WHAT'S NEW AND TRENDING IN SPECIAL EDUCATION LAW AND WHY IT MATTERS

CADRE WEBINAR SERIES

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DEUSDEDI MERCED, ESQ. [‡]

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

I. INTRODUCTION

The purpose of this presentation is to discuss three areas in special education litigation that are evolving: *Endrew F.*, stay-put, and electronic records. Various cases/guidance documents published in the last two years or so are cited. The selected cases/guidance documents, however, are not, for the most part, headline news. Rather, the selected cases/guidance documents provide a window into how hearing officers, courts, and, in the case of electronic records, the Family Policy Compliance Office (FPCO)[1] are deciding/viewing the subject matter.

II. *ENDREW F.*[2]

A. *Endrew F.* Itself

Endrew F. v. Douglas County School District RE-1, 137 S. Ct. 988, 69 IDELR 174 (U.S. Mar. 22, 2017) is the Court's attempt to define what qualifies as an educational benefit with an emphasis on progress.

In *Endrew F.*, a unanimous Supreme Court overturned a decision of the Tenth Circuit Court of Appeals that had applied a "merely more than *de*

[‡] Deusdedi Merced, Esq. is the Managing Member of Special Education Solutions, LLC (SES). SES is a leading provider of professional development programs and technical assistance / systems consultation on IDEA dispute resolution mechanisms to State educational agencies.

[1] The FCPO is located within the U.S. Department of Education. One of its primary responsibilities is to provide advisory rulings, usually in response to specific requests, on whether a local educational agency (LEA) has violated the provisions of the Family Rights and Privacy Act (FERPA) regarding its handling of student education records.

[2] The author acknowledges with appreciation source material provided by Lyn Beekman, Esq. and Mark C. Weber, Esq.

minimis" standard for the duty under the Individuals with Disabilities Education Act[3] (IDEA) to provide a free, appropriate public education to children with disabilities served by public school districts. The opinion by Chief Justice Roberts interpreted *Rowley*'s[4] reading of appropriate education as taking a middle position between no enforceable standard at all and affording the child an opportunity to achieve her full potential commensurate with the opportunity provided to children without disabilities.

The Court emphasized *Rowley*'s language requiring a substantively adequate education as well its statement that it was not establishing a single test for the adequacy of educational benefits children should receive. *Id*. at 996. The Court read *Rowley* as pointing to "a general approach: To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Id*. at 999. The approach focuses on the reasonable, not the ideal, but it emphasizes progress for the individual child given his or her unique needs. *Id*. The Court reaffirmed *Rowley*'s statement that if a child is fully integrated in the regular classroom, passing marks and advancement from grade to grade through the general curriculum will ordinarily satisfy the IDEA standard, though a footnote to the opinion warns that, "This guidance should not be interpreted as an inflexible rule," and is not a holding that every child advancing from one grade to the next "is automatically receiving an appropriate education." *Id*. at 1000, fn. 2. The Court said that a child not fully integrated in the regular classroom may not have the ability to achieve at grade level, but the IEP for that child should be "appropriately ambitious in light of his circumstances," a standard "markedly more demanding than the 'merely more than *de minimis*' test applied by the Tenth Circuit." *Id*. "The goals may differ, but every child should have the chance to meet challenging objectives." *Id*.

The Court rejected the parents' argument that children with disabilities must be offered an education that provides the opportunities to attain self-sufficiency and contribute to society substantially equal to the opportunities provided to children without disabilities. *Id*. at 1001. The Court noted that a similar standard was rejected in *Rowley*, and Congress,

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[3] In 2004, Congress reauthorized the Individuals with Disabilities Education Act as the Individuals with Disabilities Education Improvement Act. *See* Pub. L. No. 108-446, 118 Stat. 2647 (Dec. 3, 2004), effective July 1, 2005. The amendments provide that the short title of the reauthorized and amended provisions remains the Individuals with Disabilities Education Act. *See* Pub. L. 108-446, § 101, 118 Stat. at 2647; 20 U.S.C. § 1400 (2006) ("This chapter may be cited as the 'Individuals with Disabilities Education Act.'").

[4] *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 553 IDELR 656 (1982).

though it revised the IDEA several times since 1982, did not materially alter the statute's definition of free, appropriate public education. *Id.* The Court said it was not creating "a bright-line rule," but said the absence of the rule should not be taken as an invitation to courts to supplant the role of school authorities, to whose expertise and professional judgment deference should be paid. *Id.* A reviewing court, "may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances." *Id.* at 1002.

B. Impressions

There is much that the Court does not define and will require further discussion.[5] Clarity will come first from hearing officers and, ultimately, from reviewing courts. We are just beginning to see courts delve into the nuances resulting from *Endrew F.*,[6] but appreciable discussion as to some of its pronouncements and how it all fits together is still in its infancy.

The new language – "progress appropriate in light of the child's circumstances" – better refocuses the inquiry on the individualized needs of the student and recognizes that there is a wide spectrum of disabled children whose circumstances are ever changing, e.g., new needs, needs that have been met, needs that require different interventions / supports, and life experiences that impact learning. And, without a well-defined understanding of the student's unique circumstances, an IEP team cannot determine what an ambitious program would be for the student that would provide for an appropriate measure of progress. Each student's IEP must, therefore, include, among other information, an accurate statement of the

[5] For example, it is unclear what "appropriately ambitious," "challenging objectives," and "markedly more demanding" than *de minimis* mean in operation, what responses must be made to children's unique needs, and in what situations will children who are fully integrated in the regular classroom and are achieving at grade level be considered not to be receiving an appropriate education in light of their individual circumstances.

[6] *See*, *e.g.*, *Z.B. v. District of Columbia*, 118 LRP 18827 (D.C. Cir. 2018) (*Endrew F.* "raised the bar on what counts as an adequate education"); *M.N. v. School Bd. of the City of Virginia Beach*, 71 IDELR 170 (E.D. Va. 2018) (appropriately ambitious does not equate to placing student in program that is beyond her abilities); *Rosaria M. v. Madison City Bd. of Educ.*, 72 IDELR 9 (N.D. Ala. 2018) (IEP appropriately ambitious as demonstrated by metrics demonstrating progress); *M.C. v. Antelope Valley Union Sch. Dist.,* 852 F.3d 840, 69 IDELR 203 (9th Cir. 2017) (raising the possibility that *Endrew F.* has a more demanding standard than *Rowley*); *Bd. of Educ. of Albuquerque Public Schools v. Maez*, 70 IDELR 157 (D. N.M. 2017) (school district offered a "cogent and responsive explanation" as to why the IEP is appropriately ambitious); *Saucon Valley Sch. Dist.,* 71 IDELR 225 (SEA PA 2017) (*Endrew F.* does not require a school district to close the gap).

student's present levels of academic achievement and functional performance (PLAAFP).

The PLAAFP is the starting point for determining annual goals.[7] Without a baseline of current performance, it is difficult to draft measurable and relevant annual goals,[8] and to measure future progress. Age, behavior, other learning difficulties other than the primary disability, history, and current performance help to define the student's unique circumstances. How the IEP team evaluates and assess this information "contribute[s] to ensuring the [student] has access to challenging objectives."[9]

Though more time (and, likely, litigation) is needed to fully appreciate the clarified, substantive standard articulated by the Court in *Endrew F.*, the emerging case law provides some practical considerations.

C. Judicial Decisions

1. *C.S. v. Yorktown Central Sch. Dist.*, 72 IDELR 7 (S.D.N.Y. 2018). An IEP is not necessarily inadequate because a student with a disability is progressing slower than non-disabled peers. The student's progress must be measured against his/her own circumstances.

   Here, the parent sought tuition reimbursement for a unilateral placement, in part, because the student, the parent argued, failed to make progress under her fifth grade IEP and, the parent further claimed, the school district offered a virtually identical IEP for sixth grade. The parent cited to the student's standardized test scores to support her claim of lack of progress. The parent was awarded reimbursement by the hearing officer and the school district appealed to the State review officer (SRO) who reversed the hearing officer and found in favor of the school district. In affirming the State review officer, the district court agreed with the SRO that, although the standardized test scores showed that the student performed below grade level, other evaluative data showed that the student made appropriate progress. And, although the parent took issue with the student's lack of independent mastery of all annual goals listed in the IEP, the district court noted that whether the student "achieved the goals set forth in the June 2014 IEP is not the

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[7] *Bend-Lapine Sch. Dist. v. K.H.*, 43 IDELR 191, 2005 WL 1587241 (D. Or. 2005), *aff'd*, *Bend-Lapine Sch. Dist. v. K.H.*, 234 F. App'x 508 (9th Cir. 2007) (unpublished). *See also Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46662 (August 14, 2006).

[8] *Id.*

[9] *Questions and Answers on Endrew F. v. Douglas County School District RE-1*, 71 IDELR 68 (OSEP 2017).

controlling issue; rather, it is her progress toward achieving them." Despite the fact that the student did not achieve all of her goals, the district court further noted that she nonetheless made progress in every category listed in the IEP, many with no additional support from the classroom teacher.

As to the parent's argument that the student performed "well below benchmark," the court noted that the student was expected to perform below grade level given her educational history and disability. "It would be irrational to expect [the student] to suddenly begin reading at a fifth-grade level after a year, even with intensive supports from her IEP, when she began that year at a first-grade reading level."

Finally, in addressing the parent's claim that the sixth grade IEP was "virtually identical" to the fifth grade IEP, the court concluded that the school district did not fail to offer a FAPE merely because it continued any recommendations from the earlier IEP. The sixth grade IEP services that were continued were reflective of the student's progress. Nevertheless, the court also found that the sixth grade IEP included numerous changes.

2. *Rosaria M. v. Madison City Bd. of Educ.*, 325 F.R.D. 429, 72 IDELR 9 (N.D. Ala. 2018). Where parents contend that the school district's IEP was not "appropriately ambitious" under *Endrew F.*, the district court, citing to several "metrics," found that the IEP provided FAPE as demonstrated, for example, by the student's progress from an 8% to 63% score on a words assessment and "huge gain" in the student's math standing.

3. *Z.B. v. Dist. of Columbia*, 888 F.3d 515, 72 IDELR 27 (D.C. Cir. 2018). Failure to follow IDEA's evaluation process may result in an IEP that is not appropriately tailored to the student and is inconsistent with *Endrew F.*

   Here, an elementary student struggled with attention, impulsivity, and disorganization in pre-kindergarten and kindergarten. In first and second grades, the student struggled with interpersonal conflicts and was bullied. The school district did not refer the student for an evaluation. In the spring of second grade, the parents obtained a private psychological evaluation, which diagnosed the student with ADHD and recommended further testing. The school district developed a Section 504 Plan but did not conduct an IDEA evaluation. In third grade, the student underwent a private neuropsychological assessment and the evaluator recommended specialized instruction and other services. The report was shared with the school district and an IDEA

eligibility meeting was scheduled. The school district did not complete any additional assessments of the student and relied solely on the private evaluations. An IEP was developed, which the parents found inadequate. Ultimately, the parents withdrew the student from the school district, enrolled the student in a private school, and sought reimbursement. In support of their claim, the parents argued that the IEP was substantively inadequate because it was too ambitious given the student's skill levels and that the school district had "dropped the ball" by not having conducted its own evaluation of student.

The hearing officer found the IEP was reasonably calculated to provide an appropriate education. The parents appealed and the district court affirmed the hearing officer. Subsequently, *Endrew F.* was decided, which coincided with the parents' appeal to the D.C. Circuit Court of Appeals. The Circuit Court noted that *Endrew F.* "raised the bar on what counts as an adequate education under the IDEA," and that the standard was more demanding than what the district court had applied below. The Circuit Court further noted that an "underlying evaluation of the student is fundamental to creating an appropriate educational program." And, although IDEA welcomes parent input, IDEA nonetheless tasks the school district with the specific responsibility to appropriately evaluate the student and develop an IEP, if the student is eligible, which may include review of existing data and "observations by teachers." Because the district court did not determine whether the school district required "additional or different metrics" than what the parents had provided, it failed to establish a "reliable baseline" of the student's needs from which to evaluate the adequacy of the IEP. The case was remanded back to the district court for further evidence.

4. *M.L. v. Smith*, 72 IDELR 218 (D. Md. 2018). "Uneven but steady progress," can also meet the *Endrew F.* standard.

   Here, an elementary school student with a speech/language disability received special education services from kindergarten through third grade. Unhappy with the student's progress, the parents sought private assessments of the student and retained an educational consultant. Mid-third grade, the school district convened an IEP meeting to review the student's progress. It was noted that the student was reading at a kindergarten level but showing some improvement. An IEP was developed. The parents agreed with the IEP generally but thought the student should be provided with +3 hours of special education outside the general education setting than what had been recommended (i.e., 3.5 hours). The IEP was later revised to increase the 3.5 hours to 4.75 hours but the parents ultimately rejected the IEP, enrolled the

student in a private school, and sought tuition reimbursement. The student attended the private school for fourth grade. For fifth grade, the school district once again met to review the IEP and increased the special education outside the general education setting hours to 17.5 hours from 4.75 hours.

The administrative law judge (ALJ) considered the fourth and fifth grade IEPs and found twice – after considering at the district court's request the implications of *Endrew F.* on his initial decision – that the school district had provided FAPE to the student. The parents appealed. The district court agreed with the ALJ that the IEPs provided FAPE to the student, in part, because the student was making meaningful progress, albeit uneven, toward her IEP goals in the public school setting. Specifically, the district court noted that, at the start of third grade, the student could only identify four words from the school district's kindergarten list but, by January, she could read 24 of the 25 words and had mastered an additional 12 words from the next list. The court also noted that the student's end-of-year progress report demonstrated improvement in most academic areas.

5. *K.D. v. Downingtown Area Sch. Dist.*, 904 F.3d 248, 72 IDELR 261 (3rd Cir. 2018). Evidence of slow progress does not prove that a student's IEP is not "challenging enough or updated enough."

Here, a student with ADHD, specific learning disabilities, and other disabilities, and with significant deficits in reading, writing, and math, had been provided with multiple IEPs through third grade. She was not fully integrated into the regular classroom and received "supplemental learning support for much of the day." Subsequent IEPs carried over some of the goals from earlier IEPs and were tweaked to keep them "appropriately rigorous." The student's baseline performance had improved during this time. Midway through third grade, however, unsatisfied with the student's slow progress, the parents withdrew her from the public school and enrolled her in a private school and sought tuition reimbursement in a hearing.

The hearing officer found that the student had been provided with FAPE and denied reimbursement. On appeal, the district court also sided with the school district. The parents appealed to the Third Circuit. The Third Circuit first highlighted the student's significant impairments and agreed with the district court that, "[g]iven her impairments and circumstances …, fragmented progress could reasonably be expected." The Third Circuit further noted, citing to *Endrew F.*, that "[w]hile courts can expect fully integrated students to advance with their grades, they cannot necessarily expect the

same of less-integrated students." Because the student here was not fully integrated, the Third Circuit concluded that "there is no reason to presume that [the student] should advance at the same pace as her grade-level peers."

6. *Johnson v. Boston Pub. Schs.*, 906 F.3d 182, 73 IDELR 31 (1st Cir. 2018). Evidence of "slow" progress alone is not *per se* indicative that the student's program failed to meet the *Endrew F.* standard. The question is whether the student's rate of progress is appropriate given his/her circumstances.

   Here, the parent of a student with profound hearing loss challenged the student's 2013-14 and 2014-15 IEPs and the school district's proposal to continue educating him in a school that offered both sign and spoken language instruction. The school district attempted to work with the parent and explored various alternative programs for the student but would not agree to provide the specific compensatory services and monetary damages that the parent sought. The hearing officer concluded that the IEPs provided the student with FAPE and that the student had made progress. The parent appealed and the district court agreed with the hearing officer and granted summary judgment against the parent. In her appeal to the First Circuit, the parent argued, in part, that *Endrew F.* had raised the bar for evaluating the adequacy of the IEPs offered to disabled students in the First Circuit. The First Circuit disagreed and held that its pre-*Endrew F.* standard comports with the *Endrew F.* standard. As to the parent's claim of slow progress, the First Circuit remarked that "…the relationship between speed of advancement and the educational benefit must be viewed in light of a child's individual circumstances." As for this student, the First Circuit agreed that the student "moved from a substantial inability to communicate or understand spoken or signed language to gradually signing, vocalizing, and demonstrating comprehension of other linguistic concepts."

7. *E.R. v. Spring Branch Indep. Sch. Dist.*, 909 F.3d 754, 765, 73 IDELR 112 (5th Cir. 2018). Though *Endrew F.* requires an "appropriately ambitious" IEP, the IEP must nonetheless reflect the student's disability-related needs and the failure to include grade-level standards in an IEP when the student cannot function at grade-level is not a denial of FAPE.

   This case concerned a child with a seizure disorder, ADHD, a speech impairment, global developmental delay and other conditions. The Circuit Court affirmed a grant of summary judgment for the school district, ruling that the public school program offered FAPE. The Circuit Court found no conflict between

Endrew F. and the indicators of FAPE identified in *Cypress-Fairbanks Independent School District v. Michael F.*, 118 F.3d 245, 253 (5th Cir. 1997), that "1) the program is individualized on the basis of the student's assessment and performance; (2) the program is administered in the least restrictive environment; (3) the services are provided in a coordinated and collaborative manner by the key 'stakeholders'; and (4) positive academic and non-academic benefits are demonstrated."

Here, the parents sought more robust academic goals by reference to grade-level Texas Essential Knowledge and Skills (TEKS) strands. The Circuit Court, however, agreed with the lower court that the student could not meet grade-level standards given her disabilities:

> Given [student's] condition, providing her an IEP with every single TEKS strand and standard would not have been individualized. To the contrary, excessive goals could have put her in a position where success would have been exceedingly unlikely.

As such, appropriately ambitious in light of *Endrew F.* "does not require ambitions beyond what may be reasonably expected given the circumstances."

8. *R.F. v. Cecil Cnty. Pub. Schs.*, 919 F.3d 237, 74 IDELR 31 (4th Cir. 2019), *cert. denied*, 140 S. Ct. 156, 119 LRP 38775 (2019). The failure of an IEP to include specific goals or interventions to address a student's other interfering behaviors does not deny a student FAPE when the IEP as a whole addresses the student's needs.

   Here, the Circuit Court considered the case of a then-seven-year-old student with autism, a rare genetic disorder, and significant neuromuscular deficits, who generally did not use words to communicate and exhibited hyperactivity and troubling conduct such as grabbing others, pulling their hair, biting, and mouthing. The school district placed the student in an intensive communication support classroom in which she was the only student, except for gym, art, music, recess, field trips, and occasional reading and math classes. Even then, the student was frequently removed from the general education classes she did attend. The parents requested that the student be placed in a full-day program for children with autism with no general education classes. The Circuit Court affirmed a lower court decision in favor of the school district. (The district court had affirmed the ALJ.) The Circuit Court identified *Endrew F.* as the controlling precedent on FAPE and clarified that the older Fourth Circuit standard, which

was similar to that rejected in *Endrew F.*, was no longer good law.

On the issue that the school district violated the IDEA because it failed to provide the student with an IEP that was sufficient to meet her needs, the Circuit Court held that the IEP was adequate. Specifically, the parents complained that the student's behavior intervention plan (BIP), which was incorporated into the student's IEP, was insufficient because it primarily focused on biting while ignoring the student's other behaviors like hair pulling, grabbing, hitting, kicking, and scratching. The Circuit Court disagreed that the BIP was insufficient and credited the ALJ's findings that, at the time the IEP was created, biting was the student's primary problem behavior and, even if the other behaviors were known to the school district when the IEP was created, the skill set forth in the BIP for the primary behavior can be generalized to the other behaviors.

As to the inadequacy of the IEP for its failure to include a social skills goal, the Circuit Court agreed with the ALJ that "an IEP is not required to contain every goal from which a student might benefit." The IEP as a whole must be considered and, here, the student's IEP did build in opportunities for the student to practice her social skills by including the use of social stories to remind the student of appropriate social interactions and regular walks around the school building to greet other students.

9. *C.F. v. Radnor Township Sch. Dist.*, 74 IDELR 48 (E.D. Pa. 2019). An IEP that includes measurable annual goals reasonably grounded in the abilities and needs identified in an evaluation of student's educational and developmental circumstances meets the *Endrew F.* standard.

   Here, after a "rigorous evaluation" of the student's needs, the school district held a series of IEP meetings in which input from the parents and the parents' experts was sought and considered. Ultimately, the school district proposed a 42-page IEP, which included seven annual goals and 31 "specially designed instructions" (SDI) and additional modifications to support the student in meeting the annual goals. The parents, however, rejected the IEP, in part, because the IEP did not offer a program that would allow the student to make appropriate progress in all areas of need. The parents filed a due process complaint. After a three-day hearing, the hearing officer concluded that the IEP was appropriate to meet the student's needs. The parents appealed.

   In affirming the hearing officer, the district court agreed that the IEP was reasonably calculated to enable the student to progress in light of his circumstances. Specifically, the district court found that

the school district engaged in a thorough evaluation of the student's educational needs and abilities, designed an IEP with seven measurable goals tailored to the student's needs and abilities, and included 31 SDIs and additional modifications to assist the student in accomplishing his goals. Though the parents complained that the IEP did not include discrete measurable goals for each of the student's known educational needs, the district court held that the school district was not required to provide distinct measurable goals for each recognized need "where more general goals sufficiently capture the student's needs to be addressed." Citing to *Endrew F.*, the district court noted that an IEP needs to be reasonable, not ideal.

10. *D.F. v. Smith*, 74 IDELR 75 (D. Md. 2019). A student's inability to meet his/her annual goals is not necessarily an indication that the IEP is inappropriate if it can be demonstrated that the IEP provides opportunities for the student to achieve progress at a level greater than merely more than de minimis. Achieving smaller objectives under the student's IEP goals consistent with the student's unique circumstances is evidence that the IEP affords the student such opportunities.

    Here, a student with autism had been enrolled in a special education preschool program within the school district before the parents moved him to a private school because they were dissatisfied with the school district's IEP and placement proposal for his kindergarten year. The student remained in the private school for three years and sought tuition reimbursement for all three years. In each of the school years that the student was in private school, the school district updated the IEP, provided a higher level of student to teacher ratio, but stop short of recommending 1:1 instruction exclusively, which is what the private school provided to the student. The ALJ determined that the school district developed appropriate IEPs for the student. The parents appealed.

    In affirming the ALJ, the district court rejected the parents' argument that evidence that the student had only met one of his annual goals over a two-year period while in the preschool program indicated a denial of FAPE. The district court agreed with the ALJ that the student had made sufficient progress on many of his individualized IEP objectives and pointed out that the parents had also testified during the hearing that the student had made progress while in the preschool program. The lack of greater progress was inconsequential given the student's circumstances. The district court noted:

> Students with autism may not progress linearly or consistently; the nature of their disability suggests that any academic and social progress they achieved may occur intermittently…. That [the student] only achieved one IEP goal during [two] school years is not necessarily evidence that the IEPs did not provide a FAPE, but it is more likely evidence of the difficulties of educating students with autism.

11. *C.D. v. Natick Pub. Sch. Dist.*, 924 F.3d 621, 74 IDELR 121 (1st Cir. 2019). *Endrew F.'s* use of terms like "demanding," "challenging," and "ambitious" to define "progress appropriate in light of the child's circumstances" simply underscores that the IEP as a whole must be reasonably calculated to offer meaningful progress. A separate inquiry as to how ambitious and challenging the IEP objectives are is not required.

12. *Perkiomen Valley Sch. Dist. v. S.D.*, 75 IDELR 67 (E.D. Pa. 2019). The failure of a student to meet an IEP goal may be "troubling," but that alone does not automatically render the IEP inappropriate or inadequate.

    Here, a student with dyslexia who attended public schools from third grade, had IEPs in third through sixth grade to address, among other needs, her reading fluency. With each new IEP (or revisions thereto), her reading fluency goal was modified to require an increase in the total number of words the student could read correctly per minute at various grade levels. In sixth grade, the parents removed the student from the public school, enrolled her in a private school, and filed a due process complaint challenging the fourth, fifth, and sixth grade IEPs. The parents sought compensatory education for the fourth and fifth grade school years and tuition reimbursement for the sixth grade school year. The parents prevailed on their tuition reimbursement claim (but not the others) and the school district appealed.

    On appeal, the district court reversed the hearing officer, finding that the hearing officer erroneously believed that there was no baseline data used to determine the student's reading fluency goal. After considering the baseline data, all that was left was the fact that the student had not met her fluency goal in a timely manner. This, the district court said, was not enough to render the IEP inappropriate or inadequate, as the IEP was reasonably calculated to enable the student to receive meaningful educational benefits in light of the student's intellectual potential.

13. *Matthew B. v. Pleasant Valley Sch. Dist.*, 75 IDELR 157 (M.D. Pa. 2019). Where a student's IEPs repeat year-after-year annual goals that the student has "nearly mastered" and fail to explain how the school district will help the student attain his/her goals set forth in the IEPs, the IEPs are deficient because they fail to provide the student with an appropriately ambitious program.

Here, a high schooler with autism had multiple IEPs prior to graduation with post-secondary transition goals. The IEPs noted that the student had no plans for post-secondary education but require supported employment post-graduation. The IEPs also noted that the student would live with his parents post-graduation and, therefore, included an independent living goal. The transition services and goals were repeated year to year with no substantive changes being made throughout the years. However, with respect to those aspects of the IEPs addressing academics, the IEP team placed greater demands on the student, suggesting that the student was capable of more with each passing year. Unsatisfied with the student's transition program throughout the student's high school career, the parents filed a due process complaint and sought compensatory education.

The hearing officer found that the school denied the student FAPE during the 2012-13 through 2015-16 school years "with respect to an appropriate functional program and appropriate transitional supports, but not with respect to his academic program." The hearing officer awarded two years of compensatory education. Both parties appealed, the parents seeking more compensatory education and the school district seeking reversal.

The district court affirmed the hearing officer but remanded the case back to him for further consideration of the compensatory education award. In rejecting the school district's argument that the hearing officer had erred in finding that the services provided to the student were appropriate, the district court found the argument "lacking in factual support or law." Specifically, the district court found that the school district "fail[ed] to address how and why what it provided to [the student] was appropriate under *his circumstances*."

III. STAY-PUT

A. Stay-put, Generally

1. The IDEA's stay-put provision requires a school district to maintain a student in the then-current educational placement until litigation concludes. Its primary purpose is to maintain the student's "status quo" while a dispute over the student's services or placement is pending. Specifically, during the pendency of special education proceedings brought pursuant to the IDEA, unless the State or local agency and the parents of the child otherwise agree, federal law requires that the child remain in his or her then-current educational placement.[10] The application of the stay-put provision to matters concerning expedited hearings in the disciplinary context is governed by a different set of rules under the IDEA.[11]

2. The stay-put provision serves as an automatic preliminary injunction.[12] When stay-put is invoked (i.e., upon filing of the hearing complaint), it is unnecessary for the parent to demonstrate entitlement to the student's then-current educational placement or services under the standards generally governing requests for preliminary injunctive relief (e.g., irreparable harm, likelihood of success).[13] Moreover, it is not necessary to await an appearance before, and decision by, a hearing officer where the student's current educational placement is not in dispute.[14] Under these circumstances, the school district should implement the stay-put automatically.[15]

B. Current Placement

1. The stay-put provision requires that the student remain in the then-current educational placement during the pendency of the dispute, unless there is agreement to the contrary between the parents and the public agency. The IDEA does not define the term, "educational placement," much less the term, "then-current educational

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[10] *See* 20 U.S.C. § 1415(j); 34 C.F.R. § 300.518(a).

[11] *See* 34 C.F.R. § 300.533.

[12] *Zvi v. Ambach*, 694 F.2d 904, 554 IDELR 226 (2d Cir. 1982); *Cosgrove v. Bd. of Educ.*, 175 F. Supp. 2d 375, 35 IDELR 8 (N.D.N.Y. 2001).

[13] *Id. See also Joshua A. v. Rocklin Unified Sch. Dist.*, 559 F.3d 1036, 52 IDELR 1 (9th Cir. 2009); *Wagner v. Bd. of Educ. of Montgomery County*, 335 F.3d 297, 39 IDELR 122 (4th Cir. 2003); *Drinker v. Colonial Sch. Dist.*, 78 F.3d 859 (3d Cir. 1996)

[14] *Casey K. v. St. Anne Cmty. High Sch. Dist. No. 302*, 400 F.3d 508, 43 IDELR 1 (7th Cir. 2005), *cert. denied*, 546 U.S. 821, 110 LRP 67820 (2005). *Letter to Goldstein*, 60 IDELR 200 (OSEP 2012).

[15] *Id.*

placement."[16]

2. Courts have explained that a child's educational placement "falls somewhere between the physical school attended by a child and the abstract goals of a child's IEP."[17] Just as perplexing, is the term "then-current educational placement," which enjoys varying, but related, interpretations among the circuits.[18] It has been interpreted to mean typically the placement described in the student's most recently implemented IEP (Ninth Circuit paraphrasing the Sixth Circuit; Second Circuit);[19] and the operative placement actually functioning at the time when the dispute arises (i.e., when the hearing complaint is filed) (Sixth Circuit, and adopted by the Third Circuit; Second Circuit).[20]

3. Simply changing the location does not extend stay-put protection to the student unless the parents identify, at a minimum, that the location change resulted in a fundamental change in, or elimination of, a basic element of the then-current education placement.[21]

C. Unavailability of Current Placement

1. When a program/school is no longer available, courts have either required the public agency to place the student in a program that is materially and substantially similar to the former program[22] or have

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[16] *Bd. of Educ. v. Schutz*, 290 F.3d 476, 103 LRP 37743 (2d Cir. 2002); *Cosgrove v. Bd. of Educ.*, 175 F. Supp. 2d 375, 35 IDELR 8 (N.D.N.Y. 2001).

[17] *Bd. of Educ. of Cmty. High Sch. Dist. No. 218 v. Ill. State Bd. of Educ.*, 103 F.3d 545, 25 IDELR 132 (7th Cir. 1996).

[18] *See Johnson v. Special Educ. Hearing Office*, 287 F.3d 1176 (9th Cir. 2002); *Drinker v. Colonial Sch. Dist.*, 78 F.3d 859 (3d Cir. 1996); *Thomas v. Cincinnati Bd. of Educ.*, 918 F.2d 618 (6th Cir. 1990).

[19] *Johnson v. Special Educ. Hearing Office*, 287 F.3d 1176 (9th Cir. 2002). *Cf. Mackey v. Bd. of Educ. for Arlington Cent. Sch. Dist.*, 386 F.3d 158, 42 IDELR 2 (2d Cir. 2004) (defining then-current educational placement to mean either the placement described in the student's most recently implemented IEP, the operative placement actually functioning at the time stay-put was invoked, or the placement at the time of the previously implemented IEP).

[20] *Thomas v. Cincinnati Bd. of Educ.*, 918 F.2d 618, 17 IDELR 113 (6th Cir. 1990); *Drinker v. Colonial Sch. Dist.*, 78 F.3d 859 (3d Cir. 1996). *See also Mackey*, *supra*.

[21] *See*, *e.g.*, *Oliver C. v. Haw. Dep't of Educ.*, 762 F. App'x 413, 74 IDELR 1 (9th Cir. 2019). *See also Lunceford v. District of Columbia Bd. of Educ.*, 745 F.2d 1577, 556 IDELR 270 (D.C. Cir. 1984) (defining change in placement).

[22] *Ms. S. v. Vashon Island Sch. Dist.*, 337 F.3d 1115, 39 IDELR 154 (9th Cir. 2003); *John M. v. Bd. of Educ.*, 502 F.3d 708, 48 IDELR 177 (7th Cir. 2007); *Knight v. Dist. of Columbia*, 877 F.2d 1025, 441 IDELR 505 (D.C. Cir. 1989). *See also Tindell v. Evansville-Vanderburgh Sch. Corp.*, 54 IDELR 7 (S.D. Ind. 2010) (holding that a

required parents to seek a preliminary injunction in court.[23]

D. iHope, iBrain, Oh My!

1. A recent spate of federal district court cases from New York challenge conventional thinking on stay-put. The cases all involve students with traumatic brain injury (TBI) who are eligible under the IDEA and who initially attended the iHope school but were subsequently unilaterally transferred by their parents to the iBrain school. Funding for the iHope school was either through a settlement agreement between the parents and the school district or a favorable hearing decision. Upon transfer, the parents filed a due process complaint seeking tuition reimbursement in the iBrain school, as well as an immediate order requiring the school district to fund the iBrain school pursuant to IDEA's stay-put provision. The New York federal district courts are split on granting funding for the parent's preferred stay-put placement during the pendency of the litigation. The Second Circuit has not addressed the issue.

   A summary of a select number of these cases follows.

2. Judicial Decisions

   a. *de Paulino v. New York City Dep't of Educ.*, 74 IDELR 40 (S.D.N.Y. 2019) (for school district). Here, in school year (SY) 1, the parents filed a due process complaint seeking tuition reimbursement for their unilateral placement of their child in the iHope school. The hearing officer found in favor of the parents and granted tuition reimbursement. The school district did not appeal. In SY 2, the parents unilaterally enrolled the student in the iBrain school and filed a second due process complaint seeking tuition reimbursement. At the outset, the parents sought a stay-put order requiring the school district to fund the student's placement at iBrain because the iBrain program was "substantially similar" to iHope. The hearing officer declined to rule that iBrain was the student's pendent placement because the program at iHope continued to be available to the student. Parents appealed.

      The district court affirmed the hearing officer, in part, because the parents did not "first challenge the adequacy of

college internship program was comparable to the residential facility which was about to close); *Letter to Fisher*, 21 IDELR 992 (OSEP 1994).

[23] *Wagner v. Bd. of Educ. of Montgomery County*, 335 F.3d 297, 39 IDELR 122 (4th Cir. 2003).

the district's placement's IEP." It further noted that removing the student from iHope and allowing stay-put in iBrain "risks violating [the student's] right to a stable learning environment."

b. *Abrams v. New York City Dep't of Educ.*, 74 IDELR 156 (S.D.N.Y. 2019) (for parents). In SY 1, the parents filed a due process complaint seeking tuition reimbursement in the iHope school. The hearing officer issued an interim order requiring the school district to fund the iHope school until the due process proceedings concluded. Ultimately, the hearing officer issued a decision finding the iHope school appropriate and awarded reimbursement to the parents. The decision was not appealed. However, prior to the decision on SY 1, the parents unilaterally placed the student in the iBrain school and filed a second due process complaint seeking tuition reimbursement. The same hearing officer presided over the SY 2 complaint and issued a second interim order finding the iBrain program substantially similar to the program available at the iHope school and requiring the school district to fund it during the pendency of the litigation. The school district appealed, claiming that the student's unilateral placement in the iBrain school amounted to a unilateral change in placement.

   The district court rejected the school district's claim, holding that placement in the iBrain program, albeit unilateral by the parents, was not a change in placement but rather a change in location because the iBrain program was deemed substantially similar to the program offered at iHope.

c. *Navarro v. New York City Dep't of Educ.*, 384 F. Supp. 3d 441, 74 IDELR 202 (S.D.N.Y. 2019) (for parents). Here, in SY 1, the parents unilaterally enrolled the student in the iHope program and sought tuition reimbursement. The parents prevailed. Prior to the hearing officer's decision, the school district drafted a new IEP placing the student in a public school program. The hearing officer's decision, however, required the school district to reconvene an IEP meeting and incorporate "all items of the iHope proposed IEP." The decision was not appealed and the school district never reconvened an IEP meeting.

   In SY 2, the parents unilaterally enrolled the student in the iBrain school and filed a second due process complaint seeking tuition reimbursement. The parents sought an interim order identifying the iBrain school as the student's

stay-put placement. In opposition, the school district argued that the parents had the burden of establishing that the iHope program was no longer available to the student. The hearing officer, however, focused the arguments on whether the iBrain program was substantially similar to the iHope program and ultimately determined that it was not because the student had not been provided initially with required vision therapy and parent counseling. The parents appealed the interim order (which they can under state and case law).

The district court reversed the hearing officer, finding that, although related services were not provided to the student initially, suggesting a change in placement because there was an "elimination" of a basic element of the education program, the programs were nonetheless substantially similar because the iBrain school subsequently provided make-up services. There was no "elimination" of services. The district court ordered funding of iBrain for the duration of the litigation.

d. *Angamarca v. New York City Dep't of Educ.*, 74 IDELR 229 (S.D.N.Y. 2019) (for school district). Here, in SY 1, the parents placed the student in iHope and sought tuition reimbursement. The parties reached an agreement. The agreement specifically provided that it could not be relied by either party for the proposition that iHope was the recommendation of the school district, that it constitutes an appropriate placement, or that it is the student's stay-put placement. In SY 2, the parents continued their unilateral placement of the student and requested tuition reimbursement. The parties subsequently entered into a similar agreement as above. In SY 3, the parents unilaterally placed the student in iBrain and sought tuition reimbursement. At the outset, the parents requested of the hearing officer a stay-put order requiring the school district to fund iBrain during the pendency of the hearing. In support of their request, the parents argued that in SY 1, the school district had recommended a non-public school for the student but one had not been identified; iHope was able to implement the IEP and did so. As such, because the SY 1 IEP called for a non-public school, it was the pendent placement. And, because iHope was implementing the IEP, and iBrain was "substantially similar" to the program at iHope, iBrain was, in effect, implementing the SY 1 IEP.

The hearing officer rejected the parents' argument and the parents appealed to a State review officer. The State review

officer agreed with the hearing officer that iBrain was not the student's stay-put but that an earlier IEP than the SY 1 IEP was the stay-put. The parents appealed to the district court. The court rejected the State review officer's conclusion, finding, in part, that it would not be appropriate to implement the services included in an IEP that was five years old and that the most reasonable approach to determine what the student's then-current educational placement would be was to identify the operative placement actually functioning at the time the parents invoked the stay-put provision.

However, because the parents had filed their due process complaint on the same day that the student had started in the iBrain school, the district court determined that the iBrain school could not reasonably be regarded as the then-current educational placement. It also found that iBrain was not substantially similar to iHope because iBrain could not offer vision therapy and parent counseling as of the time the student started attending the program. Accordingly, the district court determined iHope to be the student's stay-put.

e. *Neske v. New York City Dep't of Educ.*, 74 IDELR 249 (S.D.N.Y 2019), *reconsideration denied*, 75 IDELR 152 (S.D.N.Y. 2019) (for school district). In SY 1, the parents unilaterally placed the student in the iHope school and sought tuition reimbursement. The parents prevailed at the hearing and the school district did not appeal the decision. In SY 2, the parents enrolled the student in the iBrain school and filed a second due process complaint seeking tuition reimbursement. The parents requested a stay-put order requiring the school district to fund the iBrain school during the pendency of the litigation because the iBrain program was substantially similar to the iHope program. The hearing office disagreed, concluding that the parents could not "port their funding to another school if the child's previously agreed-upon placement, here iHope, is still available." And, if the program was still available, the hearing officer reasoned, the "substantially similar" principle was irrelevant. The parents appealed the interim order to the State review officer. The State review officer, however, dismissed the complaint as untimely. The parents appealed to the district court.

The district court rejected the parents' "substantially similar" argument and held that the IDEA "does not require school districts to provide a portable voucher – at least not when, as

here, the original placement remains an available option." To accept the substantially similar argument, the court reasoned, when the original placement is adequate and continues to be available would grant parents veto power to reject the school district's choice of location and allow the parents to enroll their child in their preferred school, file a due process complaint against the school district, and seek automatic funding through the stay-put provision – funding which would not be reimbursable to the school district even if the school district ultimately prevailed in the litigation.

f. *Soria v. New York City Dep't of Educ.*, 74 IDELR 293 (S.D.N.Y. 2019) (for parents). Here, in SY 1, the parents unilaterally placed the student in the iHope program, sought tuition reimbursement, and prevailed at the hearing. In SY 2, the parents enrolled the student in the iBrain school and filed a second due process complaint seeking tuition reimbursement. Like the other cases, the parents here too sought an interim order requiring the school district to fund the iBrain program during the pendency of the litigation, arguing that the two programs were substantially similar. The hearing officer denied the request and the parents appealed to the State review officer. The State review officer dismissed the complaint on the grounds that he did not have sufficient information to determine whether the programs were substantially similar. The State review officer, however, did not take additional evidence as he is authorized to do under the IDEA and state law. The parents appealed to the district court.

   The district court, citing to the earlier cases, found that parents may unilaterally transfer their child from an established pendency placement to another educational setting provided the two programs are substantially similar. The district court discounted any minor deficiencies in services because "substantially similar … does not require sameness."

g. *Melendez v. New York City Dep't of Educ.*, 75 IDELR 129 (S.D.N.Y. 2019) (for parents) (rejecting the school district's argument that iHope is the pendent placement and remanding the case to the hearing officer to determine whether the programs are substantially similar and, if so, ordering the school district to fund iBrain up to the amount that it would have cost the school district had it provided the services in iHope).

h. *Hidalgo v. New York City Dep't of Educ.*, 75 IDELR 159 (S.D.N.Y. 2019) (for school district). For SY 1, the parents and the school district agreed to fund the student's placement in iHope. The agreement allowed the parties to renew the funding for an additional two school years in iHope. It also provided that the agreement could not be used be either party to establish iHope as the student's pendent placement.

The student attended iHope for SY 1 and SY 2. In SY 3, the parents enrolled the student in iBrain and filed a due process complaint, requesting, among other things, stay-put funding in iBrain during the pendency of the litigation. The hearing officer denied the stay-put request, finding that pendency lied in the IEP for the school year that preceded SY 1. The parents appealed to the State review officer who largely affirmed the hearing officer, except that she found that the student's pendency placement should be based on an even earlier IEP than the one the hearing officer identified. The parents appealed to the district court.

Citing to *Neske*, *supra*, the district court rejected the parents' substantially similar argument. However, the district court stopped short of adopting the State review officer's finding that the operative placement for pendency purposes was the last agreed upon IEP in place prior to the student attending iHope. The even older IEP provided for significantly fewer services than what had been provided to the student in iHope during her three years in the program. Nonetheless, the district court did agree that the operative placement factor – more so than the last agreed upon IEP approach – better aligns with the purposes of the stay-put provision in identifying the student's stay-put placement.

In applying the operative placement factor, the district court found that, because the parents moved the student to iBrain on the same day they filed their due process complaint, iBrain could not be deemed to be the operative placement actually functioning at the time the due process hearing commenced. And, given the circumstances, iHope was the operative placement despite the language in the settlement agreement to the contrary:

> Where, as here, the last agreed upon IEP cannot establish [the student's] pendency, … [the student's] placement at iHope can constitute her pendency placement, notwithstanding that the settlement

agreement[ ] provide no independent basis to make such a finding.

IV. EDUCATION RECORDS

A. Electronic Records, Generally

Both FERPA and the IDEA grant parents the right to inspect their child's education records. Electronic records, such as emails, photos, and video recordings, may qualify as education records. IDEA refers the reader to FERPA for the definition of an education record.[24] FERPA defines an education record as "records, files, documents, and other materials which … contain information directly related to a student … and … are maintained by an educational agency or institution or by a person acting for such agency or institution.[25] Education records do not include those records that are kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person except as a temporary substitute for the maker of the record.[26]

An electronic record typically qualifies as education record when it includes information specific to the student and it is maintained by the school district.[27]

In *Washoe* (2014), *infra*, the Nevada Department of Education (NDE) determined that an email that exists only in electronic form in a teacher's inbox is not considered "maintained" by the school district. However, with today's electronic advancements, including cloud computing, central servers, and the like, the rationale in *Washoe* is not easily adaptable across school district lines and somewhat suspect.[28]

B. Decisions / Federal Policy/Guidance

1. *Letter to Erquiaga*, 18 FAB 8 (FPCO 2014). Parents are entitled to inspect and review education records maintained by state educational agencies (SEA), such as, for example, state assessments, even if the information is not coded in a readable format. The SEA would, at a minimum, be required to respond to reasonable requests for explanations and interpretations of records that are not readily readable because of how the information is

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[24] *See* 34 C.F.R. § 300.611(b).

[25] 20 U.S.C. § 1232(g)(a)(4)(A).

[26] 34 C.F.R. § 99.3.

[27] *Owasso Independent Sch. Dist. No. I-011 v. Falvo*, 534 U.S. 426, 36 IDELR 62 (2002).

[28] *Morgan Hill Concerned Parents Association v. California Dep't of Educ.*, 67 IDELR 83 (E.D. Cal. 2016).

coded and stored.

2. *Washoe County Sch. Dist.*, 114 LRP 25728 (SEA NV 2014). The parent of a student with autism requested to inspect and review copies of email communications regarding the student's roller skating observation prior to a scheduled IEP team meeting. The school district, however, printed and delivered the emails to the parent several days after the IEP team meeting. The parent filed a State complaint.

   The NDE determined that the school district never "maintained" the requested emails. Rather, the emails only existed in electronic form and were never printed. The NDE further determined that emails are maintained as education records only when they are kept in a filing cabinet in a records room at the school, saved on a permanent secure database, or printed and placed in a student's file. Because the emails in question where never saved or printed, the NDE concluded that the school district had not violated FERPA or the IDEA when it did not comply with the parent's inspection request.

3. *Letter to Anonymous*, 115 LRP 33158 (FPCO 2015). There is no obligation on the part of the school district to notify a parent of a district's compliance with a subpoena received from the parent's former spouse with joint custody seeking their children's education records.

4. *Washoe County Sch. Dist.*, 115 LRP 34836 (SEA NV 2015). Overwhelmed by the perceived volume of the student's school file, a parent requested copies of the entire file but the school district declined to make the copies. Instead, the school district provided the parent with an unlimited amount of time and sessions to review the student's records and assigned two record officers to assist the parent in making copies of individual records and to answer the parent's questions. The parent filed a State complaint.

   The NDE determined that a district is not required to provide the parent copies of the student's records except under limited circumstances (i.e., where the failure to provide the copies would effectively prevent the parent from exercising the right to inspect and review the records).

5. *Letter to Flores*, 115 LRP 39433 (FPCO 2015). Providing a parent with an exact, electronic copy of an education record does not obligate the school district to make the original of that document available to the parent upon request.

FERPA does not prescribe the particular length of time a school district is required to maintain education records.

6. *Letter to Anonymous*, 115 LRP 40689 (FPCO 2015). The fact that the parent requested access to all of her child's education records from the past three school years, including all records related to her child's IEP, but believed she received only incomplete records, was not enough to sustained a FERPA complaint investigation absent the parent providing evidence that she specifically asked for the records that she identified as missing in her initial request or in a follow-up request. The FPCO opined that, when a parent makes a blanket request for records, s/he should submit a follow-up request clarifying the additional records s/he believes exist but were not provided.

7. *Letter to Anonymous*, 115 LRP 40693 (FPCO 2015). A school district has no obligation to comply with a standing request by a parent for access to education records. FERPA only requires that the school district comply with each individual request for access.

8. *Letter to Anonymous*, 20 FAB 8 (FPCO 2016). Providing parents access to their children's education records through the school district's internet portal is permissible practice and does not deprive the parents of their right to inspect and review education records, unless the parents do not have an ability to access the school district's internet portal.

9. *Morgan Hill Concerned Parents Association v. California Dep't of Educ.*, 67 IDELR 83 (E.D. Cal. 2016). In response to a public outcry, the district court walked back an earlier order requiring the California Department of Education to release millions of student records to two parent advocate groups without requiring individual notices to each affected student or parent. The court recognize the challenges of applying FERPA in a modern world:

> The response to the notice thus far demonstrates on the one hand, the imperfect fit between the FERPA regulation crafted in and largely unchanged since the 1970s, before the internet as we know it was a gleam in any but an academics' eye, and on the other, the social media environment in which information is churned and transformed in a nanosecond or less.

10. *Letter to Anonymous*, 20 FAB 17 (FPCO 2016); *Letter to Anonymous*, 22 FAB 30 (FPCO 2018). FERPA requires school districts to provide parents access to their children's education records within 45 calendar days of receipt of the request. Parents

have a right to inspect and review the education records but not necessarily to be provided with copies of the education records. However, if circumstances effectively prevent the parents from exercising their right to inspect and review (e.g., parent does not live within commuting distance of the school district), the school district must either provide copies or make other arrangements.

The school district is not required to create lost or destroyed education records. However, the school district may not destroy education records if there is an outstanding request to inspect and review the records. Neither is a district obligated to preserve data once it is shared with the parent and destroyed in accordance with its record retention policy.

11. *Letter to Anonymous,* 22 FAB 23 (FPCO 2018). A school district does not violate FERPA when it outsources services or functions to contractors, consultants, volunteers, or other third parties and discloses personally identifiable information to such third parties, provided the third party qualifies as a "school official" (which is broadly defined) with a "legitimate educational interest." (A school official has a legitimate educational interest if the official needs to review an education record in order to fulfill his or her professional responsibility.)

12. *Letter to Anonymous*, 22 FAB 27 (FPCO 2018). FERPA does not generally require a school district to maintain particular education records that contain specific information such as audiotapes, videotapes, or documents of communication. FERPA's privacy protections only extend to those education records that the school selects to maintain.

    FERPA does not specify a length of time that education must be kept. A school district may destroy any education record without notice to the parent, and consistent with its record retention policy, unless there is an outstanding request by the parent to inspect and review those records.

13. *Letter to Anonymous*, 22 FAB 30 (FPCO 2018). FERPA does not require a school to keep education records in any particular file or location.

14. *Burnett v. San Mateo-Foster City Sch. Dist.*, 739 F. App'x 870, 72 IDELR 147 (9th Cir. 2018). The Ninth Circuit affirmed the lower court, finding that, under the IDEA, which uses the same definition of education records as FERPA, a school district is not required to turn over emails that are not "maintained" in a filing cabinet or permanent secure database. Here, the parents requested copies of

all emails pertaining to their child. The school district only turned over emails that were printed and added to the student's physical file. In affirming the lower court, the Ninth Circuit, citing to *Owasso Indep. Sch. Dist. No. I-011 v. Falvo*, 534 U.S. 426, 36 IDELR 62 (2002), defined education records that are "maintained" to records that are "kept in a filing cabinet in a records room at the school or on a permanent secure database."

15. *FAQs on Photos and Videos under FERPA*, 118 LRP 16524 (FPCO 2018). A photo or video of a student may qualify as an education record. This Q & A provides answers to, for example, when is a photo or video an education record, whether the same image can be the education record of more than one student and, if so, can the parents of one of the students view the image, whether a school district can charge to redact/segregate images, and whether FERPA permits the parents' attorney to view the images with the parents.

16. *J.H. v. Rose Tree Media Sch. Dist.*, 72 IDELR 265 (E.D. Pa. 2018). Video footage of a student with a disability assaulting another student in the school cafeteria was used to support, in part, IEP team's determination that the conduct was not a manifestation of the student's disability.

C. Other Access

Though a school district might shield itself from having to provide access to an electronic record to a parent under FERPA or the IDEA because the school district deems the electronic record as not being an education record or it not being "maintained," a determination that is subject to review by an IDEA hearing officer and/or court, a parent may still compel its production through a subpoena or public records request. In other words, in restricting access to legitimate education records like electronic records under the belief that there are not education records or "maintained" by the school district, the school district may very well go from the lion's den to a pack of wolves.

D. Takeaways

1. Aside from FERPA and the IDEA, other laws or legal proceedings may require the school district to provide access to emails, photos, and video recordings. School districts should adopt an electronic records retention policy that advises school personnel and parents alike on how the school district handles electronic records, including whether/how they are maintained and purged.

2. School personnel should print and file substantive emails in the student's physical file or upload them to a central database. Either

approach would allow the parent with a reasonable point of access to review their student's education record, thereby reducing the likelihood of expensive and time-consuming searches.

3. School districts should adopt practices that restrict the content of an email to one student. This approach would avoid time-consuming and costly review and redaction of all emails in which the student is mentioned.

4. Given the access to emails one way (e.g., FERPA) or another (e.g., subpoena), school personnel should be trained to be sensitive to how messages are worded. Speaking negatively about a parent and/or a student might sour the relationship between the parent and the school district.

5. School districts should not delay in providing the parent with access to his or her child's education record. The IDEA requires that access be given prior to an IEP team meeting, resolution meeting, or due process hearing, but in no case later than 45 calendar days.[29] Delays only make parents suspect of the school district's intentions.

6. School districts should work with the parent to narrow down record requests. It may very well be that the parent does not require access to all of the student's education records. Knowing in advance what the parent is seeking, affords the school district an opportunity to gather all that is available prior to the parent coming in to review and inspect the education records.

7. School districts should reflect on why a parent is seeking particular education records. It may be an indication of a festering concern. And, if so, the school district should voluntarily agree to address the parent's concerns at an IEP team meeting.

8. If litigation is foreseen or in progress, school districts should not destroy any emails, photos, or video recordings pertaining to the student or the subject matter of the impending/pending litigation, whether deemed education records or not.

9. School districts should keep photo and video recordings intended solely for law enforcement purposes within the school district's law enforcement unit. Any "commingling" of electronic recordings between law enforcement and individuals tasked with school-related disciplinary functions, will likely make the recordings education record.

[29] 34 C.F.R. § 300.613.

10. The use of personal, smart devices (e.g., smart phones, tablets) to record official school business (e.g., IEP meetings, school fights) raises some thorny issues as to whether the recording is an education record and whether the school district can later compel the owner of the device to surrender its context when requested. School districts should develop policies establishing parameters.

11. Familiarity between parents and teachers may lead to texting between the two to provide updates on progress or other matters. School districts should consider limiting the use of personal devices to communicate with parents, especially through texts. Text messages are typically deleted, leaving school districts and parents alike possibly at a disadvantage regarding important communications.

12. Provide access to video recordings even if it includes personally identifiable information of other students. Obviously, any reasonable precautions that can be taken before providing unfettered access should be considered and undertaken. However, when the video recording is the "best evidence" of what occurred, hiding behind FERPA may do more harm than good.

THIS OUTLINE IS INTENDED TO PROVIDE WORKSHOP PARTICIPANTS WITH A SUMMARY OF SELECTED STATUTORY PROVISIONS AND/OR SELECTED JUDICIAL INTERPRETATIONS OF THE LAW. IN USING THIS OUTLINE, THE PRESENTER IS NOT RENDERING LEGAL ADVICE TO THE PARTICIPANTS.