THE OTHER ONE IS A FISH: AN UPDATE ON SPECIAL EDUCATION LAW- RECENT DECISIONS ON HOT BUTTON ISSUES

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Hot Button Issues:

1. Bullying/Harassment/Safety

2. Seclusion and Restraints

3. Recession/Bad Economy

4. Mediation

5. FAPE Standard

6. Incarcerated Students

7. Parents' Right to Participate

8. Discipline

BONUS CASE: ABA Therapy and the Hague Convention

1. Bullying/ Harassment/Safety

a. Early Cases

1). Shore Regional High Sch. Bd. of Educ. v. P.S. 381 F.3d 194, 41 IDELR 234 (3d Cir. 8/30/04) A school district's failure to stop **bullying** may constitute a denial of FAPE. Despite repeated complaints by the parents the bullying continued; the student became depressed and the school district developed an IEP. The harassment continued and the student attempted suicide. The Third Circuit agreed with the hearing officer that the unabated harassment and bullying made it impossible for the student to receive FAPE.

2). Gagliardo v. Arlington Central Sch Dist 489 F.3d 105, 48 IDELR 1 (2d Cir. 5/30/7) The Second Circuit held that the school district had denied FAPE by permitting bullying and **harassment** of the student, but denied reimbursement where the parent placement lacked the trained professionals the student needed as a result of the bullying .

3). Lillbask ex rel Mauclaire v. State of Connecticut Dept. of Educ. 397 F.3d 77, 42 IDELR 230 (2d Cir. 2/2/05). The Second Circuit Court of Appeals ruled that an IDEA hearing officer has the authority to review IEP **safety** concerns. The court provided an expansive interpretation of the jurisdiction of the hearing officer, ruling that Congress intended the hearing officer to have authority over any subject matter that could involve a denial of or interference with a student's right to receive FAPE, including safety concerns that might affect receipt of FAPE.

b. Current Cases

1) TK & SK ex rel LK v. New York City Dept of Educ 779 F.Supp.2d 289, 56 IDELR 228 (EDNY 4/25/11) The court denied a school district motion to dismiss.

Parents alleged that bullying of a twelve year old with an SLD was a denial of FAPE and sought reimbursement for unilateral placement. Peers ostracized her, pushed her refused to touch items that she had touched and ridiculed her daily. The court noted that when responding to bullying of a student with a disability, a school district must take **prompt** and **appropriate action** including investigating and taking steps to prevent. Here evidence showed that school district knew about the bullying but failed to do anything, even rebuffing the parent requests to discuss. Court ruled that the parents do not need to show that the student was deprived of all educational benefit or that she regressed; parent only needs to show that her educational **benefit was adversely affected** by the bullying. Where the bullying reaches a level where the student is **substantially restricted** in learning opportunities, FAPE has been denied. Court includes a long discussion on Bullying in America and kids with disabilities.

1A) TK & SK ex rel LK v. New York City Dept of Educ 63 IDELR 256 (EDNY 4/25/11) On remand, the SRO found that the parents had not shown that the bullying substantially affected the student's educational performance and denied reimbursement for a unilateral placement, but the district court reversed. The court held that the FAPE bullying standard is as follows: A disabled student is deprived of a FAPE when school personnel are deliberately indifferent to or fail to take reasonable steps to prevent bullying that substantially restricts a child with learning disabilities in her educational opportunities. The conduct does not need to be outrageous in order to be considered a deprivation of rights of a disabled student. It must, however, be sufficiently severe, persistent, or pervasive that it creates a hostile environment. When responding to bullying incidents, which may affect the opportunities of a special education student to

obtain an appropriate education, a school must take prompt and appropriate action. It must investigate if the harassment is reported to have occurred. If harassment is found to have occurred, the school must take appropriate steps to prevent it in the future. These duties of a school exist even if the misconduct is covered by its anti-bullying policy, and regardless of whether the student has complained, asked the school to take action, or identified the harassment as a form of discrimination. The rule does not require that the bullying would have prevented all opportunity for an appropriate education, only that it was likely to affect the opportunity of the student for an appropriate education. Applying this standard, the court ruled that the student's educational opportunities were substantially restricted by bullying and that the IEP team substantively denied FAPE by failing to address bullying.

2). Batchelor ex rel RB v Rose Tree Media Sch Dist 63 IDELR 212 (3d Cir 3/17/14) Third Circuit dismissed parent claims under §504 and ADA for retaliation and harassment of student with SLD for failure to exhaust under IDEA even though parent's had not alleged IDEA violation: Wright v. Carroll County Bd of Educ 59 IDELR 5 (D. MD 5/24/12) Court dismissed rejecting parent's futility argument that IDEA does not specifically provide remedies for students who are **bullying** victims; IDEA provides potential remedies for students with disabilities who are bullied; Estate of Brown v Ogletree 58 IDELR 128 (SD Tex 2/21/12) Court acknowledges that bullying can be a violation of IDEA, but dismisses § 504 action vs district for bullying and later suicide of student with Aspergers where there was no allegation connecting the bullying and the student's disability; Shadie v Hazelton Area Sch Dist 61 IDELR 138 (MD Penna 6/18/13) Court denied district Motion to dismiss holding sufficient for parent to allege

that altercation with a teacher had an impact on the student's education and therefore amounted to a denial of **FAPE;** But see, Shadie v Forte 61 IDELR 40 (MD Penna 4/22/13) Court held that a single incident of physical abuse could not amount to a violation of IDEA; Aide grabbed student's arm and then pushed him into a chair;

3). Stewart v. Waco Independent Sch Dist 711 F.3d 513, 60 IDELR (5th Cir), vacated and remanded by an **UNPUBLISHED** decision 61 IDELR 92 (5th Cir. 3/15/13) Fifth Circuit at first ruled that the parents of a student with an intellectual disability could continue their 504 action finding that district engaged in gross misjudgment by failing to adjust her IEP to address peer sexual harassment and by continuing to use ineffective methods rather than change her IEP, but then vacated the decision because the District Court did not address the issue of exhaustion;

4). District of Columbia Public Schs (JG) 111 LRP 24663 (SEA DC 1/15/11) HO ruled that although bullying or an unsafe environment is a denial of FAPE where it prevents educational benefit, here evidence showed **no bullying** or unsafe environment, instead two boys fought over a girl; JE v. Boyertown Area Sch Dist 56 IDELR 38 (ED Penna 2/4/11) (aff'd by 3d Cir. at 57 IDELR 273) Court rejected parent's fear that a high school student with Aspergers Syndrome would face bullying, finding that such fear was not sufficient to show a denial of FAPE justifying a unilateral placement. Court agreed with HO that parent had a heightened sensitivity to the unruly atmosphere of public school; Vernon ex rel DV v Bethel Sch Dist 59 IDELR 199 (Wash Ct App 8/28/12) Where mom had agreed to IEP provision approving of the use of smells to communicate with a deaf-blind teen, court found bullying or safety violation when district implemented

these provisions; SA v. Weast 59 IDELR 243 (D. MD 9/26/12) Court found **no evidence** of bullying where student's anxiety was caused by academics.

5). Mitchell ex rel DF v Cedar Rapids Community Sch Dist 832 N.W.2d 689, 61 IDELR 143 (Iowa S.Ct. 6/21/13) Iowa Supreme Court held that although an assault on a 14 year old with a severe cognitive disability took place off school grounds and outside school hours, the district was liable for **negligent supervision** for taking no steps to protect the student. She left during 6th period class without permission and met the older student who raped her in a garage. Of the jury's $500,000 verdict, court found the district 70% at fault; Braden ex rel M v Mountain Home Sch Dist 60 IDELR 16 (WD Ark 10/18/12) Court denied district motion to dismiss where parent alleged that the district failed to keep the student **safe** by placing him in an alternative classroom where he would be the target of bullies after finding him not eligible for SpEd; Fulton County Sch Dist 58 IDELR 267 (SEA GA 2/1/12) HO found denial of FAPE where student with multiple disabilities **safety** was jeopardized when district placed him with teacher known to be abusive with a principal known to turn a blind eye. HO found parents' right to participate was severely impaired by failing to inform them of hitting and name-calling; Southeast Vermont Supervisory Union (BH) 61 IDELR 150 (SEA VT 5/8/13) HO overrode lack of consent and authorized district to conduct a safety evaluation of student (per Lillibask) given deteriorating behaviors and disciplinary incidents; Begley v City of NY 111 A.DS.3d 5, 972 N.Y.S.2d 48, 62 IDELR 39 (NY SCt App Div 9/18/13) Court ruled that school district that placed a student in an out-of-state SpEd school was not responsible for the anaphylactic reaction that the student had after lunch. IDEA allows districts to place students out of state when they are unable to meet his needs. Once the

student begins attending, the out-of-state school becomes responsible for his **safety**; Hamilton ex rel KH v Spriggle 61 IDELR 251 (MD Penna 8/14/13) Court refused to dismiss §1983 action finding that parent sufficiently plead "**state created danger**" where three administrators tried to hide reports of a teacher's repeated abuse of kids in her SpEd classroom, classroom aides reported abuse and principal claimed he could not act and teacher sat on the back of a 13 year old with autism and an intellectual disability…;

6). TB & MB ex rel AB v. Waynesboro Area Sch Dist 56 IDELR 104 (MD Penna 1/19/11) Mgst recommended that FAPE provided by school district. The student had been the victim of bullying, but the school district offered services and accommodations that would lessen the potential for bullying, and the IEP addressed the student's communication and socialization needs; Southmoreland Sch Dist (CS)111 LRP 50995(SEA Penna 6/18/11) HO ruled that bullying of a child with a speech language impairment did not constitute a denial of FAPE where there was no showing that the bullying caused **educational harm**; Clark County Sch Dist 59 IDELR 30 (SEA NV 5/11/12) HO found no IDEA violation where bullying where the incidents did not impact the student's education; Bloom Township HS Dist # 206 (MS) 112 LRP 21291 (SEA Ill 4/23/12) Where the student was not eligible under IDEA, HO dismissed bullying charges; Baltimore City Schs 112 LRP 23117 (SEA Md 1/17/12) State complaint investigator found bullying of student with ADHD was not a denial of FAPE

7). Williams v. Ascension Parish Sch Bd 56 IDELR 213 (MD Louisiana 5/16/11) Court dismissed claim that failure to implement IEP & bip lead to bullying of student where parents failed to exhaust; MS by Shihadeh v Marple Newton Sch Dist 58 IDELR 131 (ED Penna 2/14/12) Court held that injunctive relief is available under IDEA,

and therefore, parent could not seek injunctive relief in a court action on a peer bullying claim because they failed to exhaust by dph; ; AA v Raymond 61 IDELR 197 (ED Calif 7/22/13) Court dismissed parent suit for failure to exhaust, finding that the relief sought (an injunction to stop school closures for budgetary reasons) was available at IDEA administrative hearing; Roquet ex rel Brown v Kelly 62 IDELR 46 (MD Penna 10/9/13) Court dismissed parent claims that child was bullied because no exhaustion at IDEA & 504 dph;

8). Estate of Lance by Lance v Lewisville Independent Sch Dist 743 F.3d 982, 62 IDELR 282 (5th Cir. 2/28/14) Fifth Circuit found district not liable under § 504 for bullying and subsequent suicide of a fourth grader with ADHD and a speech impairment finding no evidence of deliberate indifference where the district properly investigated complaints and dealt appropriately with bullies; Broaders ex rel BB v Polk County Sch Bd 57 IDELR 17 (MDFla 4/19/11) Mgst recommended that parent suit under §1983 be dismissed for failure to state a claim where student was regularly bullied and even assaulted but no evidence that district had custom or practice of failing to investigate or prevent bullying; Long ex rel Long v Murray County Sch Dist 59 IDELR 76 (ND GA 5/21/12) Court found no deliberate indifference for §504/ADA where student with Aspergers was bullied and committed suicide where district had anti-bullying policy and cameras in halls. (Ugly facts: Day after suicide, other students wore nooses around their necks)(No discussion of IDEA); GM by Marchese v Drycreek Joint Elementary Sch Dist 59 IDELR 223 (ED Calif 9/7/12) Court found no deliberate intention for §504 even though school efforts to stop bullying failed; YB by IF v Robinson Secondary Sch 61 IDELR 168 (ED Va 2/15/13), aff'd in part and dismissed in

part by 4th Circuit at 61 IDELR 185, Court denied request for injunction transferring a student who had allegedly been bullied and sexually harassed where parents had not shown likelihood of success on §504 suit; CL by RL & EL v Leander Independent Sch Dist 113 LRP 52311 (WD Tex 12/20/13) Mgst recommended dismissal of §504/ADA claims where district took prompt action by reprimanding bullies; calling their parents and addressing the issue with the entire class; TF by DF & TSF v Fox Chapel Area Sch Dist 62 IDELR 74 (WD Penna 11/5/13) No deliberate indifference where district diligently addressed student's needs; teasing of student by other students did not amount to violation; Pagan-Negron ex rel CMP v Seguin Independent Sch Dist 62 IDELR 11 (WD Tex 9/24/13) Court dismissed §504 action where no intentional discrimination where principal berated student five months before he was diagnosed with Aspergers Syndrome; Augustine ex rel MA & TA v Winchester Public Schs 62 IDELR 57 (WD Va 9/17/13) Court adopted Mgst recommendation (see 62 IDELR 31) and dismissed parent §504 claim; Wright v Carroll County Bd of Educ 61 IDELR 289 (D Md 8/26/13) Court ruled that a single incident of peer harassment, even a serious attack resulting in two black eyes, was not sufficient to show deliberate indifference; MAP by Skinner v Bd of Trustees, Colorado Sch for the Deaf & Blind 113 LRP 39962 (D Colo 8/21/13) Fact that student and four others were attacked by another student does not constitute §504 violation; BRS by Stewart v Bd of Trustees Colorado Sch for the Deaf & Blind 62 IDELR 59 (D Colo 8/21/13) Court dismissed § 504 action where parent failed to allege sufficient facts re sexual assault; Griffing v Sanders 61 IDELR 157 (ED Mich 7/19/13) Court dismissed §504/ADA action where parent failed to allege that school district did not intervene where two employees abused a student with multiple disabilities; **Contrast**,

Herrera ex rel Estate of IH v Hillsborough County Sch Dist 61 IDELR 137 (MD Fla 6/18/13) Court **found** deliberate indifference where parent alleged that district had a history of ignoring the safety of kids with disabilities. Student with neuromuscular disease stopped breathing on school bus and staff called mom but made no effort to resuscitate or call 911; Doe ex rel Doe v Bradshaw 62 IDELR 23 (D Mass 9/13/13) Court found §504 deliberate indifference where soccer coach sexually assaulted student and school district resisted parent attempts to have student **evaluated under IDEA** for SpEd for over a year instead referring him to juvenile authorities; BM by MF v Thompson 61 IDELR 285 (MD Fla 8/27/13) Court found deliberately indifferent training and supervision of teachers of kids with special needs where a teacher snatched a pencil from the hand of a 13 year old with Downs Syndrome and threw it at his head; Moore ex rel Estate of AM v Clifton County Bd of Educ 936 F.Supp.2d 1300, 60 IDELR 274 (MD Ala 3/27/13) Court denied district motion to dismiss §504 case where district took no steps to address severe bullying of a student with a growth disorder leading to his suicide; MJ by Jager v Marion Independent Sch Dist 61 IDELR 76 (WD Tex 5/3/13) Court found deliberate indifference despite district having a history of investigating incidents of bullying where math teacher of student with bipolar disorder failed to address in class incidents of bullying; Sutherlin v Independent Sch Dist # 40 of Novata County Okla 61 IDELR 69 (ND Okla 5/13/13) Court denied Motion to dismiss 504 action where school district ignored at least 32 incidents of disability related harassment; student with Aspergers was called "retard,' freak" etc; Rideau v Keller Independent Sch Dist 62 IDELR 60 (WD Tex 3/2/13) Court refused to dismiss §504 suit where teacher who had previously abused disabled student and bragged that he got away with only a slap on the

wrist later had a 17 year old student who couldn't walk or feed himself come home with a broken thumb and a knot on his head; DA & JH ex rel MA v Meridian Joint Sch Dist No. 2 289 FRD 614, 60 IDELR 192 (D Idaho 2/12/13) Mgst refused to recommend dismissal of §504 suit where student with Aspergers Syndrome was relentlessly bullied called "retard" during gym, etc. (Mgst also noted that bullying could violate IDEA); CL by RL & El v Leander Independent Sch Dist 61 IDELR 194 (WD Tex 7/23/13) Mgst again recommended that court not dismiss §504 action where student had been bullied in restroom for years and was eventually sexually assaulted (this time Mgst did not rely on 5th Circuit decision in Stewart v Waco);

9). Giovanni M by John M & Michelle M v. O'Brien 56 IDELR 224 (EDNY 4/28/11) School district filed petition for removal of parent complaint in state court alleging bullying and harassment of a student with an ED. Parent opposed removal because district petition cited wrong statute, but federal court permitted district to amend pleading.

10). Sagan v. Sumner County Bd of Educ 61 IDELR 10 (MD Tenn 4/9/13) Court awarded attorney's fees against parent where court found no plausible basis for 4 of 5 claims in dpc, including alleged abuse to student by a teacher; Reichet v Pathway Sch 935 F.Supp.2d 808, 60 IDELR 275 (ED Penna 3/26/13) Court dismissed parent §1983 suit where sexual assaults on a student with Aspergers by another student were not foreseeable; BB & MH v Appleton Area Sch Dist 61 IDELR 187 (ED Wisc 7/31/13) Court ruled that teacher slapping, squeezing and force feeding nine students with intellectual disabilities was inappropriate but not "conscience shocking" to support §1983 action

11.) Butler ex rel Estate of Butler v Mountain View Sch Dist 61 IDELR 290 (MD Penna 8/26/13) Court dismissed claim of parents of a ninth grader who committed suicide after being the victim of bullying because they sought the value of the compensatory education he would have received under IDEA because money damages are not available under IDEA.

c. Other Resources:

1). *GAO Report*

In May 2012, the Government Accountability Office issued a landmark report on school bullying. You can read the entire 64 page report here: http://www.gao.gov/assets/600/591202.pdf Although the report deals with bullying of all students, and not just students with disabilities, it contains a wealth of information. Among the facts it reveals are the following: a) Bullying at school is **pervasive**. After reviewing the research on school bullying, including four national studies between 2005 and 2009, the report notes that between **20 and 28** percent of students report that they have been bullied. That number is way high! b) Bullying is **costly**. Among the results of peer bullying are the following: suicide; violent actions against others; depression; loneliness; low self-esteem; anxiety and higher risk for physical health consequences; and increased behavioral issues. c) Important for purposes of special education law, the report notes that the literature finds that victims of bullying often have ***academic*** difficulties.

2). OCR Activity Report

On November 28, 2012, The Office for Civil Rights of the U. S. Department of Education issued a report summarizing its activities and actions over the last four years. OCR deals primarily with §504 and various other statutes, but the report featured numerous examples of school bullying which OCR described as an important cross-cutting issue. OCR has signaled in this report that it intends to continue to emphasize bullying cases. You can read the report here: http://www2.ed.gov/about/reports/annual/ocr/report-to-president-2009-12.pdf

3). **Dear Colleague Letter**

On August 20, 2013, the Office of Special Education and Rehabilitative Services issued a Dear Colleague Letter on the bullying of students with disabilities. The letter dated notes that bullying can constitute a denial of FAPE under IDEA, but in any event bullying of children with disabilities cannot be tolerated. The letter specifically notes that students with disabilities are disproportionately affected by bullying and specifies actions that should be taken when bullying is suspected. The letter encourages states to reevaluate their policies on problem behaviors, including bullying, in light of the

letter and other guidance by OSEP and OCR. You can read the letter here: http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/bullyingdcl-8-20-13.pdf

The seven page attachment to the letter specifies a number of evidence-based practices to prevent and to address school bullying. You can read the attachment here: http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/bullyingdcl-enclosure-8-20-13.pdf

2. Seclusion and Restraints

a. The Controversy

1). Early in 2009, a study was released, "School is Not Supposed to Hurt: An Investigative Report on The Use of Seclusion and Restraint in Schools," Disability Rights Network (January 2009) available at http://www.napas.org/sr/SR-Report.pdf (chronicling abusive misuse of restraint and seclusion for children with disabilities resulting in deaths or injuries.)

2) A subsequent GAO study made similar findings: http://www.gao.gov/new.items/d09719t.pdf This lead to congressional hearings.

3) In response to an inquiry by the Secretary, the Department of Education compiled a state-by-state comparison of state laws and policies on the use of seclusion and restraints. That report is available at: http://www2.ed.gov/policy/seclusion/summary-by-state.pdf

4) In early February 2010, the Committee on Education and Labor of the House of Representatives approved a bill limiting the use of seclusion and restraints on students, HR 4247. Among other things, the bill limits the use of these techniques to cases of imminent danger; requires that staff using these techniques be properly trained; outlaws mechanical restraints; requires parental notification and establishes oversight mechanisms. Note that this is a new law not an amendment to IDEA. This link provides further information: http://edlabor.house.gov/blog/2009/12/preventing-harmful-restraint-a.shtml

5) The ABC news magazine Nightline had an investigative piece on the abuse of seclusion and restraints in the schools on November 29, 2012. The story focused on electric shock, restraint and a deadly "hold." You can view the episode via this link: http://democrats.edworkforce.house.gov/blog/abc-news-investigation-students-hurt-dying-after-being-restrained

b. Recent Cases

1). MM & CM ex rel LM v Dist 0001, Lancaster County Sch 113 LRP 47 (8th Cir 12/28/12) Eighth Circuit rejected parent argument that the use of a "calming room" for a fourth grader with autism and behavior problems when he became aggressive was a denial of FAPE. IEPT considered and rejected report of parent's consultant that

physical restraints rather than seclusion be used. IEPT concluded that physical restraints posed a safety risk to student and staff. IEPT properly considered and developed strategies to address the student's behaviors.

2). DF by AC v. Collingswood Borough Bd of Educ 694 F.3d 488, 59 IDELR 211 (3d Cir 12/12/12) Although not directly addressing the issue, the Court overturned the district court decision in part because it did not address the parent's allegations that the use of **restraints** on the student denied **FAPE**.

3). Muskat ex rel JM v. Deer Creek Public Schs 715 F.3d 775, 61 IDELR 1 (10th Cir. 4/23/13) Tenth Circuit ruled that even if school district violated district policies by placing a child with developmental disabilities in a seclusion room, their actions did not shock the conscience and therefore there was no constitutional violation under section 1983.

4). CB v City of Sonora 730 F.3d 816, 113 LRP 37201 (9th Cir. 9/12/13) 2 to 1 majority of 9th Circuit panel ruled that police officers who handcuffed an 11 year old with ADHD who refused to leave a playground had qualified immunity and therefore dismissed parent's lawsuit.

5). Payne ex rel DP v. Peninsula Sch Dist 653 F.3d 863, 57 IDELR 31 (9th Cir 7/29/11) Modifying its previous standard, the Ninth Circuit ruled that exhaustion of administrative remedies depends upon the relief sought not the type of injury alleged, therefore, exhaustion is required where the parent seeks 1] an IEDA remedy- eg tuition reimbursement; 2]a change in the student's placement or program, or 3] the enforcement of a right arising from a denial of FAPE. Court then reversed dismissal of a §1983 action

involving alleged misuse of a timeout room not based upon an IDEA violation. (Modifying previous Ninth Circuit decision at 54 IDELR 72 in previous outlines.)

6). Bryant ex rel DB v New York State Educ Dept 692 F.3d 202, 59 IDELR 151 (2d Cir 8/20/12) In a 2-1 decision, the Second Circuit found that a state ban on aversives did not violate IDEA, § 504 or the constitution; The regulation is consistent with the IDEA **preference** for **positive behavior** interventions.

7). DC by TC v Oakdale Joint Unified Sch Dist 113 LRP 3443(ED Calif 1/23/13) Court approved as fair and reasonable a settlement of $65,000 for IDEA claim of improper restraint of student with ADHD causing an ankle injury.

8). EH v Brentwood Union Sch Dist62 IDELR 76 (ND Calif 11/4/13) Court denied district Motion to dismiss parent §504 claim that school staff scratched and dragged a second grader with autism as well as improperly used physical restraints.

9). Payne ex rel DP v Peninsula Sch Dist 61 IDELR 279 (WD Wash 8/30/13) Court refused to grant summary judgment to district where parents alleged violation of constitutional rights/ §1983 where a teacher had an ongoing policy of placing kids with disabilities in a 63 inch by 68 inch saferoom. Parent alleged that district knew of and permitted the seclusion.

10). JPM ex rel CM v Palm Beach County Sch Bd 916 F.Supp.2d 1314, 60 IDELR 158 (SD Fla 1/30/13) Court dismissed 504 & 1983 actions where there was no evidence of intentional discrimination or conscience shocking behavior. A middle school student with autism was restrained 89 times 14 months and documentation was improper but failure to conduct fba after first few incidents was not conscience shocking.

11). BH ex rel BB v. West Clermont Bd of Educ 788 F.Supp.2d 682, 56 IDELR 226 (SD OH 4/26/11) Court found that the use of physical restraints to manage the student's behaviors violated **IDEA**. Not only did the restraints fail to curb his behaviors but he regressed as a result of the inappropriate interventions; Albuquerque Pub Schs 111 LRP 38713 (SEA NM 4/11/11) HO found a denial of FAPE caused excessive use of physical restraints. School district failure to implement his IEP including positive behavior supports led to 16 incidents of physical restraint in a month and a half; But see, Clark ex rel JJ v Special Sch Dist of St Louis County 58 IDELR 126 (ED Missouri 2/23/12) Court rejected argument that district use of a seclusion room violated IDEA. Court found that student made progress only when district used the seclusion room, therefore use of seclusion was appropriate under IDEA.

12). In re Student with a Disability 112 LRP 49733 (SEA Wyo 1/8/12) State complaint investigator found that district violated state IDEA regs by restraining a five year old and locking her in a small room. State regs prohibit mechanical restraint and locked seclusion. Also staff lacked proper training and failed to document and notify parents ;). Norwood Public Schs 57 IDELR 28 (SEA Mass 6/7/11) HO ruled that under state law mechanical restraints, such as a hip stabilizing belt, cannot be used without a doctor's authorization.

13). EC by RC v County of Suffolk 58 IDELR 259 (EDNY 3/30/12) Court dismissed for failure to exhaust where parent brought ADA suit for security guard's **restraint** of 11 year old with cognitive deficits who threw pebbles and held large rock over his head.(implies that **IDEA** can provide remedies for seclusion and restraint.

14). Patrick B by Keshia B v Paradise Protectory & Agricultural Sch 59 IDELR 162 (MD Penna 8/6/12) Court ruled that parents stated a cause of action for §504 for school district use of physical restraints on a second grader, finding the **element** of intentional discrimination from failure to observe IDEA rules regarding addressing interfering behaviors.

15). Orth v State of Ohio Dept of Educ 112 LRP 48317 (Ohio Ct App 9/28/12) State appellate court ruled by a 2 to 1 vote that a SpEd teacher who used a "hold" on a four year old resulting in scratches and red marks and failed to send the student for first aid and who failed to submit an incident report for two days was not guilty of conduct unbecoming to her position and reversed a revocation of her teacher's license. "Teachers are called upon to make professional judgments every day…The reasonable exercise of such judgment…" cannot be conduct unbecoming.

16). Dublin City Sch Dist 111 LRP 20334 (SEA OH 2/9/11) State complaint investigator found that school district failed to implement provisions of student's IEP requiring staff to inform parents when restraints were used. A voice mail saying the student "had a bad day" was not sufficient notice.

17). ALA by Liberty v. Avilla R-XIII Sch Dist 58 IDELR 4 (WD Missouri 12/7/11) Court dismissed parent claim for failure to exhaust where parent alleged that student was routinely confined to a small closet without windows.

c. Forecast

1). Look for more cases alleging violations of IDEA 2). Also look for possible changes in IDEA in reauthorization- especially the sections regarding behaviors/FBA/BIP, positive behavior interventions, etc

3. Recession/Bad Economy

a. In general **cost** of services is not a permissible consideration. See the Supreme Court decision Cedar Rapids Community Sch. Dist. v. Garret F. 526 U.S. 66, 119 S.Ct. 992, 29 IDELR 966 (1999). In some recent cases, however, the issue of cost of services has resurfaced:

1). Ridley Sch Dist v. MR & JR ex rel ER 680 F.3d 260, 58 IDELR 271 (3d Cir 5/17/12) In selecting among educational programs that meet a student's needs, a school district must be able to take into account not only the needs of the disabled student but also the **financial and administrative resources** that different programs will require, and the needs of the school's other non-disabled students.

2). Petit v US Dept of Educ 675 F.3d 769, 58 IDELR 241 (DC Cir 4/13/12) DC Circuit held that US DOE did not exceed its authority by defining "related services" to exclude mapping for cochlear implants. Court approved of DOE taking account of the need for an audiologist to do the mapping in a specialized clinic as well as the **cost** of the procedure.

3). BJ by JJ & JJ v Homewood-Flossmore HS Dist #233 62 IDELR 141 (ND Ill 11/26/13) Court ruled that parent had standing to challenge a decision. Parents alleged that the district violated §504 by failing to place a student with a disability in a residential placement because of a **policy by state** board of education that would prohibit reimbursement.

4). Flagstaff Arts & Leadership Academy v ES by Gura 62 IDELR 78 (D Ariz 11/1/13) Court found charter school in civil contempt for failing to pay for a private placement pursuant to a stay put order by the court. The charter argued that it lacked the

funds to pay for the tuition, but the court noted that the charter hired counsel to represent it in court and that it had just 12 weeks earlier informed the court that it had put money aside for this purpose.

5). Smith v Henderson 61 IDELR 66 (DDC 5/15/13) The court found that **school closures** by LEA did not violate IDEA or other statutes; Contrast, AA v Raymond 61 IDELR 197 (ED Calif 7/22/13) Court dismissed parent suit for failure to exhaust, finding that the relief sought (an injunction to stop school closures for budgetary reasons) was available at IDEA administrative hearing; Swan ex rel IO v Bd of Educ City of Chicago 61 IDELR 190 (ND Ill 7/25/13) Court refused to dismiss ADA claims by parents of three students with disabilities who alleged that closing 53 elementary schools would cause them educational harm, see 61 IDELR 249, same case; McDaniel ex rel EE v Bd of Educ City of Chicago 113 LRP 30497 (ND Ill 7/25/13) Court ruled that parents of children with disabilities stated a viable claim under §504 that closure of 53 elementary schools would have disparate impact on disabled children, but see, McDaniel ex rel EE v Bd of Educ City of Chicago 113 LRP 28446 (ND Ill 7/9/13) Court dismissed City from ADA lawsuit challenging school closures as having an adverse impact on kids with disabilities. Court rejected parent argument that a press release showed that the school board was a mere puppet of the mayor and McDaniel ex rel EE v Bd of Educ City of Chicago 113 LRP 32508 (ND Ill 8/9/13) Court refused to certify class where no showing of common injuries under §504.

6). Chester Upland Sch Dist v Commonwealth of Penna 58 IDELR 246 (ED Penna 4/25/12) Court certified a class action against the SEA alleging improper distribution of IDEA funds; Chester Upland Sch Dist v Commonwealth of Penna 58

IDELR 249 (ED Penna 4/17/12) (same case- motion to dismiss denied); ; Chester Upland Sch Dist v Commonwealth of Penna 861 F. Supp.2d 492, 58 IDELR 191 (ED Penna 3/16/12)(same case- motion to dismiss SEA as party denied); Chester Upland Sch Dist v Commonwealth of Penna 284 F.R.D. 305, 59 IDELR 154 (ED Penna 8/15/12) (same case- Court approved settlement);

7). In Re: Student With a Disability 58 IDELR 270 (JG) (SEA WV 3/6/12) HO rejected parent's argument that the student was excluded from eligibility because there was **no room** for the student in the school district's special education program. HO concluded that parent witnesses misheard the alleged statement where the other evidence in the record showed that the student was not excluded for this reason.

8). CG v Commonwealth of Penna 59 IDELR 192 (MD Penna 8/23/12) Court refused to reallocate funds among LEAs finding that **budget related** changes to the state funding formula had no impact upon FAPE or LRE

9). ND v. State of Hawaii, Dept of Educ 600 F.3d 1104, 54 IDELR 111 (9th Cir 4/5/10), affirming 53 IDELR 186 in previous outline, Ninth Circuit ruled that 17 **furlough Fridays,** enacted because of the bad economy, was not a stay put violation. Current placement means the educational program of the student. Furlough days applied to all students. To rule otherwise would give parents veto power over the management of the schools See, ND v. State of Hawaii, Dept of Educ 55 IDELR 220(D Haw 11/28/10) Because furlough Fridays were not a change of placement, there was no stay put violation.(See also 55 IDELR 219)(same case)

10). SM & GM ex rel ZM v State of Hawaii, Dept of Educ 56 IDELR 193 (D Haw 4/20/11) Court rejected implementation challenge to Furlough Fridays where no

services were missed; Dept of Educ, State of Hawaii v. ND by LD & MD 58 IDELR 76 (D Haw 12/14/11) Mgst recommended overturning HO decision concluding the Furlough Fridays were material implementation failure; Dept of Educ, State of Hawaii v. CJ by Crystal & Tyler J 58 IDELR 10 (D Haw 11/29/11) Mgst recommended overturning HO decision concluding the Furlough Fridays were a substantive and procedural violation; Dept of Educ, State of Hawaii v. AU by Kristine & Grey U 112 LRP 4826 (D Haw 11/29/11)(similar); Dept of Educ, State of Hawaii v. TF by Pauline F 57 IDELR 197 (D Haw 8/31/11) Mgst recommended remand to HO whose decision did not analyze the materiality of the implementation failure.

11). Letter to Hunter 55 IDELR 263 (OSEP 2/12/10) OSEP ruled that under certain circumstances, a state may use ARRA funds for mainstreaming efforts.

4. Mediation and Settlement

a. CEATS, Inc v. Continental Airlines, Inc, et al,___ F. 3d _____(Fed. Cir. 6/24/2014). The United States Supreme Court denied certiorari for this case, Docket # 14-681, on March 23, 2015. NOTE: This is **not** a special education case. The Federal Circuit ruled that mediators have the same **ethical obligations of disclosure and recusal** as judges and hearing officers. "Although we recognize that mediators perform different functions than judges and arbitrators, mediators still serve a vital role in our litigation process. Courts depend heavily on the availability of the mediation process to help resolve disputes. Courts must feel confident that they are referring parties to a **fair and effective process** when they refer parties to mediation. And parties must be **confident** in the mediation process if they are to be willing to participate openly in it. Because parties

arguably have a **more intimate relationship** with mediators than with judges, it is critical that potential mediators not project any reasonable hint of bias or partiality. Indeed, all mediation standards require the mediator to disclose any facts or circumstances that even reasonably create a presumption of bias. … This duty to disclose is similar to the recusal requirements imposed on judges. …While mediators do not have the power to issue judgments or awards, because parties are encouraged to share confidential information with mediators, those parties must have **absolute trust** that their confidential disclosures will be preserved. ... Indeed, mediation is not effective unless parties are **completely honest** with the mediator. ... Just as a judge is required to recuse himself … whenever "his impartiality might reasonably be questioned," **mediators are required to disclose** a potential conflict whenever there are facts and circumstances that "could reasonably be seen as raising a question about the mediator's impartiality." You can read the entire decision here.

b. Letter to **Gerl** 59 IDELR 200 (OSEP 6/6/12) OSEP opined that a school district may **not use mediation** as a means to inform a parent of his options after a parent revokes **consent** for special education. Despite the requirement under IDEA that parental decisions under IDEA be made with "informed consent," and despite the policy favoring mediation under the reauthorization amendments, a school district may not use mediation or the other dispute resolution mechanisms under subpart E of the federal regulation, even if a parent voluntarily agrees to do so, after revocation of consent.

c. South Kingston Sch Committee v Joanna S ex rel PJS 64 IDELR 191 (1st Cir 12/9/14) First Circuit held that a settlement agreement provision whereby the parent agreed to **waive any and all** causes of action of which the parent knew or should

have known at the time that she signed the agreement did **not waive** any **unforeseeable** grounds for a complaint. But here the new request for a psychoeducational evaluation was among the many issues resolved by the previous settlement and was therefore foreseeable and waived by the settlement agreement.

f. FH by Hall v Memphis City Schs 764 F.3d 638, 64 IDELR 2 (6th Cir 9/4/14) A 97 day **gap** between the resolution meeting and the parties signing a settlement agreement did not prevent a 20 year old former student from suing to enforce the settlement. There is no time limit on resolution sessions, and a resolution agreement is enforceable in court.

g. Memo to Chief Sch Officers Re Dispute Resolution Procedures Under Part B of IDEA 61 IDELR. 232 (OSEP 7/23/13) The 64 page Q & A attachment includes a section on **mediation**.

i. JD by Davis v. Kanawha County Bd of Educ 571 F.3d 381, 52 IDELR 182 (4th Cir. 7/9/9) Fourth Circuit held that mediation discussions under IDEA are **confidential.** Accordingly where the school district offered a settlement stating that the terms would be the same terms as a failed mediation, district could not use the settlement offer to prove that it had made a more favorable settlement offer than the relief obtained by the parent at the due process hearing.

j. Hudson City Schs 63 IDELR 26 (SEA OH 2/7/14) State complaint investigator ruled that a mediator did not violate **impartiality** by sending an email to school officials repeating their statement that the parent is "odd." Investigator also ruled that the SEA did not violate FERPA, IDEA privacy or confidentiality requirements by

sharing information about the student with the mediator after the parent agreed to mediation.

k. JY by EY & GY v. Dothan City Bd of Educ 63 IDELR 33 (MD Ala 3/31/14) SD violated IDEA by not having a person with **decision making authority** present at a resolution session. Court ruled that this was a procedural violation that was harmless where no settlement was reached at the resolution session.

l. AS & RS ex rel SS v Office for Dispute Resolution, Quakertown Community Sch Dist 62 IDELR 239 (Penna Commonwealth Ct 1/24/14) Majority of state court held that a settlement was binding even though parents and their lawyer **changed the terms of the agreement** (including reimbursement for private services) without telling SD. District ratified the changes by signing the agreement{**reversing** this HO decision: Quakertown Community Sch Dist (LV) 113 LRP 23564 (SEA Penna 5/3/13) HO concluded that there was **no settlement**. The parties agreed, counsel for the district prepared an agreement, parents then changed language in the agreement and signed and returned the altered document}; JB & HB ex rel BB v Lake Washington Sch Dist 60 IDELR 130 (WD Wash 1/17/13) Court ruled that a settlement with a California school district was not binding upon a district in Washington state after the student transferred; Pagan-Negron ex rel CMP v Seguin Independent Sch Dist 62 IDELR 11 (WD Tex 9/24/13) Court ruled that a settlement agreement barring claims under IDEA does not prevent parent from filing lawsuit under §504/ADA.

n. Bd of Educ of Plainfield Community Council Sch Dist 202 v Ill State Bd of Educ 63 IDELR 40 (D Ill 3/26/14) Court granted **SD motion to enforce** an IDEA **mediation agreement**, rejecting parent claims that she signed agreement under **duress**,

was strong-armed and received nothing of benefit. Court noted that settlement was a compromise between the positions of the two parties concerning the transition of twins from a private school to a public school. No evidence of duress.

p. SD by Brown v Moreland Sch Dist 64 IDELR 205 (ND Calif 11/25/14) Court approved of settlement as **fair** and in the student's **best interest**; DC by TC v Oakdale Joint Unified Sch Dist 113 LRP 3443(ED Calif 1/23/13) Court approved as **fair** and reasonable a settlement of $65,000 for IDEA claim of improper restraint od student with ADHD causing an ankle injury; CM by PM & JM v Svosset Central Sch Dist 62 IDELR 106 (EDNY 11/22/13) Court adopted Mgst approval of settlement(Mgst recommendation at 62 IDELR 85); CM by PM & JM v Syosset Sch Dist 61 IDELR 254 (ED NY 8/9/13) Mgst recommended that court not approve a $17,500 settlement of parents IDEA, 504 and ADA suit where parent attorney had done no discovery and the entire amount would have gone to pay off a home equity **loan** parents took out to pay a hefty fee to their lawyers; GR v Brentwood Union Sch Dist 61 IDELR 124 (ND Calif 7/5/13)Court ruled that where a settlement offer from a school district **wrongfully required** the parents to **refrain from filing** any claims against the district for the upcoming school year, the parents were justified in rejecting the settlement and the fact that the offer was more favorable than what parents eventually received, the unreasonable offer did not cut off parent attorney fees at that point.

s. ADDITIONAL RESOURCE: Mark C Weber, "Settling IDEA Cases: Making Up is Hard to Do," (09/05/09), Loyola of Los Angeles Law Review Forthcoming, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1446008

5. FAPE Standard

a. Background:

The basic requirement of the IDEA is that states must have in effect policies and procedures that ensure that children with a disability receive a free and appropriate public education, hereafter or"FAPE." IDEA, Section 612(a)(1). The IDEA defines "FAPE" as: special education and related services that:
(A) have been provided at public expense, under public supervision and direction, and without charge;
(B) meet the standards of the State educational agency;
(C) include an appropriate preschool, elementary school or secondary school education in the state involved; and
(D) are provided in conformity with the individualized education program required (…hereunder.). IDEA, Section 602(9). See also 34 C.F.R. Sections 300.101 to 300.113.

The Supreme Court of the United States issued the seminal decision interpreting the provisions of the IDEA in the case of Board of Education of Hendrick Hudson Bd. of Ed. v. Rowley 455 U.S. 175, 102 S.Ct. 3034, 553 IDELR 656 (1982). The facts of the case were that the student had a hearing impairment. The parents requested that the schools provide a sign language interpreter for all of the student's academic classes. Although the child was performing better than the average child in her class and easily advancing from grade to grade, she was not performing consistent with her academic potential. Rowley, supra, 102 S.Ct at 3039-3040. Holding that FAPE required a potential maximizing standard, the District Court ruled in favor of the student. The U. S. Court of Appeals for the Second Circuit affirmed. See, Rowley, 102 S.Ct. at 3040. The Supreme Court reversed. Rowley, supra, 102 S.Ct at 3052. After a review of the legislative history of the Act and the cases leading to Congressional passage of the Act, the Supreme Court held that the Congress did not intend to impose a potential-maximizing standard, but rather, intended to open the door of education to disabled students by requiring a basic floor of opportunity. Rowley, supra, 102 S.Ct at 3043-3051.

The Supreme Court noted that the individualized educational program, or "IEP," is the cornerstone of the Act's requirement of FAPE. Rowley, supra, 102 S.Ct at 3038, 3049. The Court also notes with approval the many procedural safeguards imposed upon the schools by the Act. Rowley, supra, 102 S.Ct at 3050-3051. The Court also cautioned the lower courts (and by implication, due process hearing officers) that they are not to substitute their "…own notions of sound educational policy for those of the school authorities which they review." Rowley, supra, 102 S.Ct at 3051. The Supreme Court held that instead of requiring a potential maximizing standard, FAPE is satisfied where the education is sufficient to confer some educational benefit to the student with a disability. Rowley, supra, 102 S.Ct at 3048. Accordingly, the Court concluded that the IDEA requires "…access to specialized instruction and related services which are individually designed to provide educational benefit to the …" child with a disability. Rowley, supra, 102 S.Ct at 3048.

b. The problem:

Whenever a court discusses a FAPE issue, it invariably quotes Rowley, as it should. But then some circuits state the standard as meaningful educational benefit; whereas some state the standard as some educational benefit. Many have argued that the latter standard is higher.

c. Recent Tenth Circuit Case:

In Endrew F by Joseph F & Jennifer F v. Douglas County Sch Dist RE-I 115 LRP 39422 (10th Cir. 8/25/2015), the parents urged the Court to adopt the "higher" meaningful benefit standard. The court analyzed the issue and decided to apply the some educational benefit standard.

I don't think that the practical applications of the standard are different whether called meaningful or not. The Supreme Court has spoken on the FAPE standard, and the circuit courts of appeal are not free to adopt a higher standard. In our system the Supremes get the final word. The Rowley standard is the law. Period. Also I don't see much difference in how the standard is applied on a given set of facts, regardless of whether the term meaningful is added by the courts. The result is really the same for all practical purposes. Indeed, the Tenth Circuit hinted at this problem in its opinion. (The cool stuff is always in the footnotes.) In footnote number 8, the court noted that the difference between meaningful benefit and some benefit is not clear. I agree completely.

You can and should read the Tenth Circuit's opinion here. This argument will come up again.

6. Incarcerated Students

a. Dear Colleague Letter 64 IDELR 249 (OSERS 12/5/14) OSERS issued guidance on the IDEA rights of children with disabilities who are incarcerated. The guidance spells out the responsibilities of state departments of education, school districts and other LEAs, correctional facilities and non-educational agencies in providing child find, identification, evaluation, FAPE, least restrictive environment, discipline protections and the other provisions of IDEA. Here is a quote from the letter: "Students with disabilities represent a large portion of students in correctional facilities, and it appears that not all students with disabilities are receiving the special education and related services to which they are entitled. National reports document that approximately one third of students in juvenile correctional facilities were receiving special education

services, ranging from 9 percent to 78 percent across jurisdictions. States reported that in 2012–2013, of the 5,823,844 students with disabilities, ages 6 through 21, served under IDEA, Part B, **16,157** received special education and related services in correctional facilities. Evidence suggests that proper identification of students with disabilities and the quality of education services offered to students in these settings is often inadequate. Challenges such as overcrowding, frequent transfers in and out of facilities, lack of qualified teachers, inability to address gaps in students' education, and lack of collaboration with the LEA contribute to the problem. Providing the students with disabilities in these facilities the free appropriate public education (FAPE) to which they are entitled under the IDEA should facilitate their successful reentry into the school, community, and home, and enable them to ultimately lead successful adult lives." You can read the twenty-one page Dear Colleague letter here. The guidance was a part of a larger package, consisting of four guidance documents, of materials on the topic of educating incarcerated youth jointly issued by the federal departments of Education and Justice. You can review the entire package here; See, Letter to Chief State School Officers 114 LRP 26961 (US DOE 6/9/14) The Department noted that incarcerated students, many of whom have disabilities should be provided supports to ensure that they meet educational goals and avoid recidivism. Steps to address school to prison pipeline; and Dear Colleague Letter 64 IDELR 284 (OCR 12/8/14) OCR noted that more than 60,000 young people are in juvenile justice residential facilities and reminded that these students are entitled to equal educational opportunity including: access to coursework; services for ELLs; §504 FAPE; fair administration of discipline; freedom from

harassment; effective communication for students with hearing, speech or vision disabilities; and LRE concerns.

b. Buckley v State Correctional Institution – Pine Grove 65 IDELR 127 (MD Penna 4/13/15) District court reversed ho decision and found that a correctional facility denied FAPE to an incarcerated student who was convicted as an adult and who was a bona fide security risk by denying IDEA services altogether. IDEA does provide that the IEP of an incarcerated student can be modified where he poses a security risk, but the IEPT must consider accommodations. Although educational services yield to safety considerations, the IEP of the student may be modified but not discontinued altogether. The Court held that the student was entitled to some educational services although not necessarily outside of his cell.{See previous decisions: Buckley v State Correctional Institution – Pine Grove 62 IDELR 206 (MD Penna 1/6/14) Where student is appealing a ho decision that required the prison (his LEA) to obtain an IEE, but found that he was not entitled to FAPE because he posed a bona fide security risk, Court allowed additional evidence on appeal of his IEP report and evidence of his interactions with prison staff; and State Correctional Institution Pine Grove (BF) 113 LRP 32792 (SEA Penna 5/1/13) HO ruled that an incarcerated student was such a **serious security/safety risk** that he was not entitled to FAPE under IDEA, citing §614(d)(7)(A)& (B), and 34 CFR §300.324(D)}

c. GF, et al v Contra Costa County 66 IDELR 14 (ND Calif 7/30/15) Magistrate Maria Elena James approved of a settlement requiring a county education department to evaluate all students in juvenile hall suspected of having a disability, coordination with probation and health agencies, ensuring that eligible students receive

FAPE, and the hiring of a professor to serve as a consultant on disability related matters in juvenile hall..

d. Los Angeles Unified Sch Dist v Garcia 741 F.3d 922, 62 IDELR 221 (9th Cir 1/28/14) Pursuant to a ruling by the California SCt, the school district where the parents reside is responsible for providing FAPE to 18-22 year old students who are incarcerated in adult facilities. IDEA leaves it to each state to determine which entity within the state is responsible for providing SpEd and related services to students who are incarcerated. See history of case as follows: {Los Angeles Unified Sch Dist v Garcia 699 F.3d 956, 58 IDELR 62 (9th Cir 1/20/12) The Ninth Circuit certified a question to the California Supreme Court regarding whether under state law the school district in which the parents reside is responsible for providing IDEA services to an incarcerated student; Los Angeles Unified Sch Dist v Garcia 62 IDELR 148 (Cal S Ct 12/12/13) Upon certified question from 9th Circuit, California Supreme Court ruled that under state law, the school district of the parent's residence is responsible for the cost of providing FAPE to adult students in county jail.}

e. San Diego Office of Educ v Pollock ex rel MP 64 IDELR 42 (SD Calif 9/6/14) Court dismissed LEA suit for breach of contract and reimbursement for a residential placement for a twelve year old in the juvenile justice system because there was no federal question. The IDEA provision requiring interagency cooperation did not create a private right of action. {See San Diego Office of Educ v Pollock ex rel MP 114 LRP 35529 (SD Calif 8/11/14) Court ordered further briefs in this case.}

f. Sam K by Diane L & George K v Dept of Educ, State of Hawaii 60 IDELR 190 (D Haw 2/13/13) Court ruled that district improperly predetermined placement by

deciding that the student should attend a public program for juvenile offenders. Student had a need for stability

g. In Re: TJ 60 IDELR 198 (Ohio App Ct 2/21/13) State appellate court ruled that a student awaiting a juvenile court proceeding could not bring a claim for failure to implement his IEP as a part of his delinquency case where he failed to exhaust by first having a dph;

h. Sacramento City Unified Sch Dist 113 LRP 23312 (SEA Calif 4/18/13) HO found denial of FAPE when school district did not provide comparable services to student while he attended school in juvenile hall.

i. Meridian Joint Sch Dist #2 v DA & JA ex rel MA 60 IDELR 282 (D Idaho 3/20/13) Court affd HO decision to award IEE at public expense where school district should have evaluated student after release from juvenile detention facility where he had had social difficulties rather than rely upon evaluation while he was in the setting of the juvenile facility.

j. TR v Humbolt County Office of Educ 65 IDELR 293 (ND Calif 7/18/15) Court found sufficient deliberate indifference to deny mo/dismiss where parents alleged that County had information about a deaf teen's psychiatric needs but provided no mental health services during a nine month placement in juvenile hall; Doe ex rel Doe v Bradshaw 62 IDELR 23 (D Mass 9/13/13) Court found §504 deliberate indifference where soccer coach sexually assaulted student and school district resisted parent attempts to have student **evaluated under IDEA** for SpEd for over a year instead referring him to juvenile authorities.

k. Morris v Dist of Columbia 63 IDELR 99 (DDC 4/25/14) Court reversed HO who dismissed parent claim as moot where student was confined in a group home for three to nine months as a result of a probation violation. Although the student would not be able to obtain the relief of a private placement, he could receive compensatory education and his IEP could be corrected if inappropriate which could help him during confinement; District of Columbia Public Schs 115 LRP 16792 (SEA DC 2/10/15) HO found that a juvenile detention center violated IDEA by failing to offer services outside the regular classroom.

l. San Diego County Office of Educ v Pollock ex rel MP 63 IDELR 193 (SD Calif 6/20/14) Court denied LEA motion to continue litigation where claim was moot after HO ordered a student formerly in juvenile hall to be placed in a residential facility. However, because of financial issues including the unfairness of other agencies not contributing; court remanded to HO re residential placement and instructed to dismiss.

m. McAllister v Dist of Columbia 63 IDELR 130 (DDC 5/21/14) adopting Mgst @ 62 IDELR 294. Parent was not permitted to raise issue of alleged denial of FAPE during 46 day period of incarceration where parent's dpc did not raise this issue.

7. Parents' Right to Participate

a. Midd West Sch Dist 112 LRP 45128 (JG) (SEA Penna 8/25/12) HO found that a parent has a right to meaningful participation in the IEP process as well as the education of their child. Where the special ed director severely limited the parent's right to **communicate** with other IEP team members and the special ed director sent emails to

other IEPT members **ridiculing** the parent, he severely impaired her right to participate. HO ordered the compensatory service of counseling for the student as a result.

b. Doug C ex rel Spencer C v State of Hawaii, Dept of Educ 720 F.3d 1038, 61 IDELR 91 (9th Cir 6/13/13) The Ninth Circuit, noting that holding the annual IEPT meeting on time was **less important** than the having the parents **participate** in the IEPT meeting, held that the fact that it was difficult to work with the parent and that it was difficult to schedule an IEPT meeting was not a good enough reason for convening an IEPT meeting without the parent where the parent had not affirmatively refused to attend the IEPT meeting; Contrast, Cupertino Union Sch Dist v KA by SA & JS 64 IDELR 200 (ND Calif 12/2/14) Where parents attended IEPT meeting that was suspended to be reconvened after members reviewed evaluative data, but while suspended parents filed dph and informed SD that it would not attend further IEPT meetings until HO ruled, SD did not violate IDEA by developing an IEP without additional meetings.

c. RL & SL ex rel OL v Miami-Dade County Sch Bd 757 F.3d 1173, 63 IDELR 182 (11th Cir 7/2/14) Eleventh Circuit ruled that where IEPT meeting transcript showed that the district representative at the meeting **cut short** conversation regarding a smaller setting in the public high school, LEA had predetermined the child's placement. The school district's predetermination prevented them from raising the third prong (equities) of the Burlington etc analysis in order to defeat claim for reimbursement.

d. MM & EM ex rel LM v. Lafayette Sch Dist 64 IDELR 31 (9th Cir 9/12/14) 2-1 majority of Ninth Circuit held that a school district denied FAPE by failing to share more than a year's worth of **RtI data** with a student's parents. Although the

district used the severe discrepancy model to conclude that the student was eligible, without the RtI data, the parents were denied meaningful opportunity to participate. The procedural violation was actionable because without the data, the parents, unlike other IEPT members were unable to decipher the student's unique needs.

e. Letter to Breton 113 LRP 46788 (OSEP 9/24/13) OSEP informed an SEA SpEd Director that IDEA does not permit an LEA to **require** a parent to submit their concerns in writing **three days prior** to the IEPT meeting. However, if a parent submits lengthy written comments, the LEA may request the parent to orally summarize the concerns.

f. Simmons v Pittsburg Unified Sch Dist 63 IDELR 158 (ND Calif 6/11/14) Court ruled that school district had violated IDEA by concluding that the fact that it had developed a §504 plan for the student relieved the district of conducting and IDEA evaluation. Parents' right to participate was violated because they were not included in the eligibility process. Remanded to ho re compensatory education.

g. DA & JA ex rel MA v Meridian Joint Sch Dist No 2 62 IDELR 205 (D Idaho 1/6/14) That SD did **not acquiesce** to parents' position does **not mean** that parents (who actively participated) were **denied** meaningful participation; BP & SH v NY City Dept Of Educ 64 IDELR 199 (SDNY 12/3/14) Ct held that parents were allowed meaningful participation where goals in question were discussed by IEPT; MS by JS v Utah Sch for the Deaf & Blind 64 IDELR 11 (D Utah 8/25/14) Court held that parents were not denied meaningful participation where they participated in IEPT meetings.

8. Discipline

a. Letter to Gerl 51 IDELR 166 (OSEP 5/1/8) In the scenario of an expedited hearing, the fifteen calendar day resolution period runs **concurrently** with the twenty school day limit for the convening of the hearing. Although the five business day rule for disclosure of evidence must also be factored in, DOE feels that there is nonetheless sufficient time to schedule the expedited hearing.

b. Dear Colleague Letter 114 LRP 1091 (US DOE & DOJ 1/8/14) The United States Departments of Education and Justice issued policy guidance for school districts and states to **reduce unlawful discrimination** in student discipline policies. This seems to be a conscious decision by the Administration to attack the school-to-prison pipeline problem. Although the thrust of the guidance is obviously to reduce racial discrimination in school discipline, the Dear Colleague letter notes specifically that the contents of the guidance also fully apply to discipline that discriminates against children with disabilities and other protected groups. (See footnote 4 on pages 2-3 of the Dear Colleague Letter). You can read the DOE blog article here. You can review the video by Secretary Duncan and the complete guidance package here. The Dear Colleague Letter is available here.

c. Letter to Anonymous 113 LRP 14615 (FPCO 2/13/13) FPCO ruled that IDEA HO does not have authority to override the parental consent requirement before a school district discloses a student's educational record. IDEA incorporates FERPA…In the letter, a HO ordered a school district to produce records for the **other students involved in a disciplinary infraction** at parent's request. FPCO ruled that the school

district would have violated FERPA if it had complied with the HO's order without the consent of the other parents (??)Contrast, Morton v Bossier Parish Sch Bd 63 IDELR96 (WD Louisiana 5/6/14) Court **upheld** the validity of an **interrogatory** by parents of a teen who allegedly committed suicide after disability-based harassment. Interrogatory sought the names, addresses and phone numbers of **all students who attended class with the student for two years before his death.** Mgst noted that before complying with the interrogatory, SD must notify classmates and parents of the court order to permit them to seek protective order under FERPA.

d. Memo to Chief Sch Officers Re Dispute Resolution Procedures Under Part B of IDEA 61 IDELR. 232 (OSEP 7/23/13) The 64 page Q & A attachment includes a section on **expedited hearings**; Questions and Answers on Discipline Procedures 52 IDELR 231 (OSERS 6/1/9) (NB OSERS offers guidance in the situation where consent is revoked); Questions and Answers on Procedural Safeguards and Due Process Procedures 52 IDELR 266 (OSERS 6/1/9).(NB OSERS clarifies that a school district may still go directly to court for a temporary injunction to remove a student for safety reasons. In OSERS' opinion a district need not exhaust administrative remedies in that situation.); Questions and Answers on Serving Children with Disabilities Eligible for Transportation 53 IDELR 268 (OSERS 11/1/9) (NB OSERS clarifies that because a school bus suspension may be a change of placement, it may trigger all of the IDEA disciplinary protections, including educational services to enable student to access the general curriculum).

e. District of Columbia v. Doe ex rel Doe 611 F.3d 888, 54 IDELR 275 (DC Cir 7/6/10) DC Circuit ruled that HO did not exceed his authority where he **reduced**

a disciplinary **suspension.** HO reduced a 45 day suspension to an 11 day suspension noting the trivial nature of the infraction and finding that the more lengthy suspension denied FAPE to the student. Court notes that in legislative history Congress intended to strip schools of the unilateral authority they traditionally had to exclude children with disabilities. Note this reverses the district court decision at 573 F.Supp.2d 57, 51 IDELR 8 (D.DC 8/28/8) cited in previous outlines.

f. In Re Student With A Disability 52 IDELR 239 (SEA **WV** 4/8/09) Under IDEA'04 changes, conduct is a **manifestation** of a disability only if 1) the disability caused or is substantially related to the conduct, or 2) the conduct is the direct result of the failure to implement the IEP.

g. Warrior Run Sch Dist 114 LRP 37530 (JG) (SEA Penna 3/17/14) HO ruled that IDEA disciplinary protections were available only to students who are eligible or who should have been identified.

h. District of Columbia Public Schs (JG) 111 LRP 60123 (SEA DC 4/10/11) HO found a denial of FAPE where the school district failed to conduct a manifestation determination where a **series/pattern** of suspensions constituted a change of placement because the pattern of removal for over 20 days total for incidents involving similar types of misconduct over a short period of time. HO ordered **MDR** and a review of student's bip for possible modifications; Anaheim Union HS Dist v JE 61 IDELR 107 (CD Calif 5/21/13) Court ruled that school district had **notice** of student's **likely status** as child with a disability, and therefore should have done MDR before placing student in an alternative school. 504 teams discussion of his failing grades and inability to remain in class coupled with an attempted suicide were sufficient to confer knowledge on school

district. **Contrast**, Conneaut Area City Schs 113 LRP 26341 (SEA Ga 6/7/13) State complaint investigator found that an MDR was not required where student had two suspensions totaling 8 school days; Minneapolis Special Sch Dist # 1 113 LRP 28527 (SEA Minn 5/20/13) State complaint investigator ruled that an MDR was not required because student was out of school for suspensions only 8 days, therefore not a change of placement; Dist of Columbia Pub Schs (PV) 114 LRP 25503 (SEA DC 5/9/14) HO held that numerous incidents of sending student home for being disruptive or aggressive were not disciplinary in nature and therefore did not trigger the MDR requirement. (?); Avila v Spokane Sch Dist #81 64 IDELR 171 (ED Wash 11/3/14) Court rejected parent argument that SD was required to conduct an MDR to determine whether there was a connection between student's autism and the conduct he was suspended for. Where suspension was for six days and there was no pattern of removals, there was no change of placement and no MDR was required.

i. Wayne-Westland Community Schs v VS & YS 64 IDELR 139 (ED Mich 10/9/14) Court granted SD a **Honig v Doe injunction**. Court granted TRO prohibiting teen from entering upon school grounds where he was **extremely dangerous** and temporarily permitted SD to educate the student through an online charter program. The 6 foot 250 pound student has kicked, punched and spat on students and staff, threatened to rape a teacher and made racist comments; Seashore Charter Sch v EB by GB 64 IDELR 44 (SD Tex 9/3/14) Court issued **Honig v Doe injunction**. Court found that a 15 year old with autism had a tendency to bite, scratch and pull hair and that this constituted a dangerous situation at a charter school, ordering his stay put placement to

his neighborhood HS until HO rules. {Honig v. Doe (1988) 484 U.S. 305,108 S.Ct. 592, 59 LRP 8952}(These used to be **rare**)

j. Ocean Township Bd of Educ v. ER ex rel OR 63 IDELR 16 (D NJ 3/10/14) Noting that in disciplinary cases, **stay put is the IAES**, court granted TRO motion by SD and reversed ho's stay put order that paced student back into neighborhood HS.

k. JF by Abel-Irby v New Haven Unified Sch Dist 64 IDELR 212 (ND Calif 11/19/14) Court dismissed parent suit challenging SD MDR determination was moot where all available relief had already been provided, including an fba/bip.

l. Garmany v Dist of Columbia 935 F.Supp.2d 177, 61IDELR 15 (DDC 3/30/13) Court upheld HO ruling that **in-school suspensions** of a student with an SLD did not violate his bip or deny him FAPE.

m. Link v Metropolitan Nashville Bd of Public Educ 113 LRP 52143 (Tenn Ct App 12/19/13) On appeal of decision that expulsion was not excessive, parents attempted to add issue of appropriateness of district MDR but court dismissed because issue was not the subject of dph below;

n. **not a manifestation** of the student's disability,; Southington Bd of Educ 113 LRP 42841 (SEA CT 6/14/13) HO ruled after expedited dph that student having 200 steroid pills was not a manifestation of his ADHD; New Haven Unified Sch Dist 113 LRP 28568 (SEA Calif 5/20/13) HO affirmed expulsion finding that a student's punching and kicking a principal who attempted to restrain her while she was having a fistfight with another student was not a manifestation of her SLD or ADHD.

o. **safety exception** White Bear Lake Area Sch 113 LRP 28309 (SEA MN 5/13/13) HO approved removal of student to a therapeutic placement for 45 days where student engaged in many violent behaviors and district efforts to address the behaviors were unsuccessful.

p. **serious bodily injury**. (no significant cases)

q. "dangerous **weapon**" provision (no significant cases)

r. student knowingly possessed illegal **drugs** at school (no significant cases)

s. Other Resources:

1. Report by **Council of State Governments**: The Council of State Governments released a report on school discipline that tells school districts to spare the rod. The report notes that an over reliance by schools on suspensions is fueling the school to prison pipeline. The report is highly critical of **zero tolerance** discipline policies. The School Discipline Consensus Report mentions frequently that kids with disabilities are targeted for school discipline. Indeed the report emphasizes that children with disabilities are **twice as likely** as their non-disabled peers to be singled out for school discipline. The Report includes sixty recommendations to keep kids in the classroom and out of the courtroom. You can read the entire 436 page report here. Video and press coverage of the report are available here.

2. NINHCY Training Module on discipline. You can review the NICHCY module here.

BONUS CASE: ABA Therapy and the Hague Convention

Ermini v. Vittori 114 LRP 31602, 2014 WL 3056360 (2d Cir. 7/8/14) This is a non-IDEA decision about a nine year old boy with autism. His Italian parents moved to the United States to obtain ABA therapy for Danielle, their son. After some domestic violence, the marriage ended in divorce. The father sued under the Hague Convention as implemented in the United States by the International Child Abduction Remedies Act, 42 U.S.C. § 11601 et seq. to have his daughter returned to Italy. The Hague Convention is a treaty that provides for the return of children wrongfully removed from their country of habitual residence. The U. S. District Court in New York found that the student had benefited immensely from her ABA-based program, especially in the areas of communication, vocabulary, self-care and general cognition. The court found further that any hope that the child might lead an independent and productive life required a continued ABA program like the one offered by his school in the United States. The Court found it very likely that the child would not be able to have a similar educational program in Italy. The court ruled that the child could remain in the US because return to Italy posed a grave risk of harm to the child, one of the exceptions spelled out by the treaty. The Second Circuit affirmed noting that both the domestic violence history and the harm caused by the loss of the child's educational ABA-based program would pose a grave risk of harm to the child. The big question from our perspective is how this case will affect the IDEA analysis of ABA-based therapy. I predict (and my crystal ball is sometimes cloudy!) that hearing officers and courts in special education cases will soon be hearing arguments on just what this second circuit decision means for purposes of

IDEA. It was not an IDEA case, but I am already imagining the arguments that clever lawyers on both sides will be making.

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