CURRENT DEVELOPMENTS IN SPECIAL EDUCATION LAW: 2023 IN REVIEW

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As always, there has been a lot going on nationwide in special education law, and the past year has been no exception. In this session today, we will cover the current ramifications of a special education decision issued last year by the U.S. Supreme Court, as well as highlight some significant special education judicial rulings, federal agency guidance documents, and other resources from 2023 related to school obligations under IDEA and Section 504. In review of these, we will also discuss the potential lessons we can learn from all of them.

DECISIONS AND GUIDANCE RELATED TO COVID-19 CHALLENGES/ISSUES

Court Decisions

- **Early Class Action Lawsuits Challenging 2020 School Closures**

A. Carmona v. New Jersey Dept. of Educ., 2023 WL 5814677 (3d Cir. 2023) (unpublished). Where the parents allege that they have exhausted their administrative remedies because they are "in the process of exhausting their administrative remedies" by initiating due process proceedings is rejected. To satisfy exhaustion, parents must have the "findings and decision" from a due process hearing in hand before filing their lawsuit in court. Merely beginning the process is not enough. Further, the systemic exception to exhaustion does not apply here, and IDEA's "stay put" provision does not apply to a system-wide administrative decision, such as an order shutting schools to all students during an unprecedented and life-threatening health crisis (citing J.T. v. de Blasio). Here, the transition to distance learning applied to all students regardless of disability.

B. Roe v. Healey, 78 F.4th 11, 123 LRP 24585 (1st Cir. 2023). District court's dismissal of parents' claims for injunctive and declaratory relief based upon the assertion that the switch to virtual learning in March 2020 denied FAPE to their children is affirmed. Because the districts resumed in-person learning in May 2021, the parents' request for a court order prohibiting future school closures is moot.

C. Horelick v. Lamont, 2023 WL 5802727 (D. Conn. 2023). Where the parents of students with disabilities argue that the state's closure of public schools to in-person instruction due to COVID on March 15, 2020 violated IDEA, the state DOE's, BOE's, and school districts' motions to dismiss are granted. The threat of future school-closure mandates is too speculative to establish standing to bring this case for injunctive and declaratory relief. Further, each plaintiff is required to exhaust their administrative remedies and no exception to this requirement exists. The claim that the Defendants violated procedural safeguards systemically when closing schools and failing to follow prior written notice, stay-put, and IEP meeting requirements for change of placement under IDEA is rejected. The state's decision to close schools due to COVID did not constitute a change in educational placement. Courts across the country agree that such administrative decisions that apply to all students do not amount to a change in educational placement that would trigger IDEA's procedural safeguards.

- **Cases Regarding FAPE to Individual Students during COVID Times**

A. Abigail P. v. Old Forge Sch. Dist., 82 IDELR 227 (M.D. Pa. 2023). Hearing officer's decision that 12 year-old student with autism was provided FAPE during the 2020-21 school year is upheld. The IEP was reasonably calculated to enable the student to make progress in light of her circumstances when it was modified to reflect that she would receive virtual instruction. All of the other aspects of the IEP were the same as the pre-pandemic IEP, including the annual goals and related services. In addition, during virtual instruction, the student received 5 sessions per week of specialized instruction, along with optional Google classroom assignments 4 days per week for enrichment and extra practice. In addition, the district funded at-home nursing services, three 30-minute speech sessions per week, three 30-minute OT sessions per week, and one 30-minute PT session per week, along with services of a BCBA. In addition, an evaluation submitted by the parent reflected that the student does well and had a preference for learning on devices/tablets. Where the district was able to implement the student's IEP services in the virtual setting and the student made progress during school closures, she was provided FAPE.

B. M.B. v. Fairfax Co. Sch. Bd., 660 F.Supp.3d 508, 123 LRP 25649 (E.D. Va. 2023). Among other things, the parents challenge the services provided during school closures to the student with ADHD, dyslexia, and behavior problems. The hearing officer's decision in favor of the district is affirmed in its entirety and private school reimbursement is denied because the district offered FAPE in the LRE. Notably, the parents' assertion that the hearing officer erred in finding that the district did not violate IDEA during the COVID-19 pandemic is rejected. During the pandemic, the district implemented reasonable measures to ensure that the student continued to make progress under the circumstances presented. For example, the district developed Temporary Learning Plans for students, including this student, to promote voluntary participation in virtual learning activities while schools were closed. In addition, after the initial school closures during the first months of the pandemic, the district offered recovery services to the student to address learning loss from the pandemic, including 21 weeks of recovery services to support math goals. Thus, the record reflects that the district "devised and implemented measures during the COVID-19 pandemic designed to ensure that M.B. made reasonable progress given the difficult

circumstances. Of course, it is impossible to overstate the impact of the pandemic and the hardships imposed on parents, students, teachers, and administrators alike by virtual learning. In this respect, the Fourth Circuit has explained that the IDEA is a 'flexible' and 'practical' standard which 'must be applied in the day-to-day vortex of an up-and-down school year.'" (citing *Bouabid*, 62 F.4th at 860). Thus, the record supports that the hearing officer properly concluded that the district acted reasonably during the pandemic and the parents' argument that the hearing officer improperly excused the district's failures during the pandemic must be rejected.

- **Challenges Regarding Masking Mandates**

A. G.S. v. Lee, 123 LRP 24593 (6th Cir. 2023). District court's determination that the parents are prevailing parties under Section 504/ADA in their litigation where the district court enjoined Tennessee's governor from allowing students to opt out of mask mandates is affirmed. Thus, they may seek to recover attorney's fees for that litigation. While preliminary injunctions generally do not confer prevailing party status, an exception exists when the injunction results in a material, enduring, and court-ordered change in the parties' legal relationship. Here, the injunction met that standard when the district court prohibited the governor from enforcing his August 2021 executive order that allowed K-12 students to opt out of mask mandates on school grounds. The county government's ability to enforce its mask mandate allowed medically vulnerable students to attend in-person classes for as long as the injunction was in place, which was for two months here. While the governor argues that two months was not "enduring," he has not cited any case law requiring a mathematical approach to determining that.

NON-COVID-RELATED DECISIONS AND GUIDANCE

EXHAUSTION OF ADMINISTRATIVE REMEDIES

A. Perez v. Sturgis Pub. Schs., 143 S. Ct. 859, 82 IDELR 213 (2023). The Sixth Circuit's decision affirming the district court's dismissal of the student's ADA claims for failure to first exhaust IDEA's administrative remedies is reversed and remanded for further proceedings. IDEA's requirement that students must exhaust the statute's administrative (due process) remedies before filing claims in court does not preclude this ADA lawsuit. This is so because the relief Perez seeks in the lawsuit (i.e., compensatory damages for emotional distress) is not something IDEA can provide. While IDEA sets forth the general rule that "[n]othing [in IDEA] shall be construed to restrict" the ability of litigants to seek "remedies" under "other federal laws protecting the rights of children with disabilities," there is an exception to that. IDEA expressly states that before filing a civil action under other federal laws for relief "that is also available" under IDEA, IDEA's procedures shall be exhausted. In Perez' case, the 23 year-old deaf student seeks money damages under the ADA for the district's alleged failure to provide qualified sign language interpreters or accurate reports of his educational progress and his movement toward graduation. The district argues that the case should be dismissed for failure to first exhaust IDEA's administrative remedies because the student's complaint involves a denial of FAPE. The district's position unanimously is rejected because the remedies or relief sought by Perez

is compensatory damages—"a form of relief everyone agrees IDEA does not provide." The Court also rejects the notion that its prior ruling in Fry v. Napoleon Community Schools prevents it from interpreting IDEA's exhaustion requirement in this way, noting that the Fry Court expressly declined to decide whether a request for money damages brings a Section 504 claim outside the scope of the IDEA's exhaustion requirement. "In both cases, the question is whether a [student] must exhaust administrative processes under IDEA that cannot supply what he seeks" and "we answer in the negative."

B. Powell v. School Bd. of Volusia Co., 86 F.4th 881, 123 LRP 33407 (11th Cir. 2023). The district court's dismissal of the parents' class action 504/ADA complaint seeking $50 million in compensatory damages for alleged disciplinary removals from school is vacated and remanded for further proceedings in light of the Supreme Court's decision in Perez. While IDEA requires parents to exhaust due process proceedings before suing for an alleged denial of FAPE and the parents allege here that frequent behavior-related exclusions from school resulted in educational harm, the relief they seek in the form of money damages under 504/ADA cannot be recovered in an IDEA proceeding. Thus, under Perez, the plaintiffs' claims do not have to be first exhausted via IDEA due process procedures.

C. Lartigue v. Northside Indep. Sch. Dist., 86 F.4th 689, 123 LRP 33956 (5th Cir. 2023). District court's ruling in the district's favor is vacated and remanded for further proceedings. Where the former deaf student has exhausted IDEA claims years earlier regarding failure to provide CART services under IDEA (and lost), nothing in IDEA prevents a student from bringing a disability discrimination claim under ADA that overlaps with that. The student seeks compensatory damages for the district's failure to provide CART services she needed to participate in a school's debate team activity and other activities. As such, she can pursue her ADA claim regardless of any overlap with her IDEA due process complaint. (The dissenting judge opined that the impartial hearing officer's ruling for the district on the student's IDEA claims barred any subsequent FAPE claims under other statutes. Also worthy of noting is the district's unaddressed position that emotional distress damages cannot be recovered under ADA, which the district court on remand may address).

D. F.B. v. Francis Howell Sch. Dist., 123 LRP 33906 (8th Cir. 2023). District court's dismissal of former student's compensatory damages claims under 504/ADA is vacated and remanded for further proceedings in light of the Perez decision. The student does not need to first exhaust IDEA's administrative process before bringing his claim for compensatory damages based upon unlawful use of seclusion and restraint.

E. Doe v. Knox Co. Bd. of Educ., 82 IDELR 103 (6th Cir. 2023). District court's dismissal of student's 504/ADA claims is reversed and remanded for further proceedings before the district court. Here, the 504-only 9th-grade gifted student alleges that the district has failed to accommodate her misophonia (a disorder of decreased tolerance to specific sounds or their associated stimuli which causes an extreme reaction to hearing normal sounds of chewing gum or eating food). The student is requesting that the district institute a ban on eating and chewing in all of her academic classes and is seeking accommodations that will allow her to attend an elective called "Genius Hour" which overlaps with lunchtime. In this situation, the parents are not seeking relief for a denial of "FAPE" under the IDEA and,

therefore, are not required to exhaust IDEA's administrative remedies prior to bringing their 504/ADA claims to court. The text of the IDEA defines FAPE to mean the provision of special education and related services to a child with a disability. Thus, a request for FAPE under IDEA must involve a request for specialized instruction—a change to the content, methodology, or delivery of instruction. The accommodation requested here does not meet that standard and "[n]o ordinary speaker would describe this ban as 'specially designed instruction'...because there is nothing innately instructional about the ban." Because the student has requested an accommodation to access her general education classes, she is not seeking relief for a denial of FAPE under the IDEA and the district court must consider the parents' request for a preliminary injunction on remand.

F. Heston v. Austin Indep. Sch. Dist., 71 F.4th 355, 123 LRP 18885 (5th Cir. 2023). Previous decision is vacated and remanded to the district court for further consideration in light of the Supreme Court's decision in Perez. Where the parent is seeking compensatory damages that the IDEA does not provide as a remedy, the parent is not required to first exhaust administrative remedies prior to bringing her 504/ADA claims related to the district's assignment of an aide that allegedly harassed and injured the student with autism, ADHD, and bipolar disorder.

G. Chavez v. Brownsville Indep. Sch. Dist., 123 LRP 18043 (5th Cir. 2023) (unpublished). Where the district court dismissed the parent's ADA and 14th Amendment claims arising out of an underqualified paraprofessional's alleged misconduct without the benefit of the Perez decision (issued by the Supreme Court 15 months later) for failure to exhaust IDEA's administrative remedies, the decision is vacated and remanded. The parent may pursue claims for compensatory damages and is not required to first exhaust IDEA's procedures before filing these claims in court. However, any claims for non-monetary relief (such as injunctive relief) are still subject to IDEA's exhaustion requirement.

H. Z.W. v. Horry Co. Sch. Dist., 68 F.4th 915, 83 IDELR 75 (4th Cir. 2023). District court's dismissal of student's complaint for failure to exhaust administrative remedies is reversed and remanded. Here, the parent of a student with autism has filed a complaint alleging violations of the ADA and Section 504 for refusing to allow the student to have his private ABA therapist accompany him at school. While the district argues that the claim should be dismissed because ABA services can be available under IDEA, this does not render the claims here FAPE claims that must be exhausted under IDEA. The gravamen of the complaint is not FAPE because the "essence" of the student's "beef" with the school district is its refusal to permit him to bring his privately supplied and funded ABA therapist to school with him. Also, when a plaintiff sues under ADA and 504, exhaustion is required only if the plaintiff is "seeking relief that is also available under IDEA." Because the parent here requests nothing that would be provided at public expense, this case does not concern a denial of FAPE. "We offer no opinion about whether Z.W. has valid claims under the ADA or the Rehabilitation Act or what defenses the school district may have to them. We hold only that the district court erred in dismissing the complaint because Z.W. failed to exhaust administrative remedies under the IDEA."

MONEY DAMAGES/LIABILITY/PERSONAL INJURY GENERALLY

A. Baker v. Bentonville Sch. Dist., 75 F.4th 810, 123 LRP 22497 (8th Cir. 2023). District court's dismissal of disability discrimination claims under Section 504/ADA is affirmed. Where the parents are seeking money damages as a remedy for disability discrimination, they must show that the district's alleged failure to accommodate their child's disability amounted to bad faith or gross misjudgment. Here, the child's visual impairment was mild enough to place her in the normal range of visual acuity, but the district developed a 504 Plan to ensure the student's safety. The Plan included supervision during classroom transitions, a "buddy" assigned for errands and bathroom breaks, and specialized transportation. After some accidents on the playground where she collided with another student on a slide, got a splinter, was kicked in the face by a student crossing the monkey bars, and tripped on a concrete slab, the district amended her 504 Plan three times to include additional safety-related accommodations. The parent agreed to the revisions and the child did not experience any injuries after the third Plan was implemented. While the district refused to provide a 1:1 aide requested by the parent, given that the district took steps to ensure the child's safety, there was no evidence of bad faith or gross misjudgment as required to sustain a cause of action.

B. Larsen v. Papillion LaVista Comm'y Sch. Dist., 123 LRP 33165 (D. Neb. 2023). Parent's 14th Amendment due process claim brought under Section 1983 is dismissed against the school district. Though it is tragic that the 12 year-old boy with multiple disabilities disappeared from his school two years ago and is still missing, his mother cannot sue the district under the U.S. Constitution as a result. There is no evidence that a district policy, custom, or practice led to the student's disappearance. While a parent may generally assert a viable constitutional claim by showing that a school employee's action pursuant to official district policy violated constitutional rights, the mother here failed to satisfy this requirement. It is alleged that school officials left the student unsupervised in a classroom and that he walked out of the school in the middle of the day. The mother contends that the student had a documented history of running away from school and that the district knew that he needed constant supervision. More specifically, she asserts that school officials acted "in conscious disregard" for the student's safety when they watched him walk out of the school building without attempting to stop or retrieve him. However, the parent has not identified any district custom, procedure, or practice that could have led to the student's disappearance and also failed to identify any potential widespread unconstitutional practices in the district. "In tragic cases like this one, 'judges and lawyers, like other humans' are moved by natural sympathy to try to compensate a mother for her loss; but the [14th] Amendment was not designed to provide relief in all cases." The parent's claims under 504/ADA are also dismissed because emotional distress damages are not available under these laws.

C. Cody v. Pennridge Sch. Dist., 123 LRP 32231 (E.D. Pa. 2023). District's motion to dismiss the parents' 14th Amendment claim based upon the district's "failure to train" is dismissed, even though the parents allege that their nonverbal three year-old daughter with developmental delays was left by herself on the school bus for four hours. The district is not responsible for the bus driver's failure to check the bus after his morning run in

accordance with established transportation procedures. The parents have not shown that the district was aware of a need for additional training. To hold the district responsible for any damages, the parents must show that their alleged constitutional violation stemmed from a district custom or policy, such as failing to appropriately train staff. Here, the driver's failure to follow the district's end-of-route procedures may have been negligent but did not amount to a constitutional violation on the part of the district. Even if the driver's mistake violated the student's rights, the parents still could not hold the district responsible where the district's policies and procedures specifically require drivers to walk through their buses after the last child has gotten off. The district's policies and procedures require drivers to conduct pre- and post-run checks and inspections for students and their belongings. In addition, the parents did not identify any previous incidents of children being left on the school bus. Thus the district had no reason to suspect that there was a need for additional training.

D. B.H. v. Krause, 123 LRP 29889 (E.D. Wis. 2023). District's motion for judgment in its favor is granted on the parents' Fourth Amendment claim for "unreasonable seizure" based upon the fact that their three year-old was left for two hours unattended in a car seat on the bus. Here, the third-party transportation company (Badger Bus Lines) is responsible for that where the bus driver left the school before classroom staff had the opportunity to board and remove the child from her car seat and then marked the child absent based upon their faulty assumption that there were no students left on the bus. To hold district staff liable under the Fourth Amendment, the parents had to show that they intentionally restricted the child's movement. The parents could not meet this requirement where state law and transportation policies required the child to be in a car seat. As such, initial placement in the car seat did not violate the Fourth Amendment. Further, any "unreasonable seizure" resulting in the child's abandonment on the bus for more than 2 hours stemmed from the driver's conduct, who left the school a few minutes after a quick drop-off without checking to see whether any children remained on the bus. The district and its employees had no responsibility to ensure that the contractor's drivers were complying with the contractor's own protocols. Further, the parents' argument that district employees violated the Fourth Amendment by failing to check the bus themselves or prevent the driver from leaving so quickly is rejected. While they may have acted negligently in assuming the child was absent, their failure did not amount to an unreasonable seizure under the Fourth Amendment.

E. Chavez v. Brownsville Indep. Sch. Dist., 123 LRP 33403 (S.D. Tex. 2023). District's motion for summary judgment is granted on the parent's 504/ADA claims alleging discrimination on the part of the district for selecting and failing to remove a dedicated aide for her nonverbal high schooler who was allegedly unprepared to support him. To substantiate such a claim, the parent had to prove that the district intentionally discriminated against the student, which means more than negligence or deliberate indifference. The parent has failed to point to evidence of "ill will" on the part of the district when it assigned the aide or when it failed to take remedial action after an alleged incident in the restroom when the aide pulled the student down with him when he slipped. There is no evidence that any district employee knew or believed that assigning the Level I aide to this student created a risk of harm. While the district did not remove the aide

promptly after the incident, the district accepted the aides' explanation that it was an accident when the aide slipped and pulled the student down. No evidence suggests that any district employee believed that the district should have taken further action but intentionally chose not to do so.

F. C.B. v. Moreno Valley Unif. Sch. Dist., 123 LRP 34183 (C.D. Cal. 2023). Parent's motion for judgment on their 504/ADA discrimination claims is granted where 10 year-old boy with ADHD and ODD was handcuffed by campus security officers on three occasions for disability-related behaviors, and the parties are ordered to develop an appropriate remedy. The district's school safety practices, which have a disproportionate impact on students with disabilities, violates 504/ADA. Here, the district required campus security officers to treat all students the same way, regardless of whether they have disabilities. However, this policy does not have the same impact on all students, and data collected by the district shows that it was almost 9 times more likely to summon an officer when a student has a disability. This increased frequency is attributed to the district's failure to train officers on how to handle disability-related behaviors since the position of the campus security officer was created in 2016. They have not been trained on how to identify students with disabilities, understand disability-related behavior, and/or provide disability-specific accommodations. In addition, the district allows classroom personnel to summon the officers when students with disabilities become defiant or noncompliant, increasing the likelihood of removal or restraint. The parties are thereby ordered to work together to develop a remedy that will ensure students with disabilities have meaningful access to the district's programs.

G. D.L. v. Hernando Co. Sheriff's Office, 123 LRP 33954 (M.D. Fla. 2023). The parents of a 5th-grader with autism have sufficiently pled deliberate indifference to disability discrimination and established the right to seek compensatory damages under the ADA. Here, the child (weighing 90 pounds and standing 4'10" tall) was placed in seclusion on one occasion by an SRO who was a Sheriff's deputy, handcuffed, and then removed to a mental health facility, where he was involuntarily committed under Florida's Baker Act and continues to suffer "emotional pain, psychological injury, trauma, and suffering" after these events. The parents here must show that a district or Sheriff's Office official knew that harm to a federally protected right was substantially likely and failed to adequately respond. The parents assert that school personnel were aware that mechanical restraints were used against students, including students with disabilities, by SROs and law enforcement personnel under their supervision. They further contend that the sheriff permits and authorizes SROs to use mechanical restraints to restrain students with disabilities with excessive force unnecessarily. Moreover, the district has failed to maintain proper policies and procedures regarding the use of restraint. The parents have established that the Sheriff was responsible for establishing policies and practices for SROs assigned to public schools, had knowledge of discrimination, and failed to adequately address it.

H. Wagnon v. Rocklin Unif. Sch. Dist., 123 LRP 20669 (E.D. Cal. 2023). Bus driver's motion for summary judgment is denied where evidence reflects that driver pushed a nonverbal high schooler with CP forcefully enough to cause bruising, calling into question whether

the driver violated the student's constitutional rights under the Fourth Amendment. District personnel may use only an amount of force that is objectively reasonable in a given situation based upon the totality of the circumstances. Here, the student wore a harness to prevent falling from or leaving his seat during a 1-hour bus ride. While the driver maintains that he pushed the student back into his seat for safety reasons, the circumstances are not clear cut. This is so where a large bruise appeared on the student's upper thigh shortly after the driver stopped the bus and pushed the student back into his seat. In addition, a BCBA who viewed bus surveillance camera footage testified that she could not identify any safety-related reason for the driver's actions. Further, the driver stated that he could not recall receiving any training on how to manage disability-related behaviors. Clearly, certain portions of the record reveal that there are facts that are genuinely in dispute and a jury will need to decide whether the driver's actions violated the student's 4th Amendment rights.

I. S.G. v. Shawnee Mission Sch. Dist., 82 IDELR 107 (D. Kan. 2023). The school district's motion for summary judgment on the parent's 14th Amendment "failure-to-train" and "failure-to-supervise" claims is granted. Clearly, a school district is not automatically responsible for violations of student constitutional rights by its employees. For there to be responsibility, parents need to show that the district knew that its employee training was not adequate and disregarded the risk of harm to students as a result. Here, there is no evidence that the district had reason to believe that its behavior management training, which included training on de-escalation techniques and the appropriate use of restraint, was deficient. In addition, the parent has not identified any defects in the training that the district provided to the teacher that would have prevented the teacher from kicking the child while the child was lying on the floor of the library (which was caught on video). In fact, the teacher should not have needed training to know that she should not do that. This case does not involve a teacher making a wrong decision regarding the level of physical restraint to use with a kindergartner or whether to use restraint at all. Rather, the teacher's physical interaction with the student was "improper under any circumstances." Because the parent did not show that additional or different training provided to the teacher would have prevented her from kicking the student, the district is not responsible for the teacher's constitutional violation.

J. Barnett v. Clark Co. Sch. Dist., 123 LRP 29769 (D. Nev. 2023). District's motion for summary judgment on the parent's Fourth Amendment claim against the district is granted. The special education teacher's alleged use of excessive force does not automatically make the district liable for any injury to a student. Rather, parents must show that alleged abuse stemmed from a district practice or policy of ignoring such abuse. The fact that the teacher had known difficulties with creating lesson plans and completing service schedules did not put the district on notice of potential abuse or other misconduct toward students. Importantly, the district took action as soon as it became aware that the teacher may be mistreating students in his classroom when a classroom observer reported that the students called the teacher's ruler a "palo palo," which is Tagalog-language for a striking stick. After interviewing students and learning that the teacher used the ruler to hit them, school administrators suspended the teacher and contacted police and child welfare authorities. The administrators then contacted the students' parents and told them that the teacher had

been removed from the classroom pending investigation. Thus, the parents cannot show that the district was deliberately indifferent to the alleged abuse.

K. M.P. v. Jones, 123 LRP 29711 (D. Colo. 2023). Motion to dismiss Fourth Amendment claims brought against two School Resource Officers is denied and they are not entitled to a qualified immunity defense. While law enforcement officers have some protection from lawsuits, the doctrine of "qualified immunity" applies when they perform their duties reasonably. Here, the parents were able to show that the SROs violated constitutional rights that were clearly established when they arrested the 11 year-old ED student for "interfering with educational activities" under Colorado law. The student's alleged misconduct of noncompliance with a teacher directive and swinging his jacket when being escorted to the counselor's office did not evidence an intent to disrupt learning. In addition, the student's struggle while being restrained by the SROs did not amount to obstruction of the officer's duties. As such, the parents sufficiently plead an unlawful seizure. As for excessive force, the argument that it was reasonable for the SROs to force the student to the ground and handcuff him behind his back is rejected. The teachers were in the process of calming the student using the de-escalation techniques outlined in his BIP and there are no allegations that the student threatened the teachers or the SROs. Thus, the SROs' motion to dismiss is denied at this juncture.

LIABILITY FOR INJURIES TO STAFF

A. Sims v. Dallas Indep. Sch. Dist., 123 LRP 22647 (N.D. Tex. 2023). Because there is no evidence that the incident at issue was the result of a district custom or policy, claims brought under the 14th Amendment by the sons of a special education teaching assistant who was attacked by a 17 year-old student with disabilities and died are dismissed. The fact that the student's IEP team decided to maintain the student's special education placement did not make the district responsible for the assistant's death. Districts are not liable for the conduct of their employees, such as IEP team members, unless those violations resulted from district policy or custom. The teaching assistant's sons' argument that the IEP team's placement decision qualifies as district policy is rejected. Texas law designates a district's board of trustees as the final policymaker and the sons have not identified a state or local law that permits the board to delegate official policymaking authority to an IEP team. The argument that statements made during an IEP meeting 4 days after the teaching assistant died established district policy is also rejected. Even if the district representative on the team emphasized the importance of inclusion and peer interaction, there is no evidence that the representative spoke as the board's representative. Thus, the employee's sons could not show that the district maintained a policy of providing inclusive placements at the expense of staff safety.

BULLYING/DISABILITY HARASSMENT

A. Jordan v. Chatham Co. Bd. of Educ., 123 LRP 30861 (M.D.N.C. 2023). Where it is alleged that a school principal failed to address his own daughter's harassment of a student with autism, the district's motion to dismiss the alleged victim's 504/ADA claims is denied. While districts are not automatically liable for disability-based peer harassment, if a parent

can show that the district's response to reported incidents of peer harassment was clearly unreasonable, there is a cause of action. According to the parent here, the principal's daughter teamed up with another student to prevent her child from using school bathrooms. The parent of the alleged victim made repeated trips to the school each week to bring her child a change of clothes, which establishes the impact of the harassment. The parent's allegations that the bullies prevented her child from using the restroom at school to the point that she regularly soiled her clothing is "certainly" harassment that is sufficiently "severe, pervasive, and objectively offensive," such that the victim was deprived of educational opportunities and benefits at school. In addition, the parent claims that the harassment continued for years, notwithstanding her "weekly" conversations with the principal about his daughter's bullying behavior. If the parent's allegations are true, they could support a finding that the district's response to peer harassment was clearly unreasonable.

B. Dale v. Suffern Central Sch. Dist., 123 LRP 30409 (S.D.N.Y. 2023). The parents of a student with blindness, asthma, a neuro-developmental disorder, and anxiety have established a claim for disability discrimination under 504/ADA. Here, the parents assert that their middle schooler was subjected to ongoing and pervasive bullying and harassment from third to seventh grade based upon his disabilities. To recover money damages in such cases, parents must show intentional discrimination through deliberate indifference on the part of the district. Specifically, they must show pervasive, severe disability-based harassment about which the district was aware; that the harassment effectively deprived the student of access to education; and that the district responded to the harassment with deliberate indifference. Importantly, there must also be some factual allegation linking the bully's conduct to the student's disabilities. The parents here have linked some, but not all, of the alleged bullying episodes in their complaint to the student's disabilities and evinced that the student was bullied due to his disabilities on numerous occasions by teachers and peers. In addition, there is little dispute that the district was on notice of the alleged bullying where the parents continuously reported incidents going back to elementary school, with specific references to disabilities in at least one complaint filed in middle school. They have also established that the district's response may not have been reasonably calculated to end the harassment. In less than 2 years in middle school, the student dropped out of extracurricular activities, frequently missed school, attempted suicide, and transferred out of the district. Based on all of this, a reasonable jury could conclude that the measures the district took in elementary school were inadequate and "half-hearted," particularly where the district did not point to any particular measures it took to address the bullying behavior.

C. Allegheny Valley Sch. Dist. (OCR 2023). On September 21, 2023, OCR announced that it had resolved a disability harassment investigation where it had determined that the Pennsylvania district subjected the student to harassment so pervasive that it constituted a hostile environment and that the district failed to take steps to protect the student, end the harassment, and assess whether the harassment impeded the student's ability to access the district's educational program. Over a six-month period, classmates repeatedly directed disability-based slurs at the student and both threatened to and did physically attack him based upon his disability, all of which the parent and school staff reported to a district

principal. One of the attacks was captured on a school security camera video and the principal still did not treat it as disability-based harassment. OCR found that the district did not investigate all of the incidents reported and, when it did, the investigations were very limited. For example, they disregarded an eyewitness report and did not seek information from relevant witnesses. In addition, the district treated each report of harassment as an isolated incident, instead of an accumulation of evidence that the student was experiencing persistent disability-related harassment. Further, although the student's parent reported that the harassing behavior was impacting the student's ability to access his educational program and requested modifications to the student's IEP to add support, the district failed to convene a formal IEP meeting for over six months after the student's parent first reported the harassment. Even when the IEP team convened, there was no evidence that the team considered whether the harassment resulted in a denial of FAPE to the student and whether adjustments to the student's IEP were necessary.

The district has committed to take steps to ensure nondiscrimination in its education programs, including, among other things:

- Distribute a memo to all district staff affirming its obligations pursuant to 504/ADA;
- Train all school staff on their obligations under 504/ADA;
- Provide individual remedies to the student, such as counseling, academic, or other therapeutic services to remedy the effects of the harassment;
- Convene the student's IEP team to determine whether the student experienced a denial of FAPE due to the harassment;
- Review all bullying incidents for a 3-year period at the school to determine the need for additional remedies; and
- Perform a climate assessment to evaluate needed additional supports to ensure a nondiscriminatory school environment for students.

The heavily redacted 11-page Letter of Findings to the Superintendent can be found at https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/03221240-a.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term= and the 8-page Resolution Agreement can be found at: https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/03221240-b.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=

D. A.R. v. Cape Henlopen Sch. Dist., 83 IDELR 32 (D. Del. 2023). The school district did not fail to appropriately accommodate the fourth grader with ADHD in response to peer bullying under Section 504. Districts must take prompt and effective steps that are reasonably calculated to end harassment, eliminate any hostile environment, and prevent it from recurring when the district becomes aware of severe and pervasive bullying. Here, there were five incidents of minor peer bullying of the student spread over two years. In response, the teacher and assistant principal responded with a plan to prevent recurrence of the incidents, that included use of recess monitors and discipline of the bully. When the student experienced an incident of severe bullying in fourth grade, the district suspended the bully, separated him from the victim, and created a safety plan to keep them separate.

The school also added new anti-bullying accommodations to the student's 504 plan, including bringing friends to lunch. The incidents were handled appropriately and were not serious enough to create a hostile environment or to trigger the district's obligation to make systemic changes to combat bullying or add anti-bullying accommodations to the student's 504 plan. This duty is only triggered when the bullying is so severe, pervasive, and objectively offensive that it denies its victim equal access to education. The district responded appropriately to the incidents, quickly, materially, and in a manner reasonably calculated to end the harassment.

E. B.D. v. Eldred Cent. Sch. Dist., 661 F.Supp.3d 299, 83 IDELR 31 (S.D.N.Y. 2023). State review officer's decision that the safety plan developed by the district to address peer bullying of an eighth grader with autism, ADHD, and kidney disease was appropriate is upheld. Thus, the parents' request for reimbursement for private schooling is rejected. While a district can be found to have denied FAPE by failing to respond appropriately to peer bullying, parents must show that the district was deliberately indifferent to the bullying and failed to take reasonable steps to prevent it. Here, the district held a meeting to address the parents' concerns about bullying and to develop a safety plan for the student. The plan stated that its purpose was "to provide a safe and secure learning environment free from harassment, intimidation, or bullying," indicating that the district was not deliberately indifferent. In addition, the plan contained appropriate measures to protect the student from bullying. Although the plan contemplated some action on the part of the student, such as leaving class early and reporting bullying incidents when they occurred, the plan imposed 11 obligations on school staff. These included things such as allowing the student the opportunity to leave class, call family, or contact other school staff members; letting him out of class early and sending him to eat lunch separately to avoid contact with other students; mandatory monitoring and reporting of potentially problematic situations involving the student in the school's common areas; separating him from offending students during class and extra-curricular activities; and informing the school body at large about bullying policies and related issues. As such, the state review officer's finding that the safety plan was appropriate is upheld.

F. D.M. v. East Allegheny Sch. Dist., 82 IDELR 171 (W.D. Pa. 2023). District's motion to dismiss 504/ADA discrimination claims is partially denied. Here, the parents allege that their child with SLD began skipping class and struggling academically because of bullying-related anxiety and depression. They also allege that the district responded to the student's mental health issues (difficulty concentrating in class, struggling academically, experiencing suicidal ideations) by placing her in a cyber school program that offered no direct instruction rather than reassessing whether the student needed additional supports to address her mental impairments. These allegations, taken as true, are enough to support a claim that the district discriminated against the student because of her mental health needs.

RETALIATION/FREEDOM OF SPEECH

A. Hamilton v. Oswego Comm'y Unit Sch. Dist., 123 LRP 30461 (N.D. Ill. 2023). District's motion for judgment on the parents' retaliation claims under 504/ADA is granted. The circumstances surrounding the district's report of suspected child abuse to child welfare

authorities could suggest unlawful retaliation since the report was made one day after a contentious IEP meeting when the parents asked for additional IDEA services. Not only did the parents engage in protected advocacy when they requested additional services, but the district contacted child welfare authorities just one day after denying the parents' request. However, the district offered a legitimate, nondiscriminatory reason for reporting the suspected abuse. According to school staff, the child did not want to enter the classroom the morning after the IEP meeting, and the principal and school psychologist reported that she lifted her arms while speaking to them and they saw a large bruise above her waistband. Though her parents said she banged into a coffee table while running in the house, the child was not able to explain the injury. Thus, the bruise, the child's unusual behavior, and her statement that her father tickled her when she was in bed gave the district reason to suspect abuse. Even without the state's mandatory reporting requirement], the evidence supports the notion that the district made the report to child welfare authorities out of concern about potential child abuse. While child welfare authorities investigated and found no evidence of abuse or neglect, there is no evidence that the district sought to punish the parents for their advocacy.

B. Laquidara v. Westwood Regional Sch. Dist., 123 LRP 31965 (N.J. Sup. Ct. 2023) (unpublished). IDEA student's claim that the district filed a truancy petition against the parents to punish them for their advocacy is rejected. The student failed to attend school for more than a month after the IEP team changed his placement to a resource classroom and denied the parent's request for home instruction absent evidence of medical need. Further, New Jersey law requires districts to report truancy, which it defines as 10 or more unexcused absences. Considering that there was no question that the student was truant, school administrators were not free to "simply ignore the truancy laws."

C. Palmer v. Elmore Co. Bd. of Educ., 82 IDELR 160 (M.D. Ala. 2023). Parent has failed to establish that the district retaliated against her for advocating on behalf of her student with severe disabilities via her due process complaints against the district. To establish a claim of retaliation under the ADA, a parent must show that: 1) she engaged in a protected activity (i.e., advocacy on behalf of a student with a disability); 2) she suffered adverse action by the district; and 3) the adverse action was causally related to the protected activity. Here, the parent has not shown that the adverse action in the form of two truancy letters from the district and one from the county district attorney's office were causally related to her filing of the due process complaints. While the district's special education director knew about the parent's due process activity in support of her child, the parent did not show that the director played a role in sending the truancy letters. In fact, the director's office was not responsible for sending the truancy letters and none of the letters mentioned the director's name. Further, the parent failed to show that any district employees involved in sending the letters knew about the parent's advocacy. Thus, the district's motion for judgment is granted.

D. Morrow v. South Side Area Sch. Dist., 123 LRP 29917 (W.D. Pa. 2023). Former teacher allegedly forced to retire has established that the district may have retaliated against her under 504/ADA for her complaints to administration about disability discrimination against various students and staff members with disabilities. She asserted that she was

subject to adverse actions including frequent change to her job description, assignment to conflicting job tasks, denial of paraprofessional support, a surprise observation, threatening a hearing and denial of equal opportunities. She claims that she met with the new Superintendent regarding the district's special education programs and her concerns that students were not receiving proper support from the district. In addition, she continually complained to the Superintendent, the principal, board members, and administrators about disability discrimination and the failure to provide required services to students. Thus, she has sufficiently asserted a protected activity and has contextually and temporally connected her disability-related complaints to the adverse conduct she claims forced her to retire.

E. Rae v. Woburn Pub. Schs., 83 IDELR 61 (D. Mass. 2023). School district's motion to dismiss the claims of a school nurse brought against the district and the school principal is granted. Here, the disciplinary hearings that the middle school nurse was required to attend and her principal's unusual participation in her yearly review were not shown to be connected to her speaking out on behalf of students with diabetes. In order to establish retaliation under Section 504/ADA, the nurse must show that 1) she engaged in protected conduct; 2) she was subjected to adverse action; and 3) there is a causal connection between the protected conduct and the adverse action. While the nurse engaged in protected conduct when she advocated for more support for students with diabetes and the principal's unexpected participation in her yearly review is arguably adverse action, the nurse has shown no evidence that there is a causal connection between that action and the nurse's advocacy. While the principal did require the nurse to attend disciplinary hearings, the hearings involved legitimate concerns--a parent complaint, a t-shirt that a student obtained from the nurse's office, and another incident where the nurse did not respond to a page that was made over the school's public announcement system because she was outside. The hearings were not held because of her advocacy, and the nurse's claims are dismissed.

RESTRAINT/SECLUSION

A. Lambeth-Greer v. Farmington Pub. Schs., 123 LRP 31803 (E.D. Mich. 2023). Special education teacher's and district's motions for judgment on the parent's excessive force claim under the 14th Amendment are granted. In the Sixth Circuit, courts are to consider 4 factors when deciding such claims: 1) whether the teacher acted with a pedagogical purpose; 2) whether the amount of force used was excessive; 3) whether the teacher acted with malicious intent; and 4) whether the student suffered a serious injury. Here, all four factors weigh in favor of the teacher. Where the student resisted moving to the next workstation as directed and flailed his arms yelling, "no, no, no," testimony showed that the teacher held the student's wrist and walked with him to the next workstation. This action was aligned with the teacher's CPI training and the teacher confirmed her justification for using the hold technique in an email to the parent sent the same date of the incident. This single use of force, which lasted about 10 seconds, was part of the teacher's good faith effort to restore discipline. In addition, the minor abrasion that the student suffered after he wiggled free from the teacher's grasp did not qualify as serious injury. Because the teacher's use of the physical hold did not qualify as excessive force, the parent could not show that the teacher violated the student's rights under the 14th Amendment.

B. Thomas v. Neenah Joint Sch. Dist., 74 F.4th 521, 123 LRP 21936 (7th Cir. 2023). District court's ruling dismissing the parent's 4th Amendment claim against the school district for excessive force is affirmed. School districts are not automatically liable for their employees' violations of constitutional rights of students, unless the parents show that the alleged violation was the result of an express policy or widespread district custom or practice. Here, the parent of a sixth grader with autism did not identify any district policy requiring employees to physically restrain students with disabilities. Further, the incidents identified by the parent do not establish a widespread practice of allowing staff to use excessive force. Rather, the parent described an incident in which staff members pushed the student against a wall, pinned her to the floor, handcuffed her, and placed her in a wheelchair after she tried to use a school elevator. In addition, although the parent claimed staff members responded with similar force during another incident two weeks later, she did not provide any details about the incident. Thus, the allegations of isolated incidents fail to plausibly allege that the district has a widespread practice of using excessive force to punish students with behavioral disabilities. Where the parent has failed to connect the restraint incident to a district custom, policy or practice, she cannot hold the district responsible for the student's alleged injuries.

C. Spectrum Academy (UT) (OCR 2023). After completing a "compliance review" of the Spectrum Academy in Utah initiated by OCR in January of 2019, OCR announced on September 7, 2023 that the charter school for students with high functioning autism had agreed to resolve violations and compliance concerns related to the use of restraint and seclusion practices during the 2017-2018 and 2018-2019 school years (the Review Period). The 23-page letter to the Academy's Academic Director can be found at:
https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/08195001-a.pdf
and the 10-page resolution agreement can be found at:
https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/08195001-b.pdf

In a press release, OCR noted that its investigation resulted in a finding that the Academy failed to hold required IEP meetings for specific students to evaluate the impact of repeated use of restraint and seclusion with them and failed to consider the need for compensatory services for them. OCR also identified compliance concerns related to 26 additional students who were subjected to a high number of restraints and seclusions and noted that the Academy may have failed to consider the educational impact on these students as well.

OCR also identified a concern that the Academy may have failed to re-evaluate the subject students to determine if the repeated use of restraint and seclusion caused them to miss instruction or services, denied them FAPE, or indicated a need for additional aids and services to ensure FAPE. OCR was also concerned that the Academy did not evaluate the students' need for or offer compensatory services to them for missed services and instruction.

Finally, OCR noted that the Academy's record keeping practices may have prevented the Academy from being able to determine whether its current array of special education and related aids and services is sufficient to provide FAPE and noted significant inaccuracy in the Academy's reporting to the 2017-18 Civil Rights Data Collection (CRDC) for the 2017-18 school year.

The Academy agreed to resolve the violations and compliance concerns by making significant changes to its policies, procedures, and training requirements with respect to the use of restraint and seclusion. The Academy also agreed to remedy prior instances where restraint and seclusion of its students denied or may have denied FAPE, and to develop a monitoring program to ensure that any future restraint or seclusion complies with Section 504 and ADA.

Specifically, the Academy committed to taking the following steps:

- Revise and distribute to staff its policies, procedures, and forms for restraint and seclusion;
- Provide training on the revised policies and Section 504 FAPE-related requirements to all teachers, administrators, and other members of IEP and 504 teams;
- Provide individual remedies for students who experienced restraint or seclusion during the review period by convening a properly constituted IEP team to determine if compensatory services are needed, and if so, by timely providing them;
- Conduct a review to determine whether any other students were denied FAPE due to the use of restraint or seclusion from 2019 to the present, and to implement responsive remedies based on the review;
- Ensure records about the use of restraint and seclusion are created and maintained and that accurate report data to the CRDC is provided in future; and
- Implement a program to monitor the use of restraint and seclusion with students in the Academy's schools.

EARLY CHILDHOOD TRANSITION

A. Early Childhood Transition Questions and Answers, OSEP QA 24-01, 123 LRP 34371 (OSEP 2023). This 21-page document contains 21 questions and can be found at https://sites.ed.gov/idea/idea-files/2023-early-childhood-transition-questions-and-answers/

On November 28, 2023, OSEP issued this Q&A document that supersedes previous guidance from 2009 on the topic of transition from Part C to Part B. Important points made include, but are not limited to, the following:

- Districts must respond appropriately when a lead agency notifies it that a child who will be transitioning out of Part C is potentially eligible for Part B services. That notification is a referral for an initial evaluation.
- If the district determines there is reason to suspect the student has a disability and needs special education, the district must seek parent consent and complete the evaluation within applicable timelines.
- If the district decides not to evaluate, it must provide PWN to the parent.
- District must participate in a child's transition conference and should use the opportunity to educate parents.
- LEA personnel should explain part B eligibility requirements and evaluation procedures and inform the family that they can request to invite their Part C service coordinator to the initial IEP meeting.

- Even in cases where no transition conference occurs, the district must conduct child find and comply with IDEA's or state's evaluation timeline.

CHILD FIND DUTY TO APPROPRIATELY/TIMELY EVALUATE

A. J.Z. v. Catalina Foothills Sch. Dist., 83 IDELR 62 (D. Ariz. 2023). ALJ's decision finding that the school district did not violate IDEA when refusing to conduct an evaluation of a student with ADHD and a 504 Plan is partially reversed. While IDEA does not require a district to conduct an evaluation upon parent request, the district should have evaluated here not merely because the parents asked, but because their request, communication with district staff, and documentation of hospitalizations for depression and suicidal ideation put the district on notice that the student had been diagnosed for new suspected disabilities beyond ADHD. In addition, when district staff met via the school study team (SST) to review data and decided that the parent's request for evaluation was refused, the district denied the parents meaningful participation in the IEP process. Because the district did not include the parents in discussions about the need for an IDEA evaluation or share the student's recent diagnoses with the SST, the district impeded parent participation in decision-making and denied FAPE.

B. Ja.B. v. Wilson Co. Bd. of Educ., 82 IDELR 191 (6th Cir. 2023). District court's ruling in favor of the district on the parents' child find claim is affirmed. On the record in this case, the court cannot say that district officials "overlooked clear signs of disability and were negligent in failing to order testing, or [had] no rational justification for not deciding to evaluate" (citing 6th Circuit authority). While the 8th grade transfer student displayed noncompliant, disrespectful and disruptive behaviors upon his transfer from Illinois to Tennessee in August 2017, this did not require the new district to immediately evaluate him for IDEA services and trying the use of interventions as part of a multi-tiered system of supports was not unreasonable to address the student's behavioral problems. "To be sure, this is not a license for school districts to delay identification or evaluation of students, or otherwise drag their feet with respect to their IDEA obligations when presented with clear signs that a student--even one who is enrolled for only a short time--may have a disability. Rather, we conclude only that on these facts, especially given [the student's] general education background and recent move, the school district did not violate its statutory child-find responsibility." Of particular note is that the student was only at the middle school from August to November 2017. In addition, he had no history of receiving special education services in all of the years he attended school in Illinois. Further, district staff testified that the student's behaviors, while concerning, were not unusual or severe enough to suggest they may stem from a disability. Finally, the parents conceded that the student's recent move across state lines may have had an impact on his behavior.

C. P.W. v. Leander Indep. Sch. Dist., 83 IDELR 71 (W.D. Tex. 2023). School district's motion to dismiss the 504/ADA disability discrimination claims of a parent of an elementary student with dyslexia and ADHD is denied at this juncture. Here, the parents allege disability discrimination occurred based upon the district's prolonged failure to evaluate for IDEA services. While parents seeking relief for disability discrimination must allege more than a denial of FAPE under IDEA, these parents state a viable claim for

disability discrimination because they allege and may be able to show that the district acted in bad faith or with gross misjudgment. According to the complaint, the student first showed signs of dyslexia in kindergarten. In addition, the parents allege that they requested an evaluation in first grade for dyslexia because the student was still reversing letters and numbers. They also allege that the principal talked them into withdrawing their request until the district determined whether RTI strategies were working. Allegedly, the district did not evaluate the student for dyslexia until the second grade but, even then, only offered the student a 504 Plan. Only after an evaluation of the student reflected that the student also had ADHD did the district develop an IEP for the student. The district's continued use of RTI strategies despite the student's lack of progress, if true, could qualify as "gross misjudgment," where Texas law provides that when school personnel suspect dyslexia, an evaluation must be done and RTI procedures may not delay such an evaluation. The parents also plausibly allege gross misjudgment based upon the fact that district staff repeatedly told them that "dyslexia is separate from special education" and "dyslexia is not under special education...just 504."

D. Dear Part B Directors and 619 Coordinators (OSERS/OSEP 2023).

On March 14, 2023, Dr. Gregg Corr, OSEP Division Director, Monitoring and State Improvement Planning, sent the following email to State Directors of special education:

> Dear Part B Directors and 619 Coordinators:
>
> It has come to our attention that initial evaluations have sometimes been delayed or denied by local educational agencies (LEAs) until a child goes through the multi-tiered system of supports (MTSS) process, sometimes referred to as Response to Intervention (RTI). Although the term RTI is no longer commonly used to describe a State's multi-tiered system of supports, the attached memoranda apply to all tiered systems of support, whether the State uses a RTI. MTSS or a unique State name. The basis for these memoranda is the child find requirements in Section 612(a)(3) of the IDEA. Each IDEA Part B and Part C grantee must ensure it has a system in place for meeting the child find requirements as a condition for funding.
>
> OSEP reminds State educational agencies and LEAs that the Part B regulations at 34 C.F.R. §300.301(b) allow a parent to request an initial evaluation *at any time* to determine if a child is a child with a disability under IDEA. As OSEP Memorandum 11-07 states, MTSS/RTI may not be used to delay or deny a full and individual evaluation under 34 C.F.R. §§300.304-300.311 for a child suspected of having a disability. With respect to preschool children, IDEA does not require or encourage a local or preschool program to use a MTSS approach prior to referral for evaluation or as part of determining whether a 3-, 4-, or 5-year-old is eligible for special education and related services. Once an LEA receives a referral from a preschool program, the LEA must initiate an evaluation process to determine if the child is a child with a disability. See: 34 C.F.R. §300.301(b).

OSEP recommends that you review the attached memoranda and distribute them to LEAs and intermediate education units within your State. Please let them know that because the content of these memoranda reflects IDEA statutory and regulatory requirements, they are still in effect.

If you have any questions regarding this email, please contact your OSEP State Lead.

1. OSEP Memorandum 11-07--A Response to Intervention (RTI) Process Cannot Be Used to Delay-Deny an Evaluation for Eligibility under the Individuals with Disabilities Education Act (IDEA) (January 21, 2011); and
2. OSEP Memorandum 16-07--A Response to Intervention Process Cannot be Used to Delay-Deny an Evaluation for Preschool Education Services under the Individuals with Disabilities Education Act (April 29, 2016).

E. Salinas v. IDEA Pub. Schs. Charter Dist., 82 IDELR 203 (S.D. Tex. 2023). The hearing officer's decision that the district did not violate IDEA when it failed to evaluate the student diagnosed with ADHD and autism until sixth grade when his math skills declined earlier in fifth grade is upheld. Here, the student's academic decline in math skills during virtual learning was temporary and the duty to evaluate is not triggered unless there is reason to suspect that a student has a disability under IDEA and that the student needs special education and related services. The parent's reliance on the fact that the student's math ability dropped two grade levels in fifth grade is misplaced. It is important to consider both the context in which that ability dropped and the overall trend in the student's progress. It is important that the drop occurred during a full year of remote learning due to COVID when, as the parent acknowledged, the student was tired of remote learning and sometimes did not log in for instruction. Thus, the hearing officer did not err in finding that the switch to online learning was significant in ascertaining when the child find duty to evaluate arose and in deciding not to impose that duty until the beginning of the student's sixth grade year when the parent officially asked for an evaluation. In addition, the decline was only temporary and the student soon bounced back. Finally, the student's academic performance was generally average to above average throughout his years at the school. Thus, the district's motion for summary judgment is granted.

APPROPRIATE EVALUATION

A. Zion M. v. Upper Darby Sch. Dist., 123 LRP 30277 (E.D. Pa. 2023). While the district's 6-month delay in evaluating the high schooler with ADHD, anxiety, and mood disorder was a violation of IDEA, it did not entitle the parent to reimbursement for placement of the student in a private placement. Here, the district waited almost six months from the date of the parent's request for an IDEA evaluation in February 2020 to seek consent to evaluate due to COVID-19 school closures. While the delayed response to the request was not reasonable and therefore constituted a procedural violation, the parent is not entitled to private school reimbursement unless she can show that the procedural violation caused educational harm or impeded her participation in the decision-making process. As demonstrated by the results of evaluations that were actually conducted, the district's

evaluation delay was harmless. The student's low score in math computation did not in itself establish an SLD, especially when other evaluative data reflects that the student performed well. Further, the evaluation data reflects that the student does not need specially designed instruction to address his ADHD-related difficulties. Given that the evaluation delay did not result in substantive harm, the parent could not establish a denial of FAPE that would entitle her to reimbursement for the cost of the private placement. In addition, the parent participated fully in all stages of the IDEA decision-making process.

ELIGIBILITY/CLASSIFICATION

A. Miller v. Charlotte-Mecklenburg Schs. Bd. of Educ., 64 F.4th 569, 83 IDELR 1 (4th Cir. 2023). The district court's ruling that the district conducted an appropriate evaluation of a seventh grader with a diagnosis of autism finding the student not eligible is affirmed. While IDEA requires school districts to identify, locate, and evaluate all resident students who have a disability-related need for special education services, IDEA does not require a district to provide an IEP to any student whose parent requests one. Rather, the district satisfies its child find duty by conducting a comprehensive evaluation and considering the student's need for IDEA services. Here, the district agreed to evaluate the student after learning of his private diagnosis and administered autism rating scales and assessments in the areas of adaptive behavior, vision, hearing, education, speech and language, and OT. It then reviewed the data and determined that the student was not eligible under state criteria. The parent's disagreement with the outcome of the evaluation does not amount to a failure to conduct an appropriate evaluation. The court also rejects the parent's claim that the IEP team acted wrongfully in failing to follow the recommendations of private evaluators in determining the student's eligibility for an IEP. IDEA does not require school districts to defer to the opinions of private evaluations procured by a parent. "To the contrary, the IDEA instructs school districts to rely on diverse tools and information sources in making an eligibility assessment."

B. Mason v. New York City Dept. of Educ., 123 LRP 29905 (E.D.N.Y. 2023). SHO's decision that the district is not required to reimburse the parents for placement of their 10 year-old son in a private TBI school is upheld. Whether the student actually has TBI or not, the classification of the student's disability has little bearing on whether the district offered FAPE. Where the SRO found that the IEP was correctly tailored to meet the student's needs regardless of his classification, any district error in classifying the student as one with multiple disabilities as opposed to TBI is of no consequence. While the parent's wish for a TBI classification stems from concerns about the student's placement at a private TBI school, the proposed district class has a similar child-to-adult ratio while offering a greater variety of school personnel. In addition, the presence of additional adults as proposed would better protect the student from injuries, such as aspiration and exposure to allergens. While the parent may prefer a smaller class size, the district's offered placement addressed the student's unique needs.

C. Brooklyn S.-M. v. Upper Darby Sch. Dist., 82 IDELR 197 (E.D. Pa. 2023). Hearing officer's decision that the district was correct in finding the student ineligible under IDEA is upheld. To establish a child find violation under IDEA in the Third Circuit, a parent

must show that: 1) the child has a disability for which she needs special education and related services; 2) the district breached its child find duty; and 3) the violation impeded the child's right to FAPE, significantly impeded the parent participation, or caused a deprivation of educational benefits. Here, the student was evaluated by the district and the school psychologist found that the student was not an eligible student with SLD. While a private school psychologist concluded that the student was SLD, the psychologist only reviewed the district's records and briefly met with the student. Most importantly, the hearing officer correctly found that the testimony from the student's teachers "tips the scales" in favor of the district. For example, the student's third-grade teacher testified that, although the student would sometimes get upset and cry when class was challenging, the student eventually became a very good advocate for herself and had no problem raising her hand if she did not understand something or needed help. The teacher further testified that the student's behavior was "typical" of a third-grade student, and that given her eleven years of special education experience, she would have brought the student before the school's Student Support Team if she thought she needed extra support. The student's fourth grade teacher similarly testified that the student showed growth between her Fall and Spring MAPs assessment tests, with marked improvement once instruction switched from a completely virtual model to a hybrid model. Given her twenty-four years of special education experience, she also shared that she would have referred the student to the SST if she thought an evaluation for an IEP was needed. Both teachers' conclusions were supported by extensive in-class observation of student. The hearing officer gave the proper weight to the views of the experienced teachers who had the benefit of in-class observation of the student, and there is no evidence in the administrative record that would require a contrary conclusion. Indeed, the student's academic progress serves as further evidence that she has no need for specially designed instruction to benefit from education.

D. Perez v. Weslaco Indep. Sch. Dist., 123 LRP 27639 (5th Cir. 2023) (unpublished). District court's decision in favor of the district's finding of IDEA ineligibility of identified 504 student is affirmed. "Recall that the IDEA is limited only to '*children with disabilities,*' not every student who is struggling with something." Thus, the district is required to provide special education to the student only if the student "(1) had a qualifying disability and (2) 'by reason thereof, need[ed] special education and related services.'" Here, the parent submitted lesser evidence demonstrating the student's disability. Her primary support was a private psychologist's evaluation, which diagnosed the student with ASD and ADHD but noted that the evaluation was not a substitute for a special education evaluation. In addition, the evaluation lacked educational context where the evaluator did not review education records, solicit feedback from the student's teachers, or observe the student in a classroom setting. Thus, her evaluation did not have a "proper foundation." In addition, the private psychologist did not herself recommend special education services but instructed the parent to consult with the district to determine eligibility. In any case and as courts have observed, IDEA does not require school districts to defer to the opinions of private evaluations procured by a parent. In contrast, the district's evaluation was based on more evidence. Though not perfect, it used "diverse tools and information sources " to assess the student's eligibility. Indeed, it solicited reports from a variety of professionals—a diagnostician, a licensed specialist in school psychology, and a speech pathologist—who assessed the student using multiple formal and informal tests, personally observed the

student, interviewed the student's teachers, and carefully reviewed his cumulative school records.

E. H.R. v. West Windsor-Plainsboro Bd. of Educ., 123 LRP 22517 (D. N.J. 2023). District did not violate IDEA when determining that the kindergartener with ADHD was no longer eligible for special education services. Where a third of the student's general education class required the same extra help with reading that he did and the student was making significant overall progress in reading, math and attentiveness, the child no longer needs an IEP. To be eligible under IDEA, a child must have not only a disability but also must need special education services because of the disability. The educators who know the student well testified that he made solid progress in phonemic awareness and math and generally made significant progress throughout his year in the general education setting. While the child's attention span would wane at times, this behavior was typical of five-year-old students. Moreover, the child's attention improved as the year progressed. The fact that the child qualified for supplemental reading instruction is not determinative of eligibility, where his general education teacher testified that more than a third of the students in the general education glass qualified for it too.

INDEPENDENT EDUCATIONAL EVALUATIONS

A. In the Matter of New Jersey Dept. of Educ. Complaint Investigation C2022-6524, 82 IDELR 184 (N.J. Super. Ct. App Div. 2023). ALJ's decision that the district is required to allow the parents' private evaluator to observe their child in the classroom is upheld. The district's position that the parents' private IEE evaluator may only observe after the district has conducted its own evaluation is rejected where a district evaluation is not a prerequisite for a private IEE under IDEA. While it may be a prerequisite to a publicly funded IEE, it is not required prior to parents obtaining an IEE at their own expense. Accordingly, the district must allow the parents' evaluator to observe the student in the classroom.

B. Los Lunas Pub. Schs. Bd. of Educ. v. Schneider, 123 LRP 29853 (D. N.M. 2023). Hearing officer's decision is upheld where it set certain requirements for a publicly funded IEE of a high school student with Angelman syndrome. Where the IEP team needed information on how the rare condition impacts the student's education, the hearing officer did not err in requiring an evaluator with expertise in that condition and for the district to develop an IEP based on the ordered IEE. The district's argument that the hearing officer erred in allowing the parents to determine what qualifications the independent evaluator had to have is rejected. While IDEA regulations concerning IEEs require that independent evaluators meet the same qualifications as district evaluators, that generally applies only when parents request an IEE. Here, a hearing officer ordered the IEE based upon the district's failure to reevaluate the student during the past 7 years. The hearing officer had the broad discretion to fashion an appropriate remedy, and the district has not cited any precedent that would prohibit a hearing officer from ordering that an evaluator have expertise in the child's particular condition. The student is also entitled to four years of compensatory education for the prolonged denial of FAPE.

DISTRICT RIGHT TO EVALUATE

A. C.M.E. v. Shoreline Sch. Dist., 82 IDELR 219 (9th Cir. 2023) (unpublished). District court's ruling that the district could proceed with its proposed evaluation of the student with a disability without parent consent is affirmed. Here, the parent had requested an evaluation of her son in 2019. The district agreed and sought consent for a proposed evaluation that would include a review of existing data, an academic evaluation, an age appropriate transition assessment, and an interview. The parent sent back the consent form with handwritten modifications indicating that she did not consent to the evaluation because she objected to the age appropriate transition assessment and the interview (because the student had a traumatic experience with a prior interview), but an ALJ found that the district's proposed evaluation was reasonable and overrode the parent's refusal to consent. The district reasonably included the transition issue as part of the evaluation because it is required under IDEA to include it since the student is over the age of 16. In addition, the district reasonably believed that interviewing the student "with questions about his interests, strengths, preferences, and needs" was a reasonable way of determining his postsecondary goals. The district even requested additional information from the parent so it could determine how to assess the student without making him uncomfortable, but the parent did not respond. [Note: The dissenting judge noted that the case was moot and the parent's appeal should have been dismissed since the district had no reason to assess the student since he had exceeded the maximum age of eligibility for services].

THE FAPE STANDARD

A. Killoran v. Westhampton Beach Union Free Sch. Dist., 123 LRP 20863 (2d Cir. 2023) (unpublished). District offered FAPE in a special education placement rather than modifying its Regents-track curriculum for the student in its general education classes. While a student's IEP must be sufficiently ambitious and challenging, not every IEP must conform to the general education curriculum and align with grade-level academic standards. Rather, the Supreme Court made clear that an IEP must be appropriately ambitious "in light of the student's circumstances." Here, the student performs at or below the first percentile in reading comprehension, spelling, listening comprehension, math, and speech-language skills. In addition, the student is alternately assessed and has significant learning disabilities, which makes adherence to general education standards impossible. Thus, the parents' argument that the IEP should have aligned with grade-level standards is rejected and the proposed 12:1:1 placement is the student's LRE, offering the specialized instruction required and allowing the student to participate in nonacademic classes and activities with nondisabled peers.

B. Daniels v. Northshore Sch. Dist., 82 IDELR 154 (W.D. Wash. 2023). Magistrate Judge's recommendation that the second-grader's IEP is appropriate is adopted. Here, the district identified the student in first grade, developed an IEP in second grade, revised it several times in response to parent request, and implemented services after receiving their consent to proceed. The parents, however, unilaterally withdrew their child and placed her in a private school and filed for due process against the district. In order to provide FAPE, a school district must ensure that the student's IEP is reasonably calculated to enable her to

make appropriate progress in light of her circumstances. Here, the parents waited 18 months after they had agreed to the IEP to file for due process. In addition, they presented no evidence, other than making conclusory arguments, that the IEP was deficient. The district, however, presented testimony and documentation supporting both the sufficiency of the IEP and the student's progress toward IEP goals. Indeed, the parents consented to and signed the fifth draft of the IEP and even their evaluator agreed that the initial IEP was appropriate and included the evaluator's recommendations. In addition, the district's experienced and credentialed staff developed reading fluency goals that were measurable, reasonable and appropriate, and the parents were afforded extensive opportunity to participate in the evaluation and IEP decision-making process.

C. J.T. v. Denver Pub. Schs., 82 IDELR 163 (D. Colo. 2023). ALJ's decision that the district provided FAPE to the 5th-grader with developmental delays is upheld. The appropriateness of an IEP cannot be determined solely by evaluating a child's progress or lack thereof under it. Rather, the adequacy of an IEP is determined as of the time it was offered, not with the benefit of hindsight. Here, the district increased the student's time in the general education setting between second and third grade, even though the parent requested less time in general education. The district rejected the parent's request, based on the fact that in the second grade, the student had benefited academically from a more inclusive setting that afforded her the opportunity to model peers. While the increase in the student's general education time may not have ultimately proved successful during the third grade, the court may not rely on any regression in the student's third grade year to determine the appropriateness of the IEP created for that year. The record reflects that the district determined, based on progress made by the student in second grade and the benefits she would receive from time in the general education setting, an increase in her general education time was appropriate. Because the parent has not explained why or cited any evidence demonstrating that the district's decision to increase the student's general education time--at the time the decision was made--was not reasonably calculated to permit her to make appropriate progress, the parent has not met her burden of establishing an IDEA violation on this basis. The court is only to consider whether the IEP was reasonable when developed, not whether it was ideal or what the parent preferred.

PROCEDURAL SAFEGUARDS/VIOLATIONS

A. Davis v. Banks, 123 LRP 29915 (E.D.N.Y. 2023). District violated IDEA when it developed the 9 year-old student's IEP in the absence of her elderly guardian and offered her only the opportunity to participate in the IEP meeting by cellphone on a noisy subway. The hearing officer's order is reversed and the guardian is awarded reimbursement for private school placement where the district's actions effectively excluded the guardian from the IEP process. While the district invited the guardian, her advocate, and representatives from the private school to the on-site IEP meeting, the guardian got on the wrong subway train on her way to the meeting and ended up traveling far out of the way. The district's argument that the guardian made an "active choice" to skip the meeting when she refused to participate by cellphone is rejected. Aside from the fact that participation was impossible technologically on the subway, "it clearly would have been inappropriate to require [the guardian] to participate remotely in the meeting while traveling underground

in a subway car." In addition, the guardian would not have had access to any documents discussed by other team members had she participated by phone. Given the guardian's difficulties with technology and her expressed wish to attend the meeting in person, the district's refusal to reschedule was unreasonable.

B. I.S. v. Fulton Co. Sch. Dist., 123 LRP 33063 (N.D. Ga. 2023). ALJ's decision that the IEP team came to IEP meetings with an open mind and considered the parents' input is affirmed. Here, the student's IEP team genuinely considered the parents' concerns and entered the meeting with an open mind when proposing placement for a high schooler with autism, severe anxiety, and social skills deficits. A district has engaged in "predetermination" when it comes to an IEP meeting with a closed mind and has already decided material aspects of the IEP without parent input. The IEP team repeatedly provided the parents with the opportunity to express their input, and the parents did so. The parents' argument that they frequently raised concerns that the district ignored about the student's school refusal, his need for peer interactions, and his social skills deficits is rejected. The district actually agreed with the parents' concerns and, in response to them, developed a strategy for addressing them. While the parents may have believed that they were not truly listened to, there is no evidence that the district ignored their input, prevented them from expressing their viewpoints, or failed to approach the meetings with an open mind. With respect to the parents' desire for residential placement, the district considered their preference and engaged in a long discussion concerning the need for it, as well as other placement options.

C. J.G. v. Los Angeles Unif. Sch. Dist., 123 LRP 20855 (C.D. Cal. 2023). District did not violate IDEA when delaying the completion of the high schooler's 2019 IEP and its proposal for placement for three months. The district's delay resulted from an effort to afford the parents the opportunity to visit the proposed placement and to facilitate the parents' informed participation in the decision-making process. An IDEA procedural violation denies a student FAPE if it results in the loss of educational opportunity or impedes a parents' opportunity to participate. While an LEA is required to review a student's IEP at least annually, the ALJ correctly determined that the district's delay in proposing a placement did not violate IDEA, particularly where 9th Circuit authority (the Doug C. case) prioritizes parent participation over strict compliance with IDEA annual review timelines. The district convened a timely IEP meeting in February 19, 2019, one year after the student's 2018 IEP meeting. Although the evidence is unclear as to why the meeting was adjourned after evaluation results were reviewed, the IEP team members, including the student's parents, agreed to reconvene. On March 13, 2019, the IEP team reconvened and after reviewing the results of an independent psychoeducational evaluation, the parents wanted to visit a classroom for students with moderate intellectual disabilities, so the IEP meeting was again adjourned. On May 30, 2019, the IEP team reconvened to review the student's progress, and the IEP team offered placement in the program that the parents had visited but agreed that the student would remain at his current program for an additional week to participate in the school's graduation ceremony on June 7, 2019. Given these facts, the ALJ was correct in finding that the three-month delay in developing the student's 2019 IEP was not a procedural violation that denied FAPE where

the delay was designed to afford the parents sufficient participation in the decision-making process.

D. E.V.E. v. Grossmont Union High Sch. Dist., 123 LRP 27633 (S.D. Cal. 2023). There is no evidence that the district predetermined placement when it proposed to place the high schooler with a severe anxiety disorder at a therapeutic school. Nor is the failure to formally excuse the regular education teacher from the IEP meeting early a denial of FAPE. With respect to predetermination, it is clear that "'[a] school district violates the IDEA if it predetermines placement for a student before the IEP is developed or steers the IEP to the predetermined placement.' [citations omitted]. In other words, 'there must be evidence the state has an open mind and might possibly be swayed by the parents' opinions and support for the IEP provisions they believe are necessary for their child.' [citations omitted]. However, a parent's 'right to provide meaningful input is simply not the right to dictate an outcome.'" [citations omitted]. The proposal was based on the most recent assessments of the student and her long history of chronic absenteeism. In fact, the district and her mother had frequently discussed over the last two years the student's absenteeism, poor grades, and lack of educational progress at the neighborhood school. In addition, before proposing placement in the therapeutic program, records reflect that the district discussed the continuum of placement options with the parent in several meetings and at the October 2021 IEP meeting, the district offered to answer the parent's questions, discussed the student's most recent progress, and presented the proposed IEP. Regarding the regular education teacher's presence at the IEP meeting, IDEA does not specifically address the situation where a team member leaves a meeting early with the oral agreement of the parent. Here, the teacher's early departure did not prevent the IEP team from carefully considering general education placement, where the team had attempted to accommodate the student in general education classes since the fall of 2019. A procedural violation concerning an absent IEP member results in a denial of an educational opportunity where there is a "strong likelihood that alternative educational possibilities for the student would have been considered." [citations omitted]. In fact, when the teacher asked to be excused, he stated, "I don't have any information... I never met [the student] ... she's never been in class. So, I don't have much to report out other than uh, the fact that I've never met or seen her." At that time, the parent indicated she had no questions for him. The record reflects that the IEP team had considered the benefits of general education during each of its 2019, 2020, and 2021 meetings. Although the district may have committed a procedural violation in dismissing the regular education teacher early without written consent, a preponderance of the evidence supports the ALJ's conclusion that the violation did not deny FAPE. Thus, the ALJ's finding that the district offered FAPE to the student is upheld.

E. Pitta v. Medeiros, 83 IDELR 59 (D. Mass. 2023). Parent's First Amendment claim that he was denied the request to video record his child's IEP meetings is dismissed. To state a viable First Amendment claim, the parent was required to allege that he was seeking to record public officials who were engaged in their duties in a public place. While the First Circuit Court of Appeals has not defined "public place" in this context, an IEP meeting held on a videoconferencing platform that is only accessible to IEP team members is unlikely to be considered a "public place." It is also questionable as to whether the district members of an IEP team are "public officials" for purposes of the First Amendment. The

purpose of the First Amendment in the context of this case is to promote free discussion of government affairs and to aid in uncovering abuses. Here, the parent in this case did not even intend to share the IEP team's discussions with the public and specifically stated that he wanted an accurate record of IEP team discussions in the event that he filed a due process complaint against the district. The First Amendment claim against the special education director who denied his request to video record IEP meetings is also dismissed.

F. C.K. v. Baltimore City Bd. of Comm'rs, 83 IDELR 81 (D. Md. 2023). The ALJ did not err when it found that the district offered FAPE to a teenager with ADHD, OCD, and anxiety. Where the parents of an eleventh grader who attended the Baltimore Lab School since first grade contacted the district about possible enrollment, the district evaluated the student and sent a draft IEP to the parents. The draft IEP provided for over 30 hours per week in general education classes with 25 students and five hours per week of special education support. The parents rejected the proposal based upon their belief that the district had predetermined placement. "Predetermination," however, "is not synonymous with preparation." Rather, IDEA requires the district to come to an IEP team table with an "open mind." While the district uses online IEP forms requiring selections from drop down menus for draft IEPs, the district representative credibly explained that it selected the general education teacher as the service provider because that was the default choice but that could be changed at the IEP meeting if the team agreed that the student needed a more restrictive setting as desired by the parents. However, the team actually decided that the general education teacher could provide the supplementary services set out in the IEP and that the IEP could be implemented in any district high school. The ALJ's decision that predetermination did not occur in this case is upheld, and the parents were not able to show that the student could not receive educational benefit from the proposed IEP and placement.

WHO CAN ACT AS PARENT

A. Q.T. v. Pottsgrove Sch. Dist., 70 F.4th 663, 123 LRP 18151 (3d Cir. 2023). In this case of first impression, the student's adult cousin with whom the student lives within the district meets IDEA's definition of "parent" for purposes of bringing a due process action against the district. It does not matter that a 2008 court order grants primary physical and legal custody of the student to the student's grandmother who lives in another district while preserving the biological father's educational rights. The adult cousin has been making educational decisions for the student for several years, including providing consent for an evaluation that concluded that the student was not eligible for IDEA services. The cousin also requested an IEE, where it was found that the student qualified as OHI. The district, however, proposed a 504 plan instead of an IEP, and the adult cousin filed for due process on the student's behalf seeking IDEA services. The hearing officer's decision, based upon the court order granting the grandmother custody, follows the language of the IDEA regulations that give priority to biological parents and court-appointed educational decisionmakers. The U.S. Supreme Court has ruled that "[w]e must ask whether 'Congress has directly spoken to the precise question at issue....If we can discern congressional intent using the plain text and traditional tools of statutory construction, our inquiry ends: we give effect to Congress's intent.'" Only if the statute "is silent or ambiguous with respect to the specific issue," will the court look to the regulations. Under IDEA, the term "parent"

clearly includes "an individual acting in the place of a natural or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives, or an individual who is legally responsible for the child's welfare." Congress has spoken and there is ample evidence in the record that the cousin was acting in the place of the student's natural parent. The evidence shows that the student has lived with the cousin for two years and that she has been supporting the student and assumed all personal obligations related to school requirements. In addition, the cousin receives Supplement Nutrition Assistance Program payments on behalf of the student and the student is listed on the student's HUD paperwork. Accordingly, under IDEA, the cousin qualifies as a parent for purposes of IDEA as the individual with whom the student lives and who is legally responsible for her welfare.

IEP CONTENT ISSUES

A. Edward M.-R. v. District of Columbia, 123 LRP 30413 (D. D.C. 2023). Hearing officer's decision that the district did not deny FAPE to a middle schooler with autism and ADHD when it developed his IEPs is affirmed. Simply because an IEP contained some recycled IEP goals from a previous IEP does not make it inappropriate. Courts and hearing officers are to evaluate IEPs based on the information available to the IEP team at the time the IEP is developed. The key question is whether the IEP will allow the student to make progress appropriate in light of the student's circumstances. Here, the IEPs met this standard, even though some of the goals in the student's 2018 and 2019 IEPs were carried over from the previous IEP. Importantly, the student had not yet mastered those goals. In addition, several district personnel testified that the student struggled to remember lessons he had previously learned and needed to repeat them "over and over" to achieve mastery, which the parents did not refute was his way of learning. Further, most of the goals in the November 2019 IEP that were developed approximately 8 months after the student moved to a different school were new. Given the severity of the student's needs and his "slow-but-steady progress" since his last reevaluation, the student received FAPE.

IEP IMPLEMENTATION FAILURE

A. Plotkin v. Montgomery Co. Pub. Schs., 123 LRP 33167 (4th Cir. 2023) (unpublished). District court's affirmation of ALJ's decision that the failure to implement the IEP for a third-grader with autism did not deny FAPE is affirmed. An IEP implementation failure is viewed as a procedural violation of IDEA, for which a parent can obtain relief only by showing that the procedural violation resulted in a loss of educational benefit to the student. Though the district failed to provide "pullout instruction" to the student for math as required by his IEP, it did not cause educational harm. Indeed, the student's general education teacher and the student's case manager testified that small group instruction in the general education classroom was a better fit for the student and allowed him to avoid a difficult transition between classrooms, giving him an opportunity to work on social skills. The decision to forgo the pull-out instruction was a conscious decision based on an individualized assessment of the student's performance and the benefits he would receive in the general education classroom. In addition, the teachers found the student to be proficient in most areas of third-grade math by the end of the school year, and his performance on the math portion of standardized assessments improved significantly.

Thus, there was no need for compensatory education services. "On this record, we conclude that the district court did not err in holding that [the student] was not denied a FAPE."

OBLIGATIONS TO PARENTALLY PLACED PRIVATE SCHOOL STUDENTS (PPPSS)

A. Letter to Jenner, 123 LRP 33282 (OESE/OSERS 2023) (also can be found at https://sites.ed.gov/idea/files/OSEP-Policy-Letter-to-Jenner-11-07-2023.pdf). In response to the Indiana Department of Education's question about how to determine the location of virtual private school students in order to provide equitable services under ESEA, the US DOE's Office of Elementary and Secondary Education and Rehabilitation Services has noted that States are required to determine which LEAs are responsible for providing equitable services to virtual private school students under ESEA Title VIII and IDEA. While Title I, Part A equitable services must be provided by the LEA in which a student resides, Title VIII and IDEA equitable services are usually provided by the LEA in which the private school is located. If an SEA establishes that a virtual private school meets the definition of a nonprofit elementary or secondary school, the SEA must determine which LEA is "responsible for providing equitable services to the school's eligible students and educators." A "reasonable option" is for equitable services to be provided to an eligible student attending a virtual school by the LEA in which the student is located while receiving their education (most often the LEA of residence if the student attends virtual private school at their home). Under this approach, it is possible that multiple LEAs, including LEAs in different States, would be responsible for providing equitable services to students enrolled in the virtual private school. In these circumstances, funding would come from each LEA's allocation under an applicable program. Given the number of LEAs that may be responsible for providing equitable services under this approach, "the SEA may wish to assist LEAs in coordinating the funding and delivery of ESEA and IDEA equitable services."

B. Newport-Mesa Unif. Sch. Dist., 83 IDELR 36 (C.D. Cal. 2023). ALJ's decision in favor of the parents of a sixth grader privately placed by his parents is partially reversed where the failure to convene an annual IEP meeting was not a violation of IDEA. Here, the parents made their unilateral private placement and rejection of the district's proposed services clear, which relieved the district of the requirement to convene an annual IEP meeting. This is in accordance with 9th Circuit authority and the fact that the district sent its Parent Certification of Intent form three times to the parents without any response and the parents checked a box on the IEP form indicating that FAPE was offered, but they declined it and chose to enroll their child in private school.

TRANSPORTATION

A. J.T. v. District of Columbia, 123 LRP 35107 (D. D.C. 2023). ALJ's decision is upheld finding that the district denied FAPE to the student with autism when it did not offer transportation accommodations in the student's October 2020 IEP for the student's motion sickness and noise sensitivity on vehicle rides lasting more than 20 minutes. However, in order to recover compensatory education services, the parent had to show that the IDEA

violation caused harm or deprived the student of educational benefit. Here, the student did not travel to and from his nonpublic special education school during the 2020-21 school year. Rather, the student participated in virtual instruction due to the pandemic-related school closures. There is no evidence that the student struggled during that time and, to the contrary, the record is "robust with evidence" from teachers and administrators that the student was performing as or better than expected for that school year. Since the lack of transportation accommodations did not cause educational harm, the district is not required to provide compensatory education.

OTHER RELATED SERVICES

A. O.P. v. Jefferson Co. Bd. of Educ., 82 IDELR 152 (N.D. Ala. 2023). The hearing officer's decision that the IEP for a first grader with significant physical disabilities contained appropriate PT and OT services is upheld. At the due process hearing, the school's physical therapist testified that she had reviewed the parent's independent PT evaluation and noted that it was very similar to her own. However, she disagreed with the parents' evaluator's position that the school should provide two monthly sixty-minute sessions or pay for outpatient PT. While more PT would certainly benefit the student, the school-provided PT of one monthly thirty-minute visit was sufficient to allow the student to be safe and independent in the school environment, especially when considered in conjunction with her adapted PE program, which also focused on gross motor skills in the areas of balance, strength, and hand/eye coordination. Similarly, the district's occupational therapist testified that she had reviewed the parent's private OT evaluation and also concluded that it was similar to hers but disagreed with the extent of school-based OT services recommended. She testified that her recommendation of one sixty minute session per week, in conjunction with consultation with the classroom staff and special education case manager, was sufficient to address the student's educational needs. She testified that outpatient PT and OT are aimed at medical improvement, but school-based occupational therapy is directed at reaching the goals set out in the IEP. "The court is deeply sympathetic to [the student's] parents' wish for [the student] to receive services that will maximize her educational opportunities and cause her to progress in school at the same pace as her classmates. Unfortunately, the IDEA does not require a school district to maximize a child's potential, nor can it promise--or deliver--progress at any particular pace for any child. Because [the parents] have not shown that the Board denied [the student] a free appropriate public education based on its provision of occupational and physical therapy, the court will deny their motion for judgment on the administrative record and will grant the Board's motion for judgment on the administrative record."

B. Rivas v. Banks, 123 LRP 34269 (S.D.N.Y. 2023). SHO's decision that the district did not deny FAPE to the 11 year-old student with TBI is upheld and the parent is not entitled to recovery of private school costs. A district is not required to offer the best possible education. As long as the proposed IEP meets the student's needs and allows him to make progress, the district has fulfilled its obligation. Although the parent argues that the student needs music therapy to receive FAPE, the private school offered that service to address sensorimotor, cognitive, and communication goals. The district's psychologist, however, noted that the district could help the student meet those goals by providing OT, PT and

speech and language services. While the record reflects that the student may have benefited from music therapy, there is no evidence that it is necessary for FAPE.

LEAST RESTRICTIVE ENVIRONMENT

A. "Policy Statement on Inclusion of Children with Disabilities in Early Childhood Programs" (US DOE and the US Department of Health and Human Services). This 68-page document was issued on November 28, 2023 and extensively covers the issue, provides resources, etc. with respect to everything about inclusion of children with disabilities in early childhood programs. This document can be found at https://sites.ed.gov/idea/files/policy-statement-on-inclusion-11-28-2023.pdf.

B. Jacobs v. Salt Lake City Sch. Dist., 83 IDELR 40 (D. Utah 2023). There is no evidence that the district's policy of assigning students with cognitive disabilities to certain "hub" schools denied FAPE to the two students here. Thus, the students' federal claims are dismissed. Under IDEA, districts must educate students with disabilities in the general education setting to the maximum extent appropriate. In addition, unless a student's needs require some other arrangement, the district must educate the student in the school that he would attend if not disabled. The allegation here that the district's new policy requiring students with cognitive disabilities to receive special education in a "handful of hub schools" does not violate IDEA. IDEA does not provide students an absolute right to placement at their neighborhood schools. Rather, IDEA only entitles students to an appropriate education, not an individualized placement decision that includes meaningful consideration of special services in their neighborhood school. In the Tenth Circuit, if a student's IEP calls for placement in another school to receive specialized services, a district is not obligated to fully explore supplementary aids and services before removing the student from a neighborhood school. Thus, the district was not required to modify its program to accommodate the students' location preferences. Similarly, Title II of the ADA does not entitle students to attendance at their neighborhood schools. Under Tenth Circuit authority, "if a school district has established a system to provide special education services in specific locations, it is not required to consider providing specialized services in neighborhood schools on a case-by-case basis or to modify its program to accommodate the location preferences of individual students."

FUNCTIONAL BEHAVIORAL ASSESSMENTS/BIPS

A. Upper Darby Sch. Dist. v. K.W., 123 LRP 22649 (E.D. Pa. 2023). Administrative decision finding that the district provided FAPE during the 2020-21 and 2021-22 school years is reversed and compensatory services for approximately 1800 hours is awarded. This is so where the behaviors of the student with autism deteriorated and the district failed to appropriately conduct an FBA and develop a BIP to address them. Districts are required to consider the use of positive behavioral interventions where a student's behaviors impede learning or that of others. During the 2019-20 school year, the student began to frequently exhibit severe behaviors, such as shouting obscenities, hitting and kicking others, and elopement. A 2019 IEE and testimony from school personnel described frequent hyperactivity, rule-breaking behavior, aggression, anxiety, depression, and inattention.

However, there is no evidence that the district conducted an FBA, developed a BIP, or incorporated behavioral interventions into the student's IEPs. While the district pointed out that the student received supports through a "school-wide" behavioral support plan, this was not sufficient for FAPE, because the rewards-based supports were often ineffective. Further, teachers were required to "tweak" the plan to address the student's need for 1:1 behavioral services.

B. B.S. v. Waxahachie Indep. Sch. Dist., 83 IDELR 2 (5th Cir. 2023) (unpublished). District court's decision that the district provided FAPE is upheld. In the Fifth Circuit, an IEP is appropriate if it is based on the student's unique needs, administered in the LRE, implemented in a collaborative manner, and allows for academic and nonacademic progress. The failure on the part of the district to conduct an FBA and develop a BIP at the beginning of the year for the third grader with autism did not violate IDEA. Here, the student's special education teacher was well aware of the student's noncompliant, disruptive and sometimes violent behavior and recommended new behavioral goals for the student. In addition, the IEP team developed behavior management strategies that included frequent breaks and opportunities to walk or run with staff outside, and the student's teachers testified that those strategies were helping the student. While the student's behaviors deteriorated in February 2017 as he was adjusting medication changes and family-related issues, the district took steps to address the student's increasingly aggressive and violent behaviors by seeking consent to an FBA and scheduling an IEP meeting. The district also moved the student to a classroom that imposed fewer academic demands. "This type of responsiveness...is what IDEA requires to ensure that an IEP is sufficiently individualized."

C. E.W. v. Department of Educ., 83 IDELR 14 (D. Haw. 2023). Hearing officer's decision that the student's IEP team was not required to physically incorporate the student's BIP into the IEP is upheld. There is no legal requirement under IDEA that a BIP actually be included in an IEP. Here, the IEP's supplementary aids and services included several behavioral interventions and supports, such as daily sensory supports, visual support, and priming prior to transitions, based upon the student's individual needs and parent input. These supports were not unilaterally chosen by the school for the student. Rather, the record shows that the parent participated and conveyed her input and concerns to the team. In addition and in Hawaii, schools are required to obtain parent input when revising a BIP. Given that, the fact that the BIP was not incorporated fully into the IEP was not fatal to the parent's ability to meaningfully participate. Further, the Department provided the parent with a copy of the BIP and a BCBA explained each component of the plan with the parent.

D. H.L. v. Tri-Valley Sch. Dist., 82 IDELR 229 (M.D. Pa. 2023). Hearing officer was correct in finding that the district provided FAPE to the student with ADHD and ODD during the 2017-18, 2018-19 and 2019-20 school years based upon the extensive efforts the district made through timely and repeated assessments and the development and modification of appropriate IEPs in response to the student's changing behavioral needs. "[U]nderstanding the IDEA does not mandate an 'ideal IEP,' only one that was reasonable at the time [citing Endrew F.], the district fulfilled its obligation." The district was willing and able to review and revise the student's IEPs throughout his education and staff responded to his disruptive

behaviors with strategies that were specifically targeted to address them, using incentives they reasonably believed would motivate him. "Over and over again, the district modified H.L.'s IEP to ensure it remained 'reasonably calculated to enable [him] to make progress appropriate in light of [his] circumstances.' That H.L.'s behaviors worsened does not mean they were not assessed or addressed."

E. N.P. v. Pleasant Valley Sch. Dist., 123 LRP 30465 (M.D. Pa. 2023). Hearing officer's denial of parents' request for compensatory education in the form of prospective placement in a private residential school for a 20 year-old student with autism, InD and other impairments is affirmed. Under IDEA, a district is required to ensure that a student's IEP is reasonably calculated to enable a student to make appropriate progress in light of his circumstances. Here, the district satisfied this standard. Due to the severity of the student's disabilities, he presents with intensive negative behaviors, including physical aggression, self-injurious behaviors, destruction of property, task refusal, difficulty with transitioning, ritualistic stereotypy, eloping, yelling, crying, and occasional incontinence. To address these behaviors, the district placed him in a day treatment facility and prioritized behavioral over academic goals. Though the district revised the IEP several times, it successfully reduced the student's violent behaviors and increased positive interactions with others. However, the district determined that the student needed residential placement based on private medical evaluators and an independent psychiatric evaluation provided by the parents. While the student's behaviors worsened when the district temporarily placed the student in an out-of-state behavioral institute while it searched for an appropriate residential placement, once the student was enrolled in the appropriate program, he was able to complete small tasks and improved his ability to ask questions and assign adjectives to pictures. He was also able to follow a routine and schedule and transition to new locations and activities when prompted. The hearing officer correctly noted that "[t]he parties have worked tirelessly to provide the best education and support services [and] worked relentlessly to find an ideal placement for the student." Here, the parents have not cited any non-testimonial evidence to justify rejecting the hearing officer's credibility determinations or her finding that the district offered IEPs that were reasonably calculated to provide meaningful education progress considering the student's particular circumstances. Viewing the administrative record and the hearing officer's finding with the appropriate deference, the court concludes that the district consistently monitored, documented, and responded to the student's individual educational needs, and that the IEPs offered by the district, as modified, were reasonably calculated to enable him to make appropriate progress considering his circumstances. Accordingly, the District did not deny FAPE.

DISCIPLINE

A. D.N. v. School Bd. of Bay Co., 83 IDELR 86 (Fla. 1st DCA 2023). Student's appeal of expulsion by the School Board for his participation in a riot involving more than 50 students in a school courtyard is affirmed, and he was not entitled to be treated as a student with a disability by the Board. At the time of the incident, the 15 year-old ninth grader was not identified as a student with a disability under IDEA; nor had his mother ever asked that he be evaluated for special education services until she was notified of the student's

expulsion hearing and obtained assistance from an advocacy group. While the student had a history of 52 disciplinary referrals between 2013 and 2021 for things like fighting, drug use/possession, skipping school, defiance, physical attack, theft, class disruption and inappropriate behavior, IDEA's relevant regulations indicate that a school district is deemed to have knowledge that an unidentified student is a student with a disability if, prior to the incident: 1) the parent requests an IDEA evaluation or services; or 2) school personnel express concerns that student behaviors are caused by a disability. Although numerous school personnel reported this student's behavior problems, "there is no record that any of them viewed the behavior as disability-related or reported them as such to the school's or district's special education or other supervisory personnel." Thus, the school district's treatment of the student under the rules governing procedures where a district does *not* have knowledge that a student has a disability was appropriate and the district was authorized to impose disciplinary measures authorized for students without disabilities. Where the mother could not prove she ever asked for a disability evaluation or an IEP, and not a single trained educator or school counselor over the years expressed any concern that a disability was causing the student's behavior, the school board could not be expected to "leap to that conclusion on its own."

B. G.D. v. Utica Comm. Schs., 83 IDELR 12 (E.D. Mich. 2023). Removal of this child to an IAES for up to 45 school days without regard to manifestation for possessing a "dangerous weapon" at school is inappropriate where this kindergartner was not in possession of a dangerous weapon. While the object's use by the student may be relevant to whether it is a "dangerous weapon" and has the capacity to endanger life or inflict serious bodily injury, this child did not possess dangerous weapons. It is difficult to imagine any instance where a kindergarten student could cause death to anyone by throwing objects like plastic phone receivers, books, or pieces of a broken thermometer (no matter how broken or jagged). These items were not readily capable of causing a substantial risk of death.

MANIFESTATION DETERMINATION

A. C.D. v. Atascadero Unif. Sch. Dist., 83 IDELR 80 (C.D. Cal. 2023). ALJ's decision that the student's physical aggression toward his teacher was not a manifestation of his disability is upheld. Although the parent attributes the student's behavior to poor impulse control and communication difficulties due to his disabilities, the ALJ's decision that the behavior was not a manifestation of his ADHD, intellectual disability, or speech and language impairment was correct. Here and based upon detailed documentation kept by involved staff about what happened before, during, and after the incident, it appears that the student's behavior of physical aggression was a choice. For example, the district's school psychologist testified that the student's conduct did not arise as a result of his ADHD or cognitive functioning and that the aggressive incidents for which the student was disciplined were separated by a period of time that gave the student sufficient "time to make a choice about what behavior he wanted to do." In fact, school staff accompanying the student for a distance from a construction site next to the administrator's office and then into the office area noted that the student could have engaged in aggression at any point in time during that distance but did not. Rather, the student waited until a preferred staff member left before engaging in the aggressive behavior toward his teacher. The court also

notes that witness testimony and documentation showed that the student used functional communication to achieve his goal of being able to stay in the unsafe construction area and this is evidence of the student's cognitive understanding, as well as his receptive and expressive processing of what was going on. For example, in response to a request that he move away from the construction site, the student communicated that he was refusing to comply and that he felt he was safe. The student also put on his glasses to demonstrate that he was aware that flying debris could hurt his eyes. Further, in response to his teacher's statements that it looked like something was bothering him, he used functional language to communicate that he was not upset, that he was refusing to leave the construction area, and that he felt he was safe. Given the student's repeated use of functional language during the entire incident, it is more likely than not that the student engaged in deliberative planning in response to not being allowed to remain near the construction site. This conclusion is again further supported by the fact that he waited until preferred staff was not present before he became physically aggressive toward his teacher. As the ALJ noted, this is evidence that the student "knew what he was doing and how to differentiate between preferred and non-preferred staff." Thus, the court agrees with the ALJ in concluding that the student's aggression toward the teacher was not impulsive, and that the student processed the situation and understood it.

B. Lemus v. District of Columbia International Charter Sch., 83 IDELR 18 (D. D.C. 2023). District's motion for summary judgment is granted and the hearing officer's decision in its favor is upheld where the parent of a student with TBI and a diagnosis of PTSD did not show that the district made an improper manifestation determination and expelled him for threatening to shoot his math teacher. First, the parent did not show that the district failed to implement the student's IEP or BIP. Second, with respect to the MDR team's decision that it was the student's relationship with gangs and not his TBI that caused him to threaten to shoot his math teacher after she reported the student's use of gang gestures during class, the parent did not show that the decision was incorrect. IDEA mandates that MDR teams review all relevant information in the student's file, including the IEP, any teacher observations, and any relevant information provided by the parents. "Relevant information" is information that is pertinent to whether the conduct is directly and substantially related to a disability. Here, the team reviewed the student's evaluations and diagnostic results, information from the student's mother, observations of the student, and other information. The parent's claim that the team was required to consider the student's PTSD is rejected where PTSD is not a recognized disability under IDEA. Accordingly, the team was not required to consider it. In addition, the hearing officer was correct in finding that the student's threat was not the product of his disability but instead was based upon his association with gang members. In a footnote rejecting another parent argument, the court also noted that "[f]urthermore, the IDEA requires that the MDR Team, whose actions the Hearing Officer reviewed, focus only on Orlin's documented disability under the IDEA, as the MDR Team must determine if Orlin's conduct was a manifestation of that disability."].

INVOLUNTARY HOSPITALIZATION/EXAMINATION

A. D.P. v. School Bd. of Palm Beach Co., 658 F.Supp.3d 1187 (S.D. Fla. 2023). The court adopts the recommendations and report of the Magistrate Judge in this case brought by elementary school students with disabilities, their parents and guardians, and civil rights advocacy organization under § 1983, the ADA, the Rehabilitation Act, and the Florida Educational Equity Act (FEEA) for compensatory damages and injunctive relief against the school board, its superintendent and its police officers. Where it is alleged that the defendants unlawfully subjected students to involuntary psychological examinations pursuant to Florida's Baker Act without the parents' consent and used excessive force in arresting students, the plaintiffs have stated a claim of excessive force, a custom of deliberate indifference to handcuffing, and unlawful discrimination under ADA/504.

POST-SECONDARY TRANSITION SERVICES

A. del Rosario v. Nashoba Regional Sch. Dist., 83 IDELR 11 (D. Mass. 2023). Hearing officer's decision that the district provided appropriate transition services to high functioning adult student with autism is upheld, and the student is not entitled to compensatory education services. The district's Transitions Program in which the adult student participated after she graduated in May 2016 provided appropriate transition services. While Transitions is where in-district students with disabilities are generally placed after they turn eighteen until they reach the age of 22. In the program, the students attend a variety of job sites during the week, but those job sites have not included commercial bakeries or kitchens. During the time the students are in the classroom, they focus on individual IEP objectives and the purpose of the program is to teach skills that can be applied to any occupation, as well as skills needed to increase independence in other aspects of adult life. The program is highly individualized and tied to the goals of each student's IEP and is not designed to prepare students to enter particular trades. While the guardian ultimately objects to the program because it did not adequately prepare her to achieve her long-term goals of obtaining employment in a commercial baking/cooking setting, IDEA does not require that for FAPE. Here, Transitions provided an opportunity for the student to bake and cook in a non-commercial setting and to develop a business where she sold baked goods to school employees, and learned how to buy ingredients, budget, take orders and payments, and package and distribute her goods. Importantly, she was also exposed to non-cooking related skills, such as working with others, completing assigned tasks, and other types of vocational skills and made progress in improving her "soft skill" deficiencies, such as accepting feedback, redirection, and interacting with other employees. While the IEPs and services provided did not expose the student to a commercial baking setting, "they did take her interests into account by exposing her to baking and cooking, food preparation, and the collateral skills necessary to achieve her goals." In addition, "the Court finds it of consequence that the IEPs put in place by [the district] provided [the student] with skills in 'interpersonal relations,' workplace behavior, self-regulation, and independence that would help her succeed in any employment situation." While the district was not able to find a bakery work site for the student, it did provide work sites that would assist in her vocational and emotional growth. The issue

here was whether the district's IEP was inappropriate, not whether her parents preferred program might be a better fit for her needs and interests.

B. GS v. Westfield Pub. Schs., 123 LRP 31755 (D. Mass. 2023), subsequently amended opinion at 123 LRP 31983 (D. Mass. 2023). Hearing officer erred when determining that a special day school placement provided FAPE to 15 year-old with multiple disabilities. The parents' motion for summary judgment is partially granted and the case is remanded to the district to reconsider whether a residential program is required to meet all of the student's needs. IEPs must include transition services that facilitate a student's movement from school to post-school activities at age 14 in Massachusetts. The special day program does not provide transition services or adequate adaptive living skills programming, and the district improperly delegated its obligation to provide required IEP services to an independent third party, a mental health facility, which is not a school and does not offer educational or vocational services.

PRIVATE SCHOOL PLACEMENT/SERVICES

A. Steckelberg v. Chamberlain Sch. Dist., 77 F.4th 1167, 123 LRP 24587 (8th Cir. 2023). District court's award of reimbursement to the parents of a student diagnosed with PANDAS in the amount of $90,375 for placement at an out-of-state Academy and $9,221 in travel expenses is affirmed. To recover reimbursement for a unilateral private placement, parents must show that the school district did not provide FAPE in the form of an IEP that was reasonably calculated to enable the student to make appropriate progress in light of the student's circumstances. Here, when writing the student's IEP for her junior year in high school, the school did not consider the behavior support plan presented by a behavioral analyst, which contained "the nuts and bolts of the behavior change process" and detailed "how the school personnel w[ould] support [AMS's] developing/emerging appropriate behaviors." While the district's IEP set goals for the student, the expectation was near-perfect compliance. In addition, when the district placed the student at home to learn after behavioral issues occurred, the amended IEP lacked adequate information about how the student was going to make progress despite the change in learning environment. Even worse, the student was left at home without adequate academic support. In addition to the denial of FAPE, the parents are also required to show that the Academy placement was appropriate for their child. The district's suggestion that the Academy was not appropriate because it focused on the student's behavioral issues, not her educational ones, is rejected. The Academy was "specially designed" for the student, as it was equipped to handle her problematic behaviors and structured so that students could attend class and counseling during the week. In addition, the Academy partnered with an online school to allow students to focus on therapy and social skills outside of class. While there, the student completed different classes and, importantly, did well enough to graduate and move on to college. All things considered, the Academy was an appropriate placement, so reimbursement was not error. The district's argument that the district court erred in reimbursing the parents their cost of traveling to the Academy is rejected. Once a court holds that the public placement denied FAPE, "the court is authorized to grant such relief as the court determines is appropriate."

B. Gavin K. v. Downingtown Area Sch. Dist., 83 IDELR 76 (3d Cir. 2023) (unpublished). District court's order denying parents of an SLD student reimbursement for private schooling is affirmed. While the parents did show that the district's proposed IEP developed in August 2020 was inappropriate and was developed without conducting an appropriate evaluation due to COVID-19, the parents must show more than a denial of FAPE to obtain private school reimbursement. Parents in these circumstances must also show that the unilateral private school placement was appropriate for the student. This means that the private placement must be shown to have provided significant learning, that it provided meaningful benefit, and was the student's LRE. Here, the school did not provide the seventh grader with instruction that was tailored to his needs, such as targeted interventions to address his difficulty with reading fluency and decoding. In addition, the student made minimal progress at the private school where the assessments as a whole showed only a mix of progress in some areas but stagnation or decline in others. While the parents disagree and believe the student made appropriate progress, the objective evidence shows that the private school failed to meet the student's disability-based needs.

C. I.K. v. Manheim Tshp. Sch. Dist., 83 IDELR 54 (3d Cir. 2023) (unpublished). District court's denial of reimbursement to the parents for private placement of their third grader with autism and ADHD is upheld. The district's ongoing "good-faith efforts" to address the student's behavioral issues provided the student with FAPE. When evaluating the appropriateness of an IEP, the focus is on the information available at the time the district's IEP was developed, not the fact that the student made significant progress at the Montessori school. Here, the student's August 2018 IEP indicated that the student met her goals for reading comprehension and fluency, written expression, and math computation. In addition, the IEP included supports to address the student's behavioral difficulties, including self-talk, anxiety and inability to self-regulate. While the student's behaviors persisted and expanded to include threats of self-harm, the district revised the student's IEP in October and November 2018 to address these behaviors. The revised IEPs called for daily communication logs with the parents, adult supervision at all times, a divider to separate the student from a difficult classmate, and an observation by a behavioral specialist. Thus, the district's efforts to address the student's behavioral issues were adequate and, while the problems were "no doubt, troubling...the [district] was not ignoring them."

D. Autauga Co. Bd. of Educ., 83 IDELR 63 (M.D. Ala. 2023). Hearing officer's decision denying the parents' request for reimbursement of private school tuition for placement of their kindergartner with ADHD is upheld, but for different reasons. To obtain reimbursement for private schooling, parents must show that 1) the district denied FAPE; 2) the private placement was appropriate for the student; and 3) the equities favor reimbursement. Even where a district denies FAPE to a child under IDEA, parents must still show that the private placement was appropriate and met the child's disability-related needs. Here, the parents enrolled their child at Success Unlimited Academy after the district moved him to a behavioral unit at the alternative school. While the parents claim that the student's behaviors improved in the private school, one of the parents sat outside of the classroom at all times while class was in session to address his behavioral outbursts when needed. Further, the child's behavioral problems continued, in spite of his parents'

interventions. After only 19 days at the private school, the child was moved from four days of schooling per week to a total of only two hours per week of off-site tutoring on behavior and academics based on its inability to manage the child's behaviors. In addition, the school did not offer OT services to address the child's severe motor deficits. Thus, the parents are not entitled to reimbursement for the cost of the private schooling because the placement failed to meet the child's needs. While the hearing officer denied reimbursement because of the district's good faith efforts, this court is affirming the ruling based on the private school's failure to meet the child's needs.

E. Maysonet v. New York City Dept. of Educ., 82 IDELR 225 (S.D.N.Y. 2023). State Review Officer's decision to reduce reimbursement for private unilateral placement by 20% for a student with TBI is upheld. IDEA allows for a court to reduce or deny tuition reimbursement if it finds that parents have acted unreasonably during the IEP process. Here, the district rescheduled an IEP meeting multiple times to accommodate the parents' schedule and their request to have a district physician participate in the meeting. Although three district employees subsequently contacted the parents to confirm a meeting date, the parents did not attend and did not provide the private school progress report data they had promised to provide. The parents do not explain why the fact that the physician was going to participate by phone rather than in-person justified their failure to participate, particularly when they gave no notice to the district. Thus the parents' explanation for their absence at the meeting is "vague and unpersuasive" and supports the reduction in private school funding reimbursement.

F. K.P. v. Department of Educ., 83 IDELR 34 (D. Haw. 2023). While the Hawaii ED denied FAPE to a 7 year-old student by conditioning services upon "availability," the full amount of his private school tuition will not be awarded to the parent. For equitable reasons based upon the parent's delay in providing a consent form to the ED needed to access important information about the child after four reminders and her last-minute failure to attend an IEP meeting that the ED had rescheduled multiple times at her request, the tuition award is reduced by 25% or by more than $56,000.

RESIDENTIAL PLACEMENT

A. L.G. v. New York City Dept. of Educ., 123 LRP 33163 (S.D.N.Y. 2023). Parent's motion for an immediate order for the district to fund the student's residential placement during the due process hearing is granted. The district's proposal to place the 16 year-old ED student in a public high school while it was seeking to locate an appropriate residential placement does not satisfy IDEA's stay-put obligations. Thus, the district is to fund the student's unilateral residential placement at Crossroads RTC on a monthly basis while the parent's IDEA due process complaint is pending. Where the parent and district agreed via the student's June 2023 IEP that the student needs a nonpublic residential placement, the district must fund it during the pendency of the due process hearing initiated by the parent. The district's argument that the local high school placement satisfies the stay-put obligation is rejected where the high school does not have a residential component and is unable to implement the student's IEP. "Allowing [the district] to offer any pendency placement—regardless of how egregiously that placement fails to satisfy the student's IEP—would

render meaningless the student's right to a pendency placement." In addition, the parent is likely to succeed on the merits of her implementation claim since the proposed high school placement falls far short of the agreed-upon residential program. Further, the parent showed that she could not afford to continue the residential placement if she had to keep paying tuition and other expenses herself. Thus, a TRO and preliminary injunction are required that the district fund the program.

STAY-PUT/CHANGE OF PLACEMENT

A. Davis v. District of Columbia, 123 LRP 24589 (D.C. Cir. 2023). Where 23 year-old student was discharged by a residential treatment facility in October 2021 without consulting with the district or parent, this change in placement did not trigger IDEA's stay-put provision. Because the district did not attempt to alter or modify the student's educational placement during pending proceedings, the district court's denial of the parent's request for a stay-put order is affirmed. While a student is generally entitled to remain in his then-current educational placement while an educational dispute is ongoing, the provision does not apply here, even though the IEP identified the residential treatment facility as the student's LRE. The stay-put provision is intended to protect a student from a school district's unilateral attempt to change a student's placement. As a result, a stay-put order may only be enforced against a district. In this case, the change in the student's placement here was not effectuated or caused by the district. After receiving the discharge notice from the residential treatment center, the district never attempted to modify the student's placement. Instead, it tried to maintain the student's placement by referring him to 19 alternative residential facilities and, only when these efforts failed did the district offer the student at-home and virtual services. Accordingly, the stay-put provision does not apply because the residential component of [the student's] IEP became unavailable for reasons outside of the district's control. The parent's notion that the district should have created an alternative residential placement when similar programs were unavailable is also rejected as that is beyond the district's responsibility under IDEA's stay-put provision.

B. J.L. v. Williamson Co. Bd. of Educ., 123 LRP 21065 (M.D. Tenn. 2023). Placement of a seventh grader with disruptive mood dysregulation and ADHD in a general education setting pursuant to a September 2019 IEP is not the stay-put, as it is no longer the student's "current" placement. Rather, a June 2020 settlement provision placing the student on home instruction is the stay-put placement for the student pending these proceedings. The parents' argument that the student's current educational placement was the one in the last-agreed upon IEP is rejected where the parents subsequently signed the 2020 stay-put agreement requiring the district to provide home instruction three times per week while it searched for a therapeutic placement. Since then, the parents enrolled the student in two private schools and a homeschool program. Returning the student to the 2019 IEP's general education setting would not preserve the status quo. Rather, such a ruling would amount to granting the student new educational rights that "he has been markedly unable to demonstrate that he is entitled to on a number of occasions." Thus, the parents' request for a court order requiring the district to place the student in general education classes while their IDEA appeal is pending is denied. [NOTE: The parents appealed the ruling and subsequently asked the 6th Circuit Court of Appeals for a preliminary injunction pending

their appeal of this case. However, on September 1, 2023, the 6th Circuit denied the parents' request on the basis that they were not likely to establish that the 2019 IEP created the most current, operative stay-put placement for the student. *See* 123 LRP 27635 (6th Cir. 2023)].

STATUTE OF LIMITATIONS

A. Charlotte-Mecklenburg Bd. of Educ. v. Brady, 66 F.4th 205, 83 IDELR 27 (4th Cir. 2023). District court's ruling upholding the state review officer's decision is affirmed finding that the district's failure to provide PWN and a copy of the notice of IDEA's procedural safeguards to the parents barred the application of North Carolina's one-year statute of limitations to due process hearing claims brought in 2018. In 2013, the student's father provided to the student's 504 team a copy of an email from the student's private psychologist seeking help for the student, asking about what resources the district could provide, and mentioning the possibility of the student qualifying for an IEP under IDEA as a student with OHI. The email did more than notify the district of the student's diagnoses. Specifically, the email said, "We understand that with her specific diagnoses, [A.B.] qualifies as OHI and is eligible for an IEP -- is tutoring covered by an IEP? Is there something that is covered by an IEP that can benefit her?" As such, the email constituted an IDEA evaluation request, even though an explicit request for an evaluation was not made. Accordingly, because the district "withheld information" by failing to provide the parents with a copy of the procedural safeguards or a PWN following receipt of the February 2013 email, the withholding exception to the statute of limitations applies and prevents the student's claims from being time barred. Thus, the SRO's decision is confirmed.

TRANSGENDER AND DISABILITY

A. Williams v. Kincaid, 45 F.4th 759 (4th Cir. 2022). District court's dismissal of a former inmate's claims of mistreatment and disability discrimination against a county sheriff under ADA/504 is reversed and remanded for further proceedings. Plaintiff, a transgender woman diagnosed with gender dysphoria, is an individual with a disability under the provisions of ADA and Section 504, as the definition of disability is to be construed in favor of broad coverage. The definition of "gender dysphoria" differs dramatically from that of the now non-existent diagnosis of "gender identity disorder" used by the ADA as an exception to its protections that was removed from the DSM-5. Gender dysphoria is defined by DSM-5 as the clinically significant distress felt by some of those who are transgender who experience an incongruence between their gender identity and their assigned sex. Further, DMS-5 explains that the discomfort or distress caused by gender dysphoria may result in intense anxiety, depression, suicidal ideation, and even suicide. In short, being trans alone cannot sustain a diagnosis of gender dysphoria as it could for a diagnosis of gender identity disorder under earlier versions of DSM. Reflecting this shift in medical understanding, we and other courts have thus explained that a diagnosis of gender dysphoria, unlike that of gender identity disorder, concerns itself primarily with distinct and other disabling symptoms, rather than simply being transgender. Nothing in ADA compels the conclusion that gender dysphoria constitutes a gender identity disorder excluded from ADA

protection. Thus, ADA does not foreclose the plaintiff's ADA claim. Update: On June 30, 2023, the Supreme Court denied review of the opinion by the Fourth Circuit and Justices Thomas joined Justice Alito's dissent from the denial of certiorari. In the dissent, it is noted that, among other things:

> This case presents a question of great national importance that calls out for prompt review. The Fourth Circuit has effectively invalidated a major provision of the Americans with Disabilities Act (ADA), and that decision is certain to have far-reaching and highly controversial effects.

The entire dissent can be found at
https://www.supremecourt.gov/opinions/22pdf/22-633_1cok.pdf

SECTION 504 DISCIPLINE

A. W.G. v. Aristoi Classical Academy, 83 IDELR 43 (S.D. Tex. 2023). Charter school's motion to dismiss student's 504 and ADA claims is granted where Section 504 expressly permits LEAs to take disciplinary action against a student with a disability who "currently is engaging in the illegal use of drugs or in the use of alcohol" to the same extent that such disciplinary action is taken against nondisabled students. The facts are that the student was expelled for admittedly drinking a mixture of whiskey and soda from his water bottle throughout the school day.

SECTION 504 REGULATIONS GENERALLY

A. As we have discussed in past Quarterly Reviews, the Office for Civil Rights announced on May 6, 2022 its intent to issue proposed revisions to the 45 year-old 504 regulations enacted in 1977. In the Fall of 2022, the Department included in the President's regulatory agenda the intent to have the proposed amended regulations out by May of 2023. That did not happen, and on June 14, 2023, the regulatory agenda was amended to reflect the intent to issue the proposed regulations in August 2023. As of today, the President's Fall Unified Agenda has been changed to reflect November 2023 as the expected date for the proposed 504 regulations to be published (which, obviously, has come and gone). For future updates, see
https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202310&RIN=1870-AA18

SECTION 504 AND PRIVATE SCHOOLS

A. F.B. v. Our Lady of Lourdes Parish and School, 123 LRP 32948 (E.D. Mo. 2023). Parents cannot sue to enforce Section 504's regulations rather than the provisions of Section 504 itself. Here, the parents of a 6th-grader with learning disabilities sued the parochial school for an alleged failure to provide accommodations. The school's position that the parents failed to plead a violation of the statute itself, rather than the regulations, required the court to dismiss the claim. To survive the motion to dismiss, the parents were required to allege that 1) the student was a qualified student with a disability; 2) the school denied the student the benefits of its programs or activities; and 3) the school denied those benefits because

of the student's disabilities. The parents' complaint did not address any of those elements. Rather, the complaint alleges that the school failed to comply with 504 regulations governing evaluations, placements, procedural safeguards and grievance procedures applicable to private schools that receive federal funds. As such, 504 does not allow parents to sue schools or other entities over their alleged noncompliance with the statute's implementing regulations, and a majority of courts that have addressed this issue agree with this position.

B. Bryant v. Calvary Christian Sch. of Columbus, 123 LRP 23871 (M.D. Ga. 2023). Private religious school's motion for summary judgment on the plaintiff's 504 discrimination claim is granted. Here, the private school, through its Discovery School Program, serves students with learning disabilities who have submitted an IEP, 504 Plan, or a psychological evaluation. The student's evaluation report reflected a diagnosis of ASD and ADHD and recommendations for accommodations, including repeating directions multiple times, preferential seating, extra time on testing, and a behavior plan focused on rewarding good behavior rather than punishment for bad behavior. The school created a Student Support Plan that required a positive reinforcement behavior plan, extra assistance with directions and instructions, preferential seating, extra time on tests, pre-test study guides, and a word bank on tests when possible. During the student's 6th grade year, the Director of the Discovery Program recommended that the parent enroll the student in ABA therapy and be evaluated for medication as the private evaluator had suggested. However, the parent did neither. During the student's 7th grade year, the student's behavioral problems accelerated, including temper issues, throwing things in class, and increased anger. The student was placed on virtual instruction and as a condition to returning to in-person classes, the school required that the student complete ABA therapy in a public school or other classroom setting to demonstrate improved behavior. The parent contacted a licensed behavioral therapist to evaluate the student who supervised the student while he continued to attend virtual classes and met with the private school staff to present a therapy plan, which would include 15 hours of in-person instruction where an assistant would shadow the student to support the plan. In the alternative, the behavioral therapist offered to train the private school staff on ABA behavioral therapy techniques. The Headmaster determined that the plan would not be acceptable because it required the student to return to in-person instruction and an impasse was reached. Here, the school has not discriminated against an "otherwise qualified" student because the requested accommodation allowing the student to return to in-person classes at the private school can be properly characterized as a request for the student to be exempt from the private school's normal disciplinary policy. In turn, this would require the private school to substantially lower its behavioral standards, which is not required under Section 504. Finally, the record is replete with adjustments that the private school made in attempts to accommodate the student.

PARTICIPATION IN NONACADEMIC/EXTRACURRICULAR ACTIVITIES

A. Cody v. Kenton Co. Pub. Schs., 82 IDELR 182 (E.D. Ky. 2023). There is no evidence that the district discriminated against a high schooler with deficits in executive functioning and ADHD on the basis of disability when it suspended him from the basketball team. Therefore, the student's ADA/504 claims are dismissed. Here, the student is required to

show that he 1) has a disability; 2) was otherwise qualified to participate in the district's program or activity; and 3) was excluded from participating in or denied the benefits of the district's program or activity by reason of his disability. With respect to the third element, there is no evidence that the high school's athletic personnel unfairly disciplined the student due to disability. Rather, the student's behavior and attitude over time warranted the consequences that were imposed when the student allegedly spoke to the basketball coach in a manner that was considered aggressive, disrespectful and agitated. In addition, the coach and athletic director did not dismiss the student from the team until the student made an inappropriate sexual comment to a cafeteria employee. The guardians' allegation that this was an excuse for discrimination on the part of the district is rejected. Indeed, both guardians reported that the coach and athletic director were unaware that the student had a disability for the majority of the school year and, in fact, the student testified that he did not believe any person at the school intentionally discriminated against him because of his disability. There is simply no evidence that the district's disciplinary decisions were motivated "solely by reason of" the student's disability.

ASSOCIATIONAL DISCRIMINATION

A. Ambrose v. St. Johns Co. Sch. Bd., 83 IDELR 16 (M.D. Fla. 2023). School district's motion to dismiss the parent's 504/ADA claims for associational discrimination is denied. This parent, who has disabilities (lupus, rheumatoid arthritis, anxiety and panic disorder), is allowed to proceed with associational discrimination claims on behalf of her 5 year-old nondisabled son. The case focuses upon the district's transportation policy which limits bus transportation to students who live at least two miles from the school. This child's parent claims that her inability to drive or walk the 1.9 mile distance to and from school caused her child to miss school on the days that she cannot arrange transportation. In the Eleventh Circuit, nondisabled individuals can seek relief for harm they suffer because of their association with an individual who has a disability. Further, Title II of the ADA provides a remedy to "any person alleging discrimination on the basis of disability." Thus, the child does not need to have a disability himself to sue the district for its failure to provide an exemption to its transportation policy. The district's alleged refusal to provide the child with bus service as an accommodation for his mother's disabilities impacts the child as well as the parent. Thus, the child has plausibly alleged that associational discrimination has denied him meaningful access to education. In addition, the parent's 504/ADA claims on her own behalf may proceed based upon the allegation that the district made exceptions to the "two-mile rule" for nondisabled parents.