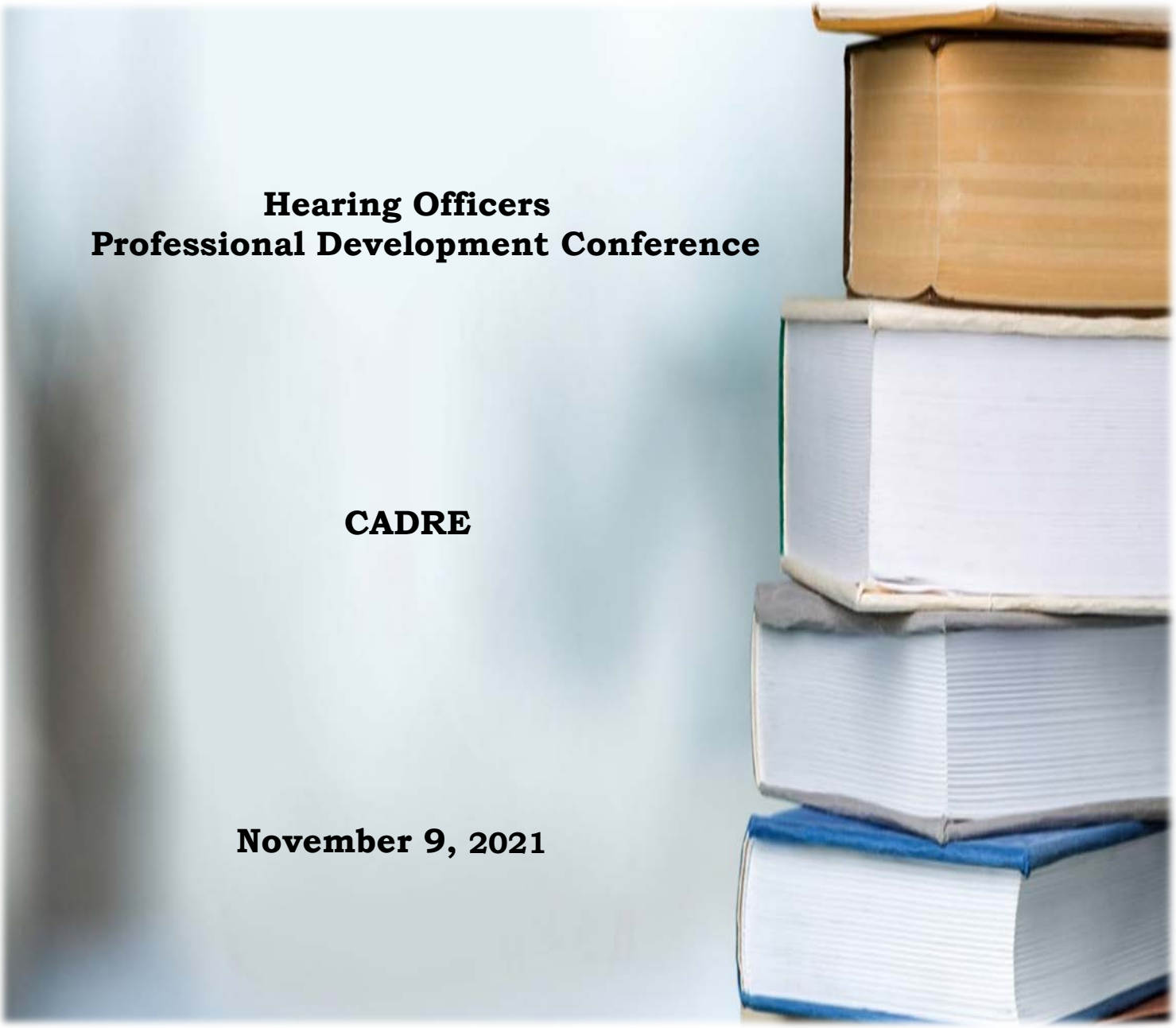
SPECIAL EDUCATION CASE LAW UPDATE
2020-21 COVID AND NON-COVID ISSUES



Hearing Officers
Professional Development Conference

CADRE

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I. INTRODUCTION

Although most of our attention has been upon the chaos resulting from COVID-19 and the challenges related to the provision of FAPE during the past twenty months, there has still been a good bit of activity generally in the area of special education law that is not COVID-related. While there has been quite a bit of litigation at the due process level nationally involving the provision of FAPE to students with disabilities in light of COVID, not much has come from the courts because of IDEA's requirement to first exhaust administrative remedies. In fact, there are only a few reported relevant court decisions that we have been able to find so far related to COVID and FAPE issues.

During this session, we will lead a discussion of some "hot topic" COVID and non-COVID issues via an update on some of the significant special education "legal happenings" during the past year or so. This will include an overview of relevant court decisions and U.S. agency interpretations and our perspectives on them.

II. COVID-RELATED CASE LAW AND AGENCY INTERPRETATIONS

A. Court Decisions

1. Court Filings Seeking Injunctive Relief for In-person Services

J.T. v. de Blasio, 120 LRP 26297 (S.D. N.Y. 2020). The court entertains "serious doubts" about numerous procedural aspects of this case, all of which must be resolved before the court will begin to consider any application for preliminary injunctive relief. In this case purporting to bring action against every school district and state department in the United States asserting that they have all violated IDEA by closing schools and requiring students to say home during the pandemic, the court "harbors considerable doubt that it has jurisdiction over any school district in any state other than New York, where it sits." Thus, Plaintiffs are ordered to show cause why their complaint should not be dismissed as against all school districts from the other 49 states. The arguments already made in previous briefing in support of the court's exercise of long-arm jurisdiction over the out-of-state districts and state departments "do not pass what one of my former partners called 'the laugh test.'" NOTE: The court dismissed the case without prejudice on November 13, 2020 for a number of reasons, including lack of standing for plaintiffs not residing within the court's jurisdiction and failure to exhaust. 500 F.Supp.3d 137, 77 IDELR 252. Notably, the court found that the plaintiffs did not show that the New York district's school closures amounted to a change in placement for purposes of stay-put. On December 11, 2020, the parents appealed to the Second Circuit but no longer focus upon all of the country's school districts and State DOEs.

Hernandez v. Grisham, 494 F.Supp.3d 1044, 77 IDELR 185 (D. N.M. 2020). Based upon the state's COVID school reentry guidance and its allowance for districts and the state ED to offer in-person learning to certain students with disabilities, the state Secretary of Education is ordered to ensure that the SLD student's IEP be revised to provide for her need for in-person instruction. The student's most recent IEP likely denies her FAPE by explicitly barring her from receiving in-person instruction. Although the state ED argues that the student's district developed the IEP based upon state health regulations issued during the pandemic, the IEP fails to properly address the student's needs. When the district shuttered brick-and-mortar schools, the student was unable

to make progress with remote services and evidence shows that the student may have already experienced irreparable "severe learning loss" because she does not have access to the specialized instruction and services she needs at home. In addition, the IEP misinterprets state health regulations as forbidding in-person instruction where state reentry guidance permits in-person instruction for special needs students. In its current state, the student's IEP improperly prioritizes the district's preference for fully remote instruction instead of prioritizing services that provide the student education benefit. Amending the student's IEP to reflect her need for in-person services is not against the public interest. While the gravity of the pandemic is noted, the state ED is not being instructed to fully reopen schools. Rather, a TRO is issued requiring the state ED to instruct the student's district to amend the IEP regardless of the LEA's preference for remote instruction. Note: On December 18, 2020, the court issued a second order essentially denying all claims brought against SEA officials and the school district involved for a variety of reasons, including failure to exhaust administrative remedies. 508 F.Supp.3d 893, 78 IDELR 12 (D. N.M. 2020). Notably, the court held that with respect to a parent concern about remote instruction violating IDEA's LRE provision, "when children with disabilities are offered the same remote instruction that is available to children without disabilities, the remote instruction setting qualifies as a regular educational environment, or regular class, under the LRE provision." On December 23, 2020, the parent appealed the dismissal to the Tenth Circuit Court of Appeals.

J.C. v. Fernandez, 77 IDELR 15 (D. Guam 2020). Temporary injunction is denied where five students with disabilities failed to establish that they would suffer irreparable harm without it. The students are required to show that: 1) they are likely to succeed on the merits; 2) they are likely to suffer irreparable harm in the absence of the preliminary relief; 3) the balance of equities tips in their favor; and 4) a preliminary injunction is in the public interest. Here, the students failed to present substantial evidence that they need four hours of daily in-school educational services, including assistance from a specialized paraprofessional, for four weeks during the summer to avoid irreparable harm. In addition, it is not possible to determine whether the students are likely to succeed on the merits of their claim, where the students based their request on the assumption that they are entitled to stay-put protections under IDEA. It is unclear whether the coronavirus-related school closures constitute a change in educational placement that would trigger IDEA's stay-put provision. According to the Ninth Circuit in *N.D. v. State of Hawaii, Department of Education*, "Congress did not intend for the IDEA to apply to system wide administrative decisions." The court needs "a clear[er] picture of the situation" to grant injunctive relief, but the students may file another motion for a preliminary injunction with supporting evidence before July 24, 2020.

Borishkevich v. Springfield Pub. Schs. Bd. of Educ., 78 IDELR 277 (W.D. Mo. 2021). After the extended school closures due to COVID and in preparation of returning to school, the school board created and implemented a school reentry plan requiring schools to contact parents of students with IEPs near the beginning of the 2020-21 school year to develop a plan for addressing student needs. A group of parents brought suit under IDEA, ADA and 504 challenging the plan. The case is dismissed for failure on the part of the parents to exhaust administrative remedies prior to seeking relief in court.

2. Court Decisions Regarding FAPE to Individual Students during COVID

Charles H. v. District of Columbia, 79 IDELR 14 (D. D.C. 2021). Plaintiffs' motion for a Preliminary Injunction and provisional certification of a putative class of about forty 18 to 22 year-old students is granted where the school district is not providing FAPE to students with disabilities who are incarcerated and enrolled in the district's Inspiring Youth Program for court-involved students aged 17 to 22. The district's contention that it has done and will continue to do the best it can in light of the constraints imposed by COVID is rejected where from March 2020 to very recently, the district offered almost no direct instruction, whether virtual or in-person, to disabled IYP students. Thus, the district and the State Superintendent are ordered to provide the plaintiffs, and all other members of the provisionally certified class (i.e., every student enrolled in the IYP program) with the full hours of all services in their IEPs through direct, teacher-or-counselor led group classes and/or 1:1 sessions delivered via live videoconference calls and/or in-person interactions. Further, defendants are to report every 30 days on the implementation of special education and related services for every class member, beginning no later than 15 days after the date of the order and must file under seal copies of the IEPs of all class members, along with a 2 to 5-page consolidated summary of the special education and related service hours mandated by each student's IEP so that the court may ensure that defendants' representations in the periodic status reports match the hours listed in those IEPs. Interestingly, as part of its public interest and balance of the equities analysis, the court rejected the district's arguments and noted that "[i]ndeed, the District has already received $386 million to safely reopen schools and meet student's needs during the pandemic. U.S. Dep't of Ed. Press Release, March 24, 2021, available at https://perma.cc/LFU6-WVF6; see also Statement of Interest at 13. If, as Defendants say, the IYP really is comprised of a comparatively 'small number of students,' the Court trusts that Defendants will find a way to financially accommodate the public's interest in ensuring that District residents receive 'special education and related services ... in accordance with applicable law.'"

R.Z. v. Cincinnati Pub. Schs., 121 LRP 27947 (S.D. Ohio 2021). The Magistrate recommends to the district court that this case be dismissed for failure to exhaust administrative remedies where the plaintiff alleges that the school district failed to provide FAPE to a high schooler with cancer-related cognitive impairments during the time period in which the high school operated 100% remote learning in response to COVID. Specifically, the parent alleges that the district ignored the effects of remote online learning on the student's IEP, refused to reopen the high school and made absolutely no effort for the provision of compensatory services.

Rabel v. New Glarus Sch. Dist., 79 IDELR 71 (W.D. Wis. 2021). ALJ's decision is upheld where the school district offered FAPE when it proposed that the 14-year-old student with Down syndrome and autism be served in a private therapeutic virtual setting for the 2020-21 school year rather than in the district's virtual program. Where the question is whether the student can receive a satisfactory education in a mainstream virtual setting at the middle school as requested by the parent, the evidence is clear that she cannot. There, all of the lessons were prerecorded and the parents' refusal to consider an in-person program for 2020-21--which was selected by all of her would-be classmates with disabilities--would have left this student by herself. However, the virtual instruction provided by the private therapeutic school would provide the student with synchronous live instruction in a small group setting with other students with disabilities. Given that the private setting's virtual program offers the live instruction, feedback and peer interaction that the student

needs to make progress, the district's proposal is appropriate. As the ALJ explained, this student has not interacted with non-disabled students for more than two years, and her parents failed to cite any evidence in the record showing that the student was ready to interact with her non-disabled peers in a virtual or in-person setting or that placement in a regular education setting was appropriate to meet the student's needs. Although the parents disagree with the ALJ's conclusion, "it is not the court's role to independently assess [the student's] case." The court can only decide whether the ALJ came to a rational conclusion, which the ALJ did.

3. General Relevant Case Law for Future COVID FAPE Cases

L.J. v. School Bd. of Broward Co., 74 IDELR 185 (11th Cir. 2019). In this case, the Court was asked to determine whether a failure to implement a student's IEP was actionable. L.J. had autism and a language impairment. Although L.J.'s elementary years generally were successful, he did not adjust well to the middle school and due to his frequent absences, L.J. was home schooled for most of his 6th grade year, after which his mother filed a due process hearing and invoked "stay put" to require the continuation of his elementary IEP. Thereafter, the parent filed additional complaints, including at least one challenging the district's implementation of the "stay put' placement. The hearing officer found in favor of the parent regarding the implementation of the stay-put IEP. Five years later, a district court reversed the administrative decision and the case proceeded to the 11th Circuit.

The Court found in favor of the district. It determined that in order to deny a student FAPE, a "material failure to implement" the IEP must occur, meaning that something more than a technical or *de minimis* deviation from the IEP must be demonstrated. The Court took pains to distinguish between cases which challenge the appropriateness of a student's IEP versus challenges to a failure to deliver the instruction/services contained in an otherwise appropriate FAPE. In reaching its decision, the Court considered the following factors: 1. The difficulty in maintaining status quo; 2. The proportion of instruction/services provided as compared with the services which were included in the IEP; and 3. The student's progress or lack thereof. Relative to the third factor the Court stated that:

> "The materiality standard does not require that the child suffer demonstrable educational harm in order to prevail." Van Duyn, 502 F.3d at 822. Still, "the child's educational progress, or lack of it, may be probative of whether there has been more than a minor shortfall in the services provided." Id. So, for example, "if the child is not provided the reading instruction called for and there is a shortfall in the child's reading achievement, that would certainly tend to show that the failure to implement the IEP was material" and vice versa. We reiterate our caution, however, that reviewing courts should not rely too heavily on actual educational progress, at least where a plaintiff has not tied the lack of progress to a specific implementation failure. It is merely one piece of evidence courts may use in assessing whether a school failed to implement substantial or significant provisions of the IEP.

Finally, the Court looked at the cumulative effect of any failure to implement.

4. Challenges Regarding Mask Mandates

The ARC of Iowa v. Reynolds, 79 IDELR 153 (S.D. Iowa 2021). Motion of the parents of 13 unrelated medically fragile students for a temporary restraining order against state officials prohibiting them from enforcing a ban on mask mandates is granted where all of the necessary elements for obtaining a TRO have been shown: 1) the requested relief is necessary to prevent irreparable harm; 2) there is a substantial likelihood of success on the merits; 3) the harm to the students outweighs the harm to the state or districts; and 4) the TRO would serve the public interest. Iowa's statutory ban on mask mandates forces medically fragile students to choose between attending school where they are potentially exposed to severe illness and attending school remotely and receiving subpar instruction—irreparable harm. The parents are substantially likely to prevail on their claim that Iowa law undermines protections to the children provided by Section 504/ADA, because the mask mandate ban prevents districts from making a reasonable modification for medically fragile students and from delivering their programs, services and activities in the most integrated setting appropriate like that which is afforded to their nondisabled peers. In addition, allowing districts to decide whether to adopt mask mandates will not harm the state and the public interest in enforcing ADA outweighs the state's interest in enforcing the ban. The TRO is in place until such time as the court can rule on the parents' motion for preliminary injunction. Note: On October 8, 2021, a preliminary injunction was granted. 121 LRP 34984 (S.D. Iowa 2021).

Hayes v. DeSantis, 79 IDELR 198 (S.D. Fla. 2021). Request for a preliminary injunction on behalf of 16 students with disabilities asserting a FAPE-based challenge to the Governor's ban on mask mandates is denied. The parents are not likely to succeed on the merits because they have failed to exhaust IDEA's administrative remedies. To prevail on their request for injunctive relief, the parents must show that 1) they are substantially likely to succeed on the merits of their claims; 2) their children would suffer irreparable harm in the absence of the injunctive relief; 3) the harm to the students outweigh the harm to the state; and 4) the requested relief would serve the public interest. Clearly, the claims set forth in the complaint address issues of FAPE and exhaustion is required under IDEA. An administrative law judge in an administrative hearing may be able to order a more limited mask mandate as a disability accommodation for a particular student, and "there is nothing in [the Governor's order] that would prevent a school from implementing mask requirements in specific classrooms." Not only have the parents failed to show that they are likely to succeed on the merits of their case, but they have also failed to show irreparable harm in the absence of an injunction. Indeed, all but one of the students' school districts adopted mask mandates in violation of the Governor's order, so the requested injunction would not have any meaningful impact.

G.S. v. Lee, 79 IDELR 159 (W.D. Tenn. 2021). Based upon the parents' assertion that their medically fragile children can no longer interact with peers or attend certain classes because the Governor issued an executive order that allows public school students to opt out of wearing face masks, they are likely to prevail on their case, have demonstrated irreparable harm, and issuing a TRO would serve the public interest. Thus, the school district can no longer grant exceptions to the mask mandate for two weeks. Note: On September 17, 2021, the court granted the parents' motion for preliminary injunction against enforcement of the ban on mandatory masking. 79 IDELR 194 (W.D. Tenn. 2021).

S.B. v. Lee, 2021 WL 4346232 (N.D. Tenn. 2021). Plaintiffs are not required to exhaust administrative remedies and the requested preliminary injunction is granted enjoining enforcement of district's enforcement of the Board's vote against a mask mandate and enforce the mandate that was in place in all of its schools during SY 2020-21 as a reasonable accommodation under ADA. Any individual with ASD or a tracheotomy is exempt from the mask mandate and the district is ordered to identify other medical conditions that it believes may require exemptions. This case will now proceed on the merits.

NOTE: There have been cases like this also filed in Texas and South Carolina (and probably others as well).

B. Due Process Decisions and SEA Findings

1. Child Find/Eligibility/Evaluations

Northwest Local Sch. Dist., 121 LRP 6033 (SEA OH 2020). A hearing officer found that a district violated IDEA's child find mandate by failing to timely evaluate a 3rd grade student who had academic and behavior problems and was on a Section 504 plan. The child had been evaluated in 1st grade and found ineligible under IDEA. In 2nd grade, the student was placed on a behavior intervention plan. The parents again requested an evaluation in August 2019, which was during the child's 3rd grade year, but the district declined this request. The parents then submitted two independent educational evaluations. In April 2020, the district notified the parents that it could not evaluate the child due to COVID, after which the parents filed a due process complaint. Given that the district had substantial data on the child, including grades, observations and behavior reports, the hearing officer determined that the district had sufficient information to evaluate the child.

Eaton Cmty. City Schs., 121 LRP 20304 (SEA OH 2021). The Ohio DOE found that a several month delay in conducting a functional behavior analysis (FBA) and behavior intervention plan (BIP) for a student who had challenging behavior violated IDEA. Prior to the COVID driven closure of the student's school, the student had engaged in aggressive behavior. As a result, the district had temporarily placed the student in an alternative placement and conducted a manifestation meeting, finding that the behavior was a manifestation of the student's disabilities. While the closure of school may have initially prevented the district from conducting a FBA in a timely basis, the district's failure to complete an FBA or BIP until months after the school reopened constituted a violation of IDEA.

2. Implementation of IEPs/FAPE

In re: Student with a Disability, 121 LRP 3961 (SEA NV 2020). A hearing officer found that a district's failure to provide something other than "distance learning" instruction to a 7-year-old student with autism, challenging behavior, and an intellectual disability denied her a FAPE. Accordingly, the parents were entitled to reimbursement for the cost of a private in-person autism program. In the Spring of 2020, the district's schools closed due to COVID. Subsequently, the district operated under a mandate whereby all students would receive 60 to 90 minutes of instruction each day, with the possibility of additional instruction as needed. While the student

did receive some instruction via this format, both parties agreed that the student was unable to benefit from distance learning without individual assistance, given the severity of the student's disabilities and her behavior, which including crying, refusing to attend and "slapping". In challenging the parents' request for reimbursement, the district asserted that according to its policy, in-person services were not available and the pandemic modified the definition of FAPE. The hearing officer rejected both arguments, noting that the U.S. DOE had many opportunities to modify the FAPE standard in light of COVID, but did not do so. Accordingly, the parents were entitled to reimbursement for placement of their daughter in an environment which afforded her in-person services.

Perry Township Schs., 120 LRP 37514 (SEA IN 2020). District was required to provide compensatory speech and language services to a student with extensive medical needs, due to the district's failure to deliver such services. The student's IEP required speech and language services 280 minutes each 9 weeks. At the beginning of the 2020-21 school year, the district revised the IEP to provide these services virtually, and there were oral discussions between the speech and language therapist and parent regarding a schedule for their delivery. The district was aware that the student was unable to access the services independently. It was also aware that a consistent schedule could not be implemented due to the parent's work schedule and the student's health needs. School began in July 2020. By the end of September 2020, the student had received no therapy because she had been hospitalized. The parent then contacted the district, asking when the therapy could begin. She also requested make-up services for therapy missed, as well as a flexible schedule. The school's response was that since it had held at least 2 virtual therapy sessions and the student failed to show, it was not responsible for any missed therapy. The Indiana DOE rejected the district's argument and found that the student's IEP was overly vague in its description of the speech and language services and that an ambiguous IEP should be construed against the district. Consequently, the district was required to amend the speech and language provision of the IEP to provide clarity and to compensate the student for the services missed.

In re: Student with a Disability, 120 LRP 22907 (SEA KS 2020). District violated IDEA when it failed to assure parental participation in the design of the student's distance learning plan. The district also violated IDEA by failing to implement the modifications/accommodations to the student's assignments as contained in her IEP, which enabled the student to access the general education curriculum.

Brookings Sch. Dist., 120 LRP 24079 (SEA SD 2020). Student with a speech disability is entitled to compensatory education due to district's failure to provide any distance learning services on the first day of extended school year (ESY). The student was to receive ESY during the summer of 2020, 5 days a week for 3½ hours per day, plus a 30-minute speech therapy session. The parents are also entitled to reimbursement for their transportation for a period prior to the closure of the school due to COVID-19. However, the parents' complaint that the district failed to completely implement the student's IEP during the school's COVID closure is rejected, as the delivery of services was close to what was included in the student's IEP and the student made progress. In addition, the district did not unilaterally change the student's placement when the schools were closed due to COVID.

Eastern Howard Sch. Corp., 121 LRP 9941 (SEA IN 2021). The Indiana DOE found that a district's failure to implement a student's IEP via remote learning violated IDEA. Noting that while the remote learning was caused by COVID, a district was still required to amend the student's IEP to reflect a change in the student's program. The student's original IEP required the student to attend a resource room for "guided study" and it entitled him to receive 48 minutes per day of progress monitoring in the general education environment. The student also received certain accommodations, such as extra time, the use of a calculator and material read to the student. When the district reverted to remote learning, the services offered were significantly different and included instructional assignment packets. Assignments were posted online and communication with teachers was via email. The district also decided that the student would no longer be required to complete general education assignments, but instead would limit his assignments relative to his goals. Stating that a student's IEP must be implemented as written, and that the district's failure to do this was a violation of IDEA, the Department required the district to consider the student's need for compensatory education.

East Windsor Bd. of Educ., 121 LRP 2530 (SEA CT 2020). Parent successfully demonstrated that a district denied her daughter a FAPE when it failed to materially implement her IEP. The daughter with autism, cognitive and language disorders, and challenging behavior, required a 1:1 paraprofessional assigned to her during her time in school, in addition to a substantial amount of specialized instruction and speech and language and occupational therapy. In March 2020, COVID required the district to utilize a distance learning plan, which included some individualized instruction and related services via a remote format. However, from the beginning of the district learning, the student had an extremely difficult time participating in the instruction, as she frequently missed and/or was not attentive during the delivery of the services. Accordingly, the district should have revisited the student's distance learning plan to amend it to meet the student's unique needs. While the district had "flexibility" regarding how to implement the student's IEP, it did not have the option of failing to deliver a FAPE.

Ankeny Comm'y Sch. Dist., 78 IDELR 206 (SEA Iowa 2021). District provided FAPE to student with CP in the hybrid model of instruction chosen by the parent and is not required to provide an in-person 1:1 paraprofessional in the home during remote instruction. Where the teenager's IEP called for 435 minutes per day of 1:1 paraprofessional assistance, the parents selected a remote learning model among multiple options for the 2020-21 school year. The district is not obligated to offer FAPE in each and every learning model available and it does not have to provide the exact same methodology to students with disabilities, as long as it provided equally effective alternate access, which it did here with its hybrid model. The parent did not show that it was medically required that the student receive instruction in the home and the hybrid model proposed was responsive to the student's high-risk status, prioritized his safety, and provided him FAPE

Florence Co. Sch Dist. 1, 121 LRP 10625 (SEA SC 2021). Compensatory services are awarded to a 9-year-old student with OHI and SLD where the district failed to implement the student's IEP during school closures. The student's IEP included a BIP and the provision of a paraprofessional in the general education setting with specialized instruction in a resource room. However, when schools closed due to COVID, the district transitioned to virtual education, but did not provide the student with resource services or a para. As the 2019-20 school year ended, progress the student had been making in the school program began to "flat line" as the year ended, even with efforts on

the part of the ESY special education teacher. While it could have been the shutdown, the reliance on virtual education, the lack of 1:1 teaching in the school setting, being at home, or a combination of all of these things that caused the slowdown in progress, it was the district's responsibility to respond to any change in circumstances that negatively impacted upon the student's education and "more of an effort could have been made" to provide services to the student during the shutdown and over the summer.

Special Sch. Dist. of St. Louis Co and Parkway C-2 Sch. Dist., 121 LRP 15324 (SEA MO 2021). Where student would have received appropriate services had the parent completed the private school's enrollment forms as instructed, the district did not deny FAPE where it made efforts to find an alternate private school placement when his special education school terminated his enrollment in March 2020. At the time that the former school was terminating services, the district administrator tasked with arranging private services for students with disabilities secured a spot in the new private special education school even though it was not accepting new students. The new school and the parent communicated by email as early as March 30, 2020—the same time the former school was ending services. The new school would have been able to implement the student's IEP during the period of distance learning, but the parent refused to complete the 31-page intake form required for enrollment. Because the district attempted to provide FAPE, the parent cannot hold it responsible for the lack of services in the Spring of 2020. In addition, the district did not violate IDEA by creating a distance learning plan for the student without holding an IEP meeting where the DLP did not replace the student's IEP. Rather, the DLP detailed how the IEP would be implemented during the extended school closures.

Orcutt Union Sch. Dist., 121 LRP 15399 (SEA CA 2021). District denied FAPE when creating a distance learning plan for a 14-year-old student with autism that was not tailored to meet the student's unique needs. In addition, the plan expected the student's mother to provide 1:1 behavioral supports for nearly the entire distance learning period. Where state law requires that "specialized instruction" be provided by a credentialed special education teacher, the district materially failed to implement the student's IEP. In addition, the DLP was not individualized for the student, but was identical to the plans of other similar students in the school district. This approach, along with the expectation that the parent would provide the needed 1:1 behavioral support during distance learning denied FAPE. Accordingly, the district must provide 428 hours of compensatory education to be used in any educationally related area of the mother's choice.

Rocklin Unif. Sch. Dist., 121 LRP 12194 (SEA CA 2021). Where district offered both in-person and virtual instructional models to a medically fragile student for the 2020-21 school year, the offer was ambiguous and interfered with the parent's opportunity to participate in the IEP process. Indeed, the parent chose the virtual option because the child was immunocompromised, but the student was placed on a waiting list. While the in-person proposed placement was described as the proposed placement in the appropriate section of the child's IEP, the notes section reflected the virtual instruction option that the parent chose. Describing two contradictory placement offers in separate sections of the IEP made the offer ambiguous and confusing to the parent and district staff did not have a clear understanding of the offer and how to implement it. The parent reasonably believed that the virtual learning model was an option and agreed to it, but the district failed to clarify what the final formal placement offer was. Since the parent was not able fully to evaluate

the ambiguous offer and accept or reject it, that interfered with the parent's opportunity to meaningfully participate.

Nashoba Regional Sch. Dist., 121 LRP 8486 (SEA MA 2021). Although the pandemic was an extraordinary circumstance requiring some "unavoidable" deviations from the student's IEP, the district's delay in providing Orton-Gillingham services to an 8-year-old student with SLD and ADHD amounted to a denial of FAPE. While the pandemic made implementation of services much more difficult, the duty to provide them under IDEA remained unchanged. At the start of school closures, it was "clear" that the district expected the parents to provide, at least partially, direct services in reading, written language and math by implementing the student's remote learning plan. A few weeks after the school closures when the teacher began providing remote O-G services, the student had become "too dysregulated to participate effectively." To correct this, the district must convene the student's IEP team to discuss compensatory education services if it has not already done so.

C. U.S. DOE Interpretive Guidance

"Return to School Roadmap: Development and Implementation of IEPs in the LRE under the IDEA, https://sites.ed.gov/idea/files/rts-iep-09-30-2021.pdf (OSERS/OSEP QA 21-06 September 30, 2021). Topics addressed in this document include meeting timelines, ensuring implementation of initial evaluation and reevaluation procedures, determining eligibility for special education and related services, providing the full array of services that children need for FAPE, the implications of delayed evaluations and services to infants and toddlers and their families under Part C and considering a student's need for compensatory services.

Letter to Special Education and Early Intervention Partners, https://sites.ed.gov/idea/files/rts-idea-08-24-2021.pdf and "Return to School Roadmap: Child Find under Part B of the IDEA", https://sites.ed.gov/idea/files/rts-qa-child-find-part-b-08-24-2021.pdf (OSEP/OSERS August 24, 2021). The Roadmap document begins by saying that--

> It is particularly important that we provide information about the IDEA Part B child find requirements at this time since, as a result of the COVID-19 pandemic, a number of children have not registered for school or have unenrolled from schools. Many others have received instruction only virtually. Given these challenges, as they prepare to return to full-time, in-person learning for the 2021-2022 school year, SEAs and LEAs may need to evaluate whether their current child find procedures are sufficiently robust to ensure the appropriate referral and evaluation of children who may have a disability under IDEA.
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> The document is apparently the first of a Q&A series to address the questions of a "diverse group of stakeholders" asking for new guidance from the U.S. DOE on IDEA in light of COVID-19 and is specifically "to reaffirm the importance of appropriate implementation of the child find obligations under Part B." It contains 13 questions. Perhaps the only two that provide us with anything we did not know already would be Questions C-3 and C-4:
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> Question C-3: If a student has received limited instruction due to educational disruptions as a result of the COVID-19 pandemic and also made little academic progress, should the

student be referred for an evaluation to determine eligibility for special education and related services?

Answer: Not necessarily. Levels of student performance primarily attributable to limited instruction do not mean the student requires special education and related services under IDEA. IDEA's child find and eligibility procedures are designed to identify, locate, and evaluate students with a suspected disability to determine whether, as a result of the disability, the student requires special education and related services. IDEA's regulations in 34 C.F.R. § 300.306(b) specifically state that a child must not be determined to be a child with a disability if the determinant factor is due to a lack of appropriate instruction in reading or math. LEAs must examine individual referrals for special education and should work with families to determine additional general education supports and interventions that can appropriately meet the child's needs that are attributable to limited instruction as a result of the COVID-19 pandemic and not because the child is suspected of having a disability under IDEA. LEA staff should document these supports when they provide prior written notice to parents under 34 C.F.R. § 300.503, explaining the reasons why the LEA will not conduct an evaluation to determine eligibility for special education and related services for their child.

Question C-4: When a parent shares that their child contracted COVID-19, has long COVID, or has other post-COVID conditions, and the symptoms of the child's condition (such as fatigue, mood changes, or difficulty concentrating) are adversely impacting the child's ability to participate and learn in the general curriculum, must the child be referred for special education and related services?

Answer: Yes. If a child experiencing symptoms from long COVID is suspected of having a disability (e.g., other health impairment) and needs special education and related services under IDEA, they must be referred for an initial evaluation to determine the impact of the long COVID symptoms and the child's academic and functional needs.

"Long COVID under Section 504 and the IDEA: A Resource to Support Children, Students, Educators, Schools, Service Providers, and Families", https://sites.ed.gov/idea/files/ocr-factsheet-504-20210726.pdf (OCR/OSERS July 26, 2021). This document was issued by the U.S. DOE "to provide information about long COVID as a disability and about schools' and public agencies' responsibilities for the provision of services and reasonable modifications to children and students for whom long COVID is a disability." For all intents and purposes, this document establishes "long COVID" as a potential disability under IDEA (e.g., OHI) or 504. As noted, "long COVID" can produce a combination of symptoms, including:

- Tiredness or fatigue
- Difficulty thinking or concentrating (sometimes referred to as "brain fog")
- Headache
- Changes in smell or taste
- Dizziness on standing (lightheadedness)
- Fast-beating or pounding heart (also known as heart palpitations)

- Symptoms that get worse after physical or mental activities
- Chest or stomach pain
- Difficulty breathing or shortness of breath
- Cough
- Joint or muscle pain
- Mood changes
- Fever
- Pins-and-needles feeling
- Diarrhea
- Sleep problems
- Changes in period cycles
- Multiorgan effects or autoimmune conditions
- Rash

Q&A Regarding IDEA Part B Dispute Resolution in COVID-19 Environment, 76 IDELR 259 (OSEP June 22, 2020). LEAs and parents are encouraged to work collaboratively to resolve agreements and to be creative in meeting the needs of students with disabilities. If not successful, mediation, State complaints and due process procedures are available. Points included in this document: The 60-day time limit for resolving a State complaint can be extended on a case-by-case basis; IDEA does not contain a specific timeframe in which mediation must occur or whether it must occur in person; the parent and LEA can mutually agree to extend the 15-day timeline for an LEA to convene a resolution meeting and the 30-day resolution timeline when a parent files a due process complaint if not able to meet in person or through virtual means; resolution meetings can be held virtually; a state may permit due process hearings to be held through video conferences or conference calls; hearing officers may grant specific extensions of timelines at the request of either party with no requirement that both parties agree to the extension request.

Q&A on Implementing IDEA Part B Procedural Safeguards During COVID-19, 76 IDELR 301 (OSEP June 30, 2020). If certain conditions are met, districts may secure required parent consent for initial evaluation, reevaluation or initial services electronically when it may not be possible to obtain consent in-person. However, in developing appropriate safeguards for using electronic or digital signatures during the pandemic, a public agency may determine that a "signed and dated written consent" may include a record and signature in electronic form that identifies and authenticates a particular person as the source of the consent and indicates that person's approval of the information contained in the consent. In addition, and to ensure the integrity of the process, districts should include a statement indicating the parent has been fully informed of the proposed activity and is giving consent voluntarily. "During the pandemic, the Department considers the use of these safeguards to be sufficient for public agencies to use in accepting electronic signatures for parental consent under IDEA." Regarding prior written notice, districts may consider the impact of the pandemic in determining when to issue it. "The Department believes that it would be appropriate to consider factors such as the closure of public and school buildings and facilities, social distancing, and other health-related orders during the pandemic, but districts should "make every effort" to provide prior written notice as soon as possible prior to proposed or refused action.

Q&A on Providing Services to Children with Disabilities During the COVID-19 Outbreak, 76 IDELR 77 (U.S. DOE March 12, 2020). While IDEA, Section 504 and ADA do not specifically

address a situation in which a school is closed for an extended period because of a disease outbreak, if a school closes its doors to stop COVID-19 from spreading but the district is not providing educational services to its student population in general, "the [local educational agency] would not be required to provide services to students with disabilities during the same period of time." Once school resumes, however, the district is obligated to "make every effort" to fully implement a student's IEP or 504 plan. In addition, IEP and 504 teams, as appropriate for each student, are required to decide on an individualized basis whether the student needs compensatory services due to the impact of school closure. It is also important that districts not provide educational opportunities to the general student population during school closures that it does not make available to students with disabilities, and to avoid discrimination under Section 504/ADA, such opportunities, including the provision of FAPE, must be equally available to students with disabilities. IEP teams should consider, as appropriate, whether a student excluded as a result of COVID-19 while the school remains open could benefit from homebound services, such as online instruction or instructional telephone calls. While IEP teams are not required to include "distance learning plans" in a student's IEP, doing so might be a prudent step in view of the potential for future COVID school closures. In addition, creating a "contingency plan" before a COVID-19 outbreak, student dismissal or school closure occurs could provide the student's service providers and parents an opportunity to reach agreement as to what circumstances would trigger the use of the student's distance learning plan and the services that would be provided during the dismissal.

Fact Sheet: Addressing the Risks of COVID-19 in Schools While Protecting the Civil Rights of Students, 76 IDELR 78 (OCR March 16, 2020). Despite COVID-19's circumstances, district must meet the antidiscrimination provisions of Section 504/ADA. If a student does not receive services after an extended period of time (generally 10 days), the student's IEP or 504 team must make an individualized determination whether and to what extent compensatory services are needed to make up for any skills that may have been lost. If school is open and serving other students, districts must ensure that students with disabilities continue to receive FAPE. In addition, the IEP team or 504-responsible personnel can assist with the effort to determine if some or all of the identified services can be provided through alternate or additional methods. For example, accessible technology may afford students, including students with disabilities, an opportunity to have access to high-quality educational instruction during an extended school closure, especially when continuing education must be provided through distance learning. Further, IEP teams are not required to meet in person while schools are closed, and evaluations and reevaluations that can be done without face-to-face assessments or observations may take place while school facilities are closed with parental consent. Otherwise, the evaluation would need to be delayed until facilities reopen.

Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities, 76 IDELR 104 (OSERS/OCR March 21, 2020). IDEA and Section 504 should not impede the use of virtual or online education services to students with disabilities. School districts must make local decisions that take into consideration of the health, safety, and well-being of all their students and staff. While previous guidance did indicate that if districts were not providing services to any of its students during school closures, then it was not required to do so for students with disabilities, compliance with the IDEA, ADA and Section 504 "should not prevent any school from offering educational programs through distance instruction." Some IEP services may be provided safely in person during a school closure,

and when it is not feasible to do so, online options or other modifications may be available and may include extensions of time for assignments, videos with accurate captioning or embedded sign language interpreting, accessible reading materials, and many speech or language services through videoconferencing. When educational materials are not available in an accessible format, educators can provide "equally effective alternate access" to the curriculum. For example, an educator might read a document to a student with a visual impairment over the phone. In addition, collaboration between districts and families is encouraged in reaching mutually agreeable extensions of time on state complaints, due process hearings, IEP decisions, eligibility determinations, and reevaluations and "[w]here we can offer flexibility, we will."

D. Student Privacy Policy Office Guidance

Letter to Anonymous, 121 LRP 19451 (SPPO 2021). While districts must generally obtain prior written parental consent before disclosing personally identifiable information from a student's education records to a third party, a teacher's disclosure of students' positive test results for COVID-19 to fellow staff and classmates without the parent's consent did not violate FERPA. Under FERPA's "health or safety emergency" exception to the parent consent rule, a district may disclose a student's education records to appropriate parties without parent consent if knowledge of that information is necessary to protect the health or safety of the student or other individuals. In making a determination of whether a health or safety emergency exists, a district may take into account the totality of the circumstances and where the district had a rational basis to conclude that disclosing the students' positive COVID-19 status was necessary to protect the health and safety of school staff and other students, this agency will not substitute its judgment for that of the district. Therefore, the investigation of this matter is closed and no violation of FERPA is found. See also, Letter to Anonymous, 121 LRP 32157 (SPPO 2021).

III. 2021 NON-COVID CASE LAW

CHILD FIND DUTY TO TIMELY REFER AND EVALUATE

D.C. v. Klein Indep. Sch. Dist., 79 IDELR 4 (5th Cir. 2021) (unpublished). School district's delay for several months in conducting an evaluation for SLD was not reasonable and denied FAPE. Districts are to evaluate students with suspected disabilities within a reasonable time after they have knowledge of facts that likely indicate that a disability exists. Here, there was extensive evidence that the district was or should have been aware of the student's disability during his fourth grade year by April 27, 2018. Among other things, the student had a 504 plan that indicated that he exhibited "characteristics of dyslexia evident in reading comprehension and written expression" and his performance substantially improved when assignments were administered orally. Despite receiving accommodations, however, the student's reading level did not improve from the beginning of his 4th-grade year through the middle of the year; therefore, the district should have known that its existing strategies were not working. The district's argument that the time period between April 27 and September 6, 2017, should not be considered because it included the summer break is rejected. Where school districts on summer break "need not move towards evaluation as expeditiously as they might during the school year," they "cannot get away with doing nothing, and here, the District did nothing." Further, the district delayed the evaluative process between early September, when the parents requested an evaluation, and late October, when the district

obtained consent to evaluate.

D.T. v. Cherry Creek Sch. Dist. No. 5, 79 IDELR 74 (D. Colo. 2021). Where the high school student's significant social-emotional difficulties were not observable in the school environment until November 2017, the school district did not violate IDEA's child find requirement when it failed to evaluate him earlier than that. Here, the district had no reason to suspect that the student was a student with emotional disturbance who needed special education and related services until he made a comment at school about "shooting up the school." In addition and to qualify for services as an ED student, the student's emotional difficulties must be found to interfere with his ability to receive reasonable educational benefit. While the student was struggling in school in some areas by April 2017, including adjusting to his new, larger school and had a documented welfare check during his freshman year, "those issues did not adversely affect [the student's] educational performance...when he earned high grades." The parent's argument that the district had reason to suspect a disability and need for special education by September 2017 when the student was hospitalized for depression and anxiety is rejected. Although the student received a poor grade in an honors class during that time, he otherwise continued to perform well academically, and "it was not until his social-emotional functioning manifested in an academic setting in November of 2017 and interfered with his ability to receive reasonable educational benefit, that the District had reason to suspect a disability."

Zamora v. Hays Consol. Indep. Sch. Dist., 79 IDELR 12 (W.D. Tex. 2021). Under the IDEA, an evaluation is required when a district suspects that a student 1) has one of the disabilities identified in the IDEA; and 2) needs special education and related services because of the disability. Here, the district had no reason to believe that the teenager diagnosed with ADHD, anxiety and depression had a disability-based need for specially designed instruction. Indeed, the student performed well with the provision of the accommodations set forth in his Section 504 Plan, which included checking for understanding; reminders to stay on task; and assistance with note-taking. In addition, the student earned A's and B's in all of his classes (including Advanced Placement classes) and scored at the "masters" level on state reading, social studies and science assessments. While the parents specifically requested an evaluation shortly after the student entered high school in September 2018, they could not hold the district responsible for its delay in the evaluation process where they refused to provide their consent to the requested evaluation.

Mr. F. v. MSAD #35, 78 IDELR 282 (D. Me. 2021). District did not violate IDEA when it waited 20 months to evaluate a student for IDEA services where it had no reason to suspect a need for special education services until November 2018 during the student's 8th-grade year. Though the parent submitted medical documentation to the school indicating that the student was diagnosed with ADHD and an anxiety disorder in September 2017, the student's difficulties with organization and completing work were not atypical for middle schoolers. In addition, throughout most of the student's 7th-grade year, he was reported to be doing well. Thus, it was reasonable for the district to try to address his issues by implementing a 504 plan. When the student's executive functioning and social skills deficits became more apparent in November 2018, the district referred the student for an IDEA evaluation, but conducted a 504 evaluation instead based upon the mother's repeated statements that the student did not need special education services. Where the student was evaluated and found eligible for IDEA services in May 2019, the district complied with its child find obligations.

Jacksonville North Pulaski Sch. Dist. v. D.M., 78 IDELR 283 (E.D. Ark. 2021). While the kindergartner's diagnoses of ADHD, autism and a sensory processing disorder do not in themselves require IDEA services, the district erred in focusing on the child's good academic performance when determining whether an evaluation was necessary. Here, the district suspended the child for a total of 12 days during the first 7 weeks of school for behaviors that could have been related to disability, and the guardians had notified the district of a history of behavioral problems when they registered him for kindergarten. Indeed, the testimony in the record indicates that the district narrowly focused on the child's academic ability without considering the overall effect that his diagnoses were having on his education. Further, IDEA prohibits districts from using a single measure or assessment—such as academic performance—to determine whether a child needs special education services. Thus, the hearing officer's decision that that the district violated IDEA in refusing an evaluation based solely on academic proficiency is upheld.

APPROPRIATE EVALUATION

D.S. v. Bainbridge Island Sch. Dist., 78 IDELR 242 (W.D. Wash. 2021). District violated IDEA by failing to evaluate a child who had dysgraphia, based upon the district's position that it was providing intervention to address the student's dyslexia. Here, the student's teacher also had concerns about the student's writing difficulties. The lack of an evaluation meant that the student went without appropriate services. It also interfered with the parents' participation in their child's program, in that the parents were prevented from receiving important information about their child's disability.

ELIGIBILITY/CLASSIFICATION

Minnetonka Pub. Schs. v. M.L.K., 78 IDELR 94 (D. Minn. 2021). Where the misclassification of a student's disability only amounts to a denial of FAPE if it results in a failure to identify and address all of the student's special education needs, FAPE was denied in this case. Here, the district's April 2018 reevaluation did not identify the student's most significant disabilities: dyslexia and ADHD. Though the district argued that it was aware of the student's reading, attentional and focusing difficulties, the student's IEPs for grades 2-4 did not appropriately address the student's needs in those areas. In addition, the IEP reading goals were substantially the same for three school years, indicating a lack of progress in reading. The district's failure to accurately identify the student's dyslexia and ADHD was not harmless. Rather, it hindered the proper design of an IEP that would have met the student's needs. Thus, the hearing officer's award of reimbursement to the parents for private reading services and the cost of an IEE is upheld.

Miller v. Charlotte-Mecklenburg Schs. Bd. of Educ., 79 IDELR 98 (W.D.N.C. 2021). Where the parent has submitted eight referrals to the district requesting that her 12-year-old son be evaluated and found eligible for special education services, the district's IEP team met and decided to conduct an evaluation on four of these occasions. On all four occasions, the student was not found eligible for services. With respect to the last evaluation, the parent presented a new diagnosis of ASD with language and cognitive impairment and the team determined that a comprehensive evaluation was needed. Upon completion of the evaluation, the team reviewed all relevant information and found that the student did not meet three out of four requirements for having ASD and that there was no disability that adversely affects educational performance. Further, the

evidence did not reflect a need for specially designed instruction. Thus, the administrative decision dismissing the parent's FAPE claims is upheld.

G.M. v. Martirano, 78 IDELR 68 (D. Md. 2021). School district correctly found that the student with ADHD and dyslexia is not eligible for services under IDEA. A student is only eligible for services if he has a disability and a need for special education services as a result. While the student has a diagnosis of dyslexia, he does not have an IDEA disability because the student is meeting grade-level standards and does not exhibit a discernible pattern of strengths and weaknesses. In addition, while the student's ADHD may qualify as an "other health impairment" based on its adverse effect on his educational performance, the student has no need for specially designed instruction. Students who are progressing appropriately in general education classrooms do not need special education. Here, witnesses agree that notwithstanding the student's behavior problems, he is making progress comparable to same age peers and meeting state-approved grade-level standards. Further, the district's expert witnesses testified that the interventions and accommodations made available to the student in the general education setting do not qualify as special education or specialized instruction. Therefore, since the student does not need special education services, he is not eligible for special education under IDEA, and the ALJ's denial of reimbursement for private school placement to the student's parents is affirmed.

Gwendolynne S. v. West Chester Area Sch. Dist., 78 IDELR 125 (E.D. Pa. 2021). Hearing officer's decision that the district correctly found that the fourth-grader is not eligible for special education services is upheld. While the district's school psychologist found strengths and weaknesses in the student's academic skill levels, she was performing overall at an average grade level standard for fourth grade. In conducting an evaluation, the district's psychologist reviewed QRI test results, the Teacher's College Reading and Writing Assessment and a variety of other results. She also administered a number of assessments, including the WISC-V, Kaufman Test of Educational Achievement, the W-J Test of Achievement and the Fifer Assessment of Reading. Based upon these assessments, the student's IQ was found to be in the average range and her achievement results reflected average performance in phonological processing. In addition to test results, progress monitoring data, as well as grades (A's and B's), information provided from teachers and other school records were considered. While the parents' retained expert—a developmental neuropsychologist licensed and certified as a school psychologist—conducted a number of similar tests, they focused on age-normed standards rather than grade-level normed standards. The private expert concluded that the student had SLD and generalized anxiety disorder and made a number of recommendations for special education services and accommodations. The hearing officer's legal conclusion giving more weight to the evaluation conducted by the district because of its educational focus—rather than its medical focus—is accepted. Clearly, an educational focus is more appropriate for purposes of determining eligibility for special education and should be given more weight, particularly where the parents' expert failed to consider the student's school performance, grades, and the results of progress monitoring in the general education intervention process. In fact, there was very little in the private evaluation report concerning the student's overall school performance.

J.D. v. East Side Union High Sch., 78 IDELR 35 (N.D. Cal. 2021). District did not err when finding the student no longer eligible for special education services as a student with SLI on reevaluation. Thus, the district properly dismissed the student from special education and the

decision of the ALJ is affirmed. Here, all of the student's teachers testified that the student has no speech/language difficulties, and the ALJ found that throughout the due process proceedings, no professional testified that the student was eligible for special education under any disability category. The father's argument that the student succeeded in general education classes and sustained a high grade-point average only because he was receiving special education services is rejected. The eligibility team and the ALJ properly considered the student's accommodations when assessing his continued eligibility and finding that he no longer qualified for special education services. In addition, the ALJ's finding that the district afforded the parent meaningful opportunity to participate in the eligibility decision is upheld, where the father admitted that he zealously advocated on his son's behalf and frequently communicated with the district regarding his needs. Indeed, the parent was heavily involved at IEP meetings and spoke "scores if not hundreds of times" at a meeting in December 2018. The father took full advantage of the opportunity to participate in the decision-making process.

J.R. v. Board of Educ. for the Iroquois Cent. Sch. Dist., 78 IDELR 280 (W.D.N.Y. 2021). The district's determination that the student with dyslexia no longer needs special education and that she should be transitioned to a 504 plan to help with reading fluency is upheld. Magistrate's recommendation to deny tuition reimbursement to the parents who placed the teen in a private college preparatory school for SLD students is therefore adopted. A student continues to be eligible for special education only as long as the student needs special education because of a disability. Here, although the district violated the IDEA procedurally by not reevaluating the student before dismissing her from special education services, the district had sufficient information to identify her needs and make its decision. The student was earning superior grades in general education classes without any modifications and did not request any reading support in class. The special education teacher testified that the student did not need any support and the student earned a final grade of 97 in her general education English class.

INDEPENDENT EDUCATIONAL EVALUATIONS

L.C. v. Alta Loma Sch. Dist., 78 IDELR 271 (9th Cir. 2021) (unpublished). District court erred when concluding that the school district unnecessarily delayed providing an IEE or filing a due process complaint. Unnecessary delay is a "fact-specific inquiry" which is to focus on the circumstances surrounding the delay. In this case, the district exchanged numerous emails and letters with the student's parents from August 10, 2017, until it filed for a due process hearing on December 5, 2017. These communications reflect the parties' attempts to reach agreement on the evaluator's IEE and other issues. Indeed, the parties reached agreement on a contested issue as late as December 1, 2017. Further, the longest delay in communications, November 17–30, was largely due to the district's Thanksgiving break. The parties reached final impasse on the IEE issue on Thursday, November 30, and the district filed for a due process hearing the following Tuesday, December 5th. Thus, the court concludes that there was no unnecessary delay and reverses the district court's decision on its merits and vacates the fee award to the parents.

D.D. v. Garvey Sch. Dist., 79 IDELR 15 (C.D. Cal. 2021). Where the school district failed to respond at all to the parent's request for IEEs, it cannot challenge the appropriateness of the requests as part of the parent's request for due process hearing challenging the evaluation of her son. Under IDEA, parents are entitled to a district-funded IEE where the parent disagrees with an

evaluation conducted by the district, unless the district files for a due process hearing to show that its evaluation was appropriate. Here, when the parent disagreed with the district's speech-language, OT, AT and behavioral evaluations and requested IEEs, the district did not fund them, file for due process or otherwise respond to her requests at all. While the ALJ correctly determined that the district denied FAPE when it failed to respond, the ALJ erred by only ordering the district to fund a speech-language IEE on the basis that the parent failed to show that the district's other assessments were not appropriate. The district's silence in responding to the parent's request stands alone to warrant all of the requested IEEs and its unexplained delay in failing to respond to the IEE requests waived any right to contest them. Thus, all of the requested IEEs must be funded by the district.

MP v. Parkland Sch. Dist., 79 IDELR 126 (E.D. Pa. 2021). Where the school district did not fund a requested IEE or challenge the IEE request by initiating a due process hearing to show its evaluations were appropriate, the district violated IDEA. Specifically, when counsel for the student submitted an IEE request on April 8, 2019, the district's response was a letter from its counsel that improperly suggested that the request be withdrawn since the student was not attending school. While the court agrees with the hearing officer's decision that an IDEA violation occurred, the hearing officer erred in finding that it was a harmless procedural violation and merely ordering staff to be trained regarding properly responding to IEE requests. Even though the district made FAPE available and its evaluations were appropriate and consistent with IDEA requirements, the appropriateness of those evaluations is not pertinent to the question of whether the district was required to respond to the grandmother's request by agreeing to fund the IEE or initiating a due process hearing. Because the district failed to do either, the grandmother is entitled to an IEE at public expense and reasonable attorneys' fees.

PROCEDURAL SAFEGUARDS/VIOLATIONS

E.C. v. Fullerton School District, 79 IDELR 17 (C.D. Cal. 2021). District denied a parental request to allow their child's neurologist to observe the child in his classroom. The child had autism and a speech/language impairment. While the parties were in the process of developing an IEP for the student, the parents again requested the classroom observation on more than one occasion, stating that a denial would impede their right to meaningfully participate in the IEP process. The district repeatedly denied the request stating that an observation would be allowed only after the IEP team had made a placement determination. The district then finalized the student's IEP, after which the parent requested an independent educational evaluation and placed the student in a private setting. In part based upon a state code provision, the court upheld the hearing officer's determination that the denial of the observation, which was a procedural violation, denied the parent meaningful participation in the IEP process. The court also acknowledged that several of IDEA's provision serve to "even the playing field" between parents and district staff.

William S. Hart Sch. Dist. v. Antillon, 79 IDELR 73 (C.D. Cal. 2021). Parents are entitled to reimbursement for the cost of placing their intellectually disabled teenager in a private parochial school where the district failed to identify a specific school when it proposed an IEP offering a "nonpublic school placement." This offer was too vague to enable the parents to determine whether to accept or challenge the offered placement and whether it was appropriate. While the

9th Circuit has not ruled that notice of proposed placement must identify a specific school placement as part of an offer of FAPE, the 4th Circuit has done so.

Day v. Cedar Rapids Comm. Sch. Dist., 79 IDELR 199 (N.D. Iowa 2021). While the 11-year-old's IEP made reference to the student's individual health plan setting out an emergency seizure protocol, the district was not required to convene an IEP team meeting to make changes to the IHP. The changes made to the IHP with which the parent objects providing that the student would go home after the administration of Diastat did not alter the related services of health services and nursing services set forth in the IEP. Thus, no procedural violation of IDEA occurred when the IHP was revised to include a new requirement that the student would be taken home after Diastat administration. It is also important to note that the school nurse, the district's health services facilitator, the school principal and the student's special education teacher met with the parent to discuss her objections to the new requirement in compliance with Iowa rules governing the revision of IHPs.

Davis v. Carranza, 78 IDELR 167 (S.D.N.Y. 2021). State review officer's decision that guardian of a 10-year-old multiply disabled student is not entitled to private school reimbursement is upheld. The district made sufficient efforts to include the guardian in the IEP decision-making process. Thus, any procedural violation resulting from the guardian's absence at the student's annual IEP review is harmless. Parents are entitled to relief under IDEA where a procedural violation results in a denial of FAPE for the student or impedes the parent's participation in the decision-making process. Here, the district's documentation reflects that it repeatedly rescheduled the annual review meeting to accommodate the guardian's schedule, but the guardian could not remember why she was unable to attend the meeting. In addition, there is no indication that the guardian would have participated in a reconvened IEP meeting after "frustrating the attempts to schedule the IEP Meeting for months." Further, there is no evidence that the district's failure to reconvene the IEP team resulted in a denial of FAPE to the student. Finally, the SRO was also correct in deciding that the district's failure to include the names of the student's physician and an additional parent member in the final IEP notice was harmless.

METHODOLOGY

Falmouth School Dept. v. Mr. and Ms. Doe, 79 IDELR 221 (D. Me. 2021). A district denied FAPE to a student with ADHD and reading deficits by failing to provide him with a reading literacy program which would enable John to make more than *de minimis* progress. From the 1st grade on, John's reading skills "stagnated" in that by his 3rd grade year, John was reading at a "pre-k to kindergarten level." There was also evidence, via an outside evaluation, that John needed a multisensory reading program such as that offered by Lindamood Bell (LMB). The district's response to John's continued reading deficit was to provide him with "incremental increases" in the amount of intervention, eventually coupled with an offer to provide some LMB instruction; but with a teacher who was not certified in the program. The district then changed John's IEP to include "multisensory synthetic phonics instruction." The court found that such intervention was not reasonably calculated to provide John with meaningful progress, stating that "the relationship between speed of advancement and the educational benefit must be viewed in light of a child's individual circumstances." *Johnson*, 906 F.3d at 106. Finally, the court rejected the district's assertion that the parents could not base their FAPE claim on the district's failure to utilize a

specific methodology. While the court acknowledged that a district has some flexibility regarding methodology, a district cannot ignore evidence that its methodology failed; and that the unique needs of a child required a different program. Consequently, the district was responsible for reimbursing the parents' tuition for John's placement in a private school, as well as certain associated costs.

C.K. v. Board of Educ. of Sylvania City Sch. Dist., 78 IDELR 65 (N.D. Ohio 2021). The State Review Officer's decision in favor of reimbursing the parent for private Lindamood-Bell tutoring services for an elementary school student with autism and significant reading disabilities is reversed. The district provided the student FAPE and provided an IEP that would allow the student to make progress appropriate in light of the student's circumstances. The private Lindamood-Bell tutoring in reading unilaterally obtained by the parent required the student to miss several hours of school each day, thereby impeding his progress in areas other than reading. Indeed, the student's IEP goals in the areas of social communication and executive functioning, for example, "are not advanced and likely harmed" by taking him out of the classroom to receive the tutoring services. In addition, the parent had rejected the district's offer to include Lindamood-Bell instruction in the student's 4th grade IEP based upon her preference for private tutoring.

TRANSFER STUDENTS

Y.B. v. Howell Tshp. Bd. of Educ., 79 IDELR 31 (3d Cir. 2021). Receiving New Jersey school district did not violate IDEA when it refused to fund a private placement arranged by the student's former New Jersey district when the student enrolled in the middle of the school year. The new district made FAPE available when it offered a placement to the elementary school student with Down syndrome in a public school program that offered services "comparable" to those at the private school. The district court's ruling is affirmed, rejecting the parents' argument that IDEA's stay-put provision requires the new district to continue the publicly-funded private placement. The IDEA has adopted a specific requirement for transfer students, requiring a new district to provide services "comparable" to those in an intrastate transfer student's IEP until such time as the new district adopts the IEP or develops and implements a new one. To apply the stay-put rule would nullify the IDEA's provisions applicable to transfer students. Here, the new district reviewed the student's IEP and determined it could provide all of the required services in its own schools. Thus, the decision of the district court that the parents are not entitled to reimbursement for private school costs is affirmed.

LEAST RESTRICTIVE ENVIRONMENT

O.V. v. Durham Public Schools Board of Education, 121 LRP 13684 (M.D. N.C. 2021). A district's placement of a child with Down Syndrome and a language disorder in a class which offered minimum interaction with children without disabilities, denied him a FAPE in the least restrictive environment (LRE). The decision represents a lengthy review of the need for progress monitoring data, but ultimately the court criticized the district's decision to rely on teachers' opinions—rather than data—when determining the appropriate LRE placement for a child. Additionally, the court was critical of the district's staffs' ability to form an accurate opinion of the student's progress in the general education environment, based on staffs' lack of training in that area. The court also stated that district staff incorrectly linked the student's placement with

the issue of whether he would be taught using extended/alternative standards. Accordingly, the court awarded the parent reimbursement for their private placement of their son.

Knox Co. v. M.Q., 78 IDELR 255 (E.D. Tenn. 2021). The hearing officer's decision that the district's proposed placement of a five-year-old student with autism in a special education setting for two-thirds of the school day is not the LRE is upheld. The Sixth Circuit has developed a three-part categorical test to determine whether placement outside of the general education setting qualifies as a student's LRE. "[A] school may separate a disabled student from the regular class...when: (1) the student would not benefit from regular education; (2) any regular-class benefits would be far outweighed by the benefits of special education; or (3) the student would be a disruptive force in the regular class." (citing Roncker, 700 F.2d at 1063). Here, the student does not fall within the first or third category, because the evidence is clear that the student did and would continue to benefit from regular education, particularly where he is delayed in three areas--communication, prevocational and social skills. Based on expert testimony, young children with autism need as much social exposure to non-disabled peers as possible to develop communication and socialization skills. In addition, this student benefits from a routine, as changes to routine cause him discomfort and overstimulate him. Remaining in the general ed. environment, rather than transitioning back and forth between the general education classroom and the proposed special education program, will allow him to follow a regular routine in addition to modeling non-disabled peers. As to the third category, witnesses who have interacted with the student testified that he would not be a disruptive force in the regular class, as he does not have any behavioral issues. Rather, he is compliant, cooperative and responds well to redirection. As to the second category, the court must identify the supposedly superior services provided by the proposed non-mainstream setting and then determine whether those services can be provided in a mainstream setting. If the benefits of the non-mainstream setting are not portable to the non-segregated setting, the court must then determine whether those non-portable benefits far outweigh the benefits of mainstreaming. If the parents prevail on either of these two steps, they have established that the child does not fall within Roncker's second category of students for whom mainstreaming is not appropriate. Where two school witnesses testified that the supports offered in the proposed blended classroom can be provided in the general education kindergarten classroom, and the district's autism support team is available to assist and train paraprofessionals or other support staff to provide the student with needed supports and services, the general education classroom is the student's LRE.

Ogden v. Belton Sch. Dist. 124, 79 IDELR 92 (W.D. Mo. 2021). Administrative hearing decision is upheld in favor of the district's proposal that the student be placed in a more restrictive placement at the state school for students with profound disabilities instead of at his neighborhood elementary school. The parent's argument that the student's "significant progress" made on his six IEP goals showed that he could receive FAPE in a special education classroom at his home school is rejected where the student's progress reports indicated little to no change in functional and communication skills. Though the student did master two goals related to gross motor skills, that progress appeared to stem from the student's physical development rather than any services provided by the district. In addition, the student had no meaningful interaction with the other children in his special education class, where he received intensive 1:1 instruction from a rotating team of teachers and therapists. Further and in response to the parent's argument that the student could make appropriate progress if the district provided additional services, there is no reason to

think that "layering a new room or a new employee on top of the aides already provided" would change the student's progress.

BEHAVIOR/FUNCTIONAL BEHAVIORAL ASSESSMENTS & BIPS

Lauren and Eric B. v. Frisco Indep. Sch. Dist., 78 IDELR 137 (E.D. Tex. 2021). Magistrate Judge's Report and Recommendation is adopted that the impartial hearing officer was correct in finding that the district offered FAPE to a student with Asperger Syndrome. Where the parents' argument is that the district should have conducted an FBA earlier than it did in October 2018, there is no general requirement under IDEA to conduct an FBA or to do so within a certain time period. Here, the district conducted an FBA two months after the student began third grade, when the student's behavior became much more of a concern. In addition, the student's initial IEP contained behavioral supports and the district took "extensive action" to address the student's behavioral issues, including the collection of data and providing intervention, support, goals, strategies and frequent meetings with the parents and district staff. While there were behavioral incidents that occurred, the student often met behavioral expectations and demonstrated progress on his IEP goals.

MANIFESTATION DETERMINATION

Gloria V. v. Wimberley Indep. Sch. Dist., 78 IDELR 96 (W.D. Tex. 2021). Court adopts Magistrate Judge's report and recommendation supporting district's decision to move the student from the High School to an alternative placement where the district believed that his continued presence at the High School would be disruptive. The Magistrate found that the district made an appropriate determination that the SLD/OHI 17-year-old's felony theft of an all-terrain vehicle (belonging to another student at the High School) off campus and during summer break was not a manifestation of his ADHD. Based upon all relevant information available to the team, the crux of the team's decision was that the student's stealing of the ATV would "at least require some sort of planning for execution." In addition, the team's determination that the theft was not caused by the student's disability was made after discussing, for well over two hours, the student's past behaviors and diagnoses, including his impulsivity attributed to ADHD. The Magistrate also noted that the team considered the type of item stolen as important and that the team's decision might have differed had the student stolen a cookie rather than an ATV. Judgment in favor of the district is granted.

N.F. v. Antioch Unif. Sch. Dist., 78 IDELR 257 (N.D. Cal. 2021). District complied with IDEA when it conducted an MDR, even though the student's parents did not attend the MDR meeting. Here, the parents argue that the district violated IDEA when it improperly excluded them from the MDR meeting by scheduling it on short notice. The district's argument that it was scheduled on short notice because IDEA requires the MDR to occur within 10 days of the student's removal from his educational placement is accepted. The student was suspended for 5 days following a behavioral incident that occurred right before a school holiday. Because of the holiday, the district was required to conduct the MDR on the day after he returned from the removal and it did so. In addition, the district reached out to both parents and attempted to ensure that they could participate, though neither could do so on short notice. Even if the district committed a procedural violation, any such violation would have been harmless, since the district's detailed records showed that the

team concluded that the behavior was a manifestation of disability and immediately returned him to his regular placement. Finally, the district attempted to conduct an FBA and to modify the student's BIP, but the parent's refusal to consent and subsequent removal of the student from school interfered with the district's effort to do so.

RESIDENTIAL PLACEMENT

A.H. v. Arlington Sch. Bd., 78 IDELR 224 (E.D. Va. 2021). School district is not required to fund the cost of an emotionally disturbed student's unilateral placement in a residential facility in Utah. Here, a teenager diagnosed with Major Depressive Disorder, Social Anxiety Disorder, Autism, Parent-Child Relational Problem, Social Exclusion and PTSD with a history of mental health hospitalizations made academic, social, and emotional progress while attending the district's therapeutic day school. Thus, he does not need residential placement to receive FAPE, and the hearing officer's decision that the district's proposal to continue the student's therapeutic day program is affirmed. While the student's mental health began to deteriorate after he transitioned back to a public school program in the Spring of 2019 after being hospitalized for mental health reasons, the district has no obligation to fund future residential programming that is primarily geared toward addressing the student's mental health needs. The parents' argument that the student's social and emotional needs are intertwined with his educational needs is rejected where the student performed well academically during his time at the therapeutic day school despite dealing with the same mental health issues for which he was hospitalized. Not only did the student earn grades in the mid to high 90s, but he also passed statewide assessments and took advantage of counseling and other therapeutic supports offered by the district. In addition, the hearing officer observed that during the student's nine months attending the district's therapeutic school, he experienced no suicidal episodes, no hospitalizations and no emotional breakdowns. Importantly, the parents' medical insurance paid a significant portion of the residential program's cost based upon the parents' argument that the mental health services were medically necessary. Because the residential placement was not based on educational need, the district is not required to fund it.

COMPENSATORY EDUCATION/OTHER REMEDIES

J.N. v. Jefferson Co. Bd. of Educ., 12 F.4th 1355, 79 IDELR 151 (11th Cir. 2021). Compensatory education is not an automatic remedy for a child-find violation under IDEA. Rather, compensatory education is designed to counteract whatever educational setbacks a child encounters because of IDEA violations—"to bring her back where she would have been but for those violations." Here, the parent did not offer evidence that the procedural violation of failing to earlier evaluate the student caused a substantive educational harm to the student and what compensatory education services could remedy that past harm. Because the parent did not provide such evidence and took the position that the procedural violation assumes that compensatory relief will be provided, the district court was correct in denying compensatory education services. In addition, the parent is not a prevailing party for purposes of recovering attorney's fees because the district had already referred the student for an evaluation when the parent initiated a due process hearing. Therefore, the eventual IEP was not the result of litigation.

McLaughlan v. Torrance Unif. Sch. Dist., 79 IDELR 75 (C.D. Cal. 2021). Even where the court has found a material IEP implementation failure, the parent has not shown that the adult student

with Angelman syndrome suffered educational harm as a result of it that would support a compensatory education services award. Though the student's IEP did require that the district provide 314 minutes per day of group instruction to the student, but the student was actually placed in a 1:1 setting with a behavioral aide for the majority of the school day, the evidence shows that the student could not tolerate the group setting outlined in the IEP because he would become overstimulated and engage in behavioral outbursts within a short period of time. In addition, the district did continue to provide some small-group instruction as much as possible, including participation in a music class with peers at least once per week. Further, the special education teacher provided the student modified classwork and services in the separate classroom to the extent that he could tolerate her presence there and the activity. Since the evidence indicates that the student remained engaged throughout the day, even though his IEP was not implemented, the parent's request for compensatory services in the form of funding for 1,530 hours of specialized instruction to be placed in a trust account by the district is denied.

Spring Branch Indep. Sch. Dist. v. O.W., 79 IDELR 101 (S.D. Tex. 2021). On remand from the 5th Circuit Court of Appeals, this case involving a district's 99-day delay in referring a gifted student for an evaluation is remanded to the hearing officer to determine what compensatory services are needed to remedy the child find violation. Here, the court finds that the delay in evaluation denied FAPE and that the student is entitled to compensatory education. However, the administrative record from the due process hearing does not contain sufficient information for the court to calculate an appropriate award. In addition, the hearing officer's decision did not identify the specific educational harm to the student resulting from the denial of FAPE and the IHO's use of a cookie-cutter formula to award one year of compensatory education for one year of a FAPE denial without any other considerations is not consistent with IDEA's purpose that guarantees students with disabilities special education and related services designed to meet their needs.

JKG v. Wissahickon Sch. Dist., 78 IDELR 158 (E.D. Pa. 2021). Hearing officer's decision not to award compensatory education services to the student with autism is upheld. While the district violated IDEA when it failed to conduct a functional behavioral assessment of the student prior to developing his initial IEP in the Spring of 2018 and failed to include in the IEP a social skills goal, an award of relief is not warranted. Parents may only obtain compensatory education by showing that a violation actually resulted in a denial of FAPE to the student or impeded parent participation in the IEP development process. Though the student had some issues with off-task behaviors and invasion of the personal space of others, the student's more serious behavioral issues did not appear until October 2018--several months after the development of the initial IEP. When the initial IEP was developed in the Spring, the child study team issued a report indicating that the student's behaviors were not atypical from that of his peers. In addition, the purpose of compensatory education services is to place a student in the educational place he would have been had the district not committed the IDEA violation. The parent, however, has not been able to show how the omission of a social skills goal actually impeded the student's educational progress. Thus, the student is not entitled to an award of compensatory education services.

K.N. v. Gloucester City Bd. of Educ., 78 IDELR 157 (D.N.J. 2021). District is ordered to place $26,017 in a trust fund for the benefit of an elementary school student with autism. This is an appropriate compensatory remedy where the district violated Section 504 by failing to provide a one-to-one aide supervised by a special education teacher to assist the child in an afterschool

program. The district's argument that it should provide the services directly is rejected, as the trust fund is more appropriate than having the very entity that committed the discrimination in the first place create the remedy for the student. However, the parent's request for $97,200—an amount needed to hire two one-to-one ABA therapists for 810 hours—is rejected, since the court has ruled previously that the student needs a one-to-one aide supervised by a special education teacher, and the appropriate hourly rate is $16, rather than the $60 rate the parent seeks. In addition, the parent is entitled to attorneys' fees as the prevailing party in this proceeding and in the due process proceeding below.