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

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I. Supreme Court Update

A. Endrew F by Joseph F v. Douglas County Sch Dist RE-1, # 15-827, 69 IDELR 174, 580 U.S. __, 137 S.Ct. 988 (2017)

1. Background

The Requirement of FAPE
(**free and appropriate public education**)

> The basic requirement of the IDEA is that states and school districts must have in effect policies and procedures that ensure that children with a disability receive a ***free and appropriate public education***, hereafter sometimes referred to as "FAPE." IDEA, § 612(a)(1).
>
> The IDEA defines "child with a disability" as a child:
>
> (i) with mental retardation, hearing impairments…, speech or language impairments, visual impairments…, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and
>
> (ii) who **by reason thereof**, needs special education and related services.
>
> IDEA, § 602(3)

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, § 602(9). See also 34 C.F.R. §§ 300.101 to 300.113.

The IDEA defines "special education" as:

Specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, including

(A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and

(B) instruction in physical education.

IDEA, § 602(29).

In 1982, 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***, hereafter sometimes referred to as the "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 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 concludes 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.

The Supreme Court instructed lower courts that the inquiry in cases alleging denial of FAPE should be **twofold**: First, have the schools "…complied with the **procedures** set forth in the Act? And second, is the individualized educational program developed through the Act's procedures **reasonably calculated** to enable the child to receive **educational benefit**." Rowley, supra, 102 S.Ct. at 3051.

Prior to the Endrew F decision, all courts cited the Rowley standard as the law governing FAPE. But some circuits read the requirement as "some benefit,' while other circuits read the requirement as "meaningful benefit." Some saw this as an important difference.

2. The Facts

The student, Endrew F. was diagnosed with autism at age two. Endrew attended school in respondent Douglas County School District from preschool through fourth grade. Each year, his IEP Team drafted an IEP addressed to his educational and functional needs. By Endrew's fourth grade year, however, his parents had become dissatisfied with his progress. Although Endrew displayed a number of strengths—his teachers described him as a humorous child with a "sweet disposition" who "show[ed] concern for friends"—he still "exhibited multiple behaviors that inhibited his ability to access learning in the classroom." Endrew would scream in class, climb over furniture and other students, and occasionally run away from school. He was afflicted by severe fears of commonplace things like flies, spills, and public restrooms. As Endrew's parents saw it, his academic and functional progress had essentially stalled: Endrew's IEPs largely carried over the same basic goals and objectives from one year to the next, indicating that he was failing to make meaningful progress toward his aims. His parents believed that only a thorough overhaul of the school district's approach to Endrew's behavioral problems could reverse the trend. But in April 2010, the school district presented Endrew's parents with a proposed fifth grade IEP that was, in their view, pretty much the same as his past ones. So his parents removed Endrew from public school and enrolled him at Firefly Autism House, a private school that specializes in educating children with autism. Endrew did much better at Firefly.

In November 2010, some six months after Endrew started classes at Firefly, his parents again met with representatives of the Douglas County School District. The district presented a new IEP. In February 2012, Endrew's parents filed a complaint with the Colorado Department of Education seeking reimbursement for Endrew's tuition at Firefly. An ALJ denied relief. Endrew's parents sought review in Federal District Court. The District Court

affirmed. The parents appealed again and The Tenth Circuit affirmed, holding that that a child's IEP is adequate as long as it is calculated to confer an "educational benefit [that is] merely . . . more than de minimis."

3. The Supreme Court Decision

The United States Supreme Court issued a big decision in March, 2017. The high court clarified what FAPE means and how courts should apply the FAPE requirement. The decision in *Endrew F by Joseph F v. Douglas County Sch Dist RE-1* vacates and remands a previous decision by the Tenth Circuit.

A few preliminary observations: First this was a **unanimous** decision, the second special ed unanimous decision by the Supremes this year. So we have a new slogan of this area of law: special ed law...bringing people together!

Second, although this opinion clarifies how courts should apply the FAPE standard, the court's decision does **not overrule** the seminal ***Rowley*** decision. Instead, it clarifies *Rowley* and explains how courts have not been correctly interpreting the decision.

Now for some general analysis- the new gold standard for FAPE is: to meet its obligations under IDEA, a SD must offer an IEP **reasonably calculated to enable a child to make progress in light of the child's circumstances**. The court described this standard is a **fact-intensive** exercise. The question is what is reasonable not what is ideal.

4. Analysis

The Supreme Court said that the Rowley decision sheds light on what appropriate progress will look like in many cases- where a child is fully integrated in **regular education classes**, that is the IEP must be reasonably calculated to make progress and to make **passing marks** and **advance**

from grade to grade. The court noted that the facts of Rowley fit this analysis. In footnote # 2, the court reiterated the language in Rowley that it was specifically declining to hold that every child advancing from grade to grade is automatically receiving FAPE. The Court also noted that the fact that the new standard is not a bright line is not in any way a suggestion that a court should substitute its own notion of sound educational policy for that of professional educators.

But where a child is **not fully integrated** in regular education classes, the IEP **need not aim** for **grade level** advancement. Instead, the IEP must be **appropriately ambitious** in light of the child's **circumstances**. The goals may differ, but every child should have the chance to meet **challenging objectives**.

The clarification, according to the Court, is a standard not a formula- but in any event it is "...**markedly more demanding** than the 'merely more than **de minimis'** test applied by the Tenth Circuit. It cannot be the case that the Act typically aims for grade level advancement for children with disabilities who can be educated in the regular classroom, but is satisfied with barely more than de minimis progress for those who cannot."

The Supreme Court decision also **flatly rejected** the parent's argument that FAPE requires an opportunities to achieve academic success, attain self-sufficiency, and contribute to society that are substantially equal to the opportunities afforded children without disabilities. The court here noted that Congress has reauthorized IDEA number of times without overruling the Rowley decision which had rejected a similar **potential-maximizing FAPE standard**, so it would not adopt the parent's proposed FAPE standard.

The court stated..."We will **not** attempt to **elaborate** on what "appropriate" progress will look like from case to case. It is in the nature of the Act and the standard we adopt to resist

such an effort: the **adequacy** of a given **IEP turns** on the **unique circumstances** of the child for whom it was created."

Some additional thoughts. First, the Court did **not reach** the **some** benefit **vs. meaningful** benefit debate which seemed to be the real question in the petition for certiorari. Instead, the court rephrased the FAPE standard without reversing the Rowley decision. So the new standard is that an IEP must be reasonable given the unique circumstances of the individual child with a disability. The high court stated that although the standard does not require an ideal education or potential maximization, it clearly requires more than a trivial or de minimis educational benefit.

One of my blog readers suggested that parents may now fight harder for **full inclusion** because of the court's statement that generally students in the general education classroom receive FAPE where they make grade level progress and advance from grade to grade.

5. Who Won?

I got an email from a reporter just after the decision asking a fascinating question: did parents or school districts win in the Endrew F decision by the US Supreme Court?

The reporter noted that it seems that parent groups are hailing the decision as a victory for them while at the same time school district groups are saying that they are already providing educational benefit at the level required by this decision.

So who won...well the answer is not very clear

For the parties to the actual case, the matter was remanded to the Tenth Circuit. This means that there will be further court proceedings before we know who prevailed in this case.

For purposes of special education law, however, the answer is a little foggy. School districts clearly won to the extent that the Supremes did **not overturn Rowley**. In fact the decision does not even mention the battle between some benefit vs. meaningful benefit that the earlier pleadings and argument seemed to involve. So Rowley is still **good law**.

On the other hand, parents clearly won to the extent that the high **court required more benefit than** the more than trivial or **de minimis standard** used by the Tenth Circuit Court of Appeals. To provide FAPE, a school district has to do better than that. The unanimous Supreme Court held that the standard is **"markedly more demanding"** than the standard used below.

However, school districts clearly won to the extent that the court **rejected** the **potential maximizing standard** that was previously rejected by Rowley. The Court refused to require an IEP that lead to self-sufficiency, academic success, and the ability to contribute to society. The Court rejected the argument that **opportunity equal** to that received by non-disabled students is necessary. In this regard, the Court mentioned that the Congress had amended IDEA a number of times since 1982 and yet never overruled Rowley so that it was good law still. Potential maximization arguments that had been rejected in Rowley continue to be rejected. So an **IEP must be reasonable not ideal**.

Nonetheless, parents clearly won to the extent that the court made FAPE turn on the **individual circumstances of the child.** The Court stated, "The goals may differ, but every child should have the chance to meet **challenging objectives...**" Rather than develop a bright line rule, the Court adopted an individualized fact specific approach.

OK so everybody won. Or at least you can see why they all believe that they won.

The real answer to the question will turn on how hearing officers and courts apply the new standard to actual fact patterns. The **new standard** requires that an IEP must be **reasonable given the unique circumstances of the child** with a disability. In other words, the IEP must be reasonably calculated to enable a child to make progress in light of his own individual circumstances. Students fully integrated in **general education** classrooms will be expected to make **passing grades and advance** from grade to grade. **Other** special education students may not need to make grade level success to receive FAPE as the **standard** for them is **somewhat lower**.

Hearing officers and courts will follow the Supreme Court's instruction and apply the revised standard on a **case by case basis.** They will engage in a **fact-specific analysis** involving the unique circumstances of the child with a disability. To some extent, what is "reasonable" is in the eye of the beholder.

You can read the decision here.

6. Application by Circuit Courts of Appeal

a. Fourth Circuit: ML by Lieman v Montgomery County Board of Education 117 LRP 33077 (4th Cir 8/14/17) The Fourth Circuit ruled that a school district did not deny FAPE where a student's IEP did not include instruction in the customs and practices of Orthodox Judaism. The Fourth Circuit **notes that the FAPE standard that it had been applying prior to Endrew F was quite similar to the "merely more than de minimis" standard applied by the Tenth Circuit and rejected by the Supreme Court.** The Fourth Circuit did not reach the question of the FAPE standard, however, because the court found that IDEA does not provide the relief sought by the parents under any standard. The Court ruled that IDEA does not require schools to provide religious instruction, and citing the

language from *Endrew F* concerning "progress appropriate in light of the child's circumstances," the court found that the circumstances that are relevant involve the student's disability and not his faith or culture. Because IDEA does not guarantee any particular outcome, the Fourth Circuit held that FAPE had been offered and affirmed the denial of reimbursement.

b. Eighth Circuit: IZM v Roesmount-Apple Valley-Eagan Public Schs, Independent Sch Dist No 1 70 IDELR 86 (8th Cir 7/14/17) Eighth Circuit ruled that a state statute regarding Braille instruction did not raise the bar for FAPE. The Court noted that IDEA does not guarantee that a child make any progress. The court acknowledged the "progress appropriate in light of the child's circumstances," language from *Endrew F*, and noted that the new standard by the Supreme Court was consistent with its ruling that the school district had provided FAPE even though not all of the student's instructional materials were provided in Braille despite reasonable efforts to do so.

c. Ninth Circuit: MC ex rel MN v Antelope Valley Union High Sch Dist 858 F.3d 1189, 117 LRP 21748 (9th Cir 5/30/17) Although the Ninth Circuit did not apply the Endrew decision, remanding the question instead to the District Court, the Ninth Circuit gave some serious hints as to how it may interpret the high Court's clarification: "Recently, the Supreme Court clarified *Rowley* and provided a more precise standard for evaluating whether a school district has complied substantively with the <IDEA >: "To meet its substantive obligation under the <IDEA >, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F.*... In other words, the school must implement an IEP that is reasonably calculated to remediate and, if appropriate, accommodate the child's disabilities so that the child can "make progress in the general education curriculum," *id.* at 3 (citation omitted), **taking into account**

the progress of his non-disabled peers, and the child's potential. We remand so the district court can consider plaintiffs' claims in light of this new guidance from the Supreme Court." {emphasis added}

B. *Fry v Napoleon Community Schools* Docket No. 15-497, 69 IDELR 116, 580 U. S. ____, 137 S.Ct. 743 (2/22/2017)

1. The facts are as follows: The student in this case has a severe form of cerebral palsy that significantly limits her motor skills and mobility. Her parents obtained a service dog, a goldendoodle named Wonder who aids the student by retrieving dropped items, helping her balance on her walker, opening and closing doors, turning on and off lights, etc. The elementary school attended by the student refused to allow her to bring the service dog, claiming that her needs were met by the human aide provided by her IEP. (I love service dogs!)

The parents removed the student from school and began homeschooling her. After an OCR complaint, the elementary school offered to allow the dog to attend with the student, but the parents felt that the principal would resent the student and make her return difficult, so the student was enrolled in a different public school in a different district. (NB because the case was originally decided on a motion to dismiss all facts plead in the parents complaint were accepted as true.)

The parents then filed suit in federal court alleging violations of the Americans with Disabilities Act and §504 of the Rehabilitation Act. The district court granted the school district's motion to dismiss holding that exhaustion of administrative remedies require the parents to first have a due process hearing before an IDEA hearing officer. The Sixth Circuit Court of Appeals agreed with the District Court. The Supremes granted certiorari, and the issue before the Supreme Court was when

Interesting aside: the Fry case, the NSBA, NASDSE, AASA and others filed an amicus brief, and the brief **cites me and one of my outlines** concerning the duty and power of a hearing officer to make a complete record. Check out footnote 18 on page 24 for the reference to my outline and the complete record discussion. You can read the amicus brief here.

2. The Supreme Court's **holding** has two parts. First it ruled that **exhaustion of IDEA** hearing procedures is **only required** where parents seek **relief** for a **denial of a free and appropriate**

public education. Second it held that courts must look to the **gravamen of a complaint** to determine whether it seeks such relief.

The **reasoning** of the court is **flawed.** The basis for the ruling is the court's conclusion that the **only relief** that a hearing officer can give is relief for a denial of FAPE. Apparently the parties stipulated to this fact, but unfortunately it is wrong. The court's standard is fine for the 85%+ of IDEA cases that involve a denial of FAPE, but how about the other cases? There are **four specific areas** that can give rise to a due process complaint for an IDEA violation. Denial of FAPE **is one of the four** areas; the others are evaluation, identification (including child find and eligibility) and placement (including allegations of least restrictive placement violations, disciplinary changes of placement, etc). IDEA §615(b)(6)(A); 34 CFR § 300.507(a)(1). What about those cases? Does this opinion authorize parents who are alleging an LRE violation or a child find violation or an independent educational evaluation at public expense the right to go directly to court without first exhausting administrative remedies because the gravamen of their complaint is not a denial of FAPE? Will parent lawyers test this new ruling by avoiding FAPE but challenging the other three categories of IDEA violations? I cannot believe that this is the result the high court is anticipating.

The court's confusion, as well as the parties, seems to stem from the changes made to IDEA in 2004 concerning procedural violations. Specifically, the Act was amended to include a provision that procedural violations only constitute a denial of FAPE where there was something more, like an adverse effect on the student's education or a substantial impeding of the parent's participation rights. IDEA § 615(f)(3)(E). The section also includes a requirement that the decision of a hearing officer be based upon substantive grounds. The Office of Special Education Programs, specifically because of these considerations, wrote the federal regulations to clarify that only a hearing officer's decision concerning whether FAPE was provided must be on substantive grounds. 34 C.F.R. §300.513(a). In an attempt to allay fears that the provision might limit hearing officers to ruling only on FAPE issues, OSEP in its analysis of comments to the proposed federal

regulations specifically stated that despite this new provision in IDEA "...(h)earing officers continue to have the discretion to dismiss complaints and make rulings on matters in addition to those concerning the provision of FAPE, such as the other matters mentioned in §300.507(a)(1)." 71 Fed. Register No. 156 at page 46707 (OSEP August 14, 2016). The other matters in the quoted regulation are placement, identification and evaluation.

3. From there the high court provides guidance to lower courts in interpreting this test. The Supreme Court ruled that the lower courts must look at the substance or gravamen of the complaint- to prevent parties from avoiding the exhaustion requirement by artful pleading.

The court then **suggests some specific questions** for lower courts to consider. This is where the concurring justices (Alito and Thomas) get off; they find the suggested questions which begin on page 15 of the opinion to be not so good. The six justice opinion offers three questions. **First** could a plaintiff have brought **essentially the same claim for a public facility that is not a school**- a theater or library for example. **Second could an adult at the school-** an employee or visitor for example- **have brought essentially the same grievance**? If the answer to these questions is yes, exhaustion would not be required because the gravamen of the complaint would not be a FAPE case. Another line of inquiry for lower courts suggested by the high court involves the **parent's prior history with IDEA proceedings**. A plaintiff that began seeking relief in a due process hearing may possibly be after relief for a denial of FAPE.

One issue that the Supreme Court specifically **did not reach** was whether exhaustion of IDEA remedies is required where the plaintiff complains of a denial of FAPE, but seeks a **remedy that an IDEA hearing officer cannot give** such as money damages. Because the parents argued that their complaint was not about a denial of FAPE, the Court specifically ducked the issue as unnecessary to the resolution of this case. See footnotes 4 and 8, and the surrounding text. So this decision does not provide guidance in that situation.

You can read the opinion and the concurring opinion here. My analysis is in this blog post.

4. Application by Circuit Courts of Appeal

a. Eighth Circuit JM by McCauley v Francis Howell Sch Dist 850 F.3d 944, 69 IDELR 146 (8th Cir 3/7/17). The Eighth affirmed a district court decision dismissing a §504/ADA claim for failure to exhaust administrative remedies by filing an IDEA dph. Applying the *Fry* decision, the Eighth Circuit ruled that the substance (not the surface) of the parent's complaint sought relief for a denial of FAPE. The complaint alleged that the student had been placed in physical restraints for half a school day resulting in loss of academic benefits. The Eight Circuit also noted that the history of this dispute had included an initial complaint alleging violations of IDEA, another factor cited in the *Fry* decision gravitating toward requiring exhaustion. Finally as to the issue ducked by the Supreme Court, the Eighth Circuit ruled that the fact that the parents sought as relief only compensatory and punitive damages, which are not recoverable under IDEA, did not exempt the claim from the exhaustion requirement.

II. Other Hot Button Issues:

1. Bullying/Harassment/Safety

2. Parent's Right to Participate

3. Incarcerated Students/ Brush with Criminal Law

4. Mediation and Settlement

BONUS: Autism (selected cases)

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.

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 7/24/14) 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.

1C). TK & SK ex rel LK v. New York City Dept of Educ 810 F.3d 869, 67 IDELR 1 (2d Cir 1/20/16) Second Circuit affirmed district court awarding reimbursement where SD told parents that **bullying was not a subject for an IEPT** meeting- thereby denying them their **participation rights** which was an actionable procedural violation. @n.3 Second Circuit declined to reach the issue of whether failure to address bullying was a substantive violation of IDEA. For the same reason, "we express **no opinion**" concerning the district court's **four-part test** for determining when bullying violates IDEA. See my blog post.

2). SB by AL v. Bd of Educ of Hartford County 819 F.3d 69, 67 IDELR 165 (4th Cir 4/8/16) Fourth Circuit applied the **deliberate indifference** standard to a **§504 bullying claim**. To prevail a parent must prove 1) student was harassed on the basis of disability, 2) the harassment was so severe and pervasive as to deprive the student of educational benefit, and 3) SD knew about the harassment and was deliberately indifferent. Here none of the incidents related to disability and no deliberate indifference where SD investigated every incident, disciplined offenders and assigned an aide for the student's safety; Sparman ex rel DW v Blount County Bd of Educ 68 IDELR 202 (ND

Ala 9/19/16) Court dismissed parent 504/ADA bullying claim where parent did not show **deliberate indifference** where SD investigated each incident and counselled the offenders; MPTC by CC & TC v Nelson County Sch Dist 68 IDELR 19 (WD Ky 6/13/16) Court dismissed parents 504/1983 claims for peer harassment where no deliberate intention where no link between disability and bullying and where SD took steps to address the bullying; Doe v Torrington Bd of Educ 67 IDELR 182 (D Conn 3/30/16) No deliberate indifference for §504 where no showing by parent that SD failed to address bullying; JR v NYC Dept of Educ 66 IDELR 32 (EDNY 8/20/15) Principal's failure to change student's bus route coupled with his statement that the student was likely to encounter disability based bullying on every bus route amounted to deliberate indifference so SD motion to dismiss 504/ADA action was denied.

3). Dear Colleague Letter 64 IDELR 115 (OCR 10/21/14) Any bullying may interfere with FAPE even if the bullying is **not disability-based**. You can review the new guidance here. Here is more discussion by the Department of Education.

4). Dear Colleague Letter (OSERS 8/20/13) OSERS issued **guidance on Bullying.** The letter notes that bullying of a student with a disability that results in not receiving meaningful educational benefit is a denial of FAPE and may be disability harassment under 504 and Title II of ADA. OSERS states that bullying of any student cannot be tolerated. Bullying is characterized by **aggression** within a relationship where the aggressor has **more real or perceived power** than the target and the aggression is **repeated over time**, Targets suffer negative effects. Students with disabilities are disproportionately affected by bullying. Schools have an obligation to address bullying that results in a denial of FAPE. Part of an appropriate response is to convene the IEP

team to determine whether the student's needs have changed as a result of the bullying. Schools should never unilaterally change the frequency, duration, intensity, placement, or location of services as these are IEPT decisions. SEAs and LEAs are encouraged to remind administrators, school boards, teachers and staff that bullying can be a denial of FAPE. You can read the letter here: http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/bullyingdcl-8-20-13.pdf An attachment to the letter provides specific, evidence-based suggestions/strategies that schools can implement to effectively prevent and response to bullying. You can read the attachment here: http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/bullyingdcl-enclosure-8-20-13.pdf

5). Rideau ex rel TR v Keller Independent Sch Dist 819 F.3d 155, 67 IDELR 166 (5th Cir 4/5/16) Fifth Circuit reversed a district court decision and held that parents have standing to sue for damages under §504/ADA for mistreatment of student by his life skills **teacher** resulting in a broken thumb, dislocated knee, skull contusions to a student with encephalopathy; Doe v Torrington 69 IDELR 10 (D Conn 11/17/16) Court granted reconsideration of decision in previous outlines 67 IDELR 182 and denied SD motion to dismiss parent §1983 claim DP violation where athletic **coaches** looked the other way when players verbally, physically and sexually harassed HS student with an SLD; Conklin by Conklin v Jefferson County Bd of Educ 68 IDELR 122 (NDWV 9/1/16) Court denied SD motion to dismiss parent 504/ADA/1983 claims where SD placed student on homebound services after teacher choked student and pushed him into a bookcase. Placement caused student anxiety and humiliation and deprived him of the benefits of transition. Contrast, Gohl ex rel JG v Livonia Public Schs 836 F.3d 672, 68

IDELR 152 (6th Cir 9/8/16) 2 – 1 majority of Sixth Circuit held that a teacher who put his hand on the head of a preschool student with hydrocephalia to redirect him after he threw a toy did not engage in conscience shocking egregious conduct, therefore, did not violate §1983; Roe ex rel Roe v Doe 69 IDELR 72 (WD Okla 12/6/16) Court dismissed parent IDEA/504 claim for abuse and sexual assault of student with autism for failure to exhaust where claim included allegations that SD created a hostile educational environment; Cochran by Shields v Columbus Bd of Educ 68 IDELR 213 (SD Ohio 10/14/16) Court refused to reconsider Mgst order , holding that parent of a child with autism whose **teacher** used a body sock to calm him was not entitled to access police records of the criminal investigation of the teacher that had been sealed by the court; Nardella ex rel CD v Leyden HS Dist # 212 68 IDELR 9 (ND Ill 6/22/16) Court dismissed parent suit for intentional infliction of emotional distress where parent made no showing that student suffered extreme distress and where **staff harassment** of student did not constitute outrageous conduct; Garza ex rel CG v Lansing Sch Dist 68 IDELR 10 (WD Mich 6/21/16) Court denied SD motion to dismiss finding that where there had been previous allegations of abuse by **teachers** and SD had knowledge was sufficient to establish deliberate indifference for §1983. (DP violation);

6). Krebs v New Kensington-Arnold Sch Dist 69 IDELR 9 (WD Penna 11/17/16) Court denied SD motion to dismiss IDEA (child find) & 504/ADA claims where SD failed to evaluate teen ‘s need for SpEd despite knowledge of bullying related anxiety, depression and eating disorder. **Child find violation where after having been bullied**, student lost 30 pounds and grades went form A/Bs to Fs.

7). JM by Mandeville v Dept of Educ, State of Hawaii 69 IDELR 31 (D Haw 12/1/16) Although court recognized that the 11 year old student with autism had suffered **horrifying and inexcusable bullying**, it concluded **FAPE provided** where IEP required constant 1:1 aide and a crisis plan that required SD staff to remove student from situation to support personnel for immediate assistance or assessment. Therefore IEP **reasonably calculated** to provide **educational benefit**; Tyler J by Cheryl Ann & Kevin J v Dept of Educ, State of Hawaii 65 IDELR 45 (D Haw 2/24/15) Court **rejected** parent argument that **bullying violated IDEA** where there was **no evidence** that bullying had any **impact** upon student's educational benefit.

8). Landon B by John & Christine B v Hamburg Area Sch Dist 67 IDELR 203 (ED Penna 5/2/16) Court denied reimbursement finding FAPE provided where SD paid for student to attend private school for two years after having been **bullied** and then proposed bring her back to public school. Evidence showed that student's maturity and social skills were now adequate to attend public school.

9). Kuhner ex rel Estate of JK v Highland Community Unit Sch Dist No 5U 68 IDELR 16 (SD Ill 6/14/16) Court dismissed parents 504/ADA/1983 claim for bullying where they failed to **exhaust** IDEA remedies by dph; Kuhiner ex rel JK v Highland Community Unit Sch Dist # 5 66 IDELR 131 (SD Ill 9/28/15) 504/ADA for peer bullying dismissed where no exhaustion and educational injuries were alleged; Contrast, MB & RB by RPB v Islip Sch Dist 65 IDELR 269 (EDNY 6/16/15) Court denied SD motion to dismiss 504/ADA claims for bullying where parents alleged that SD had failed to provide them with the **required Notice** of Procedural Safeguards therefore exhaustion was **futile** because no information regarding the dph system was given to them;

10). JM by Mr & Mrs M v Selma City Bd of Educ 16 LRP 48696 (SD Ala 11/16/16) **State** anti-bullying **law** did not provide a private cause of action for parents to sue for damages where teen with vision impairment was bullied, had his glasses broken and suffered head injury; Kushner ex rel Estate of JK v Highland Community Unit Sch Dist #5 68 IDELR 250 (SD Ill 10/21/16) Court dismissed complaint involving peer bullying and harassment for "willful and wanton misconduct" where no such cause of action exists under state law;

11). Dorsey ex rel JD v Pueblo Sch Dist 60 66 IDELR 183 (D Colo 10/26/15) Although court found bullying disturbing, it dismissed 504/ADA suit because parent failed to allege that the bullying was **disability based**; Eskenazi-McGibney v Connecticut Central Sch Dist 65 IDELR 8, (EDNY 2/6/15) Although troubled by the SD response to bullying of a student by his peers, court dismissed §504/ADA/§1983(EP) claim because parents' complaint did not allege that harassment was based upon his **disability**; KRS by McClaron v Bedford Community Sch Dist 65 IDELR 272 (SD Iowa 4/20/15) Court denied SD motion to dismiss finding that allegations that a 9th grader with SLD was called "dumb" and "stupid" by football teammates was sufficient to show disability based harassment for §504; Spring v Allegany-Limestone Central Sch Dist 66 IDELR 157 (WDNY 9/30/15) Court dismissed 504/ADA/1983(dp) claims for bullying of student with Tourettes syndrome where peers called him names leading to suicide where no allegation of effect on **major life** activities and no state created danger; Gohl ex rel JG v Livonia Public Schs 66 IDELR 122 (ED Mich 9/30/15) Court dismissed 504/ADA claims by parents of 3 year old with hydrocephalus whose SpEd teacher allegedly jerked his head back and yelled in his face where **no deprivation** of benefits where student

showed emotional **progress** after the incident; Lockhart v Willingboro HS 65 IDELR 141 (DNJ 3/31/15) Court dismissed parent §1983 action where **no deliberate intention**- SD returned 17 year old girl who had been sexually assaulted to an empty classroom did not violate EP;

11). JL by O'Flaherty v Eastern Suffolk BOCES 65 IDELR 262 (EDNY 6/29/15) Court dismissed §1983 claims vs SD for mistreatment of a 14 year old with autism where the mistreatment was allegedly by employees of an intermediate unit who were **not trained or supervised** by the SD.

12). VS by Sisneros v Oakland Unified Sch Dist 65 IDELR 234 (ND Cal 5/28/15) Court denied SD motion to dismiss parent §504 action for bullying student with a severe intellectual disability on **school bus**. SD claimed no knowledge because bus was run by a contractor, but complaint alleged that bus driver told parent she had contacted SD officials but got no response; Contrast, Sisneros v Oakland Unified Sch Dist 65 IDELR 97 (ND Cal 3/27/15) Court dismissed parent EP/§1983 action for bullying student with a severe intellectual disability on school **bus**. Because people with disabilities are **not a protected class**, parent's complaint was deficient where she failed to allege a lack of a rational basis and a legitimate state interest.

13). Letter to Soukup 115 LRP 18668 (FPCO 2/9/15) Consistent with the long-standing view of the Department of Education, FPCO ruled that **FERPA permits** a school to disclose to the parent of a **harassed** student information about the disciplinary sanctions imposed upon the perpetrators of the harassment (including stay away from the student; stay out of the school; or transfer to another class) FPCO noted that where any

civil rights laws conflict with FERPA, the civil rights law **override** any conflicting provisions of FERPA.

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. Parent's Right to Participate

a. MC ex rel MN v Antelope Valley Union High Sch Dist 858 F.3d 1189, 117 LRP 21748 (9th Cir 5/30/17) Under IDEA, the parent's right to participate includes **not only** the process of **drafting the IEP**, but **also the process of monitoring and enforcing** the IEP after it takes effect. Here the school district denied FAPE by failing to make the parents aware of the services to be provided, thereby impairing their right to participate.

b. Doe ex rel Doe v East Lyme Bd of Educ 790 F.3d 440, 65 IDELR 255 (Second Cir 6/26/15) Second Circuit ruled that SD did not violate IDEA by **finishing IEP** and issuing it **after** the IEPT **meeting**. The parent's right to meaningful participation was met where the parents fully participated at IEPT meeting and her input was considered. The parent does **not** have a right to be **physically present** during LEA decisional process; Baquerizo v Garden Grove Unified Sch Dist 826 F.3d 1179, 68 IDELR 2 (9th Cir 6/22/16) Ninth Circuit ruled that SD did not violate parent's participation rights where SD prepared an offer to be discussed at IEPT meeting; ZA & BA ex rel DA v NYC Dept. of Educ 68 IDELR 160 (SDNY 9/13/16) Where parents actively participated and IEPT considered their input and made some changes that they had requested, meaningful participation; MT & TW-S ex rel AT v NYC Dept of Educ 67 IDELR 143 (SDNY 3/29/16) Court found that parent was given meaningful participation in IEPT process; MJ & RT ex rel ET v NUC Dept of Educ 67 IDELR 92, 165 F.Supp.3d 106 (SDNY 2/19/16) Where IEPT considered parent input but disagreed, parents were afforded meaningful participation; Pollack & Quirion ex rel BP v Regional Sch Unit #75 67 IDELR 41 (D Maine 1/27/16) Court dismissed parent meaningful **participation claim** where SD failed

to produce emails between autism consultant and SpEd director re how to deal with mom in response to her FERPA request;

c. Wenk v. O'Reilly 783 F.3d 585, 65 IDELR 121 (Sixth Cir 4/15/15) Sixth Circuit affirmed district court ruling that school administrator was **not** entitled to **qualified immunity** for parent First Amendment §1983 action claiming **retaliation** for exercising IDEA participation rights. After parent had advocated for an IEP for his daughter with cognitive disability, SD director pupil services filed a **child abuse complaint** with child welfare agency. Critical emails showed animus re parent. Allegations were either embellished or entirely fabricated. Administrator waited until three weeks after deadline for mandatory reporters to report abuse.

d. 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.

e. TR v Sch Dist of Philadelphia 69 IDELR 34 (ED Penna 11/30/16) Court refused to dismiss parent's IDEA/504/ADA claim that district-wide SD routinely failed to provide **interpretation** and **translation** services that EL parents required to participate meaningfully in the process.

f. TC & AC ex rel AC v NYC Dept of Educ 68 IDELR 137 (SDNY 8/24/16) Court was bothered by SD **failure to respond** to parent's letter, but not = denial of FAPE.

g. Luo v Baldwin Union Free Sch Dist 67 IDELR 15 (EDNY 1/12/16) aff'd by Second Circuit in UNPUBLISHED decision @117 LRP 3790. Court denied parent allegations of denial of meaningful participation; IDEA requires an appropriate education, **not** one that provides **everything** that is thought **desirable** by a loving parent; LB & JB ex rel SB v Katonah-Lewisboro Union Free Sch Dist 68 IDELR 157 (SDNY 9/14/16) Court rejected claim that IEPT denied FAPE by not providing additional resource room time; team considered parent request for more time.

h. John & Maureen M ex rel JM v Cumberland Public Schs 65 IDELR 231 (DRI 6/30/15) Court held that parents do not have a right to **observe** their child in the current or prospective classrooms and LEA did not violate parent right to participate by refusing to allow them to observe;

i. JS & LS v NYC Dept of Educ 65 IDELR 201 (SDNY 5/6/15) IEP Team's failure to consider parent's independent psycho-educational evaluation was a **procedural error-but harmless** where current psycho-ed evaluation was considered and parent had a full opportunity to participate in IEP team meeting; Pollack & Quirion ex rel BP v Regional Sch Unit #75 65 IDELR 206 (D Maine 4/29/15) SD failure to give parents notice of a change in lunch outing procedures was a procedural violation, but harmless where parents learned of the change and voiced their objection, therefore no impairment of participation rights.

j. JM ex rel RM v Kingston City Sch Dist 66 IDELR 251 (NDNY 11/23/15) Even where IEPT did not engage in a detailed discussion of needs, goals and appropriateness of placement, parents had right to participate at IEPT meeting but

specifically declined to ask questions- no violation; in gen IEPT properly considered the parent's independent psych evaluation.

k. FB & EB ex rel LB v NYC Dept of Educ 66 IDELR 94 (SDNY 9/21/15) SD violated IDEA parent right to meaningful participation by ignoring 2 letters by parents during a four month delay form IEPT to placement decision by SD; **Contrast**, JL & JF ex rel CC c NYC Dept of Educ 65 IDELR 137 (SDNY 3/31/15) SD did not violate IDEA by failing to give notice that the summer site of the student's ESY had changed because unlike placement parents have **no right to participate** in **location** decisions; CS by Julia v Lansing Sch Dist #158 115 LRP 31079 (ND Ill 1/23/15) quoting *John M*, court held that a stay put educational placement falls **somewhere between the physical school attended by the child and the abstract goals of his IEP** and courts use a fact-driven approach to determine whether a change of placement has occurred. KB by Brown v Dist of Columbia 66 IDELR 63 (DDC 9/8/15) Transfer without fundamental change in services is a change of **location** and not a change of educational placement; LB & FB ex rel JB v NYC Dept of Educ 68 IDELR 195 (SDNY 9/27/16) Where parents had full opportunity to participate in IEPT meeting, they were afforded meaningful opportunity to participate;

3. Incarcerated Students/ Brush with Criminal Law

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 … (FAPE) … should …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 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 **ELL**s; §504 FAPE; fair administration of **discipline**; freedom from harassment; **effective communication** for students with hearing, speech/ vision disabilities; and **LRE** concerns.

b. Dear Colleague Letter (DOE & DOJ 12/2/16) The federal agencies addressed **transitioning** students **from juvenile facilities** to public school- including various toolkits and resource guides. Available here.

c. Meridian Joint Sch Dist No. 2 v. DA ex rel MA 792 F.3d 1054, 65 IDELR 253 (Ninth Cir. 7/6/15) Ninth Circuit affirmed HO and lower court finding that parents were entitled to an **IEE at public expense** due to SD failure to evaluate the student after his release from a **juvenile** facility.

d. **Can a child be too bad for FAPE?** Before **HO**: 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)}. On **Appeal: Discovery**: 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; On **Appeal- Merits**: Buckley v State Correctional Institution – Pine Grove 65 IDELR 127 (MD Penna 4/13/15) Court reversed HO and found that a correctional institution denied FAPE to a student by discontinuing all SpEd services. IDEA allows a public agency to modify the IEP of a student if

warranted where the student is incarcerated in an adult facility and if it demonstrates a **bona fide security interest**. {§614(d)(7)(A)& (B), and 34 CFR §300.324(D)} Here the student had 25 incidents of serious misconduct and assault so the prison had a bona fide security interest but it failed to convene the IEPT or to modify the IEP. While "… special education services must yield to legitimate **security considerations** … program should be revised **not annulled** in light of this interest." The court emphasized that it was not holding that the student must be educated outside of his cell. Quoting Brown v Bd of Educ, it is doubtful that a child may reasonably succeed in life without an education. Youth with disabilities are incarcerated at **disproportionate rates** and are **often denied** an appropriate education while incarcerated. Court hopes that a meaningful benefit might disrupt the viscous cycle of incarceration for this student.

e. Mississippi Dept of Educ 67 IDELR 45 (Dept of Justice 1/12/16) DOJ found that **SEA's almost exclusive use** of computerized tutorials and assessments to provide instruction to students in **juvenile detention centers** resulted in a denial of FAPE. SEA's **one-size-fits-all** approach was inconsistent with IDEA.

f. MS v Los Angeles Unified Sch Dist 68 IDELR 162 (ED Calif 9/12/16) Where 17 year old student with an ED was removed by DCFS at age 11 from his grandparents because of physical abuse, required many mental health hospitalizations, broke a peer's nose and assaulted a staff member which led to his arrest and 7 months in **juvenile hall**, court reversed HO decision that SD had no duty to provide FAPE because DCFS placed her in a residential placement pursuant to court order. Instead, court ruled that SD had an independent obligation to determine whether student was entitled to a residential

placement under IDEA for educational reasons Therefore, SD **predetermined** student's placement.

g. Lewis ex rel Doe v Clarksville Sch Dist 67 IDELR 212 (ED Ark 4/20/16) Court rejected parent argument that SD conspired with juvenile authorities to circumvent IDEA procedures. The **juvenile court** ordered the student transferred from public school to state school for the deaf after student stole a teacher's wedding ring and brought a knife to school.

h. TW & AW v Franklin County Sch Bd 68 IDELR 126 (ND Fla 8/30/16) Court dismissed 504 claim for failure to exhaust IDEA remedies. Student claimed that SD had him arrested for kicking a teacher to avoid the cost of implementing his IEP and that violent behaviors were the result of failure to implement his IEP.

i. Handberry v Thompson 66 IDELR 286 (SDNY 12/2/15) In a previous ruling in this class action, Handberry III 446 F.3d 335 (2d Cir 2006) Second Circuit ruled that defendants had to comply with **IDEA procedures re child find and developing IEPs** for **inmates** at Rikers Island. Here reacting to a report that inmates with disabilities in restricted housing were **not receiving IDEA services**, Mgst recommended at least 3 hours of educational services for each student although recognizing that IEPs might be modified to meet **penal objectives**.

j. GF v Contra Costa County 66 IDELR 14 (ND Calif 7/30/15) Court granted preliminary approval of a settlement of a class action requiring a county education department to **evaluate** all **students in juvenile hall** suspected of having a disability and to coordinate with probation and mental health agencies to ensure FAPE.

k. TR v Humbolt County Office of Educ 65 IDELR 293 (ND Calif 7/8/15) Court refused to dismiss parent §504 action finding deliberate indifference where county office of education had **notice** of teen's **need** for intensive psychiatric **interventions** but **failed** to provide them for nine months while student was in **juvenile hall**.

l. Tillman v Dist of Columbia 66 IDELR 77 (DDC 7/29/15) adopted @ 66 IDELR 110. Mgst recommended that parent attorney's be awarded **attorney fees** for time spent keeping abreast of developments in student's **juvenile court** proceedings so that they could decide how to proceed in **IDEA action** (but no fees for time preparing and attending juvenile proceedings.)

m. CC by Cripps v Hurst-Euless-Bedford Independent Sch Dist 65 IDELR 195 (ND Tex 5/21/15) Court affirmed HO who ruled that SD's IAES was not inappropriate just because the **juvenile** authorities had decided **not to prosecute** the student for photographing another student on the toilet; Wicks v Freedom Area Sch Dist 66 IDELR 130 (WD Penna 9/28/15) Court noted that the fact that the student was dissatisfied with his **post-plea bargain placement** did not amount to constitutional dp/1983 violation.

n. Easter v Dist of Columbia 66 IDELR 62 (DDC 9/8/15) Court ruled that 22 year old student stated a claim under §504 and denied motion to dismiss. An IDEA HO had previously ruled that SD had **denied FAPE** during a five year stay in a **juvenile** detention facility and ordered compensatory ed. SD then offered a choice of HS program with younger students or an adult ed program that would not address his SLD. **Failure to identify an LEA for students in juvenile detention was a systemic violation**.

o. Fullmore v Dist of Columbia 67 IDELR 144 (DDC 3/29/16) Student's focus and behavior improved following his **arrest and a resulting evaluation** that changed his medication.

p. RD v Souderton Area Sch Dist 65 IDELR 196 (ED Penna 5/19/15) Court dismissed parent §1983 suit claiming that SD had their daughter committed to a juvenile detention facility because of inappropriate behaviors in an out of district placement - parent claim was beyond statute of limitations (borrowed state 2 year S/L for tort claims).

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. Smith by Thompson v Los Angeles Unified Sch Dist 67 IDELR 226 (9th Cir 5/20/16) Ninth Circuit held that district court erred by failing to permit parents of students in special ed centers to **intervene**. **Other parents** and SD had entered into a **settlement** requiring the elimination of the centers, but other parents claimed that closure would prevent SD from complying with IDEA requirement that it have a full continuum of placements.

d. AF by Christine B v Espanola Public Schs 66 IDELR 92 (Tenth Cir 9/15/15) A 2-1 majority of the Tenth Circuit ruled that successful **mediation** of an IDEA claim is **not exhaustion** of administrative remedies for later 504/ADA/1983 claims. Dissent disagrees. **Contrast**, GM & MCM ex rel CM v Brigantine Public Schs 65 IDELR 229 (DNJ 6/8/15) HO approval of settlement constituted sufficient exhaustion of administrative remedies to permit parent's §504/ADA/1983 action; Zdrowski ex rel CR v Rieck 66 IDELR 42 (ED Mich 8/11/15) Settlement of dph is not enough for exhaustion, but here SD waived argument; RM v City of St Charles Sch Dist R-VI 67 IDELR 234 (ED Missou 5/19/16) Parent exhausted by filing dph and then settling in IDEA mediation (rejecting 10th circuit ruling that IDEA mediation is not sufficient for exhaustion).

e. Sam K by Diane C & George K v State of Hawaii, Dept of Educ 788 F.3d 1033, 65 IDELR 222 (Ninth Cir 6/5/15) Ninth Circuit ruled that parent claim for reimbursement for a private placement was **not** barred by state 180 day **statute of limitations** for reimbursement where LEA tacitly **agreed** to a private placement where it did not propose a public placement for the 2010-11 school year after a settlement agreement required LEA to pay for the private placement for 2009-10 school year.

f. SL by Loof v Upland United Sch Dist 747 F.3d 1155, 63 IDELR 32 (9th Cir 4/2/14) @n.2 Ninth Circuit reversed District Court holding that an IDEA hearing officer has the **authority to review or enforce a settlement agreement**; District of Columbia Public Schs (JG) 111 LRP 76506 (SEA DC 9/23/11) HO held that an IDEA HO has the authority to **enforce** a settlement agreement pertaining to the issues of identification, evaluation, placement or FAPE; Note that in South Kingston Sch Committee v Joanna S ex rel PJS 64 IDELR 191 (1st Cir 12/9/14) @n3 First Circuit did

not address whether an IDEA HO has the authority to enforce or interpret a settlement agreement but noted that courts are **split** on the issue; Sauers v Winston Salem/Forsyth County Bd of Educ 67 IDELR 176 (MD NC 3/31/16) @n.8 Courts are split on whether IDEA administrative dph is the appropriate forum to resolve settlement breach allegations, but in any event, exhaustion is not required in such cases. **Contrast**, TC by Latisha G v Penna Leadership Charter Sch 69 IDELR 67 (ED Penna 12/12/16) Court dismissed parent action to require SD to comply with an IDEA settlement that occurred after the 30 day resolution period. Court ruled that Congress intended only that settlements reached during thirty day resolution period to be enforceable in federal court. Therefore here no federal question; parent remedy was breach of contract action in state court; Hernandez v McAllen Independent Sch Dist 67 IDELR 10 (SD Tex 1/14/16) Court returned parent breach of contract claim to state court for lack of a federal question where parents could not show that the settlement took place during an IDEA **mediation or resolution** session.

g. Beauchamp v Anaheim Union High Sch Dist 816 F.3d 1216, 67 IDELR 107 (9th Cir 3/16/16) Failure of parent to accept settlement offer of 20 hours of counselling and 80 hours of tutoring **cut off attorney's fees** at that point where ho awarded just 6 hours of counselling and parent had no substantial justification for rejecting the offer. IDEA §615(i)(3)(B)(i)(I); Contrast, TB by Brenneise v San Diego Sch Dist 795 F.3d 1067, 66 IDELR 2 (Ninth Cir 7/31/15){see corrected opinion at 115 LRP 54544 (9th Cir 11/19/15)} Ninth Circuit **reversed** district court decision to **cut off attorney's fees** after settlement offer finding that SD settlement offer was not more favorable than the relief obtained by the parents; JO v Tacoma Sch Dist 64 IDELR 269

(WD Wash 1/5/15) (same); MM & EM ex rel SM v Sch Dist of Philadelphia 66 IDELR 181 (ED Penna 11/3/15) Court did not cut of attorney's fees where SD offer was made one day less than 10 days before dph as required by IDEA; YL ex rel JL v Mantern Sch Dist 68 IDELR 273 (ED Calif 11/8/16) Court rejected SD argument that settlement offer cut off attorney fees where offer not made at least ten days before dph; Troy Sch Dist v KM 67 IDELR 145 (ED Mich 3/28/16) Court did not cut off attorney fees for parent rejection of settlement here SD failed to accept uncontested portions of parent's **counteroffer** thereby prolonging litigation (eleven day dph); Latoya A v San Francisco Unified Sch Dist 67 IDELR38 (ND Calif 1/28/16) Court refused to cut off attorney's fees where HO ordered four hours of staff training; although indirect, HO award was more than $1,000 offer in settlement talks; JSR by Childs v Dale County Bd of Educ 66 IDELR 275 (MD Ala 1/6/16) Court refused to cut off attorney's fees where parent had a reasonable basis for rejecting settlement offer.

h. **Settlement Agreement Language Issues:** 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; MP v. Penn-Deko Sch Dist 66 IDELR 252 (ED Penna 11/20/15) Where parent entered into a settlement agreement with SD that included $20K in attorney's fees for parent's lawyer, the **clear and unambiguous language** of the settlement agreement **waiving** all other claims vs SD barred a later suit for attorney's fees. @n.30: The **principle** that a **release drafted by a lawyer** for a party should be construed against that party does not apply where the terms

of the release are **unambiguous;** Sauers v Winston Salem/Forsyth County Bd of Educ 67 IDELR 176 (MD NC 3/31/16) Court reversed HO & SRO and found that a **settlement release** of future actions was **narrower** than a general release; NW v Dist of Columbia 65 IDELR 230 (DDC 6/4/15) Court reversed HO who found that settlement and **waiver language** barring all claims that accrued before June 20, 2013 to bar a claim concerning an IEP drafted in April 2013 because the IEP applied to the next school year. Court did not reach the issue of whether a waiver of a federal statutory right under IDEA must ne **knowingly and voluntarily made** because not briefed by parties; KA ex rel JA v Abington Heights Sch Dist 65 IDELR 174 (MD Penna 4/20/15) Court refused to dismiss because of settlement and release where it was not clear from the release whether the parent had intended to release §504 claims; Copeland v Dist of Columbia 65 IDELR 71 (DDC 3/11/15) Court reversed HO ruling that settlement was an accord and satisfaction where **language** in the letter from SD stated that the offer was to cover all potential harm to date but mom thought that it was only for past dph; Michelle K ex rel Alice K v Pentucket Regional Sch Dist 64 IDELR 304 (D Mass 1/16/15) Court found language in settlement agreement to be **ambiguous** where parent had agreed "… to dismiss her administrative complaint involving her daughter…" and court allowed parent to pursue dph; Crawford v San Marcos Consolidated Independent Sch Dist 64 IDELR 306 (WD Tex 1/15/15) Mgst recommended dismissal of parent 504/ADA claims where parent settled previous IDEA suit and signed waiver agreeing to dismiss all claims that were or could have been brought against SD to date. Second suit was dismissed because of **waiver**. Third suit was dismissed because of res judicata.

i. Tina M ex rel SM v St Tammany Parish Sch Bd 67 IDELR 64 (5th Cir 2/23/16) Fifth Circuit ruled that because a stay put order is not a decision on the merits, parents could not recover attorney's fees. The parties **settled** in mediation after the stay put order and ho's stay put order is not judicial imprimatur; JH by Sarah H v Nevada City Sch Dist 65 IDELR 77 (ED Calif 3/6/15) Settlement agreement lacked any judicial **imprimatur** therefore, no attorney's fees; RBIII by Batten v Orange East Supervisory Union 66 IDELR 277 (D Vt 12/30/15) Where HO dismissed dpc after settlement in mediation, and dismissal did not mention settlement or change parties' legal relationship, insufficient imprimatur.

j. Dear Colleague Letter 65 IDELR 151 (OSEP 4/15/15) OSEP has learned that some SDs are filing dpcs based upon the same issues after parents file state complaints to prevent SEA investigation. Although this is permissible under IDEA, OSEP strongly encourages LEAs to respect the parent's choice to use state complaint procedures rather than dph. Likewise **before pursuing dph**, **LEA should attempt** to engage parent in **mediation** or other informal dispute resolution mechanisms.

k. 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**.

l. 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; Champa v Weston Public Schs 66 IDELR 187, 473 Mass 86 (Mass Supreme Judicial Court 10/23/15) Court required SD to provide parent with copies of all settlements in which SD paid for out of district private placements with all personal information redacted. They are educational records under FRPA, IDEA and state law. Fact that settlements had **confidentiality clauses** did not prevent access of documents to other parents if personal info is redacted; Johnson ex rel NS v Boston Public Schs 68 IDELR 97 (D Mass 8/17/16) Court ruled that unlike mediation discussions under IDEA, **settlement discussions** during a PHC or dph are **not confidential**.

m. Maple Heights City Sch Dist Bd of Educ v Ac ex rel AW 68 IDELR 5 (ND Ohio 6/27/16) SRO properly interpreted a settlement agreement to have resolved some of the FAPE allegations that were pending before ho.

n. Abdella v Folsom Cordova Unified Sch Dist 68 IDELR 74 (ED Calif 6/17/16) Mgst agreed with HO that SD violated LRE by placing student in a class with no typically developing peers **even though** SD **agreed** with parent to this placement in a **mediation agreement**.

o. Dallas Independent Sch Dist v Woody ex rel KW 67 IDELR 168 (ND Tex 4/15/16) Student was not a **transfer student** for purposes of IDEA where California SD entered into a **settlement agreement** placing the student in a Texas private school and parent later moved to Texas.

p. Tyler J by Cheryl Ann & Kevin J v Dept of Educ, State of Hawaii 65 IDELR 45 (D Haw 2/24/15) @n.6 Court **rebuked** parents for presenting the court with a **draft** settlement agreement where the parties never agreed to a settlement. Court did not consider the draft.

q. Zilberman v Gateway Sch Dist 65 IDELR 261 (WD Penna 6/29/15) Court dismissed parent IDEA claim vs SEA to avoid **duplicate recovery** where parent had already accepted a settlement from LEA; Toth v NYC Dept of Educ 116 LRP 10445 (EDNY 3/14/16) Mgst recommended dismissal of parents' dpc where SD had entered into a **settlement agreement** that provided all of the relief sought in dpc;

r. Dervishi ex rel TD v Stamford Bd of Educ 66 IDELR 60 (D Conn 8/5/15) Because an IDEA **settlement** clearly provided for a student's home based program as a temporary measure, SD did not have to continue funding it for years under stay put; LL ex rel XL v NYC Dept of Educ 68 IDELR 129 (SDNY 8/29/16) Where a settlement required SD to fund a private placement through the end of 2012-13 school year, **stay put** was last agreed upon IEP from March 2010. Because **settlement** was **specific as to time**, it did not supersede most recently implemented IEP for pendency purposes.

s. HE ex rel HF v Walter D Palmer Charter Sch 68 IDELR 244 (ED Penna 10/27/16) Court reversed HO and found that SEA has a duty to provide FAPE where liquidation of charter school prevented it from complying with three settlements. Parents were allowed to proceed to dph vs SEA.

t. 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

BONUS: Autism (selected cases)

a. Ermini v Vittori 114 LRP 31602, 2014 WL 3056360 (2d Cir 7/8/14) NOT a SpEd case! The Italian parents of a nine year old boy with autism moved to the United to obtain **ABA therapy** for 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. You can read the entire Second Circuit decision here.

b. Timothy O & Amy O ex rel LO v Paso Robles Unified Sch Dist 822 F.3d 1105, 67 IDELR 227 (9th Cir 5/23/16) The Centers For Disease Control estimate that **one in sixty-eight children** has autism spectrum disorder, a neurodevelopmental disorder

characterized in **varying degrees of difficulty communicating and socializing and by restricted repetitive behavior interests and activities**. SD **violated IDEA** by **failing to evaluate** student for autism because one staff member informally observed the student and did not observe symptoms rather than assess the child in all areas of suspected disability using thorough and reliable methods instead of just informal observation.

c. AM ex rel EH v NYC Dept of Educ 845 F.3d 523, 69 IDELR 51 (2d Cir 1/10/17) Although IDEA does **not** specifically speak to methodology, where all of the evaluative materials stated that the student needed 1:1 ABA therapy to receive educational benefit, and this data was backed up by the testimony of witnesses familiar with the student, SD **denied FAPE** by not offering a placement that provided 1:1 ABA methodology.

d. Dear Colleague Letter 66 IDELR 21 (OSEP 7/6/15) OSEP reminded education agencies that **ABA therapy** is **just one methodology** that may be appropriate for a child on the autism spectrum, and that eligibility and services should be determined by the team after the child's unique needs have been determined by evaluation. Some districts have been leaning entirely on ABA therapists for **eligibility and services** and excluding speech language therapists and others.

e. LK v NYC Dept of Educ 67 IDELR 123 (SDNY 3/1/16) Applying third prong, court held that full reimbursement is not appropriate if the **cost** of private services is unreasonable; SD is responsible for FAPE, but if private services exceed FAPE, such as **generalization of skills for a student with autism to home or community settings**, are not reimbursable; QW by MW & KTW v Bd of Educ of Fayette County, KY 64 IDELR 308 (ED Ky 1/14/15), aff'd in an UNPUBLISHED decision by 6th Cir @ 66

IDELR 212 (Sixth Cir 11/17/15) Student with autism was no longer eligible for SpEd where he performed off the charts academically and behavior was similar to other students. His autism no longer affected his educational performance. While ed performance extends beyond academics to behavioral/social issues at school, it doesn't apply to problems **only exhibited at home**.

f. McElroy v Pacific Autism Center for Educ 67 IDELR 230 (ND Calif 5/27/16) Court dismissed parents negligence suit against a private school for physical injuries suffered by a student with autism as an alleged result of failure of school to provide **ABA methodology** and understaffing. Court found alleged negligence was not cause in fact of the injuries

g. **Methodology issues**: ML by YL & CL v NYC Dept of Educ 65 IDELR 96 (EDNY 3/27/15) Parents objected to SD choice of methodology: **TEACCH** for a nine year old with autism; court rejected the argument noting that an SD is not required to use any particular teaching **methodology**. @n.12 court noted that an SD is not required to specify a methodology in the IEP; JW & LW ex rel Jake W v NYC Dept of Educ 95 F.Supp.3d 952, 65 IDELR 94 (SDNY 3/27/15) Court rejected parents' speculative challenge to proposed placement; parents objected to ABA methodology. @n.7 court noted that parents do not have a right under IDEA to a specific teaching methodology, and in any event their claim was speculative where no evidence that school would not use other methodologies; GK & CB ex rel TK v Montgomery County Intermediate Unit 66 IDELR 288 (ED Penna 7/17/15) Although parents preferred Lovaas methodology, LEA provided FAPE by using a slightly different ABA method; Ruhl v State of Ohio Dept of Health 68 IDELR 73 (ND OH 7/26/16) Court dismissed 504/ADA claim that Part C lead

agency refused to fund **ABA therapy** for a toddler with autism where no discrimination was alleged; NT v Garden Grove Sch Dist 67 IDELR 229 (CD Calif 5/19/16) SD offered FAPE to a student with autism with special day class with 1:1 behavioral interventions, rejecting parent argument that student could only make progress with 1:1 ABA at home services; SB by SB & DB v NYC Dept of Educ 67 IDELR 140 (SDNY 3/30/16) Court rejected parent arguments that a student with autism required **ABA** instruction because questions of methodology are **left to SD**, however, court ruled that a 6:1 +1 setting denied FAPE where parent evidence showed that student **needed** 1:1 instruction; MJ & RT ex rel ET v NUC Dept of Educ 67 IDELR 92, 165 F.Supp.3d 106 (SDNY 2/19/16) Where IEP mentioned **ABA** as one of the techniques previously used for student but did not require ABA instruction, court rejected parent claim that placement was inappropriate because it did not use ABA methodology; NB & CB ex rel HB v NYC Dept of Educ 68 IDELR 228 (9/29/16) Court rejected parent argument that student with autism needed **DIR/Floortime** methodology; GS & AS ex rel KS v NYC Dept of Educ 68 IDELR 154 (SDNY 9/19/16) (same); TC & AC ex rel AC v NYC Dept of Educ 68 IDELR 137 (SDNY 8/24/16) Court remanded to SRO to determine whether IEP required the use of DIR/Floortime methodology. While courts are **reluctant to substitute** their opinion regarding proper **educational methodology**, if a particular methodology is **necessary to implement** IEP goals, SD must provide that methodology. @ n. 3 DIR means "Developmental Individual-difference Relationship-based"; EH ex rel MK v NYC Dept of Educ 67 IDELR 61 (SDNY 2/16/16) Where IEP goals could only be accomplished by using DIR/Floortime methodology and IEP did not require that methodology, FAPE denied; Contrast, TY & KY ex rel TY v NYC Dept of Educ 68

IDELR 182 (EDNY 9/30/16) adopting Mgst @ 116 LRP 37325. Court reversed SRO and found that SD violated IDEA by refusing to discuss methodology at IEPT meeting where 12 year old with autism had made no progress with ABA or TEACCH methods and student needed **DIR/Floortime** method to receive FAPE; TC & AC ex rel AC v NYC Dept of Educ 68 IDELR 67 IDELR 183 (SDNY 3/30/16) Court rejected parent demand for DIR methodology; unless a specific methodology is necessary for a student to receive educational benefit, the choice of pedagogic methodology is left to the teacher; MG & VM ex rel YT v NYC Dept of Educ 66 IDELR 276, 162 F.Supp.3d 216 (SDNY 1/4/16) (Judge Judy's daughter) Court certified a class action based upon parent allegations that SD banned the use of certain **services/methodology** to students with autism (1:1 instruction; ABA services and services outside the regular school day); US ex rel AS v City Sch Dist of City of NY 67 IDELR 242 (SDNY 5/23/16) Court reversed HO and awarded reimbursement where 7 year old with autism **regressed** the previous school year with a **6:1+2** setting and SD recommended **6:1+1**. The evidence revealed that student needed 1:1 **ABA therapy** to make progress.

h. DM & JM ex rel MM v Seattle Sch Dist 68 IDELR 165 (WD Wash 9/9/16) Court rejected parent argument that staff training re autism needed to be done by **BCBA**, holding that SD personnel were qualified to do the training. Contrast, A by Mr A v Hartford Bd of Educ 68 IDELR 40 (D Conn 7/19/16) Court remanded case to HO where HO decision did not explain credibility determinations or the HO's reasoning in denying parent request for a **home program by a BCBA** for a middle school student with autism;

i. FB & EB ex rel LB v NYC Dept of Educ 66 IDELR 94 (SDNY 9/21/15) **No transition plan required** for a change of schools by an autistic student.

j. Bd of Educ of the County of Boone WVa v KM 65 IDELR 138 (SD WV 3/31/15) Court **denied** SD motion to **stay** enforcement of HO decision pending appeal. **HO ordered** SD to pay for **private ABA services** and when HO ordered that relief it became stay put. The fact that SD failed to pay does not justify stay.

k. Morgan M by Barbara M & Arthur WM III v Penn Manor Sch Dist 64 IDELR 309 (ED Penna 1/14/15) Court reversed HO ruling. Court ruled that SD failure to label its services as **"autistic services"** as required by state law did not violate IDEA where the IEP provided a full range of services to address the student's identified needs.

l. Morgan Hill Concerned Parents v Calif Dept of Educ 67 IDELR 5 (ED Calif 1/26/16) Court **permitted discovery** of SEA budget and expenses where parents alleged possible financial motive for SEA resistance to ensure **compliance** by LEAs with IDEA requirements to **evaluate autistic students**.

m. Gates-Chili Central Sch Dist 65 IDELR 152 (Dept Justice 4/3/15) DOJ ruled that SD violated ADA by refusing to allow a student with autism to have a 1:1 **aide** to be the **handler** of his **service dog.**

n. GS & AS ex rel KS v NYC Dept of Educ 68 IDELR 154 (SDNY 9/19/16) Court ruled that SD did not deny a 9 year old student with autism FAPE by failing to provide **music therapy** as a related service where IEP provided for music and where **counselling** was provided as a related service.

o. KM v Chichester Sch Dist 65 IDELR 5 (ED Penna 2/10/15) Court denied SD motion to dismiss noting that **children with autism are particularly vulnerable** to **injury** therefore imposing a **lower standard** for **conscience shocking** behavior for viable

§1983 claim (here state created danger/XIV dp claim- student left on bus asleep causing great anxiety);

p. MA & EM ex rel AA v Jersey City Bd of Educ 69 IDELR 57 (DNJ 12/29/16) Court ruled that ho properly excluded evidence regarding the programs and **methodologies** used for other students with autism on FERPA/ state law privacy grounds, but exclusion was also supported on relevance rules. IDEA requires that FAPE be personalized to each student so that the programs or instructional methods used for one child has little or no bearing upon whether another child has received FAPE.

q. Other Resources

1. GAO Report

The Government Accountability Office issued a report on May 4, 2017 on the transition needs of children with Autism Spectrum Disorder. The report stated "…According to the Centers for Disease Control and Prevention (CDC), about **1 in 68 children** were identified as having ASD in 2012 (about 1.5 percent of 8-year-olds). ASD is a complex developmental disorder with characteristics that can range from mild to more pronounced. Each autism characteristic may vary in type and degree from person to person and can fluctuate over time. The combination of characteristics results in a highly individualized condition, as illustrated in figure 2. To successfully transition into adulthood, youth with ASD need to be able to access services that are individualized, timely, equitable, and community- and evidence-based, among other things, according to a roundtable panel we convened in 2016 to examine the needs of transitioning youth with ASD. The panel also identified **14 key services and supports** that may help youth with ASD attain the goals of education, employment, health and safety, independent living, and community integration as they transition to adulthood…" Among the recommendations of the GAO was: "To determine whether IDEA's current transition age requirement allows youth with disabilities, including those with ASD, the time needed to plan and prepare for the transition to adult life, the Secretary of Education should examine outcomes for students when transition services begin at age 16 and the merits and **implications of amending IDEA to lower the age at** which school districts are to begin providing **transition services to students with disabilities, such as 14.**" The entire 70 page report is available here. My blog post is here.

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