IDEA Legal Update: Lessons Learned

CADRE

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Introduction

This outline is intended to summarize some of the significant judicial decisions under the IDEA in the past year. It is important that those of you who are dispute resolution decision makers (such as Administrative Law Judges, hearing officers and state complaint investigators) read the full decision before relying on it's relevancy in a dispute that you will be deciding. Also, participants should be mindful that this outline does not address any state specific statutes or regulations which may exceed IDEA requirements.

I. Due Process Issues/United States Supreme Court

A. A former student who is deaf, now 23 years old, attended the public school in this case from ages 9 through 20. It was alleged that although the student was assigned individual aides they were unqualified in sign language or absent from the classroom for hours at a time. It was also alleged that the school district misrepresented the student's educational progress to his parents awarding him inflated grades and advancing him from grade to grade. His parents were first informed that he would not receive a diploma just months before graduation.

The adult student then initiated a due process hearing. The parties agreed to settle the IDEA dispute by paying for him to attend the State School for the Deaf and paying for his attorney's fees. Subsequently, the former student sued the school district under the ADA and state law alleging he was discriminated against on the basis of disability. He sought compensatory monetary damages for his emotional distress. The school district filed a Motion to Dismiss. The District Court, affirmed by the Court of Appeals, dismissed the

lawsuit for failure to exhaust the IDEA's administrative due process procedures. The former student appealed the dismissal.
The Supreme Court unanimously held that exhaustion of the IDEA due process procedures was not required when seeking only compensatory damages which is not an available remedy under the IDEA. Exhaustion of administrative remedies only applies for a denial of FAPE when seeking relief that is available under the IDEA. The Court remanded the case for further proceedings under the ADA. Perez v. Sturgis Public Schools 82 Individuals With Disabilities Education Law Report (IDELR) 213 (United States Supreme Court (2023)). Note: The former student will still need prove his case under the ADA for monetary damages by showing intentional discrimination or deliberate indifference.

II. Child Find/Evaluation Issues

A. The parent of a student with a disability disagreed with the IEP developed for the student which called for services provided through the district's community based transition program at the local community college. The parent eventually revoked her consent for special education services. The school district issued a prior written notice informing the parent that based on her revocation the student would no longer be deemed eligible to receive special education services.
Approximately three weeks later the parent notified the district she was requesting a special education evaluation to determine the student's eligibility. The last evaluation that was conducted was two years old.
The school district proposed a new evaluation consisting of a review of existing data, an academic evaluation, a student interview to determine the student's needs, strengths and preferences and an age appropriate transition assessment. The parent objected to the transition assessment and the student interview. Although the school district offered to ensure that the assessments and interview were conducted in a manner that was comfortable for the student and to ensure the results were valid and reliable the parent nevertheless refused to consent to the evaluation.
The school district initiated a due process hearing. The Administrative Law Judge, affirmed by the District Court, ordered the evaluation over the parent's refusal. The parent appealed.
The Court of Appeals held that the evaluations take place. Since the

student was over 16 years of age, the school district was legally required to include age appropriate transition assessments and to take into account the student's strengths, preferences and interests. Such information was necessary to develop appropriate IEPs if the student was deemed eligible. C.M.E. v. Shoreline School District 123 LRP 9647 (United States Court of Appeals, 9th Circuit (2023)). Note: this is an unpublished decision.

B. The family of an 8th grade student moved into a new state for the school year. The parent met with the school's counselor and shared information that the student had been struggling with behavior mostly at home.
The student started to engage in misconduct in 8th grade (being disrespectful to teachers, being rude, not following directions, etc.)
The parent emailed the teachers requesting assistance and interventions since the student was not completing his homework and his grades were terrible. A meeting was held with the parent and school personnel where it was agreed that additional supports were needed to provide greater structure for the student and the availability of tutoring services was discussed.
The next day there was another incident at school resulting in an in-school suspension. That night the student's behavior escalated at home. The student was admitted to a hospital setting for several days. Upon discharge, the student was diagnosed as having a general anxiety disorder, conduct disorder and impulse-control disorder.
The parent shared this information with the school counselor who started the process for developing a Section 504 plan for the student.
Before the Section 504 meeting was held the student engaged in three disciplinary incidents the last of which involved a fight requiring the intervention of the school's resource officer. The student was arrested for disorderly conduct and resisting arrest with both charges being eventually dropped. The student then awaited a disciplinary hearing to determine if he should be placed in the school district's alternative school.
Before the hearing took place, the parents withdrew the student and homeschooled him eventually enrolling him in a private school.
During this period of time, the student was re-admitted to the hospital due to home behavior and placed in a residential treatment center for three months.
The parents then initiated a due process hearing alleging a denial of child find and FAPE seeking reimbursement of educational expenses. In response to the resolution meeting held, the school agreed to evaluate the student. He was found eligible for IEP

services.

The Administrative Law Judge, affirmed by the District Court, found no violation of child find or FAPE. The Court of Appeals held that in order to support a child find violation it must be shown that a school overlooked clear signs of a disability or that there was no rational justification for deciding not to evaluate the student. The Court concluded there was no child find violation.

The Court observed that the school used a "tiered response to intervention approach" so that students are not over identified or improperly referred to special education. Here, the school took action to provide additional structure for the student, provided tutoring resources, kept in communication with the parents and initiated the Section 504 process. Although "RTI" cannot be used to delay/deny a special education evaluation, the school did not violate child find by first attempting other interventions since the school need not evaluate every struggling student. Here, since the student had no history of receiving special education, attended the school district for a relatively short period of time and had recently moved into the state (a move that the parents acknowledged contributed to his behavior), the school did not overlook clear signs of a disability or failed to have a rational justification for deciding not to evaluate the student for special education.

Note: There was disagreement whether the parent had ever provided the school with a private neuropsychological evaluation concluding the student was IEP eligible. However, neither the report nor testimony from the Dr. who evaluated the student was ever entered into the evidentiary record.

Ja.B. v. Wilson County Board of Education 82 IDELR 191 (United States Court of Appeals, 6th Circuit (2023)).

C. A student who repeated kindergarten and attended first grade in a parochial school enrolled in a public school for second grade at the recommendation of the parochial school staff in order to receive reading support. The public school tested the student's reading ability and as a result the student received support from a reading teacher four days a week in both the second and third grades.

The parents requested a special education evaluation at the beginning of the fourth grade. The school conducted the evaluation including a full neurological assessment, classroom observations, standardized testing, progress monitoring data, grades, and information provided by the parents and teachers. The student was found ineligible since she was performing at an average level overall.

The parent obtained an independent evaluation. The evaluator conducted assessments with similar results to the schools. However, the evaluator's interpretation was different than the school's finding that the student had weaknesses in reading and written expression which would make her eligible for special education. Note: The evaluator used age norms when interpreting testing while the school used grade level norms since the student was retained and the school felt age norms would be inappropriate.

The parents then initiated a due process hearing alleging that the school violated its child find duties under the IDEA. The Court of Appeals, in affirming the hearing officer and District Court, held that the school did not violate child find. The school tested the student's reading ability when entering public school, provided reading support which was not considered special education, monitored the student's progress and promptly conducted a comprehensive evaluation when requested by the parent. The Court observed that this student "was not a student who was permitted to fall through the cracks". G.S. v. West Chester Area School District 81 IDELR 63 (United States Court of Appeals, 3rd Circuit (2022)). Note: This is an unpublished decision.

D. A student attended a private kindergarten where he started to have "meltdowns" toward the end of the year. The parents were asked to remove him. The parents had their student privately evaluated over the summer by a clinical psychologist who also was a school neuropsychologist who issued her report in October.

They enrolled their student for first grade in a public school but did not inform the school of the student's kindergarten experience or the private evaluations they obtained. The school staff recognized the student's behavioral challenges by mid-September. The school convened an Intervention Team which developed an intervention plan providing behavioral supports, basic skill instruction and extra reading support. The team monitored the student's progress and concluded that the interventions/supports were effective.

The private evaluator then issued her report which noted that the student posed a "challenging diagnostic challenge". The report concluded that the student had a language disorder, a pragmatic communication disorder and specific learning disability. The report also stated while the evaluation results were suggestive of autism and ADHD she did not include any diagnosis of those disabilities but she stated she couldn't rule them out either. The evaluator recommended that the school provide behavioral supports and academic supports in language arts. Even before receiving the report,

the school's intervention plan had been providing the student with the recommended supports.

The parents then made a referral for a special education evaluation even though it was not a recommendation of the private evaluator. The evaluation team met with the parents and private evaluator and developed an evaluation plan.

At the eligibility meeting held in February 2016, the Team considered the school's evaluations, the private evaluations and parent input. The Team, with the parent and private evaluator disagreeing, concluded that the student was not eligible for special education since the student was making progress in both behavior and language arts.

The parents continued to have their student evaluated. In the next year (2017), the private evaluator diagnosed the student as having autism and ADHD. After receiving the private evaluator's report, the school conducted additional evaluations, including the involvement of a psychiatrist, who agreed with the diagnoses of autism and ADHD. The Team met again in August of 2017and determined the student was eligible for special education and developed an IEP which the parents agreed to.

The parents filed a due process hearing challenging the initial ineligibility decision alleging that the school violated its child find responsibility by not finding the student eligible as having a SLD and Autism/ADHD in 2016. They requested that compensatory education be provided for a violation of child find for the period between the initial ineligibility decision and the eventual eligibility decision the following year.

The Court of Appeals, in affirming the decisions of the hearing officer and District Court, held that the school district did not violate child find. The Court noted as it relates to SLD, the law allows the school to use either a severe discrepancy formula or response to intervention (RTI) method in evaluating a student. Here, the school used RTI. The Court stated that a school district does not violate child find by not using the severe discrepancy option. The evidence supported that the student was receiving behavioral and academic supports under a plan, the school engaged in progress monitoring and the student made demonstrable progress.

Regarding the child find allegations pertaining to autism and ADHD, the Court noted the school proactively responded to the student's behavior and academic needs and conducted a special education evaluation in response to the parents' request. Although the initial private evaluator's report concluded that she could not rule out autism and ADHD, the Court held child find does not trigger a

school's obligation to evaluate a student for disabilities that cannot be ruled out. This is especially the case when the school would have to be re-administering several of the same assessments that the private evaluator just administered.
Immediately after the school was notified of the private evaluator's diagnosis of autism and ADHD one year later, the school evaluated the student and found him eligible. Therefore, the Court concluded that the school met its child find responsibilities. J.M. v. Summit City Board of Education 39 F.4th 126, 81 IDELR 91 (United States Court of Appeals, 3rd Circuit (2022))

III. Eligibility Issues

A. Prior to enrolling their student in kindergarten, the parents provided the school district a private psychological evaluation that diagnosed the student with an Autism Spectrum Disorder, General Anxiety Disorder and separation anxiety. The district conducted a special education evaluation at the parents' request.
The Team concluded, based on the evaluation, the student did not qualify for special education as a student with Autism. The parents requested an Independent Educational Evaluation from the district. The district denied the request and filed for a due process hearing. Prior to the hearing the parents obtained an IEE at their expense which concluded the student was eligible for special education under the emotional disturbance (ED) category based on his anxiety.
The parent alleged that the district's evaluation was not appropriate since it did not assess the student in all areas of suspected disability including ED. The Court of Appeals, in affirming the hearing officer and District Court, held that the school district's evaluation was appropriate (denying parental reimbursement for the IEE) and that the student was not eligible for special education as a student with an ED.
The Court found that the district's evaluation did include assessments of the student's emotional and behavioral functioning which covered anxiety. The evaluation data did not raise a suspicion that the student could qualify under the category of ED. Also, in order to qualify for special education as a student with an ED there must be evaluation data to show that the emotional disturbance conditions "adversely affect a child's educational performance" to a marked degree. Here, there was no evidence to show that the student's anxiety was exhibited in the school setting or that the student's educational performance was negatively impacted. Heather H. v. Northwest Independent School District 81 IDELR 32 (United

States Court of Appeals, 5th Circuit (2022)). Note: This is an unpublished decision.

B. A student who had been privately diagnosed with ADHD and anxiety was placed on a Section 504 support plan in kindergarten. The student achieved academic success and appropriate social skills through the third grade.
In the fourth grade the teacher observed that although the student was meeting or exceeding academic grade standards, he was argumentative, anxious, unorganized and engaged in escalating negative interactions with peers. At times the negative interactions resulted in physical altercations while being bullied. The parents complained about the pervasive bullying and also requested a special education evaluation.
The Team met to discuss eligibility after the assessments were completed. The Team determined that the student met the criteria for an Other Health Impairment but found the student ineligible since his disability did not "adversely affect his educational performance" requiring special education. The Team's decision was largely based on his academic grades and performance. The school psychologist disagreed with the Team's decision and recommended the student receive special education services such as school based mental health services that were beyond the accommodations and supports in the Section 504 plan. (Note that the school did not revise the Section 504 plan to incorporate the school psychologist's recommendations.)
The parents removed the student from the school district and requested a due process hearing contesting the ineligibility decision.
The Court held that the student should have been found eligible. In doing so, the Court stated that "academic success alone does not determine whether special education services are necessary". The student's increasing negative behaviors indicated that his needs were not being met through the interventions provided. Therefore, the school district denied the student a FAPE by not finding him eligible and developing an IEP with appropriate services and supports.
Rocklin Unified School District v. J.H. 80 IDELR 165 (United States District Court, Eastern District, California (2022).

C. A seventh grade student who was on a Section 504 plan was diagnosed by a private psychologist as having an Autism Spectrum Disorder. The parent provide the school the report and then requested a special education evaluation.
The school convened a Team that proposed an evaluation in several

areas including autism rating scales, adaptive behavior, vision and hearing, educational, speech-language, and occupational therapy. The Team, based on consideration of multiple sources of information including the completed evaluations, the private evaluations, student observation, parent input, and student classroom performance data, determined the student was not eligible for IEP services. The Team concluded the student did not meet the definition of autism under state policies.

The parent initiated a due process hearing. The Court of Appeals, in affirming the Administrative Law Judge, the State Review Officer and the District Court, upheld the Team's decision that the student was not eligible for special education. The Court stated that although the Team was required to consider multiple information sources, including the private evaluators reports, it was not required to defer to the private evaluators' opinions.

The parent alleged that not only did the student have a disability diagnosis but the student had "deficits", a "lack of meaningful progress" and problems with focus and inattentiveness." The Court found that these characteristics of a student underperforming under school standards, by themselves, is not indicative of a qualifying disability under the IDEA.

The parent also alleged that the school's violation of the timelines in conducting the evaluation resulted in denial of FAPE. The Court held that a procedural violation of the IDEA does not always warrant a remedy. Since the student was found ineligible for special education, he could not have been denied a FAPE. Miller v. Charlotte-Mecklenburg School Board of Education 123 LRP 12111 (United States Court of Appeals, 4th Circuit (2023)).

IV. IEP/FAPE

A. The U.S. Supreme Court in Board of Education of the Hendrick Hudson Central School District, et al. Rowley, et al. (102 S. Ct. 3034, IDELR 553:656 (1982)) held that an inquiry in determining whether a FAPE is provided is twofold:

1. Have the procedures set forth in the IDEA been adequately complied with?

2. Is the IEP reasonably calculated to enable the child to receive educational benefits?

B. Procedural Issues

1. The parents placed their student with autism in a private school for students with autism. In a prior due process decision, the hearing officer ordered reimbursement for the private placement and ordered that the student remain there for that school year. The IEP Team met to develop an IEP for the next school year after several unsuccessful attempts to find a mutually convenient date with the parents. The Team, other than the parents, determined that the LRE was Separate Public Facility which provided some interaction with peers who were non-disabled in a neighboring school.
The Court of Appeals, in affirming the hearing officer and District Court, upheld the decision of the Team. The Court found that there was no predetermination and that all Team members were able to fully participate in making the placement decision.
The Court also addressed two procedural issues raised by the parents in their appeal.
First, the Court held that the IEP Team did not need to include any teachers from the student's "home school" since there was no possibility that the student would be placed in the general education environment. The Team did include teachers from the private school and LEA representatives from the public school system.
Second, the parents alleged that the school violated the IDEA by not sending them prior written notice before the IEP meeting notifying them that the Team would be changing the student's placement. The Court clarified that the prior written notice was not sent to the parents prior to the IEP Team meeting since no placement decision had been made at that point. Proper prior written notice was provided to the parents after the IEP Team meeting informing them of the placement change and a summary of information and placement options discussed at the IEP meeting. Clarfeld v. Department of Education, State of Hawaii 80 IDELR 210 (United States Court of Appeals, 9th Circuit (2022)). Note: This is an unpublished decision. Appeal to the United States Supreme Court denied.

2. A student with autism and ADHD attended the local public school until his parents withdrew him. He was then enrolled by his parents in a virtual public charter school that was considered its own local education agency (LEA) under state

law. The charter school has been providing services under an IEP.
The parents then requested that the school district of residence develop an IEP offering the student a FAPE. The school district of residence refused stating that the charter school is the LEA for IDEA purposes and is responsible for providing FAPE.
The school district of residence stated that it was ready, willing and able to develop an IEP for the student if the student re-enrolled in the school district. The parents were given enrollment forms but refused to re-enroll the student.
The parents initiated a due process hearing against the school district of residence for failing to offer the student a FAPE.
The Court of Appeals, in affirming the Administrative Law Judge and District Court, held that the charter school was the LEA responsible for FAPE and therefore the school district LEA had no obligation to offer the student an IEP unless the student's parents enrolled him in the school district.
The Court contrasted this fact situation with one where a parent places their student in a private school. In that case the Courts have held that the resident school district must evaluate the student and, if eligible, offer the student a FAPE even if not yet enrolled in the school district. (For example, see Bellflower School District v. Lua (9th Circuit 2020). N.F. v. Antioch Unified School District 80 IDELR 267 (United States Court of Appeals, 9th Circuit (2022)) Note: This is an unpublished decision.

3. The parents of a fourth grade student requested a due process hearing alleging that FAPE was denied based on an inappropriate evaluation, lack of meaningful parental participation and inappropriate IEP goals and services.
The Court of Appeals held that FAPE was provided. The Court stated that the evaluation was appropriate. The school, with the parents' consent, conducted a comprehensive evaluation consisting of multiple assessments in all areas of suspected disability including spelling, writing, math and reading. The Team properly considered the Independent Education Evaluation the parents obtained which concluded the student had a SLD in reading and referenced the IEE in its report. Ultimately, the Team using the discrepancy standard, found the student qualified for special education in written expression and math but not in reading.

The parents requested that the school provide them with copies of the testing protocols prior to the IEP meeting. The school district refused the request for copies citing copyright law and the need to maintain the integrity of the tests. The school did invite the parents to inspect the protocols at the school and offered to have the school psychologist available to interpret and explain the results of the testing. The parents ultimately did inspect the records. The Court concluded that the lack of copies of the protocols did not prevent the parents from meaningfully participating in the development of the IEP.

Lastly, the Court held that the IEP contained measurable goals and services reasonably calculated to meet the student's needs in writing and math. Although the parents consented to the initial IEP they removed their student and placed him in a private school before the IEP was implemented. The Court rejected the parents' assertion that the student's progress at the private school indicated that the IEP was inappropriate especially when the school was never given the opportunity to implement the IEP. Daniels v. Northshore School District 81 IDELR 154 (United States Court of Appeals, 9th Circuit (2022)). Note: This is an unpublished decision.

C. Substantive Issues

1. In a unanimous decision the United States Supreme Court clarified the FAPE standard under the IDEA as established by the Court's previous decision in Board of Education of the Hendrick Hudson Central School District, et al. v. Rowley, et al. (102 S. Ct. 3034, 553 IDELR 656 (1982)). In doing so, the Court rejected the lower Court's decision which held that a FAPE means that an IEP confer an educational benefit "merely…more than de minimis".

The Supreme Court held that although their decision lays out a "general standard, not a formula" a school must offer an IEP "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances". The IEP provisions reflect "Rowley's expectations that, for most children, a FAPE will involve integration in the regular classroom and individualized special education calculated to achieve advancement from grade to grade". The Court noted that this decision does not attempt to elaborate on what "appropriate progress" will look like from case to case which

requires the IEP Team to have a prospective judgment of the child's circumstances based on a "fact intensive exercise". For those children not "fully integrated" in a regular classroom the IEP need not necessarily "aim for grade-level advancement" although the IEP must be "appropriately ambitious in light of his circumstances".
The Court observed that an IEP is a collaborative effort between families and school representatives to develop a plan for pursuing "academic and functional advancement". When a dispute does occur a Court "may fairly expect that those [school] authorities be able to offer a cogent and responsive explanation for their decision" (emphasis added) to show that the IEP offered the child a FAPE.
Endrew F. v. Douglas County School District RE-1 137 S.Ct. 988, 69 IDELR 174 (United States Supreme Court (2017)).

2. The parents of a second grader requested a special education evaluation due to their belief that their student had dyslexia based on a private evaluation they obtained prior to the school year. The school district conducted an evaluation and considered the private evaluation which stated that the student "showed a pattern consistent with a classic profile of the specific learning disability dyslexia".
The student was found eligible under the category of SLD and an IEP was developed addressing writing and reading using multi-sensory reading methods. The parents requested another IEP meeting and requested that the student's teachers be trained and use the Orton-Gillingham (OG) approach. Their request was denied. The student ended the second grade making progress in both special and general education but did not meet her IEP goals.
Another IEP meeting was held in the third grade where the parents renewed their request for the use of OG and asked that the student's disability category be changed to dyslexia. Their request was again denied by the Team although the amount of special education instruction was increased and new goals were developed.
The school district requested a due process hearing when it denied the parents' request for an IEE and the parents requested a hearing alleging FAPE was denied in the second and third grades. The Administrative Law Judge found for the school district which was affirmed by the District Court.
The Court of Appeals agreed. The Court found that the

school's assessments appropriately evaluated the student's reading and writing skills. In doing so, the Court stated "we therefore conclude that the District did not procedurally violate the IDEA when it found [the student] eligible for language-related services under the specific learning disabilities category rather than using the term 'dyslexia' ". The Court also held that the IEP need not address a specific methodology unless it is necessary to provide FAPE to the student. Here, the school's reading program used a multi-sensory approach adapting the principles of OG. The fact that the student did not meet all the grade level expectations is not determinative of FAPE. Although the student did not meet all of her goals she made meaningful progress toward them. The evidence supported the conclusion that the student's IEP provided the student a FAPE since it was tailored to the student's needs and the student made "appropriate educational progress" without the use of OG. Crofts v. Issaquah School District 80 IDELR 61 (United States Court of Appeals, 9th Circuit (2022)).

3. A student with a mild intellectual disability was placed in both a general and special education setting under her IEPs from second through fourth grade. The amount of time spent in a general education setting gradually decreased over the school years from 66% of the day to 40% of the day.
The student was performing on the first grade level while in the third and fourth grade. When the student finished the third grade the parent asked that the student be retained, however, the school district did not agree to the retention pursuant to school district policy.
In a mid 4th grade IEP review, the evidence showed that the student made progress, although limited, under her goals and objectives. An Independent Educational Evaluation report, considered by the IEP Team, concluded that the student's growth and progress were inconsistent. The IEE agreed that the student was performing on the first grade level.
The parent requested a due process hearing after the completion of the 4th grade. The parent alleged that FAPE had been denied based on the student's limited progress under her IEP and performance significantly below grade level.
The District Court, in affirming the Administrative Law Judge, held that the IEPs afforded the student a FAPE. In so holding, the Court stated that the appropriateness of an IEP

cannot be judged solely by evaluating a student's progress (or lack of progress) under their IEP. Although the student was performing below grade level, the Court, citing other case law, noted "Performing at grade level in not a reasonable expectation for all students and the IDEA does not require it when the student's characteristics make such a goal inappropriate."

The standard is whether the IEP, at the time it was developed, was reasonably calculated to allow the student to receive educational benefit and was "appropriately ambitious".

In this case, the student's IEP was revised after reviewing the student's third grade performance to include more special education instruction. In addition, the Team considered the benefits of academic and behavioral modeling in having the student attend a general education setting for part of the day.

In conclusion, the Court held that the IEPs met the standard in Endrew F. of being "appropriately ambitious" and allowed the student to receive both academic and nonacademic benefit. J.T. v. Denver Public Schools 82 IDELR 163 (United States District Court, Colorado (2023)).

V. Related Services

A. A student with extensive medical issues was non-verbal and non-ambulatory. The student had multiple needs including the need for a 1:1 registered nurse (RN) to provide suctioning to avoid the danger of asphyxiation. The student was provided with a RN in the pre-kindergarten program and kindergarten.

However, the parent (who is a LPN) removed the student from kindergarten after one day due to concern that the nurse was not properly performing the suctioning procedure and required additional special training. Around the same time the parent and school staff convened to review the "Physician's Order and Treatment Plan" for the student. The student's nurse raised a concern that the document appeared to have been altered which the parent admitted to. The school stated that the student could not attend the program until a corrected plan was in place from the student's doctor. Furthermore, the parent would not allow the nurse to contact the doctor. A corrected plan was eventually provided.

The RN then resigned. Although the school district posted the job opening and took other measures to find another RN they were unable to do so. As a result the student did not come to school for the remainder of the school year.

At the IEP meeting to develop the student's first grade IEP, the Team proposed a residential placement due to the inability to find a RN. The parent disagreed and filed a due process hearing.
The hearing officer held that there was no denial of FAPE due to the "impossibility of performance" since a RN could not be found and that residential placement was the only viable option. The State Review Officer reversed and remanded the case back to the hearing officer to determine a compensatory education award. The case was appealed to state court.
The Court first held that the RN reasonably declined to provide services under an altered treatment plan until an updated valid plan was provided by the student's doctor. However, the Court concluded that FAPE was denied after the RN resigned. The "impossibility of performance" defense is at odds with the IDEA. Furthermore, the district did not provide sufficient evidence that it's inability to hire a RN was "objectively impossible".
The Court further stated that the residential placement decision by the Team was not based on the student's needs but was made for "administrative convenience". The Court ordered that the hearing officer determine the appropriate compensatory education that was owed to the student. Elmira City School District v. New York State Department of Education et. al. 80 IDELR 294 (New York Supreme Court, Appellate Division (2022)). Note: The Court noted that the dispute occurred prior to the COVID pandemic and therefore the guidance issued to schools during the pandemic regarding feasibility and safety concerns in providing services was not applicable.

VI. Placement/Least Restrictive Environment

A. A student with autism had an IEP for the 3rd grade which called for placement for 75% of the day in a regular education classroom with supplementary aids and services. The student had a full time aide who worked one on one with the student in the regular class to assist him in following a modified general education curriculum.
During three IEP Team reviews (mid 3rd grade, 4th grade and 5th grade), the Team agreed that the student had made progress socially and some progress academically but were concerned that the student was performing several grade levels below his non-disabled peers in math and language arts. The IEP Team proposed a blended program with the student being placed in a Special Day Program for 56% of the day with the remainder of the school day in a regular education class.
The parents objected to each of the IEP placement changes. The

school did not implement the placement changes in the 3rd or 4th grade keeping the student in the placement reflected in the original 3rd grade IEP. Before the 5th grade, the parents removed the student from the school. The parents hired a private tutor to provide a one to one education program.

The parents then initiated a due process hearing challenging the placement change. The Administrative Law Judge and District Court held that the blended program was the least restrictive environment. On appeal, the Court of Appeals reversed holding that performance at grade level is not always the appropriate standard for determining academic progress under the LRE analysis. The Court stated:

> For children whose developmental disabilities preclude them from achieving at the same level as their non-disabled peers, the appropriate benchmark for measuring the academic benefits they receive is progress toward meeting the academic goals established in the child's IEP.

In this case, the student had met 4 of his 6 academic goals for the 4th grade even though he was performing several grade levels below his peers. The fact that he progressed in a significantly modified curriculum in the regular class by receiving one to one instruction from his aide was deemed irrelevant by the Court.

The Court also noted that the parent introduced unrebutted expert testimony, based on a wealth of academic literature and peer-reviewed studies, establishing that the vast majority of students with disabilities perform better academically when they are educated in an inclusive general education classroom. D.R. v. Redondo Beach Unified School District 82 IDELR 77 (United States Court of Appeals, 9th Circuit (2022))

B. A student with Down Syndrome, ADHD and other health issues was placed in a kindergarten general education setting with inclusion supports and a modified curriculum. A FBA was conducted when behavioral challenges surfaced. The IEP was amended to add a behavior plan and the curriculum was modified further including below grade level standards.

The student's progress toward her IEP goals was inconsistent and inadequate and she was failing her subjects. As a result, there were 10 IEPs or amendments between the student's kindergarten year and third grade each time increasing supports in the general education setting and providing increased time receiving instruction in the resource room.

The IEP for third grade called for a "blended placement" where the

student would receive instruction in a self-contained classroom. The IEP would have provided the student the opportunity to participate in non-academic and extracurricular activities with peers who are not disabled. The parents disagreed with the IEP and filed a due process hearing.

The Court of Appeals, in affirming the hearing officer and District Court, held that the "blended placement" IEP was the least restrictive environment. In doing so, the Court noted that the school made more than "mere token gestures" to keep the student in a general education setting. Several supports, such as a modified curriculum, behavior plan, resource room services, were provided with increased intensity before determining a blended placement was appropriate.

The Court also held that measuring a student's progress requires a "holistic, overall academic record perspective" requiring consideration of multiple factors. Progress toward a student's IEP goals is "not dispositive" especially when the student's modified curriculum had such disparity with the general education curriculum.

Lastly, the Court determined that the student's benefit from being a general education setting was minimal at best. In fact, the evidence supported the conclusion that the student had a disruptive effect in class. The student bit, hit, kicked and struck staff and other students and frequently screamed and yelled.

Therefore, the "blended placement" was the least restrictive placement for this student considering the continuum of placements required under the IDEA. H.W. v. Comal Independent School District 81 IDELR 2 (United States Court of Appeals, 5th Circuit (2022))

C. A student with autism, who is bright and well behaved, experienced delays in communication skills, social/emotional behaviors and prevocational skills (such as staying on task, following directions, etc.). The student had started learning to use an Augmentative and Alternative device to communicate since he is mostly nonverbal. The student's IEP in his preschool years called for the first two years in a self-contained class and his last year in an inclusive preschool class which followed a general curriculum designed to prepare students for kindergarten. He also received "push in" services in speech and language and OT. His progress reports stated that he made "good progress toward his IEP goals".

The IEP developed for his kindergarten year stated that he would be placed in a general education class for the non-academic portions of the day (lunch, recess, music, art, physical education) and a special

education class for academic instruction (language arts, math, science, social studies). The parents objected wanting their student to be placed in a general education class full time with supplementary aids and services. A due process hearing complaint was filed.
The Court of Appeals, affirming the hearing officer and District Court, held that the proposed IEP was not his least restrictive environment. The Court found that the evidence supported the conclusion that the student had made progress under his IEP goals in an inclusive preschool class. It was also noted that the IEP Team did not see the need in preschool for the student to receive extended school year services or additional support. The parents' expert and the school's preschool staff also testified that the student's needs could be provided through supports and accommodations in the general education class.
Although the school district believed the special education class was "superior" to general education class for academic instruction, the Court concluded that the non-academic benefits (such as role modeling communication and other skills) the student would receive in a general education class also warrant consideration. The benefits the student would receive in the special class do not outweigh those of placement in a general education class. The Court stated that the school district's position "hews closer to an unwillingness to mainstream [the student] largely because it will be difficult to do so." That is not enough to overcome the legal requirement under the IDEA to place a student with a disability in the least restrictive environment in order to meet their educational needs. Knox County, Tennessee v. M.Q. 82 IDEL 214 (United States Court of Appeals, 6th Circuit (2023))

VII. Behavior and Discipline

A. United States Disciplinary Guidance Documents (July 2022)

1. IDEA Guidance issued by the Office of Special Education and Rehabilitative Services (OSERS)

The following guidance documents were issued by OSERS addressing disciplinary requirements under the IDEA and Section 504. The documents provide a summary of legal requirements but also include "best practices" which are not labeled as such.

Questions and Answers: Addressing the Needs of Children

With Disabilities and IDEA's Discipline Provisions (OSEP Q and A 22-02)

Website:
https://sites.ed.gov/idea/files/qa-addressing-the-needs-of-children-with-disabilities-and-idea-discipline-provisions.pdf

2. Section 504 Guidance issued by the Office for Civil Rights

Supporting Students With Disabilities and Avoiding Discriminatory Use of Student Discipline Under Section 504 of the Rehabilitation Act of 1973

Website:
https://www2.ed.gov/about.offices/list/ocr/docs/504-discipline-guidance

B. A student who is autistic and speech impaired demonstrated both physical and verbal aggression. In 3rd grade the student had nine significant behavior incidents in the fall (spitting on others, hitting staff, trying to stab another student with a pencil). The school conducted a re-evaluation and held an IEP meeting in October to consider the results. The IEP was amended to include behavior supports such as frequent breaks and providing an opportunity to run/walk outside with staff. The IEP also changed the student's placement to a special education class except for art, music and physical education.

The student did well until February when his behavior suddenly deteriorated. The Court noted that during this time the student's medication was changed, the family had a new baby and changed homes. The school district then recommended that an FBA be conducted and a BIP be developed.

Before that occurred, the student had a "meltdown" in class requiring that other students be evacuated. The teacher called 911 and after having a chair thrown at the police officers the student was restrained and handcuffed when the student failed to calm down. The parent picked the student up from school.

The parent then received a Notice to Evaluate including an FBA but did not provide consent. The day after receiving the notice the parent filed a due process hearing request alleging that the student was denied a FAPE due to insufficient behavioral supports including the lack of an FBA and BIP.

The student did not have any significant behavioral incidents for the

remainder of the school year.

The Court of Appeals, in affirming the hearing officer and District Court, held that the school had provided a FAPE. The IEP Team properly considered the student's behavior and included behavioral goals and supports when the student's behavior deteriorated. The IDEA requires the Team to "consider the use of positive behavioral interventions and supports and other strategies" when the student's behavior impedes their own learning or that of others. Courts have held this requirement is satisfied even in the absence of an FBA. (Note: The IDEA only mentions an FBA when a disciplinary change of placement has taken place. Also, some states have state laws that would require that an FBA be conducted even when a disciplinary change of placement has not occurred.)

In addition, the Court upheld the credibility decision of the hearing officer regarding the parent's expert. The expert testified that an FBA and BIP should have been developed at the beginning of the third grade. The expert never met with the student or spoke to his teachers. The Court held that the hearing officer was entitled to credit the testimony of the student's teachers over the testimony of the expert.

The Court concluded that the school's response to the escalating behaviors was appropriate. After the February incidents, the school proposed an FBA and an IEP meeting to consider adding a BIP and review of the student's educational setting. The student demonstrated "appropriate progress under the circumstances" both academically and behaviorally. It noted "the IDEA does not entitle [the student] to an IEP that remediates his behavioral problems in every instance" but one that enables the student to make progress, not perfection. He had several multi-month long periods during the school years with no significant behavioral issues. Therefore, the Court concluded that the student received some academic and nonacademic benefit under his IEP. B.S. v. Waxahachie Independent School District 123 LRP 10558 (United States Court of Appeals, 5th Circuit (2023)). Note: This is an unpublished decision.

C. The parents of a student with autism unilaterally placed their student in a private school for the 2020-2021 school year and initiated a due process hearing seeking reimbursement. The hearing officer found that FAPE was denied and ordered reimbursement.

The IEP Team ,with parent participation, met in the spring of 2021 to develop an IEP for the 2021-2022 school year. The IEP called for placement back in the public school. The parents then initiated another due process hearing seeking reimbursement for that school

year.

Among the issues raised was an allegation that the behavior intervention plan (BIP) developed for the student was not part of the IEP thus resulting in a substantive denial of FAPE.

The Court, affirming the hearing officer, held that FAPE was not denied. The IEP did include behavior goals, support and interventions in the supplementary aides and support section. Although a BIP was also developed the Court held that a BIP is only required under the IDEA in a disciplinary context. Therefore, "a BIP was not legally required for this student."

Note: The IDEA does not include a definition of a BIP even in the disciplinary section of the law. Therefore, it is important to understand how the term is used. The hearing officer in this case found that "BIPs are individualized plans that are used to train registered behavior technicians with specific strategies to address the target behaviors that the student is displaying." E.W. v Department of Education, State of Hawaii 123 LRP 11357 (United States District Court, Hawaii (2023)).

Note: The U.S. Department of Education issued non-binding guidance addressing disciplinary issues under the IDEA, including BIPs, in July of 2022. The Department stated:

> Behavioral intervention plan (BIP), although not defined in IDEA and its implementing regulations, is generally understood to mean a component of a child's educational program designed to address behaviors that interfere with the child's learning or that of others and behaviors that are inconsistent with school expectations.
>
> For a child with a disability whose behavior impedes their learning or that of others, and for whom the IEP Team has determined that a BIP is appropriate, or for a child with a disability whose violation of the code of student conduct is a manifestation of the child's disability, the IEP Team must include a BIP in the child's IEP (or, if a BIP already has been developed, review and modify it as necessary) to address the behavioral needs of the child.

Questions and Answers: Addressing the Needs of Children With Disabilities and IDEA's Discipline Provisions (OSEP Q and A 22-02) 81 IDELR 138 (United States Department of Education, Office of Special Education and Rehabilitative Services (2022))

D. A 10th grade student with autism, ADHD and depression attended general education classes and a special education academic lab. In May of the school year there was an incident in the school's bathroom. A friend of the student took an airsoft gun out of his backpack and pointed it at the student. When school authorities were informed the student with the airsoft gun was expelled.
Later that day, the student with a disability attended his monthly appointment at an Autism Center at the Children's Hospital. After he reported stressors at home and worsening depression he was admitted to the Pediatric Behavioral Unit for one week.
Upon discharge, the parents met with the school staff and consented to an "assessment revision" of his IEP. After the assessment, the IEP Team met and added counseling with a behavioral specialist to the IEP. The Team also developed a temporary safety plan for the student. The parents were provided the IEP and did not request any additional supports or services.
The parents did have a concern about their student being bullied. They met with the Assistant Superintendent to discuss their concerns. An investigation was conducted which concluded that the school was unable to substantiate any of the bullying allegations. However, based on the recommendation of the student's private therapist, the school district approved a transfer to a different high school for the 11th grade. The new high school unsuccessfully attempted to set up a meeting with the parents before the school year. The parents then notified the district that the student would be attending an out of state boarding school and requested a due process hearing seeking reimbursement.
The District Court, in affirming the hearing officer, found that the school offered the student a FAPE and therefore denied the request for reimbursement. Among the issues raised by the parents was the failure of the IEP to address bullying. The Court held that the parents were involved at the IEP meeting that added counseling but made no request for additional behavioral supports. The Court also noted that the school enacted a temporary safety plan (which was not part of the IEP) for the few remaining weeks of the school year and took disciplinary action against the student who had the airsoft gun. The Court did observe had the school obtained more information about continued bullying after the IEP meeting "perhaps it would have

been necessary to address the issue in later IEPs".
The parents also alleged that their agreement with the IEP improperly shifted the burden of complying with the IDEA off the school and onto the parents. The Court stated:

> While the onus is on the District to adequately address the student needs through the IEP process, the lack of contemporaneous concern over the IEP's adequacy from any party tends to suggest the IEP was appropriate given the information available at the time.

W.S. v. Edmonds School District 81 IDELR 101 (United States District Court, Western District, Washington (2022)

E. A student with multiple-disabilities, including autism, was placed in several foster placements and numerous hospitalizations due to significant behavioral issues. In 5th grade, his foster parents enrolled him in their school district. The student's IEP called for placement in a self-contained behavior program with several supports and services. The student had several serious behavioral incidents at school requiring other students be removed from the classroom, assaulting staff and breaking the classroom window. He was suspended for each incident with the suspension cumulatively exceeding 10 school days requiring a manifestation determination meeting.
The Team met and concluded that the behaviors were a manifestation of the student's disability. The Team then determined that the student's IEP would be changed to provide a 1:1 tutoring program in the school building but outside of the behavioral classroom. The foster parents agreed to this change.
The student subsequently had another behavioral incident threatening staff with scissors and a verbal threat to kill staff members. Other students observed the incident and were visibly frightened and crying. The Director of Special Education then ordered that the 1:1 tutoring program be moved to the District's central office over the objections of the parent.
In a procedurally complex case, both the parents and the school district requested due process hearings on several issues. The school district eventually withdrew its requests.
Under the IDEA, if the behavior of the student is deemed a manifestation of their disability, the student must return to the placement from which they were removed "unless the parent and the local education agency agree to change the placement as part of the modification of the behavioral intervention plan." (34 CFR

300.530(f)(2)) The parents alleged, among other issues, that the school failed to give them proper verbal notice at the manifestation meeting of their right to object to the change of placement from a behavioral program to the 1:1 tutoring program which would have required the school to return the student to the prior placement. The Court, in overruling the hearing officer, held that the school provided the parents with the required notice. The parents received both a prior written notice of the manifestation meeting and a copy of the IDEA's procedural safeguards. The IDEA does not require that the Team also verbally inform the parents at the meeting of their right to object to the placement change in a manifestation meeting. K.C. v. Regional School District Unit 81 IDELR 93 (United States District Court, Maine (2022))

VIII. Part C-- Early Intervention Services

A. The U.S. Office of Special Education Programs issued an informal guidance document regarding toddlers who are receiving early intervention services under Part C as they transition to possible preschool services under Part B of the IDEA. To ensure a seamless transition, the lead Part C agency in each State (SLA) must have an interagency/intra-agency agreement with the State Education Agency (SEA).

The SLA must ensure that a transition plan is established in each toddler's individualized family service plan (IFSP) not fewer than 90 days before their 3rd birthday. The plan needs to address steps for the toddler and their family to exit the Part C program and any needed transition services the IFSP Team identifies.

The SLA must also ensure that notice is provided to the SEA and LEA of legal residence of the toddler with a disability who may be potentially eligible for preschool Part B services. This notice "must be treated as a referral" under Part B.

With the family's approval, the SLA must provide written notice of a transition conference. (This notice may be combined with the notice in the preceding paragraph.) The conference includes the lead agency, the family and the LEA of legal residence. The guidance states that "The LEA must participate in the transition planning conference…". (emphasis added) The purpose of the conference is to provide the parent with information about Part B preschool services and to start the evaluation process leading to the eligibility determination.

If the LEA suspects the toddler will be eligible for preschool IEP services the LEA must request parental consent to conduct the initial

evaluation. If the LEA does not suspect the toddler will qualify for IEP services, the parent must be provided with prior written notice which, among other things, includes the basis for its decision. In either case the LEA must provide the parents with a copy of the procedural safeguards under Part B which includes the right of the parent to file a state complaint or request a due process hearing. The procedures and timelines for the evaluation, eligibility determination and the development of an IEP (if eligible) are the same as those that apply to school aged students under Part B. The parent has the right to request that the Part C representative be invited to the initial IEP meeting. Letter to Nix 123 LRP 11295 (United States Department of Education, Office of Special Education Programs (2023))

IX. Miscellaneous Issues

A. A student was deemed eligible for special education under the categories of autism and other health impaired. His parents decided to withdraw him from public school and placed him in a homeschool program where he remains.
The student started to receive 40 hours of Applied Behavior Analysis (ABA) from a private provider. The ABA services were funded by the parents' insurance company.
The parents considered re-enrolling the student in the school district. They contacted the district and requested that the student's private ABA therapists accompany the student at school so that he could be provided meaningful access to school.
The school district denied their request. The parents then sued the school district under Section 504 and the ADA alleging that the school was denying the student a necessary accommodation.
The Court concluded that the school district did not violate Section 504/ADA in denying the parents' request. At trial, the evidence established that the insurance company requires that the ABA services must be a medically necessary treatment for coverage. The doctor, who testified as the parents' expert, stated that a diagnosis of autism requires medical treatment specifically ABA.
The Court noted that the parents did not provide any evidence that the school needed to modify its program to allow the ABA therapists to accompany the student to school in order for the student to enjoy meaningful access to the benefits of public education. O.A. v. Orcutt Union School District 80 IDELR 76 (United States District Court, Central District, California (2021)) Affirmed in an unpublished decision by the United States Court of Appeals, 9th Circuit (2022).

Note: There was no mention in the judicial decision whether the parents ever requested the school district to provide ABA services under the student's IEP.

Note: This outline is intended to provide workshop participants with a summary of selected Federal statutory/regulatory provisions and selected judicial interpretations of the law. The presenter is not, in using this outline, rendering legal advice to the participants. The services of a licensed attorney should be sought in responding to individual student situations.