conclusion that the services of a private tutor are appropriate until the Student earns the credits expected of her same-age peers."

Spring Branch Indep. Sch. Dist. v. O.W., 961 F.3d 781, 120 LRP 18300 (5th Cir. June 12, 2020) This case involved a student who transferred from a private therapeutic school to public school in fifth grade. In August, the parent told the school district that the student had ADHD and behavior challenges. In September, the student engaged in verbal and physical aggression, refused to follow directions, left without permission, slept in class, took others' property, and did not complete schoolwork. He started to fail in his academic classes. On October 8, the school adopted a Section 504 plan with behavior interventions, but the student's misconduct soon resumed and his grades declined. The mother said she requested a referral for special education evaluation in October, but the district did not make the referral. After incidents including misconduct toward staff, the district referred the student for a special education evaluation and the

parents agreed to a temporary alternative school program placement. The district adopted an IEP on March 11. The IEP included specific behavior intervention techniques, including training the student in replacement behaviors, offering choices to avoid power struggles, and using calm interaction. It did not include time outs or restraint. The district placed the student in an adaptive behavior program that used "take 5" or "take 10" isolation at a desk in the classroom. The student was restrained 8 times over 40 days, and police were summoned. In May, school officials and the student's mother, without any consultation with the IEP team, placed the student on a shortened school day, which was then further reduced by the school. The parents enrolled the student at a private school, and eventually placed him in a residential setting. The parents filed for due process, seeking private placement and tuition reimbursement. The hearing officer found in favor of the parents on claims regarding child find and free, appropriate public education as well as the district's failure to comply with the IEP, and ordered tuition reimbursement and payment for the student's continuing enrollment. The district court affirmed. On appeal, the court of appeals stated that a failure to conduct an expedited evaluation pursuant to the student discipline provisions found in 34 C.F.R. § 300.534(d) did not constitute a violation of the child child-find requirement, but went on to rule that the district committed a child-find violation by not initiating the special education evaluation process for the 99-day period from October 8, 2014 to January 15, 2015. The court stated at 793 that "the reasonableness of a delay is not defined by its length but by the steps taken by the district during the relevant period. A delay is reasonable when, throughout the period between notice and referral, a district takes proactive steps to comply with its child find duty to identify, locate, and evaluate students with disabilities. Conversely, a time period is unreasonable when the district fails to take proactive steps throughout the period or ceases to take such steps." The court rejected the district's position that it complied with child find by adopting behavioral interventions in a response-to-intervention program before making the special education referral. The court said that it was clear by October 8 that general education behavior interventions were not working. On the issue of denial of appropriate education, specifically the failure to implement the IEP and the use instead of time-outs, physical restraints, and police intervention as forms of discipline as well as the shortening of the school day, the court said that state law prohibits time-outs unless they are specified on the student's IEP or behavioral intervention plan and applied in conjunction with positive behavior strategies. It agreed with the district court that the take-5 and take-10 sessions constituted time outs and effected a substantial departure from the IEP. The deterioration in the student's grades and behavior demonstrated the denial of appropriate education. The court said that state law allows physical restraint in emergencies, and ruled that the police intervention was not an actionable IDEA violation. The ultimate modification of the school day to three hours without a written agreement to amend the IEP denied FAPE. The court, however, said that a portion of award of tuition for a period when appropriate education was not denied was error, and remanded the case for a redetermination of the remedy. The previous panel opinion, *Spring Branch Indep. Sch. Dist. v. O.W.*, 938 F.3d 695, 119 LRP 36071 (5th Cir. Sept. 16, 2019), was withdrawn and superseded on rehearing.

J.N. v. Jefferson Cnty. Bd. of Educ., 421 F. Supp. 3d 1288, 1301, 75 IDELR 153 (N.D. Ala. Nov. 6, 2019), *appeal filed*, No. 19-14847 (11th Cir. Dec. 5, 2019). This is the case of

an eighth-grader whose medical records indicated when she enrolled in sixth grade that she had ADHD, and whose parent informed the school of her ADHD diagnosis in March of the sixth grade year. During sixth grade, the student engaged in misbehavior and was suspended for three days and sent to alternative school for 15 days. Although student did not manifest academic failure in sixth grade, she earned Cs in reading and math and her sixth grade tests indicated a need for reading support. Her behavior issues continued in seventh and eighth grade, resulting in detentions and suspensions as well as academic trouble. Nevertheless, the student was not referred for special education evaluation until December of her eighth grade year. The evaluation led to her being found eligible on the basis of specific learning disability and other health impairment. The due process hearing officer found that the defendant violated the child-find obligation by overlooking clear signs of disability, but the decision did not award compensatory education or any other remedy because the parent did not show what relief was needed to make the student whole. The court affirmed the hearing officer. It reasoned that under 34 C.F.R. § 300.111(c)(1) schools must evaluate every child suspected of being a child with a disability, and pointed out that the student's poor grades indicated that the extra help provided during seventh and eighth grades was not availing. Nevertheless, the court reasoned as to the remedy that although there was no basis in equity to withhold compensatory relief, the only evidence regarding the need for compensatory education was the parent's testimony that the student would benefit from additional or compensatory education in reading and math. Moreover, there was no showing that the student was actually denied appropriate education in sixth and seventh grade, and interventions were undertaken in eighth grade prior to the special education referral. The court declared: "To summarize, the court concludes that the hearing officer erred by determining that an award of compensatory education is not warranted without considering whether the Board denied M.N. a FAPE, but the error is harmless because J.N. did not meet her burden of showing that the Board deprived M.N. of a FAPE due to its child-find violation."

Doe v. Cape Elizabeth Sch. Dep't, 382 F. Supp. 3d 83, 101, 74 IDELR 95 (D. Me. Apr. 4, 2019). This case concerned a student enrolled in the defendant school district from kindergarten to eleventh grade, but who was not found eligible for special education until twelfth grade. She performed well in school except for increasing absences in eleventh grade, but was engaged in serious behavior conflicts at home and had difficulties due to a concussion from an auto accident. The court affirmed a due process hearing decision rejecting tuition reimbursement for the unilateral parental placement of the student at two out of state private educational and therapeutic institutions. The court acknowledged that the IDEA child-find process may be prompted by absenteeism alone, but said that in light of the student's high grades, a single unexcused absence, and no discipline problems in ninth and tenth grade, followed by absences, most of them excused, after the concussion, and a decline in grades in eleventh grade that led to a Section 504 referral, no child-find violation occurred. The court stated: "Without a causal link to a disability or suspected disability, the decline in Jane's educational performance was insufficient to obligate CEHS to identify and refer Jane in accordance with its child-find duty." The court said that it may be reasonable in some cases for a school to pursue general education interventions in form of a Section 504 plan before

making a referral for special education. The court also said that the evaluation delays were attributable to unreasonable conduct by the parents.

Avaras v. Clarkstown Cent. Sch. Dist., No. 15 CV 9679, 2018 WL 4964230, at *10, 73 IDELR 50 (S.D.N.Y. Oct. 15, 2018, as amended), *appeal filed*, Nos. 18-3468 (2d Cir. Nov. 16, 2019), 18-3494 (2d Cir. Nov. 21, 2018), *reconsideration denied*, 2019 WL 2171140 (S.D.N.Y. May 20, 2019). In this case, a child who ultimately received a classification as learning disabled was provided early intervening and Response to Intervention services during kindergarten and first grade, but was not evaluated until the parent made a request late in the child's first grade year, 2011-12. Overturning the impartial hearing officer and state review officer decisions, the court held that in 2011-12 the district violated its child-find responsibility by not beginning the evaluation process within a reasonable time after being on notice of child's likely disability. The court said, "[T]he District provided RTI services for N.A. for the majority of both his kindergarten and first grade years, apparently believing that his ability to 'advance from grade to grade' was sufficient an excuse not to refer him for evaluation," but the court ruled that it was not sufficient. The court pointed out that despite receiving RTI for most of kindergarten, the child was referred for RTI again in first grade. The court determined that the duty to refer was triggered no later than eight weeks after the child began Tier 3 services in first grade, and further ruled that the violation caused deprivation of educational benefits. The court denied tuition reimbursement for 2011-12, noting that the child remained in public school. The court found a denial of free, appropriate public education for 2012-13 on the ground that the district failed to have an IEP in place for the child at the beginning of the school year, and awarded tuition reimbursement, but affirmed that the district did offer appropriate education for 2013-14.

III. EVALUATION AND ELIGIBILITY

Independent Sch Dist. No. 283 v. E.M.D.H., supra

A.A. v. Northside Indep. Sch. Dist., 951 F.3d 678, 76 IDELR 61 (5th Cir. Mar. 6, 2020). This case involved a student with emotional disturbance and other disabilities. The court affirmed the lower court's determination that a two-month reevaluation delay was not unreasonable. The court said that the record did not show a parental request for a counseling evaluation, and further, that changes in the student's program and program location within the school district did not amount to a change in educational placement when the classrooms were similar and the differences did not disrupt the implementation of the IEP or deprive the student of educational benefits. The court of appeals applied the Fifth Circuit's *Michael F.* factors (*Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5th Cir. 1997)) to find the IEP sufficiently individualized on basis of the student's assessment and performance. It further held that the student made meaningful and measurable progress academically and non-academically.

Lisa M. v. Leander Indep. Sch. Dist., 924 F.3d 205, 74 IDELR 124 (5th Cir. May 15, 2019). In this case, the district had provided the child with accommodations under

Section 504 when the child was in second grade. Shortly before the student started fourth grade, the parents requested a special education evaluation, but the district refused. The parents then obtained a private evaluation, and the district conducted its own evaluation and held an IEP meeting at which it found the student eligible under the IDEA on the basis of specific learning disability and other health impairment-ADHD. Twelve days later, after a private staff meeting, the district changed course and found the student not IDEA-eligible, and the parents challenged that decision at a due process hearing. The court affirmed the hearing officer and district court decisions that the child was eligible for special education. It analyzed the case as one in which the student had an impairment that qualified as a disability under the IDEA, so that the question on eligibility was whether due to the condition the student needed special education as of the time the determination was made. On that question, the court pointed to the hearing officer's credibility determinations and emphasized the student's record of failure in benchmark tests, his attention difficulties and difficulties with written work, lack of concentration, and stomach pains due to distress over academics. The court commented on the student's areas of strength, stating that "students with some baseline writing ability may still need special education." *Id.* at 219. The court also said that "Nothing in our opinion today should be read to foreclose the possibility that a student who demonstrates some academic success might still need special education. Indeed, federal regulations specifically provide that IDEA eligibility must be granted to a disabled student 'who needs special education and related services, even though the child has not failed or been retained in a course or grade, and is advancing from grade to grade.' 34 C.F.R. § 300.101(c)(1)." *Id.* at 218 n.12.

Greenhill v. Loudoun Cnty. Sch. Bd., infra

L.B. v. Kyrene Elementary Dist. No. 28, No. CV-17-03316-PHX-SMB, 2019 WL 4187515, 75 IDELR 44 (D. Ariz. Sept. 4, 2019), *order clarified*, 2020 WL 3026286 (D. Ariz. Jan. 31, 2020), *appeal dismissed*, No. 19-16971 (9th Cir. Feb. 12, 2020). This case involved a student, J.B., with behavior problems who had, according to the complaint, reactive attachment disorder, fetal alcohol syndrome, Klinefelter's syndrome, intellectual disability, ADHD, dyslexia, and dysgraphia. At public school, the student was restrained 16 times in 22 days. On Sept. 19, 2013, his mother gave a 10-day notice of intent to enroll him in a private school. The district offered to pay for the placement for the second quarter of that school year with an eye to returning the student to the district by January. The mother withdrew the student from the district, enrolling him in the private placement on Oct. 15, 2013. The mother and the school continued discussing transition back to public school, and the district provided some related services at a public school. The district held a multidisciplinary evaluation team meeting with the mother on December 19, 2013, then issued a notice saying that the student was no longer enrolled in the district, and the mother had rejected a plan to have him return to a district school. The notice also said the mother rejected the district's plan to evaluate the student at the private placement because of her concerns about traumatizing the student, and the district rejected other ways of obtaining the evaluation suggested by the mother. The notice stated: "As [J.B.] is not currently a student enrolled in Kyrene School District, no further [Multidisciplinary Evaluation Team/Individual Education Plan] meetings will take place. Should [L.B.] choose to enroll [J.B.] as a student in Kyrene, we

are ready[,] willing[,] and able to implement his [Individual Education Plan] as written and proceed with the evaluation process." 2019 WL 4187515, at *3. The mother kept the student at a private placement and filed for due process. The ALJ ruled in favor of the district. The mother appealed to district court, which affirmed the decision on all issues except for a challenge to the ALJ's ruling that the parties did not properly raise whether the district had the obligation to continue to evaluate J.B. and offer him FAPE after Dec. 13, 2013. That issue was remanded to the ALJ. The mother said that she raised the issue of the district's IDEA obligations after Dec. 19 in her amended due process complaint. The ALJ restated one of the complaint's claims, without any objection, as a contention that the district violated the IDEA by refusing to pay for the private placement and "subsequently violated the IDEA by refusing to hold IEP or multidisciplinary evaluation team (MET) meetings or provide any IEP services to Student." *Id*. The ALJ's restatement of another claim included that "Respondent denied FAPE to Student by unilaterally withdrawing Student from the District on October 14, 2013 and thereafter, refusing to provide any IDEA special education services unless and until Student re-enrolled in District." *Id*. at *4. Nevertheless, the ALJ found that the issue of failure to develop an IEP and offer services was not raised in the complaint and that there was no obligation to provide services after the Oct. 14, 2013 withdrawal from the district. The court ruled that the issue was pled sufficiently in the due process complaint. The court ruled that the district had IDEA obligations to the student even after withdrawal from the district. Following U.S. Department of Education guidance and applicable court decisions, the court said: "[T]he District is required to provide FAPE to students that reside in its district, but it is not required to provide FAPE 'if the parent makes clear his or her intention to keep the child enrolled' in an out-of-district private school. It also does not have to provide special education if Parent refuses to allow testing. The District is, however, required to offer FAPE to a student upon request of Parent." *Id*. at *6. The court said the record lacked information to determine whether the mother had made clear she had no intention to reenroll J.B. in the district, whether the district's efforts to evaluate the student or the mother's rejection of services in December 2013 eliminated the district's obligations, and whether the mother made any attempts after Dec. 19, 2013 to request FAPE. The mother also contended that the district's decision in October 2013 not to change the student's IEP denied appropriate education to the student. The court, however, deferred to the decision of the ALJ, who discussed the data about the child's behavior in detail in the decision. The court said that errors in the data were minor, and the district's position was well supported. The mother also said the district denied FAPE by failing to conduct needed evaluations. The court affirmed the ALJ's conclusion that a functional behavioral assessment was not needed despite the frequent use of restraint on J.B., saying that there was extensive information about J.B.'s behavior and a behavior support plan. The court also upheld the denial of a new speech-language assessment and an occupational therapy assessment. The requests for tuition reimbursement and attorneys' fees were denied without prejudice pending remand.

Questions and Answers on Implementing IDEA Part B Procedural Safeguards During COVID-19, 76 IDELR 301 (OSEP June 30, 2020). This document furnishes guidance on matters such as obtaining parental consent for evaluation, giving notice, and responding to records requests. Use of secure electronic means is suggested, and timelines are discussed.

IV. DISPROPORTIONALITY IN SPECIAL EDUCATION IDENTIFICATION

Council of Parent Attorneys and Advocates, Inc. v. DeVos, 365 F. Supp. 3d 28, 74 IDELR 13 (D.D.C. Mar. 7, 2019), *appeal dismissed*, No. 19-5137, 2019 WL 4565514 (D.C. Cir. Sept. 18, 2019). The court in this case denied a motion to dismiss for lack of standing and granted the plaintiff organization's motion for summary judgment in an action seeking to vacate a regulation at 83 Fed. Reg. 31306 (July 3, 2018). The regulation would have delayed until July 2020 the date for compliance with the 2016 IDEA regulations setting common parameters by which state educational agencies are required to determine whether significant disproportionality of minority students' placement in special education occurs in states and in local school districts, through the use of reasonable risk ratios set by the states. The court reasoned that organizational standing existed on the basis of a denial of access to information that must be publicly disclosed. The court also found associational standing on the basis of an informational injury to members of the organization. The organization's litigation goals were found to be germane to its mission. On the merits, the court held that the challenged regulation was arbitrary and capricious, for it lacked a reasoned explanation for the delay. The court ruled that the 2016 regulation had significant safeguards against the adoption of racial quotas, safeguards that the delay regulation did not adequately address. The court also stated that the delay regulation did not explain the Education Department's change in position from its prior regulation, apart from citing information about a decrease in identification of eligible children in Texas, which the court said did not involve race or ethnicity. The court further pointed out that the delay regulation did not consider cost, including damage to transparency and participation costs to parents and children.

V. IEE AT PUBLIC EXPENSE

M.S. v. Hillsborough Twp. Pub. Sch. Dist., 793 F. App'x 91, 75 IDELR 212 (3d Cir. Dec. 13, 2019) (unpublished). In this case, the court of appeals affirmed a district court judgment denying the parents' request for payment for an independent educational evaluation (IEE) for their son. The student had been found eligible for special education. His parents agreed to a reevaluation to determine his continued eligibility under the IDEA. They then changed their views and withdrew consent for the reevaluation and instead requested the payment for the IEE. A hearing decision ordered the school district to pay, but the district court reversed on the ground that the parents lack the right to a publicly funded IEE unless there is a disputed evaluation by the school district. Citing 34 C.F.R. § 300.502(b)(1) and state regulations, the court of appeals said that the publicly funded evaluation is to be provided if the parent disagrees with an evaluation obtained by a public agency, thus a publicly funded IEE must follow a disputed evaluation from the school district. The court also relied on guidance documents from the United States Department of Education.

Jones-Herrion v. District of Columbia, No. CV 18-2828, 2019 WL 5086693, at *4, 75 IDELR 92 (D.D.C. Oct. 10, 2019). The student in this case was a seventh-grader whose eligibility for special education was being determined. The school system, however, performed only four of the five assessments it agreed to do for the evaluation, and of the four, the district could defend only three before the special education hearing officer.

The five areas were assistive technology; occupational therapy; speech/language; functional behavior; and comprehensive psychological. The parents asked for funding for an independent educational evaluation (IEE) that would cover all five assessments, and in litigation the system agreed to fund an IEE for the one that it did not perform (the assistive technology assessment) and the one it could not defend (the occupational therapy assessment), which was conducted by a therapist who could not attend the hearing. The court granted the parents' motion for summary judgment, awarding payment for all five assessments, overturning the hearing officer decision that the psychological, speech and language, and functional behavior assessments were adequate and the occupational therapy assessment request was mooted by the offer to assess in this area. The hearing officer did not address the missing assistive technology assessment. In reversing the hearing officer, the court ruled that when an IEE is requested the district must defend the appropriateness of the evaluation as a whole, and that the hearing officer erred in finding that the partial evaluation by the school system was appropriate, therefore the parents were entitled to an IEE for the student. The court declared: "Congress recognized that assessments cannot be separated from the evaluation which they inform. Here, DCPS determined which assessments were needed to evaluate K.H. but failed to perform them all or even to defend successfully all of those it did perform. Without necessary assessments, its evaluation was clearly deficient. IDEA entitles K.H. to a publicly funded independent educational evaluation, and therefore entitles her to all of the independent assessments necessary to formulate that evaluation."

Collette v. District of Columbia, infra

Letter to Zirkel, 74 IDELR 142 (OSEP May 2, 2019). In response to a set of questions on the interpretation of the IDEA from Professor Zirkel, the Office of Special Education Programs stated: "Question 1: Does the parent have the right to obtain an IEE at public expense if the child is evaluated under IDEA and found not to be a child with a disability in need of special education and related services? Answer: Yes. Under 34 C.F.R. § 300.502(a), the parents of a child with a disability have the right under Part B of IDEA to obtain an IEE, subject to 34 C.F.R. § 300.502(b) through (e). Under 34 C.F.R. § 300.15, the term 'evaluation' means the procedures used in accordance with 34 C.F.R. §§ 300.304 through 300.311 *to determine whether a child has a disability* (emphasis added), and the nature and extent of the special education and related services that the child needs. Because the definition of evaluation includes eligibility determinations under IDEA, we believe an IEE can be obtained after an initial evaluation regardless of whether the child was found eligible as a child with a disability, if the parent disagrees with the initial evaluation obtained by the public agency, subject to certain conditions. 34 C.F.R. § 300.502(b)(1). The right to an IEE at public expense, therefore, would extend to parents who suspect their child might be a child with a disability and who disagree with the initial evaluation obtained by the public agency. Question 2: If a parent whose child has been found not to be a child with a disability provides an IEE at his or her expense, is the district required to consider it? Answer: Yes. . . . [citing 34 C.F.R. § 300.502(c)]."

VI. IEP IMPLEMENTATION AND RELATED

Spring Branch Indep. Sch. Dist. v. O.W., supra.

L.J. v. School Bd. of Broward Cnty., 927 F.3d 1203, 1211, 74 IDELR 185 (11th Cir. June 26, 2019). This case concerned a student who was identified for special education on account of autism and a speech-language impairment. The student's third-grade IEP remained in place for several years of elementary school, but when the student entered middle school, the board proposed a new IEP. The student exhibited problem behavior at middle school, persistently refusing to attend, and the mother home-schooled the student for most of sixth grade, then challenged the proposed IEP and invoked stay-put rights to continue operation of the elementary school IEP. The case involved an alleged failure by the board to implement that elementary school stay-put IEP during the student's seventh grade year, in which the student due to illness and refusal to attend missed over 100 school days, as well as the first part of eighth grade before the mother withdrew him from public school in February 2008. The ALJ found that there was a failure to implement the stay-put IEP. The school board appealed to district court, and the mother sued for enforcement of the hearing decision and additional relief, and district court reversed. The court of appeals affirmed the district court's decision in favor of the school board. The court said that the proper standard for evaluating cases alleging failure to implement an IEP is that "the plaintiff must prove more than a minor or technical gap between the plan and reality; *de minimis* shortfalls are not enough. A material implementation failure occurs only when a school has failed to implement substantial or significant provisions of a child's IEP." In support of this approach, the court reasoned that schools should not be "inappropriately penalized for *de minimis* failures that do not themselves deprive a student of the educational promise of the IDEA." The court further relied on the "in conformity with" language in 20 U.S.C. § 1401(9)(D). The court said that the materiality of the failure depends on the proportion of services provided in light of the importance of the services, the student's actual progress or lack of it (though that is not dispositive), the context of implementation such as implementation of an elementary school IEP in middle school, and the IEP's overall goals. As to this student, the court ruled that shortfalls as to hours of speech and occupational therapy were relatively minor, and other alleged failures were actually disputes about how to provide services, The court also said that the student's school aversion was not caused by any IEP implementation failure, though it noted that a child's absence from school does not relieve the school of its duties under the IDEA. Judge Jordan filed a partial dissent, concluding that the board materially failed to implement the IEP.

R.F. v. Cecil Cnty. Pub. Schs., 919 F.3d 237, 74 IDELR 31 (4th Cir. Mar. 25, 2019), *cert. denied*, 140 S. Ct. 156 (Oct. 7, 2019). Here the court considered the case of a then-seven-year-old student with autism, a rare genetic disorder, and significant neuromuscular deficits, who generally did not use words to communicate and exhibited hyperactivity and troubling conduct such as grabbing others, pulling their hair, biting, and mouthing. The district placed the child in an intensive communication support classroom in which she was the only student, except for gym, art, music, recess, field trips, and occasional reading and math classes. Even then, the student was frequently removed from the

general education classes she did attend. The parents requested that the child be placed in a full-day program for children with autism with no general education classes. The court affirmed a lower court decision in favor of the school system. The court identified *Endrew F.* as the controlling precedent on free, appropriate public education and clarified that the older Fourth Circuit standard, which was similar to that rejected in *Endrew F.*, was no longer good law. On the issue of least restrictive environment, the court ruled that placing the child in a classroom where she was the only student did not violate the requirement. The court reasoned that the LRE duty is defined in terms of education of children with disabilities with children who are not disabled; it further said that the classroom of one was due to an unforeseen lack of enrollment of students who could be served in the program. The court said that failure to follow the IEP in removing the child from her general education classes was a procedural violation but not a substantive IDEA violation in light of the child's struggles in general education. It additionally declared that the increase in special education hours without notice to the parents did not significantly impede parental participation when it was consistent the with the parents' expressed wishes about the child's program, and the school system did ultimately hold a new IEP meeting. The destruction of raw data about the child's behavior was not a knowing violation of policy and not a procedural violation of the IDEA. The court also ruled that the child's behavior plan was sufficient when it focused on biting, when no evidence showed that the school system was aware of other behaviors of the child interfering with her learning; moreover, other behaviors were addressed outside the behavior plan. The IEP was deemed sufficient even though it lacked a social skills goal and was said to have adequate instructional hours despite the child's failure to achieve grade-level advancement. Applying *Endrew F.*, the court said the IEP had reasonably ambitious goals focused on the child's particular circumstances.

Greenhill v. Loudoun Cnty. Sch. Bd., No. 1:19-cv-868, 2020 WL 855962, 120 LRP 6875 (E.D. Va. Feb. 20, 2020). This case involved a nine-year-old boy whose parents asked that he be evaluated for special education and furnished an IEP. The district denied the request for an IEP and ultimately offered a Section 504 plan. The parents requested a due process hearing. Six of seven witnesses at the hearing were school employees, two of whom were qualified as experts. The parents did not submit expert testimony and did not offer the report of a neuropsychologist and psychopharmacologist who diagnosed the student with ADHD; a specific learning disorder, with mild impairment in reading comprehension and written expression; depressive disorder with anxiety; asthma and allergies; and mild to moderate nonverbal learning disorder-visual-perceptual processing disorder. The parents had presented the report at the meeting at which the district decided that the child was not eligible for IDEA services. The hearing officer ruled in favor of the school district, holding that the child was not eligible under the IDEA. The court affirmed the hearing officer decision, focusing on the process by which the hearing officer reached the decision. The court noted that the hearing officer allowed opening statements, heard witness testimony, allowed admission of exhibits, heard objections to evidence, and permitted the filing of post-hearing briefs with proposed findings of fact and conclusions of law. The court deemed the decision thorough, saying it included evaluations of credibility and explicit reasoning. The court rejected specific challenges to the hearing officer decision: It said the hearing officer was correct in finding that the eligibility team reviewed the parents' expert report, that the hearing

officer's credibility determinations were consistent with the evidence and entitled to deference, and that the hearing officer was right in ruling that the parents had the opportunity to participate meaningfully in the eligibility meeting. On the issue of meaningful participation in the IEP process, the court reasoned that the parents had an advocate at the meeting, and could have obtained access to their expert. The parents had the opportunity to speak at the meeting but declined to take an active role. "Thus, when given the opportunity to participate meaningfully in the Eligibility Meeting, plaintiffs declined to do so." *Id.* at *9. The court further determined that the services offered under the Section 504 plan satisfied the obligation under IDEA to provide appropriate education, and rejected a claim about visual-impairment services as not having been exhausted through the due process hearing.

C.W. v. Denver Cnty. Sch. Dist. No. 1, No. 17-CV-2462-MSK-SKC, 2019 WL 4674331, 75 IDELR 66 (D. Colo. Sept. 25, 2019), *appeal filed*, No. 19-1429 (10th Cir. Nov. 6, 2019). This case concerned a gifted student with autism spectrum disorder, anxiety disorder, obsessive-compulsive disorder, Tourette's syndrome, and other conditions, who refused instruction when offered homebound services and whose 2017 IEP called for education in a residential facility. Nevertheless, a residential facility was never designated. The court reversed an ALJ decision in favor of the school district as to that IEP, and remanded for determination of relief. The court stated that the IDEA requires IEPs to specify "anticipated frequency, location, and duration of services" to be provided, 20 U.S.C. § 1414(d)(1)(A)(i)(VII), and though some case law indicates that physical location does not always have to be specified, a school district violates the IDEA when it fails to offer any means by which to provide services, as here, where the district was unable to find any appropriate facility to designate, leaving the student without instruction for four months as of the time of the ALJ decision.

Letter to Rowland, 119 LRP 36312 (OSEP Sept. 9, 2019). This letter addressed an advocate's concerns about a Preschool for All Learners, or PAL, program that as described served ten children with various disabilities, in a class with a special education teacher and two assistants. Special education and related services were not listed in the children's IEPs, though the program was supposed to provide two hours per week of speech and language services to each PAL classroom. The questions were whether categorically barring speech and language therapy beyond that offered, on the basis of placement in the PAL program violated IDEA, and whether a district violates IDEA by placing blanket restrictions on related services such as physical therapy, occupational therapy, or behavior intervention, on account of placement in a particular program. The response stated: "[U]nder IDEA, decisions about each child's educational program and services and the setting in which the child's program and services will be implemented must be made on an individual basis in light of each child's unique needs. In general, a policy that prohibits the provision of specific related services or restricts the amount or type of services that can be provided to a child based solely on the particular setting in which the child is placed, regardless of the child's individual needs, would not be consistent with IDEA." The letter went on to state that "the child's IEP must include the specific amount of special education and related services, and supplementary aids and services, that the public agency will provide to the child so the level of the agency's commitment of resources is clear to parents and IEP Team members. The amount of

time to be committed to each of the various services to be provided must be appropriate to the specific service, and clearly stated in the IEP in a manner that can be understood by all involved in the development and implementation of the IEP. . . . In all cases, however, placement decisions must not be made solely on factors such as category of disability, severity of disability, availability of special education and related services, configuration of the service delivery system, availability of space, or administrative convenience." Accordingly, "barring a specific related service from being included in a child's IEP or restricting the provision of a specific related service or services based solely on the child's placement in a particular program – without regard for the child's identified needs for that service – would be inconsistent with the individualized decision-making required in both the IEP and placement processes."

Letter to Wayne, 73 IDELR 263 (OSEP Jan. 29, 2019). This letter stated that when the parent places a child with a disability at a private school and does not request special education from the school district, but instead tells the district that the child will continue attending private school, the district need not offer the child IEPs in the following school year and each year thereafter, if the parent does not contact the school district and request free, appropriate public education. The letter noted that the child-find obligation requires the school district where the child's parents live to identify, locate, and evaluate children who may have disabilities, including children in private schools, but "If a determination is made through IDEA's child find process that a child needs special education and related services and a parent makes clear his or her intent to keep the child enrolled in the private school, the LEA where the child's parent resides, is not required to make FAPE available to the child."

VII. *ENDREW F.* AND FAPE

A.A. v. Northside Indep. Sch. Dist., *supra*

R.S. v. Highland Park Indep. Sch. Dist., 951 F.3d 319, 76 IDELR 32 (5th Cir. Feb. 25, 2020) In this case, the student was nonverbal, non-ambulatory, and diagnosed with several conditions, including hypotonia, cortical visual impairment, and cerebral palsy. At the defendant's public schools, he had experienced five falls in three years. His parents believed that the goals in his IEP were not sufficiently ambitious, but the court ruled against the parents, citing *Rowley* and *Endrew F.* for proposition that child's potential did not need to be maximized. The court applied the test for appropriate education from *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5th Cir. 1997), that the program must be sufficiently individualized on the basis of the student's assessment and performance, that it must be administered in the least restrictive environment appropriate to child's needs, that it be sufficiently coordinated as to administration, and that the student gain academic and non-academic benefits. The court found that there was progress, even though some regression occurred as well. See also Least Restrictive Environment, *infra*.

Albright v. Mountain Home Sch. Dist., 926 F.3d 942, 74 IDELR 187 (8th Cir. June 12, 2019). This case involved a young student with autism and intellectual deficits whose parent challenged the educational program proposed by the district. The court of

appeals affirmed determinations below that the IEP conformed to the requirement of providing free, appropriate public education as articulated in *Endrew F. v. Douglas County School District RE-1*, 137 S. Ct. 988 (2017). The court stressed the evidence that the child's behavior plan was working and that the district extensively used peer-reviewed practices. The sensory integration techniques employed by the district were recommended by an occupational therapist. The court also noted that the student's test scores, when considered in context, demonstrated academic improvement. The court also affirmed that the parent was not denied the opportunity to participate in the IEP process. It pointed out that the parent attended all the IEP conferences she chose to attend. There was no evidence that IEP conferences were held without her. Moreover, various emails and IEP meeting transcripts demonstrated that the parent participated. The court declared that any technical violation of the IDEA notice requirements did not affect the student's IEPs or deprive her of an educational benefit. An issue existed about other school years, but the court held that the settlement of IDEA due process proceedings as to those school years meant that claims under other statutes for the same periods were not exhausted; futility might be a basis to excuse exhaustion, but a futility argument not raised in district court. The court also affirmed summary judgment against the parent on a retaliation claim, saying that it lacked factual support.

R.F. v. Cecil Cnty. Pub. Schs., *supra*.

Preciado v. Board of Educ. of Clovis Mun. Schs., 443 F. Supp. 3d 1289, 76 IDELR 67 (D.N.M. Mar. 11, 2020). This case concerned a sixth grader classified as having a specific learning disability. The court affirmed a hearing officer decision that the district's IEPs did not offer the student appropriate progress. The court reasoned that although some progress occurred, the student was still reading at a third grade level at the beginning of fifth grade, and the IEPs largely mirrored each other and over time showed some decrease in expected levels of mastery. Moreover, the teacher received only one week of Orton-Gillingham training, and evidence indicated that the program was not implemented correctly. The district could not explain scores it said indicated satisfactory progress under the "Istation" program, and could not provide a cogent and reasoned explanation for decisions about the levels of services, and the services did not comply with amounts specified in the student's fifth grade IEP. The court deferred to the hearing officer on the compensatory education award.

Matthew B. v. Pleasant Valley Sch. Dist., No. 3:17-CV-2380, 2019 WL 5692538, 119 LRP 42439 (M.D. Pa. Nov. 1, 2019). This case concerned a student with autism and speech and language impairments. The court affirmed the hearing officer's decision that during school years 2012-13 through 2015-16 the district denied the student a free, appropriate public education with respect to transition services and functional skills instruction. It also affirmed the hearing officer's decision that in school year 2016-17 the district's homebound program completely denied him free, appropriate public education. The court remanded the case to the hearing officer to develop a more extensive compensatory education remedy than what had been ordered. With regard to transition and the years 2012-16, the court acknowledged that the school district provided transition and functional skills opportunities, including instruction about cooking, money, transportation, and recognizing sight words. The district also had the

student participate at work sites. Nevertheless, the district did not explain how and why what it provided was appropriate under the student's circumstances. The court said that the hearing officer correctly concluded that the IEPs included many goals that the student had already nearly accomplished, and that the same transition goals came back year after year with little change. "Thus, it sensibly follows that the Hearing Officer reached the conclusion that the IEP was deficient in that it failed to provide Matthew with an 'appropriately ambitious' program with respect to transition services and functional skills, which are considered the fundamental aspects of Matthew's IEP. *Endrew*, 137 S. Ct. at 999.," *Matthew B.*, 2019 WL 5692538, at *11. In affirming the finding of a complete denial of FAPE for 2016-17, the court pointed out that the student was on homebound instruction with only four hours of direct academic instruction per week, an hour of speech therapy, and some at-home assignments. The court relied on the hearing officer's finding that the homebound program was calculated to provide no educational benefit to the student. The court further said that when a student's continuous behavior interferes with the ability to obtain any real benefit from the education offered, and the IEP fails to remedy the behavior, the school district has not provided even a basic floor of opportunity. On the issue of remedy, the court reasoned that the denial of appropriate education spanned five years, so the remedy should have taken into account the length of the denial, and residential services should have been considered.

Perkiomen Valley Sch. Dist. v. S.D., 405 F. Supp. 3d 620, 75 IDELR 67 (E.D. Pa. Sept. 24, 2019), *appeal dismissed*, No. 19-3410 (3d Cir. July 24, 2020). This case involved a child with dyslexia who attended district schools starting in third grade. Her IEP was reviewed at the end of the third grade; it gave her reading fluency as 38 words correct per minute (wcpm) at a third-grade level and 58 at a second-grade level. The IEP put forward a goal of 127 wcpm at a 3rd grade level. When the student was in the middle of fourth grade, the district held a meeting to revise the IEP. In May 2016, at the end of fourth grade, a revised IEP listed 78 wcpm on a fourth grade probe, and 96 wcpm at a second grade level. The new IEP maintained a goal of 127 wcpm at a third grade level. In May 2017, the district conducted a three-year reevaluation and the parents obtained a private evaluation; in preparation for the student's sixth grade year the IEP team revised the IEP. The student's score at a third-grade level was a median of 103.5 wcpm on four tests; she scored 108 wcpm at a second-grade level. Her score at a fourth grade level was 76 wcpm. The IEP set a goal of 107 wcpm at a fourth-grade level. The parents removed the child from the public school, enrolled her in a private school, and filed for due process. They claimed a denial of free, appropriate public education for fourth grade (2015-16), fifth grade (2016-17), and sixth grade (2017-18), and asked for compensatory education for 2015-17 and reimbursement of tuition and transportation for 2017-18, and of the costs of the private evaluation. The hearing officer ruled that the school denied the student FAPE, and granted tuition and transportation reimbursement for 2017-18. The district court reversed. It said that an IEP does not have to aim for grade-level achievement if that is not reasonable for the student, and that the IEP does not have to be ideal. Moreover, an IEP should not be evaluated solely on the basis of the child's progress. The hearing officer had found that there was no third-grade level reading fluency baseline in the May 2016 IEP, and a probe for a third grade level was not attempted, despite the fact that the May 2016 IEP was being written for a third-grade

level probe. The district said it tested the student at the second and fourth grade levels because she was on a second-grade instructional level while in fourth grade, so the data was not deficient, and in fact the June 2017 IEP reported a score of 103.5 wcpm at a third grade level, showing progress. The court concluded that the hearing officer incorrectly believed that there was no fourth grade reading fluency data for the July 2017 IEP. Since the data sufficed, all that was left of the parents' claim was the fact that the student did not meet her reading fluency goals as planned. The court said that was "troubling," *id.* at 633, but under Third Circuit precedent it was not enough in light of steady progress the student made in reading fluency. The court said there was no procedural omission once the existence of the relevant progress data was recognized. The court stated that if the parents had received tuition payments from the district they did not have to pay the money back, because requiring forcing repayment would discourage parents from exercising rights under the IDEA.

Board of Education of Uniondale Union Free Sch. Dist. v. J.P., No. CV-18-1038, 2019 WL 4315975, 119 LRP 33121 (E.D.N.Y. Aug. 23, 2019) (magistrate judge recommendation), *adopted*, 2019 WL 4933576, 119 LRP 38753 (E.D.N.Y. Oct. 7, 2019). The student in this case was diagnosed with dyslexia, attention deficit hyperactivity disorder, autism spectrum disorder, and reading and language disorders. She repeated kindergarten in general education, but was then found eligible for special education in September of 2011. From that date until she finished fifth grade in spring, 2016, she was in general education with one period per day of group resource room and group speech therapy. She made limited academic achievement with that program. An evaluation from 2013 recommended placement in a small, specialized class. For 2016-17, the district offered her one 43-minute period per day of resource room services with five students to one teacher and two 30-minute sessions per week of speech and language therapy, also 5:1, which was reduction from the last year. The IEP did not offer Academic Intervention Services, nor parent training or counseling. Her parents challenged the 2016-17 program at due process and placed her at a private school, which provided a class with four students to one teacher as well as one-on-one support and individual program modifications. The hearing officer found in favor of the school district, but the state review officer (SRO) overturned that decision. The SRO agreed with the hearing officer that the district met procedural requirements and that the speech therapy was adequate and parent counseling unnecessary. Nevertheless, the SRO ruled that the district's failure to recommend a specialized reading program denied the student free, appropriate public education. Agreeing with findings of the IHO, the SRO also ruled that the private school was an appropriate placement and the equities supported reimbursement. On appeal, the magistrate judge recommended affirmance of the SRO decision in its entirety. The magistrate judge concluded that the program was not reasonably calculated to enable the child to receive educational benefits. The opinion noted that the IEP did not include Academic Intervention Services (AIS), a form of specialized reading instruction that the student received in the past. The court found deference to the SRO particularly apt as to the substantive adequacy of the program; it noted the SRO's thorough review of the record concerning the student's reading and memory deficiencies and the SRO's conclusion that the services offered were insufficient in light of the student's needs. The court refused to credit the district's statement that AIS services would have been offered even though not listed in the IEP, reasoning that

the Second Circuit said that sort of testimony should not be relied upon in *R.E. v. New York City Department of Education*, 694 F.3d 167, 185 (2d Cir. 2012). Services falling in the realm of special education are required to be listed on an IEP under *Letter to Chambers*, 59 IDELR 170 (OSEP 2012). The small class size at the private school and the richness of the reading program there bolstered the finding that the private program was appropriate, and the student made excellent academic progress there. The district court adopted the magistrate judge report and recommendation in its entirety.

Gaston v. District of Columbia, No. CV 18-1703, 2019 WL 3557246, at *8, 74 IDELR 248 (D.D.C. Aug. 5, 2019). This case involved a teenager with ADHD whose educational and behavioral performance showed severe and steady regression during the 2017-18 school year. The court overturned a hearing officer decision and ruled in favor of the parent that the December 6, 2017 IEP should have included more than an adjustment of specialized instruction to add ten hours per week outside general education. The court pointed out that the student finished the previous year with one failing grade and other near-failing grades, then by October of 2017 was failing all classes except music and had been in violent altercations and amassed disciplinary referrals while showing academic disengagement and self-destructive behavior. Nevertheless, the defendant did not provide the student full-time special education with behavior support until February 2018. The court stated that the defendant "failed to offer the "cogent and responsive explanation for [its December 2017] decision[ ]" that would entitle it to deference. *See Endrew F.*, 137 S. Ct. at 1001–02," and remanded the case to the hearing officer for determination of compensatory education relief.

E.S. v. Smith, No. PWG-17-3031, 2018 WL 3533548, at *15, 72 IDELR 184 (D. Md. July 23, 2018), *aff'd*, 767 F. App'x 538 (4th Cir. May 24, 2019). This case involved a student with autism spectrum disorder, ADHD, and anxiety disorder, whose parents challenged his IEP and sought a full-time therapeutic placement. The parents contended that the middle school program offered by the district was not appropriate when the IEP called for 29 hours and 20 minutes of specialized instruction per week outside the general education setting, with an option for lunch in general education setting. Moreover, they argued, the placement was predetermined. The court, however, affirmed an ALJ decision against the parents, reasoning that the ALJ's credibility determinations as to testimony that the public school program could deal with explosive students merited deference, as did the ALJ's credibility determinations about testimony that the program could implement all aspects of the IEP. The court went on to state that the student had not needed further support during time in the hallways when he was in a previous program, and noted that he would not be left alone while other students were in the general education class. The court stated: "Simply put, a FAPE, to which a child with a disability is entitled, is the education that any student without disabilities would receive"; it said that *Endrew F.* does not require that the student's education be the best possible. The court acknowledged the evidence that the public school predetermined the student's placement, but said that any predetermination was harmless because the school system provided appropriate education. The court of appeals affirmed in an unpublished opinion. 767 F. App'x 538 (4th Cir. May 24, 2019) (stating that procedural errors do not support any relief greater than ordering compliance with IDEA procedural requirements unless the ALJ determines that the procedural violation denied the child

free, appropriate public education, even when the procedural violation is that of predetermination).

Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak, 76 IDELR 77 (OSEP Mar. 12, 2020). This document states, among other things, that "If an LEA closes its schools to slow or stop the spread of COVID-19, and does not provide any educational services to the general student population, then an LEA would not be required to provide services to students with disabilities during that same period of time. Once school resumes, the LEA must make every effort to provide special education and related services to the child in accordance with the child's individualized education program (IEP) or, for students entitled to FAPE under Section 504, consistent with a plan developed to meet the requirements of Section 504. The Department understands there may be exceptional circumstances that could affect how a particular service is provided. In addition, an IEP Team and, as appropriate to an individual student with a disability, the personnel responsible for ensuring FAPE to a student for the purposes of Section 504, would be required to make an individualized determination as to whether compensatory services are needed under applicable standards and requirements. If an LEA continues to provide educational opportunities to the general student population during a school closure, the school must ensure that students with disabilities also have equal access to the same opportunities, including the provision of FAPE." (Q. A- 1). It goes on to say that "If a child with a disability is absent for an extended period of time because of a COVID-19 infection and the school remains open, then the IEP Team must determine whether the child is available for instruction and could benefit from homebound services such as online or virtual instruction, instructional telephone calls, and other curriculum-based instructional activities, to the extent available. In so doing, school personnel should follow appropriate health guidelines to assess and address the risk of transmission in the provision of such services. The Department understands there may be exceptional circumstances that could affect how a particular service is provided. If a child does not receive services after an extended period of time, a school must make an individualized determination whether and to what extent compensatory services may be needed, consistent with applicable requirements, including to make up for any skills that may have been lost." (Q. A-2). Also, "IEP teams may, but are not required to, include distance learning plans in a child's IEP that could be triggered and implemented during a selective closure due to a COVID-19 outbreak. Such contingent provisions may include the provision of special education and related services at an alternate location or the provision of online or virtual instruction, instructional telephone calls, and other curriculum-based instructional activities, and may identify which special education and related services, if any, could be provided at the child's home." (Q. A-5). Guidance is also provided regarding IDEA-Part C Infants and Toddlers Program.

VIII. AUTISM-SPECIFIC SERVICES

D.L. v. St. Louis City Pub. Sch. Dist., 950 F.3d 1057, 76 IDELR 31 (8th Cir. Mar. 2, 2020). This case involved a student, 13 years old at the time of the decision, who had diagnoses of autism spectrum disorder, PTSD, and other conditions. The district proposed to place him in a school for children with behavioral and emotional challenges, but the school lacked a sensory room for students with autism and had little or no experience with students with autism at time of the due process request. Nevertheless, the school had created a sensory room and accepted three students with autism at the time of the hearing. The parents rejected the defendant's placement recommendation and placed the student at a private school. The court held that the hearing officer had jurisdiction even though student did not attend the defendant's schools at the time of the decision; the court noted that the student was enrolled in the district at time the due process complaint was filed. On the merits, the court affirmed reversal of the administrative decision upholding the district's proposed placement. In ruling for the parents, the court reasoned that the IEP did not provide for sensory support despite unchanged needs of the student identified in prior IEPs and by experts. Focusing on the district's placement when it was proposed, the court further noted the inability of the program to address the student's involuntary behavior due to autism. The court found that the private school met the student's needs, and reversed a limit on reimbursement that the district court had imposed. The court pointed out that the parents were not informed of changes in the capacity of the proposed placement to serve children with autism until the hearing.

Renee J. v. Houston Indep. Sch. Dist., 913 F.3d 523, 73 IDELR 168 (5th Cir. Jan. 16, 2019). This decision upheld a grant of summary judgment to the school district in the case of a student diagnosed with autism, intellectual disability, and ADHD, whose parents alleged the denial of free, appropriate public education during the student's eighth and ninth grade years. The court rejected the argument that the student's program was predetermined, reasoning that although the district did not expressly provide Applied Behavioral Analysis, it incorporated ABA techniques into its approach. The court also said that the record failed to show that the parents specifically requested ABA, and further declared that courts should not dictate pedagogical methods. The court also rejected the claim that the district denied the student appropriate education by not adequately addressing bullying, which was said to have caused the student to refuse to attend school. The court reasoned that the district communicated with the parents about bullying and it proposed accommodations including having the student's teacher meet him at drop-off and having the student spend the first hour of the day in the office of student support, and the parents did not respond to repeated requests for more information. Finally, the court rejected a claim based on an allegedly unrealistic transition plan focusing on law enforcement careers, reasoning that the district made efforts to collaborate with the parents on transition plans, and that subsequent plans were more realistic.

IX. BEHAVIOR SERVICES AND STUDENT DISCIPLINE

Spring Branch Indep. Sch. Dist. v. O.W., supra

Olu–Cole v. E.L. Haynes Pub. Charter Sch., 930 F.3d 519, 119 LRP 26900 (D.C. Cir. July 19, 2019). This case concerned a teen with emotional disturbance who allegedly attacked another student, causing that student a concussion. Because the victim suffered serious bodily harm, this misconduct resulted in a suspension of 45 days during which the student was removed to an isolated interim alternative educational setting. At the conclusion of the 45 days, the charter school the student had attended refused to allow him to return, and instead initiated a due process hearing to change his placement on the ground of dangerousness. The parent sued in district court for preliminary relief against the student's continued exclusion from school, but the district court, despite finding a likelihood of success on the merits, denied the injunction on the ground that the student had not shown he would suffer irreparable injury from the continued exclusion. The court of appeals reversed the denial of the relief, reasoning that the IDEA provides for an automatic injunction when the stay-put principle applies, and it was error to place a burden of showing irreparable harm on the student. The district court had made a finding that there was an unacceptably significant potential of injury to other interested parties if the student returned to school, but the court of appeals ruled that this was not a sufficient basis to override the right to stay put. The court further held that the case was not moot even though the school had relented and readmitted the student, for the decision affected the measurement of compensatory education relief, which would hinge on the difference between the value of the stay-put services wrongfully denied and the services actually provided. Finally, the court held that 34 C.F.R. § 300.533, which limits an interim alternative educational placement to a 45-day period, does not conflict with the IDEA provision that a child remains in the interim alternative educational setting until the hearing officer issues a decision, 20 U.S.C. § 1415(k)(4).

Albright v. Mountain Home Sch. Dist., *supra*

Schiff v. District of Columbia, No. 18-CV-1382, 2019 WL 5683903, 75 IDELR 156 (D.D.C. Nov. 1, 2019). This case involved a student with an intellectual disability and Prader-Willi Syndrome who was expelled from the nonpublic school where he had been placed pursuant to his IEP, for having attacked other medically fragile student. Ten other nonpublic schools refused to accept him or did not respond to inquiries. At the due process hearing, the hearing officer found that the private school had erred in not consulting the student's IEP during the manifestation determination review, that the behavior was a manifestation of the student's disability, and that the behavior intervention plan should be modified. The hearing officer nevertheless found that the defendant did not fail to provide the student free, appropriate public education, because it took prompt action in sending referrals and the student was difficult to place. The district court adopted a magistrate judge report and recommendation to grant the plaintiff's summary judgment motion and remand the case to determine the appropriate amount of compensatory education. The recommendation reasoned that the total failure to provide education violates the IDEA, even if the defendant acted diligently in trying to

find a location for the student. It further reasoned that no impossibility defense applied and contract impossibility principles were inapposite. Furthermore, the defendant did not show an unexpected occurrence of an intervening act or that such an occurrence made performance impracticable due to extreme circumstances. The opinion further noted that appropriate education must be provided to students expelled or suspended from school, and that a defense of unclean hands does not apply because it would undermine the IDEA.

Department of Educ. v. L.S., No. 18-CV-00223, 2019 WL 1421752, at *12, 74 IDELR 71 (D. Haw. Mar. 29, 2019). This case concerned a teenage student with autism spectrum disorder and other conditions. The court upheld some portions of the student's program, but determined that the public school denied the student free, appropriate public education by failing to sufficiently describe the student's behavioral supports in the IEP. The court stressed that the school system did not incorporate into the IEP measures to address student's behavioral needs, never made the behavior plan part of the IEP, and never sent the behavior support plan to the parent while the IEP was being developed. The court said: "Failing to incorporate the BSP into the IEP in this case was a procedural violation that seriously infringed on Parent's ability to meaningfully participate in the formation of Student's IEP. Because the BSP was not made part of the IEP, the district was free to amend or curtail the BSP without Parent's knowledge or input, which seriously infringes upon her right to participate in the IEP process. . . . Indeed, DOE failed to send the BSP to Parent, thus precluding her from providing any input into it. The facts in this case demonstrate the need for parent participation, because had Parent seen the BSP, she may have objected to the fact that significant portions of the BSP were not completed." The court ultimately found the behavior plan substantively insufficient. However, it reversed an award of full private school tuition and remanded the case to the hearing officer for determination of the reasonableness of the costs of the private program. The court also imposed a 25% reduction based on parental conduct.

Letter to Zirkel, 74 IDELR 171 (OSEP May 13, 2019). In a response to several inquiries, the Office of Special Education Programs stated: "Question 2: Does the specific express authorization for hearing officers to address issues arising from disciplinary changes in placement (34 C.F.R. § 300.532(a)-(b)) exclude these issues from the jurisdiction of the State complaint process? Response: No. The express authorization for hearing officers to hear appeals from parents of decisions regarding disciplinary changes of placement under 34 C.F.R. §§ 300.530 and 300.531 and the manifestation determination under 34 C.F.R. § 300.530(e) would not limit an SEA's authority to resolve the same issues under the State complaint procedures. . . . Question 3: Do the two specifically authorized hearing officer remedies for disciplinary changes in placement at 34 C.F.R. § 300.532(b)(2) preclude the hearing officer from alternatively, or additionally, ordering other remedies, such as compensatory education services, for these particular issues? Response: No. IDEA does not preclude hearing officers conducting due process hearings under 34 C.F.R. § 300.511(a) on expedited due process complaints filed under 34 C.F.R. § 300.532(a) from ordering relief that is appropriate to remedy the alleged violations based on the facts and circumstances of each individual complaint. This is so even

though 34 C.F.R. § 300.532(b)(2) identifies the specific actions that a hearing officer may take in resolving an expedited due process complaint. . . ."

Letter to Nathan, 73 IDELR 240 (OSEP Jan. 29, 2019). In response to a query, the Office of Special Education Programs stated that for any child that a school district is deemed to know is a child with a disability under the IDEA, the district must conduct a manifestation determination within ten days of a decision to change the child's placement due to violation of school rules. The school is not permitted to postpone the manifestation determination until completion of the child's evaluation, if that would entail delay of the determination beyond the time limit. The letter went on to say that the manifestation determination might be made without the completion of an IEP. The school might act on the basis of "the information that served as the LEA's basis of knowledge that the child may be a child with a disability under IDEA, such as concerns expressed by a parent, a teacher or other LEA personnel about a pattern of behavior demonstrated by the child." The letter also declared that the district must offer the parent a printed copy of the notice of parental rights to invoke due process, and is not permitted to simply provide a link in the suspension notice to the notice of procedural rights on the district's web site.

X. CHARTER SCHOOLS – HOMEBOUND SERVICES

Price v. Commonwealth Charter Acad.-Cyber Sch., No. 18-1778, 2019 WL 3816788, 74 IDELR 286 (E.D. Pa. Aug. 13, 2019). This case involved a teen with anxiety disorder and ADHD, whose guardian enrolled him in a charter school that provided its instruction online through the internet. The guardian asked the school to provide homebound services for the student, specifically, that a qualified special education teacher with a background in working with students with anxiety disorders come to the student's home. The parent submitted a letter from the student's psychiatrist, which said that due to the student's anxiety in his current school program it was recommended that he be provided homebound schooling. The charter school requested more information including medical records, and permission to discuss the student with the psychiatrist. The guardian refused the request, and filed for a due process hearing. The hearing officer ruled in favor of the school, and on appeal to district court the court granted summary judgment for the school. The court concurred with the hearing officer that the state's regulations concerning homebound instruction are not applicable to cyber schools, where the students do not attend at a specific physical location. Even if the regulations were applied, said the court, schools have the discretion to deny homebound requests. The court said the letter from the psychiatrist was not specific enough to show a need for homebound instruction; more information might have supported the request, but the guardian prevented the school from getting it. Ultimately, the court said the parent did not show that the school denied appropriate education to the student. The court also rejected Americans with Disabilities Act and Section 504 claims, and found a retaliation claim under Section 1983 barred by failure to exhaust administrative remedies.

XI. CHOICE PROGRAMS AND RESIDENCY

Osseo Area Schs. v. M.N.B., No. 18-3255, 2020 WL 4342263, at *3, --- F.3d ----, 120 LRP 22511 (8th Cir. July 29, 2020) This case involved an eleven-year old student with disabilities who was placed at an out-of-district school by her home district, Big Lake, for third and fourth grade, with Big Lake reimbursing her parents for the mileage driving her to and from school under an IEP calling for individualized transportation. The parents subsequently applied for enrollment in the Osseo district under the state open enrollment law, and that district accepted the application. Osseo placed the student in yet another school district, and agreed to reimburse the parents for the mileage between the Osseo district's boundary and the new school but not between the child's home in Big Lake and new school. The court of appeals reversed the district court's decision requiring reimbursement for driving the student between her home and the school, holding that the IDEA does not require school districts that enroll nonresident students to provide transportation between a student's home and the school district where the parent chooses to enroll her. The court reasoned that under the state open enrollment law, a nonresident school district must provide transportation only within the district. The court declared, "We see nothing in the IDEA that provides clear notice to a State that it must cover transportation expenses when a student's travel is the result of a parent's choice under an open enrollment program."

XII. LEAST RESTRICTIVE ENVIRONMENT

R.S. v. Highland Park Indep. Sch. Dist., 951 F.3d 319, 76 IDELR 32 (5th Cir. Feb. 25, 2020) This case concerned a nonverbal, non-ambulatory student diagnosed with several conditions, including hypotonia, cortical visual impairment, and cerebral palsy, who experienced five falls in three years at the defendant's schools and whose parents believed that the goals in the IEP were not appropriate. The court ruled against the parents on the issue of whether the district complied with the obligation to offer education in the least restrictive environment. The court applied the framework of *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036 (5th Cir. 1989). It reasoned that the parents did not argue that the student should be educated in the regular education classroom, but rather that he was excluded from contact with peers without disabilities. The court said the evidence of exclusion was ambiguous at best, and there were examples of interaction such as participation in a peer tutoring program, physical education, lunch in school cafeteria, and the student's job delivering items throughout campus. See also *Endrew F.* and Free, Appropriate Public Education, *supra*.

A.B.. v. Clear Creek Indep. Sch. Dist., 787 F. App'x 217, 222-23,75 IDELR 90 (5th Cir. Oct. 10, 2019). This case involved an elementary school student diagnosed with autism, ADHD, and a speech impairment, who was served in second grade in a program with general education students for most of the school day but with separate instruction in social skills. His behavior deteriorated in third grade, and the district temporarily removed him from the general education classroom when he was disruptive, then proposed placement in a program for lower functioning students for his academic classes. The parents filed for due process, which kept the student in his existing program; the district put into place measures to address his behavior, and the behavior

improved so that by spring he was no longer engaging in most of the misbehavior and continued to progress academically. A hearing officer ruled that the removal from general education would violate the least restrictive environment obligation, and the parents filed suit for attorneys' fees while the district appealed the decision on the merits. The district court affirmed on the merits and the district appealed. The court of appeals affirmed, applying the approach of *Daniel R.R. v. State Board of Education*, 874 F.2d 1036, 1048 (5th Cir. 1989). The court noted that the school district argued that the student's progress in general education "was entirely the result of his modified curriculum and paraprofessional support," but that position merely evidenced that education in the regular classroom could be achieved satisfactorily with the use of supplemental aids and services. "A.B. does not need to demonstrate that he was receiving a special benefit from the general-education setting in order to merit being placed there; the preference for general education is built into the IDEA." The court further noted that the student's behavior improved from his ability to model the conduct of his general education classmates.

C.D. v. Natick Pub. Sch. Dist., 924 F.3d 621, 74 IDELR 121 (1st Cir. May 22, 2019), *cert. denied*, 140 S. Ct. 1264 (Mar. 4, 2020). This case concerned a student with an intellectual disability and serious language deficits who had been educated in general education with the help of tutors before high school. The court affirmed a decision upholding a public high school placement for the student consisting of general education for electives and a self-contained program for academic courses, an arrangement that would be expected to lead to a certificate rather than a regular diploma. Accordingly, the court affirmed denial of tuition reimbursement for the private placement arranged for the student by the parents. The court said that the public school's proposed program and the modification of it for the final year met the *Endrew F.* standard for free, appropriate public education. The court went on to state that the least restrictive environment standard should be same irrespective of whether a less restrictive placement is proposed by the district or by the parents. The court adhered to the analysis of *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 993 (1st Cir. 1990), that "the desirability of mainstreaming must be weighed in concert with the Act's mandate for educational improvement." The court declined to adopt the approach of *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1048 (5th Cir. 1989), which asks first "whether education in the regular classroom, with the use of supplementary aids and services, can be achieved satisfactorily," and, if child cannot be educated in the regular classroom, asks second "whether the school has mainstreamed the child to the maximum extent appropriate." The court, however, stressed that the district considered the use of supplementary aids and services for the student.

R.F. v. Cecil Cnty. Pub. Schs., supra

XIII. RELATED SERVICES

Osseo Area Schs. v. M.N.B., supra

Letter to Rowland, supra.

XIV. RESIDENTIAL PLACEMENTS

M.S. v. Los Angeles Unified Sch. Dist., 913 F.3d 1119, 73 IDELR 195 (9th Cir. Jan. 24, 2019). This case involved a ward of the superior court and Department of Child and Family Services with mental health needs and history of violent actions. The court of appeals affirmed a district court decision overturning the decision of an IDEA ALJ. The court held that the student was denied free, appropriate public education when the district did not consider offering her a residential placement for educational purposes as part of her IEP on the ground that another county agency had residentially placed her for mental health treatment pursuant to a juvenile court order. The court said that the school district had an independent obligation to ensure that a continuum of placements was available to meet the student's educational needs and therefore had to consider whether the residential placement was necessary for educational purposes. The court remanded the case to the ALJ for the determination of relief.

C.W. v. Denver Cnty. Sch. Dist. No. 1, supra

Center for Discovery, Inc. v. New York City Dep't of Educ., No. 160157/2016, 2019 WL 399554, 73 IDELR 239 (N.Y. Sup. Ct. Jan. 29, 2019), *aff'd*, 111 N.Y.S.3d 174 (App. Div. Dec. 3, 2019) (mem.). The court here held that the defendant's refusal to increase the tuition rate for a child's placement at a private school was arbitrary and capricious when it continued to pay at the same rate after the child demonstrated seriously dangerous and self-injurious behavior while in residential placement, and the defendant held a meeting at which the child's IEP was amended to include an around-the-clock, one-on-one crisis management paraprofessional, as well as psychological and behavioral services by a board-certified analyst to monitor and oversee implementation of the child's behavior intervention plan. The court emphasized that the initial rate was set on the assumption that the student would have a one-on-one aide only for the 30 hours per week that he received educational services.

XV. POST-SECONDARY TRANSITION

Renee J. v. Houston Indep. Sch. Dist., supra

Questions and Answers on Increasing Postsecondary Opportunities and Success for Students and Youth with Disabilities, https://www2.ed.gov/policy/speced/guid/increasing-postsecondary-opportunities-and-success-09-17-2019.pdf (OSEP Sept. 17, 2019). This document describes how school districts, state vocational rehabilitation agencies, and state educational agencies may work together to assist students with disabilities in making the transition from secondary school. The document notes that if certain conditions are met, IDEA Part B funds can be used to support students with disabilities with IEPs in dual enrollment programs – situations when high school students with disabilities who have IEPs are receiving services under the IDEA, and take courses offered by a community college or other postsecondary education institution program prior to high school graduation. The conditions are that "the student's IEP Team must determine that the courses offered as part of a dual enrollment program are necessary to provide the student with FAPE.

Because FAPE under IDEA Part B does not include postsecondary education, when using IDEA Part B funds, LEAs are only permitted to provide or pay for services that constitute FAPE in postsecondary education settings with IDEA Part B funds if the education provided is considered secondary school education in the State." (Q. 6). Comprehensive Transition Programs (CTPs) are treated similarly. (Q. 8). State vocational rehabilitation funds may also be used to support student with disabilities in dual enrollment programs (Q. 11). An appendix to the document details options for support under vocational rehabilitation programs.

XVI. MAINTENANCE OF PLACEMENT

Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 76 IDELR 173 (2d Cir. May 18, 2020). Parents of children placed in a private school called iHope pursuant to earlier due process hearing decisions moved their children to a new school called iBrain in the wake of a dispute among the management of iHope. The parents invoked due process, and sought judicial enforcement of stay-put rights to require payment by the defendant of tuition at iBrain, arguing that the iBrain program was substantially similar to that offered at iHope. In one case, the court affirmed the denial of preliminary relief and the dismissal the case, and in the other, it reversed the grant of a preliminary injunction. The court rejected an exhaustion defense, but ruled against parents in both cases on the stay-put claims. The court reasoned that school districts have general authority over educational decision making and that exceptions are limited. The court further noted that districts cannot recoup pendency costs from parents, and that private placement costs vary dramatically. Moreover, said the court, the court, the parents' interpretation of stay-put would entail races to the courthouse to obtain determinations of the similarity of the programs.

Olu–Cole v. E.L. Haynes Pub. Charter Sch., supra

L.J. v. School Bd. of Broward Cnty., supra

Renee J. v. Houston Indep. Sch. Dist., supra

N.S. v. Board of Educ. of the City of Chi., No. 19 C 5699, 2019 WL 4166871, at *1, 75 IDELR 46 (N.D. Ill. Sept. 3, 2019). In this case, the court denied what it termed a "motion to enforce the stay-put injunction" to place a child with "multiple significant disabilities" who had completed eighth grade into a selective public high school. The school had one seat in the freshman class designated for children with special needs. The occupant was to be selected on the basis of a lottery. The parent received notice that the child had been denied placement at the selective school on April 29, 2019, and retained counsel in May, but did not file for the due process hearing until August 6, and did not file the motion for a stay-put order with hearing officer until August 14, 2019. In denying the motion, the court reasoned that parent failed to exhaust administrative remedies. It said that even if the district misrepresented in January 2019 that the parent's making a request for placement in the selective school was sufficient for being assigned there, the parent could have requested a due process hearing immediately after receiving notice of denial of the placement on April 29 or at least after obtaining counsel

in May. That would have allowed time to exhaust the administrative process before the beginning of school year on Sept. 3. The court said that the hearing officer had said that the motion for a stay-put order would be ruled on by Sept. 11. The decision could have come earlier if the hearing request had been made more promptly. The court also noted that granting relief would require bumping the winner of the lottery from the seat for a student with special needs as well as placing the plaintiff ahead of two other lottery participants.

XVII. MEDIATION AND SETTLEMENT

Anderson v. Abington Heights Sch. Dist., 779 F. App'x 904, 907, 74 IDELR 217 (3d Cir. July 22, 2019). The court in this case found that the settlement of an appeal of an IDEA due process hearing that had been decided in the student's favor barred the current action alleging violation of Section 504 and breach of fiduciary duty. Accordingly, the court affirmed summary judgment against the student. The court stated: "Jacob's claim falls squarely within the scope of the settlement agreement. Because his Section 504 claim is barred by the settlement agreement, we do not consider the District Court's alternative holdings on the merits. . . . Jacob next contends the District Court erred in granting summary judgment to the School District on his breach of fiduciary duty claim. We will affirm the Court's holding that all three individual defendants . . . are immune from suit under the Pennsylvania Political Subdivision Tort Claims Act."

Shaw v. Dolton Riverdale Sch. Dist. 148., No. 19 C 1241, 2019 WL 5695825, 119 LRP 42740 (N.D. Ill. Nov. 4, 2019). This case concerned a then-seventh grader with an emotional disability and a learning disability, whose parents filed a due process complaint, then withdrew it after they and the district entered into a mediation agreement that required the district to place the student in a private therapeutic day school and change the student's eligibility category to autism. The parents then claimed that the district breached the agreement, and filed a new due process complaint. The hearing officer dismissed that complaint, and the parents filed an action in state court challenging the dismissal. The district, however, removed the case to federal court. The federal district court dismissed the federal claims and remanded the state law claims to the state circuit court. It reasoned that the federal court lacked jurisdiction over a claim that the district breached its contract by violating the terms of the mediation agreement. It said that although a federal court has the power to enforce a mediation agreement, it lacks the jurisdiction over an action alleging breach and seeking money damages. There was also a federal claim under the IDEA alleging denial of free, appropriate public education, but the court dismissed that claim as well, on the ground that the parents failed to plead how student was denied FAPE when they were not challenging the district's educational program, the parents were afforded an adequate opportunity to participate and advocate for child, and the district could no longer provide prospective relief because the student reached high school age.

XVIII. MOOTNESS

Nathan M. v. Harrison Sch. Dist. No. 2, 942 F.3d 1034, 75 IDELR 179 (10th Cir. Nov. 14, 2019) In this case, the mother of a student with autism challenged a December 2016 IEP that proposed moving the student from a private autism-only school to public school. The ALJ upheld the IEP at a due process hearing, and the district court affirmed. By the time of the court of appeals decision, the IEP had been superseded by a proposed IEP recommending placement in an autism program at different public school, in light of the student's transition from elementary school to middle school. The court of appeals vacated the district court's ruling and remanded with the direction to dismiss the case as moot. The court pointed out that the student had remained at the private school during the pendency of the proceedings, effectively giving the parent the relief that was sought in the proceedings. The court said that the case was not subject to the exception for mootness dismissals of a case that is capable of repetition yet evading review. It reasoned that although IEPs are short-lived and review proceedings are anything but that, the parent failed to show a reasonable likelihood that the district would again violate the IDEA in the same specific ways as alleged in the case, even though the alleged violation was a substantive one rather than a violation of procedural rights. The court further noted that the substance of the program had been revised following a reevaluation of the student.

Pocono Mountain Sch. Dist. v. T.D., 790 F. App'x 387, 390, 75 IDELR 120 (3d Cir. Oct. 29, 2019). In this case, a hearing officer awarded private school tuition reimbursement and compensatory education under Section 504, but ruled that the student was not eligible for services under the IDEA. The district court ruled that the student was in fact IDEA-eligible and affirmed the tuition reimbursement award under the IDEA rather than Section 504. The parties cross-appealed aspects of the decision. The court of appeals found that the tuition reimbursement claims were moot and that the only live issue in the case had been waived, so it vacated in part and affirmed in part the district court judgment. The court of appeals stated: "In this case, both issues raised by the parties—the correctness of the District Court's IDEA eligibility determination and its finding that Pocono did not act with deliberate indifference under § 504—are related to tuition reimbursement and are therefore moot. Pocono paid for T.D.'s private school tuition for the entirety of his time at the school. T.D. then returned to the District. Pocono does not seek to recoup its costs related to its private-school tuition reimbursement." The court rejected the school district's challenge to the award of compensatory education because it failed to raise the issue in its opening brief, so that part of the judgment was affirmed.

Olu–Cole v. E.L. Haynes Pub. Charter Sch., supra

Steven R.F. v. Harrison Sch. Dist. No. 2, 924 F.3d 1309, 74 IDELR 122 (10th Cir. May 28, 2019, as amended June 12, 2019). The court held that this case was moot. It involved a 14-year-old with severe autism, whose school district proposed a change of placement to a public school program. The district court ordered the school district to reimburse the parent for school year 2016-17 tuition at the student's private placement, and awarded attorneys' fees. The school district had paid the tuition pursuant to the IDEA

stay-put provision. In finding the appeal moot, the court rejected the view that the dispute was capable of repetition yet evading review, even while recognizing that a one-year IEP is too short in duration to be fully litigated before it expires. The court reasoned that the procedural challenges the parent raised were fact-specific to the 2016-17 IEP process, in particular, the alleged failure to follow requirements for an IEP meeting required by the outcome of a state complaint review – having a staff member from the proposed placement observe the student at the private placement and having a neutral facilitator for the IEP meeting – which would not necessarily recur at subsequent IEP meetings. Thus the court vacated the district court judgment, including the award of fees.

XIX. DUE PROCESS HEARING COMPLAINTS

L.B. v. Kyrene Elementary Dist. No. 28, supra

XX. DUE PROCESS HEARING REQUEST LIMITATIONS

Independent Sch Dist. No. 283 v. E.M.D.H., supra

R.S. v. Highland Park Indep. Sch. Dist., 951 F.3d 319, 76 IDELR 32 (5th Cir. Feb. 25, 2020). In this case, the court confronted a defense based on the Texas one-year statute of limitations, and stated at 329 that "a claim challenging the substantive sufficiency of an IEP must be linked to a specific act adopting, changing, or declining to change the IEP, and such a claim accrues when a parent knew or should have known that the action resulted in a deficient IEP,"; for complaints concerning "a specific education choice, the alleged unsuitability of the IEP will generally be immediately apparent when the school district adopts, changes, or refuses to change the IEP," *id.*; but, "Where, as here, the claim is instead based on a generalized allegation that an IEP is not reasonably calculated to confer benefits, accrual will depend on the more fact-intensive inquiry of when the alleged deficiency became sufficiently apparent that the parent knew or should have known of the problem, including from a child's lack of progress under the IEP," *id.* The court, however, did not apply these accrual principles to the facts of the case, because the court reached the conclusion that there was no violation of the IDEA. For more on the case, see *Endrew F.* and Free, Appropriate Public Education, and Least Restrictive Environment, *supra*.

B.B. v. Delaware Coll. Preparatory Acad., 803 F. App'x 593, 597, 76 IDELR 1 (3d Cir. Feb. 11, 2020). This decision vacated the dismissal of an appeal from a decision by the Delaware state hearing panel's dismissal of an IDEA due process hearing complaint on the basis of the state's two-year statute of limitations. The court reasoned that the complaint filed in April 2016 alleged violations that in May 2014, the defendant failed to conduct testing of the student, that the defendant failed to provide student transportation during the period after April 2014, and that by August, the defendant still had not evaluated the student, met to revise his IEP, or provided him speech services. The court declared: "Although DCPA had previously failed to evaluate B.B., meet to revise his IEP, or provide him with speech therapy, subsequent failures of a like nature are distinct from prior failures and themselves support cognizable violations." The court

pointed out that its approach to the case did not rely on the concept of a continuing violation.

Ms. S. v. Regional Sch. Unit 72, 916 F.3d 41, 73 IDELR 223 (1st Cir. Feb. 15, 2019). The First Circuit held that Maine has a two-year statute of limitations for due process complaints, aligned with IDEA limitations. Therefore, claims as to school years 2009-10 and 2010-11 were untimely when the due process complaint was filed in May 2013. Procedurally, the court held that the law of the case doctrine did not bar consideration of the theory that Maine has one statute of limitations mirroring IDEA's, and that the argument was not waived when the school district failed to raise it in an earlier appeal of the decision in district's favor. On the merits of the limitations issue, the court reasoned that Maine intended to adopt a two-year limitations period mirroring IDEA's timing provisions. The court followed the analysis employed by *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601, 604-05 (3d Cir. 2015), and *Avila v. Spokane Sch. Dist. No. 81*, 852 F.3d 936, 937 (9th Cir. 2017), as to IDEA limitations. In this case, according to the court, there were no misrepresentations by the school district that would support an exception to the limitations.

K.C. v. Chappaqua Central Sch. Dist., No. 16-CV-3138, 2019 WL 6907533, 75 IDELR 252 (S.D.N.Y. Dec. 19, 2019). In this case, the student, who had bipolar disorder and ADHD, frequently left class when asked to do individual or group classwork. His IEP called for him to take breaks when experiencing frustration or fatigue, but his parents contended that he spent much time wandering the halls and not completing his work. The court dismissed various Section 504 and Americans with Disabilities Act claims. On the IDEA claim, the court denied the parent's request that it overturn the State Review Officer decision against the parents. The SRO had reversed a hearing officer ruling that found a denial of free, appropriate public education and awarded compensatory education and tuition reimbursement. The court upheld the SRO determination that the parents' claims that accrued before May 26, 2012 were time barred, pointing out that the due process complaint was filed on May 27, 2014. The parents knew or had reason to know about the student's frequent departures from class due to conversations with staff throughout the 2011-12 school year, including a February 15, 2012 IEP meeting at which the parents raised the issue as well as putting forward their concerns about the student's declining grades and his behavior; some additional evidence was available to the parents before May 26, 2012 as well, such as a parent portal that provided attendance information. The parents visited the portal multiple times during the 2011-12 school year. Thus claims over the implementation of the 2011-12 IEP's implementation were almost totally barred by limitations. On issues of free, appropriate public education during the relevant time period, the court deferred to the SRO, whose decision, it said, was reasoned and supported by the record. Conduct under the 2011-12 IEP was time-barred, except for one month, and failures to implement during that time were minimal; accommodations were provided the student throughout the school year; some educational progress occurred during the relevant period.

Collette v. District of Columbia, No. CV 18-1104, 2019 WL 3502927, 74 IDELR 251 (D.D.C. Aug. 1, 2019). This case challenged the set of services offered to a student with impulse control disorder, episodic dyscontrol syndrome, anxiety, learning disabilities,

and autism spectrum disorder, for the period from 2012 to 2019. Relevant to the IDEA, the court dismissed claims related to the September 15, 2015 IEP and placement in 2015-16, and the failure to issue prior written notices before October 13, 2015 on basis of limitations. The court identified the knew-or- should-have-known date as that of the IEP meeting when the student was already withdrawn from public school; it identified October 13, 2017 as the date of the due process complaint. The limitations barrier applied despite the ongoing effects of the IEP into the period covered by limitations. As to other issues, the court ruled that the parents were entitled to reimbursement of the full cost of the independent evaluation they undertook even though it did not include a classroom observation and was more expensive than the defendant allowed. The court ruled that the hearing officer incorrectly shifted the burden of showing appropriateness of the evaluation onto the parents. The court also found the compensatory education award of private tuition for the remainder of school year 2017-18 inadequate when it was not specifically directed at remedying the denial of appropriate education in 2016-17, during which the student missed significant class time.

XXI. CONDUCTING DUE PROCESS HEARINGS

Board of Educ. of Lake Forest High Sch. Dist. 115 v. Illinois State Bd. of Educ., No. 19-cv-04475, 2020 WL 1467418, at *6, 76 IDELR 91 (N.D. Ill. Mar. 26, 2020). This case was the school district's appeal of a remand decision after the original hearing officer retired. The replacement hearing officer responded to an order to take into account various evidence identified in remand order and reweigh the totality of evidence, and hearing officer relied on the record of the original hearing rather than personally hearing witnesses. The court granted in part and denied in part a motion to dismiss the school district's complaint. On the issue of the propriety of the procedure used by the replacement hearing officer, the court commented, "It is true that the second Hearing Officer did not hear the witnesses in person, so she could not see their demeanor (as she herself acknowledged). . . . But hearing testimony in person is not a sine qua non for weighing evidence. And as a practical matter, it is much ado about nothing. This case is not a 'whodunit' where the outcome could turn on a witness's small twitches, odd looks, body language, or evasive facial expressions. This case doesn't require the factfinder to decide which witness is lying. It's a case about the proper education of a student. And Hearing Officers are well qualified to make determinations about educational policy."

Greenhill v. Loudoun Cnty. Sch. Bd., supra

Questions and Answers on IDEA Part B Dispute Resolution Procedures During COVID-19, 76 IDELR 259 (OSEP June 22, 2020) This document provides, among other things, that state educational agencies may extend the 60-day time limit for resolving a state complaint due to circumstances related to the pandemic, but only on a case-by-case basis, and that circumstances in some instances may include the unavailability of personnel and the inability to obtain information (Q. 2); that parties in mediation proceedings may agree to conduct mediation by means such as video conferences or conference calls (Q.3); that parties may agree to extend the 15-day timeline for the school district to convene a resolution meeting and the 30-day resolution timeline from when parent files due process complaint, but there must be no extension of the 7-day

resolution meeting timeline or the 15-day resolution period for expedited due process complaints that address disputes about disciplinary removals (Q. 4); that parties may agree to conduct ordinary and expedited resolution meetings virtually (Q. 5); that "A State could permit hearings on due process complaints to be conducted through video conferences or conference calls, if a hearing officer concludes that such procedures are consistent with legal practice in the State" and the hearing process provides parental rights to an impartial due process hearing consistent with all requirements in 34 C.F.R. §§ 300.511 through 300.515, and the same for state level review (Q. 6); that "hearing officers, or where applicable, reviewing officers, have the authority to extend the applicable timelines for issuing decisions on due process complaints during the pandemic," noting that extensions may be granted at the request of either party to a proceeding but "the hearing officer or reviewing officer must document the length of the extension and the reason it was provided" and extensions are not permitted for expedited hearings (Q. 7).

XXII. TUITION REIMBURSEMENT

D.L. v. St. Louis City Pub. Sch. Dist., supra

W.A. v. Hendrick Hudson Cent. Sch. Dist., 927 F.3d 126, 147, 74 IDELR 186 (2d Cir. June 14, 2019), *cert. denied*, 140 S. Ct. 934 (Jan. 21, 2020). In this case a teen had a migraine condition causing him to miss many school days. The court of appeals upheld the state review officer's determination that the district met its child-find obligation when it did not have sufficient reason to believe that student's disability required special education during eighth grade. The court noted that the student made progress in the general curriculum and received good test scores, which undermined the conclusion that he needed special education. As to ninth grade, the court affirmed the state review officer and district court determination that the private boarding school chosen by the parent was not an appropriate placement for the student. The court said that the SRO considered evidence of the student's progress at the private school but relied on the lack of evidence that the private school addressed the student's tendencies to develop physical symptoms and exhibit school avoidance when under stress, and his need to develop coping and organizational skills. The court stated: "[T]he question of whether a private school placement provided special education services is precisely a question on which we defer to educational experts." The court additionally overturned a ruling of the district court and affirmed the SRO, who denied tuition reimbursement for the student's tenth grade year. The court stressed that the student's absences in ninth and tenth grades were similar, and the SRO took into account improvements produced by the use of an iPad and small classes, as well as the lack of evidence that the private school provided specially designed instruction to meet the student's specific needs.

L.H. v. Hamilton Cnty. Dep't of Educ., *supra*

Collette v. District of Columbia, supra

A.S. v. Board of Educ. of Shenendohowa Cent. Sch. Dist., No. 1:17-CV-0501, 2019 WL 719833, at *9, 73 IDELR 260 (N.D.N.Y. Feb. 20, 2019), *motion to reopen granted*, 2020

WL 1245346 (N.D.N.Y. Mar. 16, 2020). The court in this case rejected reimbursement for a home-based program for a child with autism, stating, "Here, the only deficiency with the IEP the SRO identified was the district's failure to consider the extent to which its program constituted a removal from the general education setting in a manner inconsistent with A.S.'s LRE. . . . As the Court upholds the SRO conclusion that the only deficiency in the IEP was the LRE issue, the unilateral placement can only be regarded as proper, or appropriate, if the unilateral placement addressed that LRE deficiency. . . The parents' unilateral placement did not address this deficiency. The parents did not place A.S. in a more general education setting or in a plausibly less restrictive environment. Rather, the parents provided A.S. home-based instruction that removed him even further from a general education setting."

I.W. v. Lake Forest High Sch. Dist. No. 115, No. 17 C 7426, 2019 WL 479999, 73 IDELR 236 (N.D. Ill. Feb. 7, 2019). In this case, the parents of a teenage student with multiple disabilities removed her from public high school and placed her in Eagle Hill, an out of state private residential school. They filed a due process complaint requesting reimbursement for two years' tuition, which led to a decision, not appealed by the school district, that the school district failed to offer appropriate education. The hearing officer also ruled, however, that the parents were not entitled to tuition reimbursement because they failed to show that the private school was an appropriate placement for student. The court vacated the hearing officer decision as to reimbursement and remanded. The court said that teacher narratives on the student's progress may be considered in determining whether a private placement provided appropriate education, but it was uncertain whether the hearing officer afforded them no weight or merely overlooked them. The court said: "The court remands the case to the Hearing Officer for reconsideration of his propriety finding, in light of the teacher narratives included in I.W.'s Eagle Hill report card." *Id*. at *11. The court also pointed out that the hearing officer gave little weight to the grades at the private placement but the court said that teacher narratives may illuminate how the student earned the grades. The hearing officer did not explain the conclusion that the student did not make progress in many areas of need. The court commented: "This court's own review of the administrative record suggests that I.W. did make social, psychiatric, and academic progress at Eagle Hill." *Id*. at *12.

XXIII. COMPENSATORY EDUCATION AND RELATED

Doe v. East Lyme Bd. of Educ., 962 F.3d 649, 660, 120 LRP 18693 (2d Cir. June 18, 2020). This is a long-running case. In this decision the Second Circuit took up the appeal of a remand to the district court for the district court to determine remedies for a violation of the maintenance of placement duty. A student diagnosed with autism and other conditions was not provided services under the IEP after there was an impasse between the defendant and the parent, and the parent filed for due process. The court of appeals affirmed the bulk of the compensatory education order, which called for the defendant to reimburse the parent for full out-of-pocket expenses of $36,555.94 plus interest, and to place $203,478 in an escrow account for compensatory education crafted to meet the student's current educational needs for six years or until student graduates college, whichever is first. The court specifically affirmed the time limit on use

of funds in the escrow account, as well as the return of unused funds to the district; but it reversed a grant of decision-making power to the escrow agent to determine payouts and therefore potentially unilaterally reduce reimbursable services. The court stated: "The escrow agent's power to unilaterally reduce Doe's access to the award amounts violates the IDEA's requirement that adjustments to an award 'must be justified to a hearing officer'" (quoting *Reid v. District of Columbia*, 401 F.3d 516, 527 (D.C. Cir. 2005)). The court also reversed part of the order calling for the parent to pay half of the administrative fee on the escrow account, in violation of the free education entitlement. On the other hand, the court affirmed the district court on the method of calculating the interest award, which included compounding. The court also adhered to its previous decision that the defendant offered the student an adequate IEP, stating that the decision was consistent with *Endrew F.* Finally, the court held that a claim for tuition reimbursement, claims for the value of services provided by the parent but not in the stay-put IEP, and a challenge to the deeming of the date of filing for due process as the relevant start time for calculating the award of services were all barred by the doctrine of the law of case doctrine and it rejected other challenges to district court decision.

Independent Sch Dist. No. 283 v. E.M.D.H., supra

T.B. v. Prince George's Cnty. Bd. of Educ., supra

J.N. v. Jefferson Cnty. Bd. of Educ., supra

Matthew B. v. Pleasant Valley Sch. Dist., supra

R.S. v. Board of Dirs. of Woods Charter Sch. Co., No. 1:16-CV-119, 2019 WL 1025930, 73 IDELR 252 (M.D.N.C. Mar. 4, 2019), *aff'd*, 806 F. App'x 229, 120 LRP 16635 (4th Cir. May 27, 2020) (affirming on basis of district court opinion). This case involved a student with a nonverbal learning disability who transferred into the charter school from out of state and began to attend on August 20, 2013 but experienced academic difficulties and was withdrawn by the school on March 6, 2014 after ceasing to attend during the period after December 2, 2013. The court granted the parent's motion for summary judgment against the charter school, overturning the state review officer's rejection of the ALJ's fact finding and credibility determinations. The court held that the school provided comparable services upon transfer as to speech and language, even though the school used pull-out services rather than a mix of pull-out and push-in, but ruled that it failed to provide comparable services when it offered modified rather than adapted physical education. The court also determined that there was a failure to timely develop an IEP under the state's 90-day timeline from referral for evaluation starting August 20, 2013, which elapsed November 17, 2013. The court also found a violation of the prior written notice requirement when the school disenrolled the student. The physical education violation denied appropriate education, and the parents' conduct did not relieve the school of liability for failure to develop the IEP when the parents wanted an attorney to attend the IEP meeting and the attorney had a scheduling conflict. The disenrollment also deprived the student of appropriate education. The court awarded compensatory private education funding for adaptive physical education hours for the period from August 20, 2013 to November 17, 2013, and full direct funding for at least

three hours per day of compensatory education from November 17, 2013 to the end of school year, with parents choosing credentialed providers at the prevailing market rate.

Letter to Zirkel, 74 IDELR 142 (OSEP May 2, 2019). In response to a set of questions on interpretation of the IDEA from Professor Zirkel, the Office of Special Education Programs stated: "Question 3: In a case where the parent files for a due process hearing to claim a child find violation but either: (a) the district's belated evaluation determines that the child is not eligible under IDEA; or (b) the district never evaluated the child, is the parent deprived of the right to a FAPE-denial remedy (e.g., compensatory education or tuition reimbursement) and to attorneys' fees under the IDEA? Answer: The determination of a specific remedy resulting from a due process hearing is made on a case-by-case basis in light of the specific facts of each case at the discretion of the hearing officer. We believe that the hearing officer, as the designated trier of fact under IDEA, is in the best position to determine whether a delayed evaluation or a failure to complete an evaluation would be subject to the remedies described in your question."