Special Education Law Update (2009-2010): Judicial and Administrative Decisions

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To accompany a presentation at
CADRE's 5th National Symposium on
Dispute Resolution in Special Education
October 26 -28, 2011

I. Statutory Non-IDEA Changes

A. Rosa's Law

In October, 2010, Congress passed and the President signed Rosa's Law. The law removes the offensive word "mentally retarded" from federal legislation and replaces it with "intellectual disability." The changes are made in all federal laws, including IDEA and the Rehabilitation Act. The text of the of the legislation may be found at http://www.govtrack.us/congress/bill.xpd?bill=s111-2781 . President Obama's remarks when he signed the bill into law may be reviewed at http://www.whitehouse.gov/the-press-office/2010/10/08/remarks-president-signing-21st-century-communications-and-video-accessib

Rosa Marcellino, for whom the law was named, was on hand for the signing ceremony. Rosa worked with her parents and siblings to get the offensive word removed from the laws first in Maryland and then in the United States.

B. §504

The Congress has enacted a series of amendments to the Americans with Disabilities Act, effective in January, 2009. The result is a number of big changes to §504. The main dissatisfaction of the Congress was with decisions involving §504 and the ADA in the employment context. Congress felt that the U. S. Supreme Court was interpreting the laws too narrowly and blocking many employees from going to court to be heard on the question of reasonableness of accommodations that they were requesting. In particular Congress took issue with two lines of cases by the Supreme Court. One involved cases following *Sutton v. United Airlines* 527 US 471, 30 IDELR 681 (1999). Another

involved cases following *Toyota Manufacturing v. Williams* 534 U.S. 184, 102 LRP 6137 (2002).

One line of cases began with *Sutton v. United Airlines* 527 US 471, 30 IDELR 681 (1999). There the Supremes ruled that in determining eligibility for employees with disabilities who have used mitigating measures, such as medication or contact lenses, the disability must be measured by taking the mitigating measures into account. (Under §504 and ADA to be eligible, a person must have a disability that substantially affects a major life activity.)

Another involved cases following the decision in *Toyota Manufacturing v. Williams* 534 U.S. 184, 102 LRP 6137 (2002). In that case, the Court held that people who have impairments that substantially limit a life activity are not protected where the limitation is one that would substantially affect the lives of most people. The Supremes ruled that this would not be a major life activity.

Here are some of the major changes:
- The definition of major life activities has been expanded to include major bodily functions, sleeping, standing, lifting, bending, reading, concentrating, thinking and communicating.

- Impairments that are episodic or in remission are considered a disability if they would substantially limit a major life activity when active.

- The determination of whether an impairment substantially limits a major life activity must be made without regard to the ameliorative effects of mitigating measures such as medication, medical supplies, ...low vision devices (not including ordinary eyeglasses or contact lenses), prosthetics, hearing aids, cochlear implants, ...the use of assertive technology, ... learned behavioral or adaptive neurological modifications... 42 USC §12102(4)(E).

- a relaxed definition of substantial limitation.

- changes to the requirements related to service animals.

The following link leads to a summary of the amendments and to links to the text of the changes to the law: http://adaanniversary.org/2010/ap06_adaa_resources/ap06_adaa_rsc_09_natl.html

To understand §504, one must remember that it is an anti-discrimination law. FAPE as defined by §504 involves a discrimination analysis. The "appropriate" portion of the definition requires education services designed to meet the individual education needs of students with disabilities as adequately as the needs of nondisabled students are met. For more on §504 FAPE, see the U.S Department of Education website at this link: http://www2.ed.gov/about/offices/list/ocr/docs/edlite-FAPE504.html

The current burning question is how the changes will affect education. Most of the changes were specifically enacted to overturn Supreme Court decisions in the area of employment. So do they translate to special education? For example a child who has an impairment that substantially limits his ability to read, but not to learn, is now clearly eligible, but does he need a 504 plan? Or as to remission, if a middle school girl has cancer but it is in remission in high school, does she need any accommodations?

Another example is a child with a cochlear implant who is hearing well, does this child need accommodations to learn? What about the child who has ADHD that is well controlled by medication? Or a child who functions well with the use of an assistive technology device.

II. The United States Supreme Court

The U S Supreme court did not decide any special education cases in 2010. It did however, decline review of a number of potential cases. The primary examples are the following:

1. Campbell v. Hookset Sch Dist 110 LRP 37164 (U.S. 6/28/10) Unilateral Placement case. District Court found no denial of FAPE where LEA exited student from SpEd because no longer IDEA eligible. Circuit affirmed without elaboration.

2. Houston Sch Dist v. VP ex rel Juan P 130 S.Ct. 1892, 110 LRP 17234 (U.S. 3/22/10) Fifth Circuit had held that parent could receive reimbursement for a unilateral placement despite their failure to make a specific request.

3. Loch v. Edwardsville Community Schs 130 S.Ct 1736, 110 LRP 14134 (U.S. 3/5/10) Parents of high school student claimed that she was wrongfully denied eligibility for SpEd.

4. Draper v. Atlanta Independent Sch Dist. 131 S.Ct 342, 110 LRP 57266 (U. S. 10/4/10) 11th Circuit ruled that parents §504 claim paralleled their unsuccessful IDEA claim.

III Other Key Judicial and Administrative Decisions

A. Due Process Hearing Issues

1. IDEA'04 Issues

a. Resolution Session

1. Letter to Irby 55 IDELR 264 (OSEP 2/12/10) The purpose of the resolution meeting is to give the school district a better understanding of the parent's complaint and an opportunity to resolve the dispute. Although the parent is required to participate in the resolution meeting, the law does **not** require the parent to have an **open mind** as to settlement. OSEP noted that a failure to consider a reasonable settlement could have attorney's fees implications.

2. Letter to Lawson OSEP opined that where a parent brings an **advocate** to a resolution meeting, the school district may not bring their attorney unless the parent also brings an attorney. This is true even in states where state law permits the same advocate who attended the resolution meeting to represent the parent at the later dp hearing.

3. Letter to Anderson 110 LRP 70096 (OSEP 11/10/10) OSEP told Texas SEA that it could not adopt **regulations** that allowed it to wait until after Christmas vacation to notify an LEA of a dp complaint filed just before break for the holiday. OSEP noted that the resolution meeting must be convened within 15 calendar days of a dp complaint by parent and this timeline cannot be extended by the SEA.

4. El Paso Independent Sch Dist v. Richard R ex rel RR 53 IDELR 175 (5th Cir 12/16/9) Fifth Circuit held that agreements from resolution session are **enforceable**. Accordingly a parent's refusal to accept an offer of all educational relief sought was unreasonable and no attorney's fees were awarded to parent's lawyer.

5. JDG by Gomez v. Colonial Sch Dist 55 IDELR 197 (D. Del 11/2/10) Court affirmed HO Panel ruling that a late resolution session was a harmless **procedural** error.

6. Jeremiah B v. Dept of Educ, State of Hawaii 54 IDELR 21 (D. Haw 1/19/10) Mgst Judge ruled that P's attorney's **fees** petition must be reduced because hours spent at a resolution meeting are not reimbursable.

7. Oregon City Sch Dist 110 LRP 39205 (SEA OR 6/23/10) Sch Dist sent parents a list of 5 dates within the 15 day period for the resolution session. Parents picked the last date and then cancelled. District replied to email cancelling and outlining

the facts of the complaint with their own email to parents outlining a potential settlement. Parents filed a state complaint re on resolution meeting. State complaint investigator ruled that **emails satisfied** the requirement.

8. Mr & Mrs S ex rel BS v. Rochester Community Schs 106 LRP 58719 (W.D. Mich. 10/2/6). The district filed a due process complaint after the parents requested an IEE. A resolution meeting was scheduled and the district's **attorney** arrived before the meeting to review documents and to train school personnel for the resolution meeting. The attorney left before the meeting began. After two hours, the parties reached an initial agreement. The lawyer retyped it adding legal language. After subsequent revisions, the parties signed the agreement. The parents then faxed the agreement to their lawyer who advised them that the agreement gave up their right to an IEE. The parents rescinded the agreement immediately. The parents then filed a state complaint, and the SEA found a violation of the IDEA issuing a corrective order. The court reversed holding that there is a distinction between the resolution meeting and the agreement creation period. The court held that the ban on LEA lawyers, and the restriction on fees for parent attorneys, applies only to the resolution meeting itself and not to the agreement drafting period.

b. Sufficiency of Complaint

1. Anello v. Indian River Sch Dist 107 LRP 7179 (Del. Family Ct. 1/19/7) Citing the Weast Supreme Court decision, the court held that the IDEA pleading standard requires only **minimal** specificity. The court reversed the HO panel that required too much specificity.

2. NB **UNPUBLISHED**! MS-G v Lenape Reg High Sch Bd of Educ 51 IDELR 236 (3d Cir 1/13/9) UNPUBLISHED Third Circuit affirmed lower court and HO who required more than minimal specificity; Alexandra R by Burke & Rolfhamre v. Brookline Sch Dist 53 IDELR 93 (D.NH 9/10/9) UNPUBLISHED Court held that HO erred where he granted a sufficiency challenge filed more than 15 days after complaint filed. Also court found the complaint to meet sufficiency where it was on model dpc form published by school dist and included a 16 page summary of facts.

3. KE by KE & TE v. Independent Sch Dist # 15 54 IDELR 215 (D.Minn 5/24/10) Court ruled that HO did not err in failing to clarify issues before dph(???) Ct found that sch dist waived any argument regarding clarity by failing to file a sufficiency motion under IDEA.

4. Knight v. Washington Sch Dist 54 IDELR 185 (E.D. Missouri 5/10/10) Ct held that although it was not comfortable that it could not review a state official's decision that parents failed to comply with federal law, court nonetheless dismissed parent's challenge to HO panel's decision that complaint was not sufficient under IDEA, noting that the statute only provides for appeal of HO decision.

5. Brooks ex rel Brooks v. Central Dauphin Sch Dist 54 IDELR 48 (M.D. Penna 2/26/10) Court dismissed parent's claim for failure to exhaust administrative remedies where parent failed to comply with HO directive to amend her complaint by clarifying her claims.

c. Statute of Limitations (2 years)

1. CB ex rel ED v. Pittsford Central Sch Dist 54 IDELR 149 (WD NY 4/15/10) In 2d circuit, the 2 year IDEA statute of limitations begins when the parent

knew or reasonably should have known of the ***injury*** that is the basis of the action (???); See Gwinnett County Sch Dist v. AA 54 IDELR 316 (ND Ga 7/16/10) Where sch dist miscategorized the student as having a mental disability from 1996 to 2006, court ruled that the KORSHK date that triggered the S/L was 2006 when the parent's learned of the denial of FAPE, therefore dp complaint was timely. However, court limited the relief to the period from 2006 forward as the period of denial of FAPE (???)

2. Steven I v. Central Burks Sch Dist 618 F.3d 411, 55 IDELR 35 (3d Cir. 8/18/10) Because the 2 year statute of limitations did not take effect for seven months after Congress passed IDEA, the Third Circuit ruled that the statute of limitations had retroactive application, reversing 52 IDELR 4 (E.D. Penna 2/18/9) cited in last year's outline.; See, Breanne C v. Southern York County Sch Dist 53 IDELR 191 (M.D. Penna 10/19/9) Two year S/L barred claim by parents even where events predated IDEA'04 where two year S/L had already been in effect for over two years.

3. Mittman v. Livingston Township Bd of Educ 55 IDELR 139 (D.NJ 10/7/10) Parent could not challenge 2002 or 2003 decisions by sch dist to exit student from SpEd by a dp complaint filed in 2009 where neither exception to the 2 year statute of limitations applied; Houston Independent Sch Dist 110 LRP 38147 (SEA TX 6/18/10) Where neither exception is applicable, IDEA 2 year statute of limitations bars claims that accrued before the time limit.

4 Boatright v. Sch Bd of Polk County Fla 52 IDELR 101 (M.D. Fla 3/27/9) Although parents had timely filed FAPE appeal in state court, subsequent 2d appeal in federal court was untimely under statute of limitation.

5. PP by Michael P & Rita P v. West Chester Area Sch Dist 585 F.3d 727, 53 IDELR 109 (3d Cir. 11/2/9) Noting that there are few federal statutes as related as IDEA and §504, the third Circuit applied the IDEA 2 year S/L to cases brought under §504.

d. Time Limit for Appeals

1. Brown by Brown v. City of Chicago Sch Dist # 299 380 Fed.Appx 235, 54 IDELR 220 (ND Ill 5/11/10) Where state had 120 day (instead of 90 day) period for appeal of HO decision, Parent's appeal filed 122 days after the HO decision was mailed was ruled untimely and not considered by the court.

2. Wall Township Bd of Educ v. LM 534 F.Supp.2d 487, 49 IDELR 160 (D. NJ 1/30/8) The 90 day period for appeals is not jurisdictional and is subject to equitable modifications such as tolling which stops the running of the time period for equitable considerations; Stanton ex rel KT v. District of Columbia 639 F.Supp.2d 1, 53 IDELR 16 (D. DC 7/30/9) Parent's filing of motion to reconsider with HO tolled appeal time limit. (NB OSEP has ruled that HOs have no authority to consider or grant motions to **reconsider**.)

3. Jonathan H by John H & Susan H v. Souderton Area Sch Dist 562 F.3d 527, 52 IDELR 31 (3d Cir 4/14/9) after considering the wording of IDEA procedural safeguards, Third Circuit held that 90 day appeal period does not apply to **counterclaims** filed by the responding party. Reversing 49 IDELR 277 (E.D. Penna 3/20/8) cited in previous outline.

4. BB & VB ex rel AB v. Tacoma Sch Dist 109 LRP 3950 (W.D. Wash. 1/22/9) Parents motion to vacate filed 5 months after HO decision was untimely.

e. Hearing Officer Training and Qualifications

1. JDG by Gomez v. Colonial Sch Dist 55 IDELR 197 (D. Del 11/2/10) Because there were no allegations that the problem was systemic, the court rejected claims against the SEA alleging that the HO Panel chair was not sufficiently aware of special ed law, was not properly trained and did not properly conduct the hearing.

2. NB **UNPUBLISHED** Keene v. Zelman 53 IDELR 5 (6th Cir. 7/29/9) UNPUBLISHED Parents brought a class action against Ohio SEA alleging illegal policies resulting in widespread dismissals of dp complaints and improper HO training. Also alleged was that HOs were to do nothing for the first 30 days and bill no more than one hour during that time. Sixth Circuit approved settlement that included an agreement to retrain HOs and an award of $81,000 vs SEA.

3. Quatroche v. East Lynne Bd of Educ 604 F.Supp.2d 96, 53 IDELR 96 (D. Conn. 3/31/9) If allegation had been that an SEA system of HO training affected a number of dp hearings, parent would state claim for a systemic violation. Here the allegation was that lack of sufficient ho training affected only one dp complaint, therefore no systemic violation and court dismissed.

f. Amendment of Complaint/ Limitation

1. KE by KE & TE v. Independent Sch Dist # 15 54 IDELR 215 (D.Minn 5/24/10) Court ruled that HO erred by including in his "restatement" of issues at the beginning of the hearing issues not raised by the parent's complaint.

2. Madison Metropolitan Sch Dist v. PR by Teresa & Rusty R 51 IDELR 269 (W.D. Wisc 2/25/9) Court construed §615(f) limit on new issues very broadly to permit parties to fairly present their case.

g. Response to Complaint

(No significant cases.)

h. Attorney's Fees against Parents

1. AM by Marshall v. Monrovia Unified Sch Dist 627 F.3d 773, 55 IDELR 215 (9th Cir 12/15/10) Ninth Circuit reversed an award of attorney's fees against parents for litigating after claim became frivolous. Where parents sought reimbursement for home education, fact that student died during litigation did not render their claim moot. See, District of Columbia v. Nahass, et al 54 IDELR 115 (D. DC 3/30/10) Court denied atty fees where litigation of claim was not frivolous; District of Columbia v. Barrie 55 IDELR 125 (D DC 10/4/10) Court denied claim for attorney fees vs parent lawyer where no evidence of bad faith.

2. Children's Center for Developmental Enrichment v. Machle 612 F.3d 518, 54 IDELR 273 (6th Cir 7/16/10) Sixth Circuit held that a private sch was not liable for violations of IDEA, and therefore, a private sch may not receive an award of attorney's fees against a parent under IDEA.

3. El Paso Independent Sch Dist v. Richard R ex rel RR 53 IDELR 175 (5th Cir 12/16/9) Fifth Circuit held that agreements from resolution session are enforceable, therefore actions of parent lawyer were unreasonable, but court refused to award attorneys fees vs parent lawyer because school dist was not the **prevailing party**; District of Columbia v. Strauss (D.DC 4/14/9) 607 F.Supp.2d 180, 52 IDELR 126 (D.DC 4/14/9) While LEA decision to fund IEE at issue mooted dp complaint, it did not convert LEA to prevailing party status; to award attorney fees would punish parents who were right to complain in the first place; Alief Independent Sch Dist v. CC 54 IDELR 156

(S.D. Tex 4/7/10) Sch dist was not a prevailing party where parents dismissed their complaint before it was adjudicated and where district counterclaim seeking an order that it was in compliance with IDEA did not allege a violation of IDEA.

4. Parenteau ex rel CP v. Prescott Unified Sch Dist 52 IDELR 23 (D. Ariz 7/17/9) Where dp complaint sought monetary relief- relief not available under IDEA and parents continued to litigate after all services requested had been provided because of anger, an improper purpose, court awarded over $141K attorney fees vs parents and their attorney; ML ex rel AL v. El Paso Indep Sch Dist 53 IDELR 87 (W.D. Tex 8/26/9) Where parents attorney continued to litigate after all relief provided, award of attorney's fees appropriate but court reduced award by 88% because of district's gross denial of FAPE; EK by MR & Mrs K v. Stamford Bd of Educ. 52 IDELR 133 (D.Conn 3/31/9) Where attorney continued to litigated time-barred claim after it became apparent that the parent could not prevail, court awarded $16K vs parent attorney; District of Columbia v. Ijeabunonwu 631 F.Supp.2d 101, 52 IDELR 289 (D.DC 7/8/9) Where parent attorney continued to pursue a dp complaint after LEA agreed to all relief requested, actions were frivolous and unreasonable, ct awarded over $1K to dist; Bridges Public Charter Sch v Barrie 709 F.Supp.2d 94, 54 IDELR 186 (D DC 5/6/10) Where attorney for parent continued to litigate claim after it was obviously baseless, Court found sch dist stated a claim for attorney fees vs parent lawyer; Bethlehem Area Sch Dist v. Zhou 54 IDELR 311 (ED Penna 7/23/10) Court allowed sch dist to proceed with attorney's fees claim vs parent who had filed 14 dpcs in 8 years, requested interpreters/translators although she speaks English and told a mediator (???) she was just trying to increase sch dist expenses.

5. Disability Law Center of Alaska v. Anchorage Sch Dist 581 F.3d 936, 53 IDELR 2 (9th Cir. 9/9/9) Ninth Circuit held that District Court erred in awarding attorneys fees vs parent attorney under state law. IDEA provisions as federal law are supreme.

i. Response to Intervention/ SLD

1. Jackson v. Northwest Local Sch Dist 55 IDELR 104 (SD Ohio 9/1/10) Court ruled that sch dist should have been aware that a third grader with ADHD had a disability instead of providing intervention services for two years. Her RtI team recommended a mental health eval but never a SpEd eval; Meridian Sch Dist 223 55 IDELR 30 (SEA Ill 9/9/10) HO ruled that sch dist violated its child find obligation where it offered only general ed interventions to student with a hearing impairment. Despite repeated requests from parent for a SpEd evaluation, dist offered only "RtI."; Austin Independent Sch Dist 110 LRP 49317 (SEA Tex 7/19/10) HO found that sch dist violated IDEA by continuing to subject student to RtI interventions despite parent requests for SpEd evaluation. HO found that LEA policy of RtI interventions before SpEd testing to be in contravention of IDEA. But HO found violation harmless here where student made educational progress.

2. Letter to Torres 110 LRP 319 (OSEP 4/7/9) A screening to determine instructional strategies is not an evaluation under IDEA and consent is not required. But screenings may not be used to delay an evaluation to determine eligibility.

3. Letter to Brecken 110 LRP 73610 (OSEP 6/2/10) IDEA does not require or encourage an LEA to use RtI to determine eligibility for SLD. States adopt criteria for eligibility for SLD.

4. DB v. Bedford County Sch Bd 55 IDELR 42 (WD Va 8/23/10) Court rejected sch dist argument that the law requires a severe discrepancy analysis for SLD eligibility. Law provides that an SEA cannot require a severe discrepancy analysis.

5. EM by EM & EM v. Pajaro Valley Unified Sch Dist 53 IDELR 41 (N.D. Calif 8/27/9)Where student improved when teacher in general ed setting used interventions such as small group settings, court affirmed ho decision finding student not eligible.

j. Peer-reviewed Research to the Extent Practicable

1. Letter to Kane 55 IDELR 203 (OSEP 2/12/10) If peer reviewed research indicates that a particular service will only be effective at a certain frequency and intensity, the child's IFSP (& presumably IEP) must reflect this information and apply it as appropriate to the particular child.

2. Souderton Area Sch Dist v. JH by JH & SH 52 IDELR 6 (E.D. Penna 2/12/9) Court rejected a challenge by parent to a particular methodology as not based upon peer-reviewed research to the extent practicable. Where Orton Gillingham method was a "best practice," it was sufficient. {See related case at: Jonathan H by John H & Susan H v. Souderton Area Sch Dist 562 F.3d 527, 52 IDELR 31 (3d Cir 4/14/9)}

3. In Re Student With a Disability 52 IDELR 146 (SEA **WVa** 4/24/9) HO found that district program with SCRETS methodology denied FAPE to a student with autism because it was not based upon peer-reviewed research to the extent practicable. HO ordered tuition reimbursement for ABA-DTT private sch.

4. NB **UNPUBLISHED** Joshua A by Jorge A v. Rocklin Unified Sch Dist 52 IDELR 64 (9th Cir. 3/19/9) Ninth Circuit in unpublished decision rejected parent

challenge to LEA's methodology and claim that it was not based upon peer-reviewed research to the extent practicable.

2. Difficult Parties/Lawyers

a. JD by Davis v. Kanawha County Bd of Educ 53 IDELR 225 (**SD WVa** 11/4/9), aff'd on other grounds, JD by Davis v. Kanawha County Bd of Educ 54 IDELR 184 (**4th Cir.** 4/27/10) NB: **UNPUBLISHED,** Pro se parent requested indefinite continuance and ho requested more information. Parent refused to provide more information as to parent's medical conditions on privacy grounds. HO granted a short continuance but denied request for an indefinite continuance as not permitted under IDEA. Parent did not appear at hearing. HO denied motion to dismiss, but imposed the **sanction** of proceeding to hearing without the parent being present. Ct affirmed HO rulings no abuse of discretion as hearing procedures are within the discretion of the HO.

b. JD by Davis v. Kanawha County Bd of Educ 48 IDELR 159 (**SD WVa** 8/3/7). Where parents had **derailed** the IEP process after five IEP Team meetings for the same IEP, parents could not claim predetermination. JW by JEW & JAW v. Fresno Unified Sch Dist 52 IDELR 5 (E.D. Calif 2/18/9) Court granted motion to strike parents **141 page** statement of facts to support their motion, aff'd 55 IDELR 153; Reyes v. Valley Stream Sch Dist 52 IDELR 105 (E.D. NY 3/26/9) Despite 15 requests for an emergency conference by parent, court dismissed case where parent failed to first appeal to SRO; Clairborne County Sch System 109 LRP 23840 (SEA TN 3/23/9) HO allowed school dist to present its evidence after parent failed to appear at the dp hearing; In re Student with a Disability 109 LRP 56222 (SEA NY 8/14/9) SRO affirmed dismissal of dp complaint where parent failed to comply with the reasonable directives of the ho: LF by Ruffin v.

_____ 53 IDELR 116 (S.D. Tex 9/21/9) As a sanction for baseless allegations, court admonished the parent; In re Student with a Disability 55 IDELR 89 (SEA Va 6/3/10) HO dismissed dp complaint where parent failed to comply with HO order to provide documents. (State regs gave HO power to bring case to a conclusion if bad faith by either party.); French by French v. New York State Dept of Educ 55 IDELR 128 (N.D. NY 9/30/10) Court ruled that the child's failure to receive FAPE was caused directly by the father's dilatory tactics and failure to compromise and his holding the student out of school; JG by Stella G v. Baldwin Park Unified Sch Dist 55 IDELR 2 (CD Calif 8/11/10) Where the parent filed multiple dpcs alleging the same issues or multiple complaints where the parent could have raised other issues in a previous complaint, Court affirmed the HO's dismissal of the later complaints under res judicata and collateral estoppel; Bethlehem Area Sch Dist v. Zhou 54 IDELR 311 (ED Penna 7/23/10) Court allowed sch dist to proceed with attorney's fees claim vs parent who had filed 14 dpcs in 8 years, requested interpreters/translators although she speaks English and told a mediator (???) she was just trying to increase sch dist expenses.

c. Madison Metropolitan Sch Dist v. PR by Teresa & Rusty R 51 IDELR 269 (W.D. Wisc 2/25/9) Court reprimanded school district for playing semantics games as IDEA "…was not intended to reward such games."

d. In Re RW & Orange county Social services Agency v. AW 109 LRP 17060 (Calif App Ct 3/26/9) State appellate court affirmed juvenile court decision to limit parent's educational **decision-making rights** and to order consent to a residential placement over parent's objections; CB v. Sonora Sch Dist 54 IDELR 293 (ED Calif 3/8/10) Court denied immunity and allowed suit against personnel to continue where staff

ignored the bip of an 11 year old with a mood disorder that caused him to freeze in place, cross arms and keep his head down, instead calling the police and having him handcuffed and put in the back of a squad car. Contrast, Minnesota Special Sch Dist # 001 110 LRP 44951 (SEA Minn 5/17/10) State complaint investigator found no violation where principal required parent to comply with visitor policy requiring that she sign in after parent threatened the student's teacher.

e. CH by Hayes v. Cape Henlopen Sch Dist 606 F.3d 59, 54 IDELR 212 (3d Cir 5/25/10) Third Circuit denied **reimbursement** for a unilateral placement in part because the parents failed to participate in the scheduling of an IEPT meeting; KG ex rel CG v. Sheehan 111 LRP 6572 (D RI 12/30/10) Ct denied reimbursement in part where parent cancelled IEPT meetings, stacked meetings with private sch personnel; and urged IEPT member not to vote for a placement; Hogan v. Fairfax County Sch Bd 654 F.Supp.2d 554, 53 IDELR 14 (E.D. Va. 8/3/9) Court reduced reimbursement because of parents' failure to cooperate, adversarial tone and failure to return phone calls; Winkleman v. Parma City Sch Dist Bd of Educ109 LRP 76161 (N.D. Ohio 10/28/9) and 53 IDELR 215 (N.D. Ohio 11/30/9) Court found no IDEA violation for failure to timely complete IEP process where parents failed to respond to multiple efforts to schedule an IEPT meeting; Smith v. James C Hormel Sch at the Virginia Institute of Autism 53 IDELR 261 (E.D. Va 12/8/9) Where parent failed to cooperate to find alternative placement for student after his expulsion, court held no violation of IDEA; Cobb County Sch Dist 109 LRP 72062 (SEA Ga 11/2/9) Where parents violated **collaborative** spirit of IDEA by refusing to accept all relief requested in complaint, HO reduced reimbursement award;

f. DA & AA ex rel RA v. Haworth Bd of Educ D. NJ 9/25/9) Court ruled that HO erred by failing to impose a **lesser sanction first** where HO dismissed dp complaint where parent **attorney** failed to file sworn response to Mo/ summary judgment; Nicholas W by Melanie W v. Northwest Indep Sch Dist 53 IDELR 43 (E.D. Tex 8/25/9) Court dismissed FAPE action where parent's attorney refused to obey orders of the court; court rejected argument that neglect was excusable because of the exceptionally **pressing workload** of all lawyers practicing school law; Nicholas W by Melanie W v. Northwest Indep Sch Dist 51 IDELR 238 (E.D. Tex 1/16/9) Where parent attorneys failed to amend complaint within timeframe ordered by court, court dismissed complaint finding neglect not excusable; EK by Mr & Mrs K v. Stamford Bd of Educ 52 IDELR 133 (D. Conn 3/31/9) where attorney continued to litigate after it became frivolous and unreasonable, court awarded attorney fees vs parent attorney; District of Columbia v. Ijeabunonwu 631 F.Supp.2d 101, 52 IDELR 289 (D.DC 7/8/9) (same); Bridges Public Charter Sch v Barrie 709 F.Supp.2d 94, 54 IDELR 186 (D DC 5/6/10) Where attorney for parent continued to litigate claim after it was obviously baseless, Court found sch dist stated a claim for attorney fees vs parent lawyer; CO by Oman v. Portland Public Schs 54 IDELR 162 (D OR 3/31/10) Court found that both the LEA and its attorney retaliated against a parent for filing a dpc by issuing a blanket refusal to provide discovery and by ordering parent not to talk to sch personnel.

g. Pottstown Sch Dist 109 LRP 68536 (SEA Penna/***GS*** 10/3/10) HO found FAPE provided despite hostile communications between parties. Both sides filed **criminal** complaints vs the other. Sch Dist personnel testified vs parent in a child custody dispute.

At the hearing, HO had to threaten to remove all from the hearing room at the next outburst. (7 full days dph; 1700ppg TR; 100's ppg exhibits).

3. Hearing Officer Bias

a. York County District Three 49 IDELR 178 (SEA SC 1/24/8). HO enjoys a **presumption** of good faith, honesty, integrity and impartiality that may be overcome only upon a showing of actual bias.

b. WT & KT ex rel JT v. Bd of Educ Sch Dist of NY City 716 F.Supp.2d 270, 54 IDELR 192 (SD NY 4/15/10) Court rejected allegation that SRO Paul Kelly was biased. Parent cited *Massey Coal* decision by SCt, and alleged bias because SRO lives with an SEA lawyer and because a Wall St Journal article stated that he ruled for LEA in an overwhelming # of cases before him. Ct found no evidence of actual bias (Is this the standard after *Massey Coal*??); CG & LG ex rel BG v. NY City Dept of Educ 55 IDELR 157 (SD NY 10/25/10) (same allegations; court found no admissible evidence of bias.); ES & MS ex rel BS v. Katonah-Lewisboro Sch Dist 55 IDELR 130 (SD NY 9/30/10) Ct rejected bias allegations against HO and SRO. While the interactions between the HO and the parties was tense at times, they were fair and impartial. HO properly exercised his authority to speed along the proceeding. Evidence of SRO's alleged bias in other cases was rejected because not based upon evidence in the record.

c. Allyson B By Susan B & Mark B v. Montgomery county Intermediate Unit # 23 54 IDELR 164 (ED Penna 3/31/10) Court ruled that HO was not required to recuse himself or to disclose his past relationship with defense counsel or his current working relationship with defense counsel's wife (also a HO) (Query when disclose?)

d. LF by Ruffin v. Houston Indep Sch Dist 53 IDELR 116 (S.D. Tex 9/21/9) Court rejected parent allegations of HO bias where parent produced no evidence that HO and district lawyer were close friends, partners, lovers and that decisions were based upon "**bedroom affairs**."

e. AG & LG ex rel NG v. Frieden 52 IDELR 65 (S.D,NY 3/25/9) Court found no evidence of HO bias where HO was patient and afforded both parties an opportunity to present evidence; WH by BH & KK v. Clovis Unified Sch Dist 52 IDELR 258 (E.D. Calif 6/8/9) Ct ruled no evidence of HO bias where HO **ruled** consistently on objections; Sundbury Public Schs v. Mass Dept of Elementary & Secondary Schs 55 IDELR 284 (D. Mass 12/23/10) Court ruled that HO's clarifying of issues and **questioning** of Ws did not reveal bias; SA by CA v. Exeter Unified Sch Dist 110 LRP 69145 (ED Calif 11/24/10) Court upheld the right of the HO to ask **questions** and found no credit in the parent's allegations that the Qs were adversarial or lacked impartiality.

f. Council Rock Sch Dist v. Bolick 55 IDELR 100 (ED Penna 9/13/10) Fed judge denied parent request that she recuse herself. Standard is whether a reasonable person would conclude that the judge's impartiality may reasonably be questioned. The party's displeasure with previous legal **rulings** is not an adequate basis for recusal.

4. Hearing Officer Authority

a. Forrest Grove Sch Dist v. TA 129 S.Ct. 2484, 52 IDELR 151, n. 11 (U.S. 6/22/9) U.S. Supreme Court rejects challenge to HO authority to award reimbursement for a unilateral placement. The argument made by the school district was that only courts but not hearing officers may award reimbursement under IDEA. In footnote 11, the Court squarely rejects this argument, noting that in *Burlington* the

supremes expressly recognized the authority of hearing officers to award reimbursement and reasoned that by subsequently amending IDEA without altering this ruling, Congress implicitly adopted that reading of the statute.

b. JD by Davis v. Kanawha County Bd of Educ 54 IDELR 184 (4th Cir. 4/27/10) NB: **UNPUBLISHED** Magistrate Judge had ruled that HO had not imposed his discretion by denying a **continuance** and imposing **sanctions** upon a pro se parent who refused to comply with HO's instructions. District court affirmed when parent did not file a timely objection to the Magistrate's recommendation. Parent appealed, but Fourth Circuit ruled that failure to file objections to District Court precluded further review.

c. Ferren C v. Sch Dist of Philadelphia 109 LRP 5365 (E.D. Penna 1/28/9) Court ruled that HO has **broad** authority to impose equitable remedies where IDEA is violated. Ct rejected HO's glib assertion that he lacked authority. ("… it would have been easy to just wave my hearing officer's wand and order the district to do the one or two little things that…" parent is requesting. !!!!); JT by Harrell v. Missouri State Bd of Educ 109 LRP 6540 (E.D. Missouri 2/4/9) Court held that courts and HOs have the authority to order audio-visual **surveillance** as relief where IDEA is violated; Marcus I & Karen I v. State of Hawaii, Dept of Educ 53 IDELR 189 (D. Haw 10/21/9) HO is not bound by previous decisions of other HOs, and HO has authority to use independent judgment in analyzing a case and writing a decision; In Re Student With a Disability 108 LRP 45824 (SEA WV 6/4/8) HO has broad equitable authority to fashion an appropriate remedy for a violation of IDEA- here awarding comp ed plus a thorough behavioral **evaluation**; Letter to Miller 110LRP 73646 (OSEP 5/10/10) (HOs have broad authority to determine reimbursement for a unilateral placement.); BA by Randall v. State of

54 IDELR 77, (ED Missouri 3/24/10) (HO's broad equitable authority to determine remedies includes installation of **surveillance** equipment); Matunuska-Susitna Borough Sch Dist v DY ex rel BY 54 IDELR 52 (D Alaska 2/23/10) (HO's broad equitable authority to determine remedies includes the authority to require a district to **hire** a specific **individual**.); Student with a Disability 55 IDELR 179 (SEA NY 8/19/10) (SRO noted HO's broad equitable authority to determine remedies and affirmed a HO decision ordering an increase in the number of hours of specialized instruction rather than the requested private tutoring as relief.); Ferren C v. Sch Dist of Philadelphia 612 F.3d 712, 54 IDELR 274 (3d Cir. 7/13/10) Third Circuit ruled that HO had the authority, given HO's broad equitable authority to determine remedies, to require 3 years of comp ed eligibility beyond normal max age and that LEA continue to write IEPs to effectuate the comp ed)

d. In re Student with a Disability 109 LRP 1338 (SEA KS 1/2/9) HO found that he **lacked** authority to issue injunctive relief and denied a motion to declare parent self-representation the unauthorized practice of law where to do so would make even more uneven the uneven playing field enjoyed by the district…"???; BB & VB ex rel AB v. Tacoma Sch Dist 109 LRP 3950 (W.D. 1/22/9) Court ruled that HO had no authority to rule on a motion to vacate his prior order dismissing a dp complaint.

e. Madison Metropolitan Sch Dist v. PR by Teresa & Rusty R 51 IDELR 269 (W.D. Wisc 2/25/9) Court construed §615(f)limit on new issues very broadly to permit wide authority to HOs to ensure that parties are able to **fairly** present their case; ; Hogan v. Fairfax County Sch Bd 654 F.Supp.2d 554, 53 IDELR 14 (E.D. Va. 8/3/9) Court ruled that HO has authority to reduce reimbursement where equities so require In

_____ 109 LRP 56222 (SEA NY 8/14/9) SRO ruled that HO has authority to dismiss complaint where parent defies reasonable directive of HO.

f. State of Missouri ex rel St Joseph's Sch Dist v. Missouri Dept of Elementary & Secondary Educ 54 IDELR 124 (Missouri Ct App 3/30/10) LEA filed a dph asking HO panel to enforce settlement agreement. HO panel declined stating a lack of authority. Court reversed stating that HO panel had the authority and a clear duty to rule as to whether a **settlement** agreement was in effect. Citing exhaustion principles, remanded. (NB cases re HO authority as to settlements is all over the map.); Traverse Bay Intermediate Sch Dist v. Michigan Dept of Educ 615 F.3d 622, 55 IDELR 1 (6th Cir 8/4/10) Sixth Circuit did not reach the issue alleged by the LEA- that the SRO lacked authority to hear an appeal of a decision to deny a parent's request to incorporate a settlement agreement into a dismissal order. (decided on other grounds).

g. Terrell et al v. District of Columbia 703 F.Supp.2d 17, 110 LRP 19263 D DC 3/29/10) HOs had no property interest in their former contracts so court dismissed constitutional dp claims. However, Court left it to state court as to whether allegations that their contracts were not renewed because they had **ruled in favor** of parents, including expensive private placements, stated a cause of action under state law.

h. District of Columbia v. Doe ex rel Doe 611 F.3d 888, 54 IDELR 275 (DC Cir 7/6/10) DC Circuit ruled that HO did **not exceed** his authority where he **reduced** a disciplinary suspension. HO reduced a 45 day suspension to an 11 day suspension noting the trivial nature of the infraction and finding that the more lengthy suspension denied FAPE to the student. Note this reverses the district court decision at 573 F.Supp.2d 57, 51 IDELR 8 (D.DC 8/28/8) cited in previous outlines.

i. District of Columbia v. Strauss 590 F.3d 898, 53 IDELR 250 (DC Cir 1/8/10) DC Circuit held that HO had authority to dismiss dpc as **moot** where LEA had offered all relief requested by the complaint, but found that dismissal not on the merits did not make LEA a prevailing party.

j. ES & MS ex rel BS v. Katonah-Lewisboro Sch Dist 55 IDELR 130 (SD NY 9/30/10) Ct found that HO properly exercised his authority to **move along** the lengthy proceeding.

5. Evidence

a. Formal court **rules of evidence** do not apply to due process hearings; Anello v. Indian River Sch Dist 109 LRP 7262 (D. Delaware 2/6/9) Court refused to consider parent claim that HO panel failed to follow Federal Rules of Evidence; DZ v. Bethelehem Area Sch Dist 54 IDELR 323 (Penna Commonwealth Ct 7/27/10) Court upheld HO's evidentiary rulings over parent's challenge.

b. Blake C by Tina F v. Dept of Educ, State of Hawaii 51 IDELR 239 (D. Haw 1/15/9) Court ruled that HO erred by excluding all evidence before date of IEP and then used documents before that date to conclude that student made educational progress.

c. GB & DB ex rel JB v. Bridgewater-Puritan Regional Bd of Educ 52 IDELR 39 (D. NJ 2/27/9) Court upheld HO rulings re **relevance**.

d. AG & LG ex rel NG v. Frieden 52 IDELR 65 (S.D,NY 3/25/9) Court ruled that HO erred where he prohibited **leading questions** on cross examination, but error was harmless where witnesses later indicate no knowledge.

e. Mahoney ex rel BM v. Carlsbad Unified Sch Dist 52 IDELR 131 (S.D. Calif 4/8/9) Ct upheld ruling by HO permitting the use of an excluded document for the

purpose of refreshing recollection of a parent re what she had told the district. Court found that HO did not rely upon excluded document in his decision.

f. Newport Public Schs 109 LRP 9847 (SEA Mich 2/2/9) Where a witness violated a sequestration order, HO found the witness to be not credible and a "frequent liar." ???

g. JW by JEW & JAW v. Fresno Unified Sch Dist 611 F.Supp.2d 1097, 52 IDELR 194 (E.D. Calif 4/27/9) Court upheld HO refusal to take **official notice** of SEA Guidelines for education of Hearing Impaired Students where the document was not on parent exhibit list, aff'd 55 IDELR 153; Attleboro Public Schs 109 LRP 74987 (SEA Mass 11/18/9) HO used **Mapquest** to take official notice of the distance between two elementary schools at issue.

h GB & DB ex rel JB v. Bridgewater-Puritan Regional Bd of Educ 52 IDELR 39 (D. NJ 2/27/9) HO did not err in ruling upon motions to qualify **experts**; WH by BH & KK v. Clovis Unified Sch Dist 52 IDELR 258 (E.D. Calif 6/8/9) Court found that HO erred by excluding the testimony of the parent's expert witness; JDG by Gomez v. Colonial Sch Dist 55 IDELR 197 (D. Del 11/2/10) Court ruled that HO panel did not err in considering a psychologist's expert report that was unsigned but authenticated by his testimony; Marshall Joint Sch Dist No.2 v CD by Brian & Traci D 616 F. 3d 632, 54 IDELR 307 (7th Cir 8/2/10) Seventh Circuit reversed HO decision finding that student was eligible because adaptive PE could benefit him, criticizing the HO for relying upon the opinion of an expert physician that student needed adaptive PE. Physician's opinion was not reliable where all of his information came from mom and a fifteen minute exam of the student.

i. Millay ex rel YRM v. Surry Sch Dept 54 IDELR 80 (D Maine 3/19/10) Court declined a request to **supplement** the record on appeal with the opinion of an "expert" opinion analyzing the HO decision in hindsight; RL & SL ex rel OL v. Miami-Dade County Sch Bd 55 IDELR 259 (SD Fla 12/2/10) Court refused to consider parent's expert where his opinion was unreliable, speculative and not substantiated by evidence; Hingham Public Schs 110 LRP 8778 (SEA Mass 2/1/10) HO rejected the testimony of parent's advocate that student needed a residential placement noting that she was not an expert with appropriate professional qualifications; Nguyen v. District of Columbia 681 F.Supp.2d 49, 54 IDELR 18 (D DC 2/1/10) Court declined to consider an allegation that HO improperly refused to certify parent witness as an expert in social work where the allegation was not accompanied by any allegation of resulting prejudice.; CG v. Commonwealth of Penna Dept of Educ 55 IDELR 193 (MD Penna 11/8/10) Court rejected testimony of parent's expert witness where it was not based upon facts or data and was unreliable.

j. Gaumond v. Trinity Repertory Co. 46 IDELR 254 (Rhode Island S. Ct. 11/14/6). Court declined parent's request that it recognize a "disabled student – school **privilege**." Parents argued that based upon IDEA confidentiality and FERPA provisions that this privilege cloaks all confidential education records with protection from discovery in a civil action. (NOTE: how would this privilege affect dp hearings?) See also, Catrone ex rel Catrone v. Miles, et al 107 LRP 36034 (Ariz. Ct App 6/26/7) Court declined the parents' invitation to create and enforce a "special education records" **privilege**. In a medical malpractice suit, the parents sought to block discovery of the special education records of the patient's brother citing FERPA and IDEA privacy

provisions. The court affirmed the lower court's order requiring production under a narrow protective order.

6. Hearing Procedures

a. In General

1. DB by CB v. Houston Independent Sch Dist 48 IDELR 246 (D.Tex. 9/28/7). Court rejected a claim by the parent that the dp HO denied them a fair hearing by **sleeping** through the hearing. The court did not credit the allegations where the hearing transcript revealed that the HO appeared to be awake while asking questions of witnesses and when ruling on objections and where the parents failed to preserve their objection by objecting to the alleged napping on the record.

2. The federal regulations were amended effective December 31, 2008 to make an important change to the policy interpretation by OSEP regarding the representation of parties (primarily parents) by **non-lawyers** in due process hearings. Prior to the change, it had been the long-standing interpretation of OSEP that a non-lawyer could represent parents at a due process hearing in much the same way that a lawyer could represent a party. After certain lower courts declared such a practice to be a violation of "unauthorized practice" statutes, OSEP changed 34 C.F.R. Section 300.512 (a)(1) to specify that whether a party has the right to be represented by a non-lawyer at a due process hearing shall be determined by state law.

3. JD by Davis v. Kanawha County Bd of Educ 53 IDELR 225 (**SD WVa** 11/4/9) HO has **discretion** to control hearing procedures (including imposing **sanctions**) and absent an abuse of discretion, HO will be upheld, aff'd on other grounds, JD by Davis v. Kanawha County Bd of Educ 54 IDELR 184 (**4th Cir.** 4/27/10) NB:

UNPUBLISHED Magistrate Judge had ruled that HO had not imposed his discretion by denying a continuance and imposing **sanctions** upon a pro se parent who refused to comply with HO's instructions. District court affirmed when parent did not file a timely objection to the Magistrate's recommendation. Parent appealed, but Fourth Circuit ruled that failure to file objections to District Court precluded further review; In re Student with a Disability 109 LRP 56222 (SEA NY 8/14/9) The parties to a dp hearing are obligated to comply with the reasonable directives of the HO regarding the conduct of the hearing; Pottstown Sch Dist 109 LRP 68536 (SEA Penna/***GS*** 10/3/10) HO cautioned both parties during the hearing re inappropriate conduct. At one point in the hearing, HO had to threaten to remove all from the hearing room at the next outburst. (7 full days dph; 1700ppg TR; 100's ppg exhibits).

4. JD by Davis v. Kanawha County Bd of Educ 53 IDELR 225 (**SD WVa** 11/4/9) Pro se parent requested indefinite **continuance** and ho requested more information. Parent refused to provide more information as to parent's medical conditions on privacy grounds. HO granted a short continuance but denied request for an indefinite continuance as not permitted under IDEA. Ct affirmed HO denial of indefinite continuance, aff'd on other grounds, JD by Davis v. Kanawha County Bd of Educ 54 IDELR 184 (**4th Cir**. 4/27/10) NB: **UNPUBLISHED;** ; Nguyen v. District of Columbia 681 F.Supp.2d 49, 54 IDELR 18 (D DC 2/1/10) Court declined to consider an allegation that HO improperly denied a continuance where the allegation was not accompanied by any allegation of resulting prejudice.; But see, Millay ex rel YRM v Surry Sch Dept 54 IDELR 191, n.3 (D. Maine 4/21/10) Although HO has the undoubted right to control the scheduling of a dph, in this case HO's conduct bordered upon an abuse of discretion and

a violation of constitutional procedural due process where HO denied a continuance and held three days of dph without the pro se parent after parent failed to respond to emails with very short deadlines to a very rural area; Philbin ex rel SP v Bureau of SpEd Appeals 54 IDELR 96 (D Mass 1/6/10) Court ruled that HO erred by dismissing a dpc after several delays when parent moved for a continuance. Dismissal was in violation of state procedural rules.

5. SA by CA v. Exeter Unified Sch Dist 110 LRP 69145 (ED Calif 11/24/10) Court upheld the right of the HO to ask **questions** and found no credit in the parent's allegations that the Qs were adversarial or lacked impartiality.

6. DZ v. Bethelehem Area Sch Dist 54 IDELR 323 (Penna Commonwealth Ct 7/27/10) Court rejected parent argument that HO improperly used an **interpreter** for all words rather than just the specific words selected by the parent.

7. NB **UNPUBLISHED** Davis v. Hampton Public Schs 55 IDELR 122 (**4th Cir** 10/1/10) **Res judicata** prevented a former student from relitigating claims that a school district had misdiagnosed him. A previous judgment on an IDEA claim (based upon statute of limitations) precluded this claim; JG by Stella G v. Baldwin Park Unified Sch Dist 55 IDELR 2 (CD Calif 8/11/10) Where the parent filed multiple dpcs alleging the same issues or multiple complaints where the parent could have raised other issues in a previous complaint, Court affirmed the HO's dismissal of the later complaints under res judicata and collateral estoppel; Theodore ex rel AG v. District of Columbia 55 IDELR 5 (D DC 8/10/10) Court ordered parties to argue the correctness of the HO's dismissal of the claim under res judicata as already having been litigated rather than arguing the merits of the case.

8. JDG by Gomez v. Colonial Sch Dist 55 IDELR 197 (D. Del 11/2/10) Court ruled that HO Panel did not err in **quashing subpoenas** of witnesses who had no relevant testimony to give.

9. Sch Bd of the City of Norfolk v Brown ex rel RP 111 LRP 4712 (ED Va 12/13/10) Court rejected allegations that the HO improperly failed to **fairly allocate** the time available for the hearing.

10. Newport Public Schs 109 LRP 9847 (SEA Mich 2/2/9) Where a witness violated a **sequestration** order, HO found the witness to be not credible and a "frequent liar." ???

11. ML & BL ex rel ZL v Frisco Independent Sch Dist 55 IDELR 73 (ED Tex 6/15/10) Court refused to overrule HO ruling on a statute of limitations. Parent was required to first **exhaust** administrative remedies by pursuing dph to conclusion before appealing.

12. In re Student with a Disability 109 LRP 1338 (SEA KS 1/2/9) HO denied a motion to declare parent self-representation the unauthorized practice of law where to do so would make even more uneven the uneven playing field enjoyed by the district…"???;

13. Laster v District of Columbia 109 LRP 3932 (D.DC 1/22/9) Court ordered parties to resolve their disputes through a dp hearing and to stop filing motions with the court to circumvent.

14. Knight ex rel JKN v. Washington Sch Dist 51 IDELR 209 (E.D. Mo. 12/22/8) Where SEA regulations permitted HO panel chair to eliminate frivolous due process claims and ho panel chair dismissed 4 of 5 issues, and was asked by parent

attorney to recuse himself, chair then had **heated exchange** with the attorney on the record and dismissed the fifth issue in retaliation for motion to recuse. Court reversed noting that especially dismissal of the fifth claim was improper because it denied parents an opportunity to present evidence, confront and cross-examine witnesses, etc.; Dept of Educ, State of Hawaii v. Karen I & Marcus I 53 IDELR 157 (D. Haw 9/21/9) Where HO took it upon himself to conduct 2d hearing after being reversed **without a remand** by the state court, federal court refused to award attorneys fees based upon order that should never have been issued.

b. Burden of Persuasion

1. Schaffer v. Weast 546 U.S. 49, 126 S.Ct. 528, 44 IDELR 150 (11/14/5). The Supreme Court held that the burden of persuasion in an IDEA due process hearing is upon the party challenging the IEP. The "**burden of persuasion**" involves which party loses if the evidence is closely balanced. In any civil legal proceeding, if the evidence for both sides is equal, the party with the burden of persuasion loses. Concerning the IDEA due process hearing process, the Court noted that such hearings are deliberately informal. The Court went on to note that the IDEA due process hearing was set up by Congress with the intention of giving the hearing officers the flexibility they need to ensure that each side can fairly present its evidence.

2. NM by Saleen M v. Central York Sch Dist 55 IDELR 228 (MD Penna 9/10/10) Court reversed HO who ruled that sch dist has the burden of persuasion under Shafer v Weast in LRE cases. Court held that the filing party has the burden in all cases alleging a violation of IDEA, not just alleged denials of FAPE.

c. Parties

1. Kaliope R by Irene D & George R v. NY State Bd of Educ 54 IDELR 253 (ED NY 6/1/10) Court ruled that parents stated a cause of action against **SEA** for violation of IDEA by alleging that it adopted a policy directing IEP teams to deny 12:2:2 student/teacher/aide ratio for students who need them to make academic progress. If proven, court noted that it would constitute unlawful predetermination; Terrell et al v. District of Columbia 703 F.Supp.2d 17, 110 LRP 19263 D DC 3/29/10) Court left it to state court as to whether allegations that HO contracts were not renewed because they had ruled in favor of parents, including expensive private placements, stated a cause of action under state law; LK by Henderson v. North Carolina Dept of Educ 55 IDELR 47 (ED NC 6/23/10) Court permitted surrogate parent to sue SEA over SRO discipline decision; Los Angeles Unified Sch Dist 54 IDELR 70 (SEA Calif 1/29/10) HO ruled that SEA is ultimately responsible for ensuring that all eligible students get FAPE, but deferred ruling as to whether LEA or SEA is responsible for a student's education until after he is released from a residential treatment facility; Woods ex rel TW v Northport Pub Schs 110 LRP 33252 (WD Mich 6/3/10) Court denied motion to strike LEA defenses alleging that HO (OAH) caused delays that increased the cost of litigation; CG v. Commonwealth of Penna Dept of Educ 55 IDELR 193 (MD Penna 11/8/10) In a class action against SEA concerning whether funding formula complied with the requirements of IDEA, Court rejected testimony of parent's expert witness; Barron ex rel DB & NB v State of South Dakota 55 IDELR 126 (D SD 9/30/10) Court ruled against parents on merits of suit vs SEA where state decision to close its school for the deaf was not shown by parents to result in a denial of FAPE; Klein Independent Sch Dist v. Hovem 54

IDELR 79 (SD Tex 3/22/10) Court dismissed suit vs SEA by parent claiming that LEA hadn't paid reimbursement ordered by HO where LEA paid after filing mooting the claim; Los Angeles County Office of Educ v. CM 55 IDELR 138 (CD Calif 9/17/10) Court ordered further briefing where SEA not a party to dph and issue was whether LEA or SEA or health department was responsible for a residential placement for an incarcerated student; State of Missouri ex rel St Joseph's Sch Dist v. Missouri Dept of Elementary & Secondary Educ 54 IDELR 124 (Missouri Ct App 3/30/10) Court remanded error by HO Panel back to HO panel; Bryant ex rel DB v NY State Educ Dept 55 IDELR 38 (ND NY 8/26/10) Court dismissed claim vs SEA re regulation prohibiting aversives does not constitute a denial of FAPE where parents alleged that reg would take away a viable option for behavior management; Traverse Bay Intermediate Sch Dist v. Michigan Dept of Educ 615 F.3d 622, 55 IDELR 1 (6th Cir 8/4/10) Sixth Circuit ruled that an LEA cannot sue an SEA over alleged noncompliance with IDEA; only "aggrieved parties" can sue and then only as to matters involving identification, evaluation, placement and FAPE; Chavez ex rel MC v. NM Public Educ Dept 621 F.3d 1275, 55 IDELR 121 (10th Cir 10/8/10) Tenth Circuit ruled that HO properly dismissed SEA from DPH where mere notice of parent's contention that LEA could not provide FAPE was not sufficient to trigger SEA duty to provide direct services; CO by Oman v. Portland Public Schs 54 IDELR 162 (D OR 3/31/10) Court dismissed action vs SEA; BJS ex rel NS v State Educ Dept, et al 699 F.Supp.2d 586, 55 IDELR 74 (WD NY 3/23/10) Court ruled that a parent cannot sue SEA or SRO over adverse ruling at a dph. The parties are (& the dispute is between) the parents and the sch dist.; BJS ex rel NS s State Educ Dept et al 55 IDELR 48 (WD NY 2/9/10) Court held that SEA was not a proper party to a routine

appeal of an SRO decision; BI ex rel BI v. Montgomery Bd of Educ 55 IDELR 188 (MD Ala 11/12/10) Court dismissed SEA that was not a party to dph and where parent failed to substantiate vague allegations of statewide violations; JDG by Gomez v. Colonial Sch Dist 55 IDELR 197 (D. Del 11/2/10) Court dismissed allegations against SEA where parent made no statewide allegation; French by French v. New York state Dept of Educ 55 IDELR 128 (N.D. NY 9/30/10) Court dismissed allegations against SEA where parent made no systemic allegations; Wood ex rel JW v Kingston City Sch Dist 55 IDELR 132 (ND NY 9/29/10) (same); Bd of Educ of City of Chicago v Illinois State Bd of Educ 55 IDELR 133 (ND Ill 9/29/10) (same); Comb v. Benji Sp Ed Academy, Inc 55 IDELR 162 (SD Tex 10/15/10) Court dismissed SEA rejecting parent's claim that SEA takeover of a financially strapped charter school was a change of placement warranting PWN.

2. NB **UNPUBLISHED** Keene v. Zelman 53 IDELR 5 (6th Cir. 7/29/9) UNPUBLISHED Parents brought a class action against Ohio **SEA** alleging illegal policies including improper HO training. Also alleged was that HOs were told to do nothing for the first 30 days and bill no more than one hour during that time. Sixth Circuit approved settlement that included an agreement to retrain HOs and an award of $81,000 vs SEA; Quatroche v. East Lynne Bd of Educ 604 F.Supp.2d 96, 53 IDELR 96 (D. Conn. 3/31/9) If allegation had been that an SEA system of HO training affected a number of dp hearings, parent would state claim for a systemic violation. Here the allegation was only one dp complaint, therefore no systemic violation; Chavez ex rel Chavez v. Bd of Educ of Tularosa Municip Schs 52 IDELR 229 (D.NM 2/24/9) SEA denied FAPE to student but parents not prevailing party; Emma L v. Eastin 52 IDELR 43 (N.D. Calif 2/24/9) Where LEA did miserable job of providing FAPE, and SEA is

ultimately responsible for FAPE, court held SEA to an enhanced role; Delaware Valley Sch Dist v PW by James & Patricia W 52 IDELR 192 (M.D. Penna 5/5/9) Although parents may sue SEA for LEAs failure to provide FAPE, the LEA may not sue the SEA for indemnification and contribution under IDEA; DW v. Delaware Valley Sch Dist 109 LRP 80026 (M.D. Penna 12/29/9) Complaint alleging that SEA failed to properly monitor or supervise the LEA with respect to the provision of FAPE to a student stated a cause of action against the SEA; Stengle v. Office of Dispute Resolution 109 LRP 24455 (M.D. Penna 4/27/9) SEA did not violate First Amendment by cancelling contract of HO who who wrote articles about issues pending before her as HO; CG v. Commonwealth of Penna, Dept of Educ 53 IDELR 150 (M.D. Penna 9/29/9) Dist court certified a class action re the manner that SEA distributes IDEA funds; King v. Pioneer Regional Educ Service Agency 53 IDELR 196 (Georgia Ct App 11/5/9) State appeals court ruled that SEA's general supervisory responsibilities under IDEA do not include being subject to tort-like damages; Independent Sch Dist No. 12 v Minnesota Dept of Educ 767 N.W.2d 748, 52 IDELR 265 (Minn Ct App 6/23/9)

3. Fuentes v. Bd of Educ of the City of New York 540 F.3d 145, 51 IDELR 4 (2d Cir. 8/26/8) (before 2006 fed regs took effect)Second Circuit certified question to the New York Court of Appeals of what the educational decision-making rights of a non custodial **parent** are under state law where the divorce decree was silent; Fuentes v. Bd of Educ of the City of New York 907 N.E.2d 696, 52 IDELR 164 (NY Ct App 4/30/9) NY appellate court held that under state law, the custodial parent has the sole right to control educational decisions pertaining to the child unless the divorce decree or custody order specifies otherwise. Fuentes v. Bd of Educ of the City of New York 589 F.3d 46,

52 IDELR 152 (2d Cir. 6/15/9) because noncustodial parent was not given educational decision-making rights under the divorce decree or custody order, he could not bring IDEA challenge re his son's education; Fuentes v. Bd of Educ of the City of New York 54 IDELR 312 (ED NY 7/21/10) Although Parent had lost educational decision-making rights, court let parent proceed with an action vs LEA for alleged violations of parents own constitutional rights; Ewing Township Bd of Educ 52 IDELR 87 (SEA NJ 2/23/9) Ho sided with parent that had custody 5 days a week over the parent with 2 days; Brainerd Independ Sch Dist #181 52 IDELR 145 (SEA Minn 3/27/9) Investigator found that district violated IDEA by failing to give notice and provide copies of evaluations to non-custodial **parent**; Zeichner v. Mamaroneck Union Free Sch Dist 881 N.Y.S..2d 883, 52 IDELR 264 (N.Y. SCt 6/24/9) (joint custody; both have decision-making authority); In re Student with a Disability 50 IDELR 297 (SEA NY 8/8/8) SRO dismissed complaint where parent was not an "aggrieved party." HO had ordered LEA to reimburse parents for two IEES, but parent also wanted SRO to order LEA wrong; JC v Slippery Rock Area Sch Dist 54 IDELR 127 (Penna Commonwealth Ct 3/25/10) Court ruled that parent still retained educational decision making rights despite being incarcerated and there being a temporary order giving custody to youth services. Only if there had been a permanent revocation of parental rights would parent lose educational decision making power.

4. **State of West Virginia** v. Beane 680 S.E.2d 46, 52 IDELR 199 (**W. Va.** SCt 5/4/9) **State supreme court** reversed trial court order requiring a school district to provide a nurse for a student as a part of an **abuse and neglect** proceeding. Because school district was not a party, it was denied procedural due process. Workman, J. dissenting would have required exhaustion by dp hearing first especially as to whether

trail court had jurisdiction of IEP issue; In Re RW & Orange County Social services Agency v. AW 109 LRP 17060 (Calif App Ct 3/26/9) State appellate court affirmed juvenile court decision to limit parent's educational **decision-making rights** and to order consent to a residential placement over parent's objections.

5. DC & AC ex rel TC v Klein Independent Sch Dist 711 F.Supp.2d 739, 54 IDELR 187 (SD Tex 5/5/10) Court held that where parents had moved out of the school district 10 months before IEP was due, prior **LEA** had no duty to prepare an IEP for the student; Alief Independent Sch Dist v. CC 54 IDELR 156 (S.D. Tex 4/7/10) LEA was not a prevailing party where parents dismissed their complaint before it was adjudicated and where district counterclaim seeking an order that it was in compliance with IDEA did not allege a violation of IDEA. Lakeland Area Sch Dist 55 IDELR 182 (SEA Penna/GS 5/30/10) An LEA is responsible for providing FAPE under IDEA and the duty cannot be contracted away. Placing a child in a therapeutic setting does not relieve the LEA of the duty to provide FAPE.

6. LR by GR v Steelton-Highspire Sch Dist 54 IDELR 155 (MD Penna 4/7/10) Court ruled that the school district where the student resided when his home burned down was the LEA that was responsible for continuing to enroll him and implement his IEP even though he had moved with relatives to another district because the student was within the definition of **homeless** under the McKinney-Vento Act which is adopted by IDEA.

7. Letter to Anonymous 53 IDELR 127 (OSEP 3/30/9) OSEP provided opinion that IDEA requires **charter schools**, whether themselves a separate LEA or not, to ensure the availability of the full continuum of placements and that students with

disabilities are placed in the LRE. There is no requirement that every placement on the continuum be used, but they must be available; Delaware College Preparatory Academy 53 IDELR 135 (SEA Del 7/30/9) HO Panel ruled that a charter school/LEA violated its child find obligation under IDEA by failing to identify a student as eligible where his extreme behaviors caused him to be suspended almost weekly. In re Student with a Disability 110 LRP 35352 (SEA Del 5/26/10) State complaint investigator found that the discipline rules of IDEA apply to students with disabilities in charter schools; MH & HN ex rel JN v New York City Dept of Educ 700 F.Supp.2d 356, 54 IDELR 165 (SD NY 3/25/10) Court rejected parent allegations that charter school program denied FAPE as one-size-fits-all; Comb v. Benji Sp Ed Academy, Inc 55 IDELR 162 (SD Tex 10/15/10) Court dismissed SEA rejecting parent's claim that SEA takeover of a financially strapped charter school was a change of placement warranting PWN. See, ADDITIONAL RESOURCE: Weber, Mark C., Special Education from the (Damp) Ground Up: Children with Disabilities in a Charter School-Dependent Educational System (October 12, 2009). Loyola Journal of Public Interest Law, Forthcoming. Available at SSRN: http://ssrn.com/abstract=1487667; See, "Charters, Students With Disabilities Need Not Apply," by Prof. Thomas Herir, (op-ed piece) Education Week online January 25, 2010, http://www.edweek.org/ew/articles/2010/01/27/19hehir_ep.h29.html?tkn=QQNC6AY97%2B01O7%2Bu4nwLnioyJY%2BAvdDbAtIU

8. Medici v. Pocono Mountain Sch Dist 54 IDELR 87 (MD Penna 3/16/10) Court ruled that a parent was not an **aggrieved party** and therefore could not appeal where HO had already ordered production of the documents in question; Traverse Bay Intermediate Sch Dist v. Michigan Dept of Educ 615 F.3d 622, 55 IDELR 1 (6th Cir

8/4/10) Sixth Circuit ruled that an LEA cannot sue an SEA over alleged noncompliance with IDEA; only "aggrieved parties" can sue and then only as to matters involving identification, evaluation, placement and FAPE.

9. Student with a Disability 110 LRP 74143 (SEA NY 11/12/10) SRO ruled that because **home schooled** children are not in a public school under state law, they are not entitled to FAPE.

10. Progressive Michigan Insurance Co v Calhoun Intermediate Sch Dist 54 IDELR 295 (Mich Ct App 7/6/10) State appeals court held that an **insurance company** could not sue an LEA in a coverage dispute as a backdoor way of second guessing whether a child needed educational services agreed to by a parent and a school district through proper channels under IDEA.

11. DS v. District of Columbia 54 IDELR 115 (D DC 3/30/10) Court ruled that HO erred by dismissing a claim because the child was not enrolled in the LEA. Court observed that the child find obligation applied to all disabled children in a district whether or not enrolled. (NB though not a child find case; challenge to IEP???)

12. LK by Henderson v. North Carolina Dept of Educ 55 IDELR 47 (ED NC 6/23/10) Court permitted **surrogate** parent to sue SEA over SRO discipline decision;

d. Record of Hearing

1. Suggs v. District of Columbia 679 F.Supp.2d 43, 53 IDELR 321 (DDC 1/19/10) Court remanded the case in part because the administrative record did not contain exhibits referred to in the HO's decision.

2. Letter to Connelly 108 LRP 2221 (OSEP 8/15/7)An SEA is obligated to provide at no charge to parent a verbatim copy of the transcript of the testimony at a dp

hearing even where the time to appeal has run. A parent could use the transcript for future IEP team meetings. Letter to Maldonado 108 LRP 2251(OSEP 9/11/7) The public agency responsible for conducting the hearing is responsible for providing the verbatim record. Parent has the right to either a verbatim written record or a verbatim electronic record, not both.

3. Bethelehem Area Sch Dist v. Zhon 976 A.2d 1284, 53 IDELR 24 (Penna Commonwealth Ct 7/24/9) Parent whose primary language was Mandarin Chinese was provided an interpreter for the dp hearing and a translated order and opinion, but she had no right to a **translated** copy of the hearing transcript; Bethlehem Area Sch Dist v. Zhou 54 IDELR 311 (ED Penna 7/23/10) Court allowed sch dist to proceed with attorney's fees claim vs parent who had filed 14 dpcs in 8 years, requested **interpreters/translators** although she speaks English and told a mediator (???) she was just trying to increase sch dist expenses.

e. Timelines/ 45 day rule

1. Letter to Anderson 110 LRP 70096 (OSEP 11/10/10) Reinforcing the importance of the 45 day timelines, OSEP told Texas SEA that it could not adopt **regulations** that allowed it to wait until after Christmas vacation to notify an LEA of a dp complaint filed just before break for the holiday. OSEP noted that the resolution meeting must be convened within 15 calendar days of a dp complaint by parent and this timeline cannot be extended by the SEA.

2. JD by Davis v. Kanawha County Bd of Educ 53 IDELR 225 (**SD WVa** 11/4/9) HO has **discretion** to control hearing procedures (including ruling on **continuances**) and absent an abuse of discretion, HO will be upheld, aff'd on other

grounds, JD by Davis v. Kanawha County Bd of Educ 54 IDELR 184 (**4th Cir.** 4/27/10) NB: **UNPUBLISHED** Magistrate Judge had ruled that HO had not imposed his discretion by denying a continuance and imposing sanctions upon a pro se parent who refused to comply with HO's instructions. District court affirmed when parent did not file a timely objection to the Magistrate's recommendation. Parent appealed, but Fourth Circuit ruled that failure to file objections to District Court precluded further review; JDG by Gomez v. Colonial Sch Dist 55 IDELR 197 (D. Del 11/2/10) Court ruled that HO panel did not err in issuing continuances that delayed the timeline.

3. Millay ex rel YRM v Surry Sch Dept 54 IDELR 191, n.3 (D.Maine 4/21/10) Although HO has the undoubted right to control the scheduling of a dph, in this case HO's conduct bordered upon an abuse of discretion and a violation of constitutional procedural due process where HO denied a continuance and held three days of dph without the pro se parent after parent failed to respond to emails with very short deadlines to a very rural area;

4. Woods ex rel TW v Northport Pub Schs 110 LRP 33252 (WD Mich 6/3/10) Court denied motion to strike LEA defenses alleging that HO (OAH) caused delays that increased the cost of litigation; . In re Student with a Disability 110 LRP 39021 (SEA NY 6/25/10) SRO reversed HO who denied a continuance, citing state regulations that required that four factors be considered.

5. Lake Washington Sch Dist #414 v. Office of the Superintendent of Public Instruction 51 IDELR 278 (W.D. Wash 1/16/9) School district asked federal court for a temporary restraining order (reversing HO order on 12/31/8 granting a continuance to 5/18/9 because of two vacations, two unrelated trials and time for trial prep for parent's

lawyer) and an order **banning** any extensions past 45 day period. Court denied the requests noting that the vague prejudice alleged by the district was outweighed by the prejudice to the parents in having a dp hearing with an unprepared lawyer.

f. Due Process Hearing System in General

1. MO by CO &LO v. Indiana Dept of Educ 635 F.Supp.2d 847, 52 IDELR 93 (N.D. Ind 3/31/9) Court found no evidence that the second tier review panel routinely reversed HO decisions in favor of parents.

2. NB UNPUBLISHED Keene v. Zelman 53 IDELR 5 (6th Cir. 7/29/9) UNPUBLISHED Parents brought a class action against Ohio SEA alleging illegal policies resulting in widespread dismissals of dp complaints and improper HO training. Also alleged was that HOs were to do nothing for the first 30 days and bill no more than one hour during that time. Sixth Circuit approved settlement that included an agreement to retrain HOs and an award of $81,000 vs SEA.

3. Quatroche v. East Lynne Bd of Educ 604 F.Supp.2d 96, 53 IDELR 96 (D. Conn. 3/31/9) If allegation had been that an SEA system of HO training affected a number of dp hearings, parent would state claim for a systemic violation. Here the 4/27/9) allegation was that lack of sufficient ho training affected only one dp complaint, therefore no systemic violation and court dismissed.

4. Stengle v. Office of Dispute Resolution 109 LRP 24455 (M.D. Penna 4/27/9) SEA did not violate First Amendment by cancelling contract of HO who wrote articles about issues pending before her as HO; Terrell et al v. District of Columbia 703 F.Supp.2d 17, 110 LRP 19263 D DC 3/29/10) HOs had no property interest in their former contracts so court dismissed constitutional dp claims. However, Court left it to

state court as to whether allegations that their contracts were not renewed because they had **ruled in favor** of parents, including expensive private placements, stated a cause of action under state law.

5. Questions and Answers on Procedural Safeguards and Due Process Procedures 52 IDELR 266 (OSERS 6/1/9).

g. Five Day Disclosures

1. In Re Student With a Disability 110 LRP 18493 (SEA **WV**/ JS 3/17/10) Ho excluded documents because of the 5 day rule.

2. In re Student with a Disability 55 IDELR 89 (SEA Va 6/3/10) HO dismissed dp complaint where parent failed to comply with HO order to provide documents and the five day disclosure rule. (State regs gave HO power to bring case to a conclusion if bad faith by either party.).

h. No Right to Effective Assistance of Counsel

1. DC & AC ex rel TC v Klein Independent Sch Dist 711 F.Supp.2d 739, 54 IDELR 187 (SD Tex 5/5/10) Court ruled that parents had no right to effective assistance of counsel under IDEA!!!!

7.. ***Stay Put –Student's Placement During Due Process or Litigation***

a. Millay ex rel YM v. Surry Sch Dist 632 F.Supp.2d 38, 52 IDELR 251 (D. Maine 6/18/9) **last agreed upon IEP** placement = status quo.

b. John M. by Christine M & Michael M v. Bd of Educ of the Evanston Township HS Dist No. 202 502 F.3d 708, 48 IDELR 177 (7th Cir. 9/17/7) The Seventh Circuit noted that determining "then current educational placement' is an inexact science requiring a **fact driven** approach. Respect for the purpose of the stay put provision

requires focus upon the child's educational needs so the educational status quo for a "growing, learning, young person" often makes rigid adherence to a particular educational methodology an impossibility. Stay put, therefore, requires **flexibility** in interpreting the educational placement per the last agreed upon IEP and flexibility concerning the child's needs. (reversing 46 IDELR 218 (N.D. Ill 9/26/6); LM & DG ex rel CG v Pinellas County Sch Bd 54 IDELR 227 (MD Fla 4/11/10) Court rejected parent argument that sch dist had violated stay put by changing schools of the student. "Then current placement" generally refers to the student's educational program and not the particular building where IEP is implemented; Concord Public Schs 110 LRP 51493 (SEA Mass 9/3/10) HO relied upon the John M court's reasoning in ruling that a change from a single teacher to a co-taught classroom was a change in methodology that did not violate stay put.!!

c. Joshua A by Jorge A v. Rocklin Unified Sch Dist 559 F.3d 1036, 52 IDELR 1 (9th Cir. 3/19/9) Ninth Circuit held that the stay put provision requires a district to comply with a district court order even if the matter has been appealed to the circuit court of appeals.

d. ND v. State of Hawaii, Dept of Educ 600 F.3d 1104, 54 IDELR 111 (9th Cir 4/5/10), affirming 53 IDELR 186 in previous outline, Ninth Circuit ruled that 17 **furlough Fridays,** enacted because of the bad economy, was not a stay put violation. Current placement means the educational program of the student. Furlough days applied to all students. To rule otherwise would give parents veto power over the management of the schools See, DK & AK by Kellet v. State of Hawaii, Dept of Educ 53 IDELR 187 (D. Haw 10/22/9) (similar facts, etc); ND v. State of Hawaii, Dept of Educ 55 IDELR

220(D Haw 11/28/10) Because furlough Fridays were not a change of placement, there was no stay put violation.

f. JH by Hesse v. Los Angeles Unified Sch Dist 54 IDELR 195 (CD Calif 3/29/10) For purposes of stay put, **HO decision** is treated as an **agreement** between parties. (Here school district had to fund additional speech and behavioral services ordered by HO pending appeal.); Ravenswood City Sch Dist v. JS 55 IDELR 222 (ND Calif 11/18/10) (same); WR & KR ex rel HR v. Union Beach Bd of Educ 53 IDELR 234 (D. NJ 11/19/9) Where HO decision did not change the student's placement because the IEP and classes remained essentially the same, it was not stay put??; But See, DL by KL & IL v Shoreline Unified Sch Dist 55 IDELR 165 (ND Calif 9/30/10) Where Ho found denial of FAPE and ordered IEPT to change program, and parents rejected LEA offer of new program and placed child in private school, court ruled that the private school is not stay put.

h. Millay ex rel YM v. Surry Sch Dist 632 F.Supp.2d 38, 52 IDELR 251 (D. Maine 6/18/9) **last agreed upon IEP** placement = status quo; Faranza K ex rel SK v. Indiana Dept of Educ 53 IDELR 180 (N.D. Ind 10/30/9) Stay put placement was the last agreed upon placement, even though parent wrote "for now" on the IEP form; In re Student with a Disability 110 LRP 1175 (SEA NY 12/23/9) Stay put is the last agreed upon placement at the time the dp complaint is filed (subject to later agreement by the parties to change placement); Ewing Township Bd of Educ 52 IDELR 87 (SEA NJ 2/23/9) Where parents were divorced and each had custody (5days vs 2 days) a district agreement with one but not both parents was not sufficient to create stay put placement; LY ex rel JY v. Bayonne Bd of Educ 53 IDELR 92 (D.NJ 9/15/9) Where school district

(=LEA) objected to charter school placement, it was not the stay put placement because it was not agreed to.

i. Laster v District of Columbia 109 LRP 3932 (D.DC 1/22/9) Court dissolved a three year old stay put order and ordered parties to resolve their disputes through a dp hearing and to stop filing motions with the court to circumvent.

k. John M. by Christine M & Michael M v. Bd of Educ of the Evanston Township HS Dist No. 202 52 IDELR 73 (N.D. Ill 3/16/9) Where stay put placement provided all relief sought by parents and district agreed to keep it, court dismissed FAPE lawsuit as moot; Weakley County Bd of Educ v. HM by JM 53 IDELR 40 (W.D. Tenn 8/31/9) There was no stay put placement or status quo where student had graduated.

l. Fairlawn Bd of Educ 110 LRP 26395 (SEA NJ 3/25/10) HO ruled that fed law (=stay put) trumps state law provision permitting administrative ho to grant relief pending outcome of an admin hearing.

m. NY City Dept of Educ v. SS ex rel SS 54 IDELR 85 (SD NY 3/17/10) Court ruled that an LEA that pays private sch tuition as stay put has a right to recoup the expense if parent later loses.

n. GM by Marchese v. Dry Creek Join Elementary Sch Dist 55 IDELR 249 (ED Calif 12/10/10) Court ruled against a parent claim that stay put entitled them to a particular private instructor. Neither the last agreed upon IEP nor the settlement agreement indicated that the district's contract with a reading specialist would be permanent.

n. RY ex rel IX v State of Hawaii, Dept of Educ 54 IDELR 4 (D Haw 2/17/10) Court held that by graduating student while dph was pending, LEA violated stay put;

Tindell v Evansville-Vanderbough Sch Corp 54 IDELR 7 (SD Ind 2/10/10) Where parent challenged the LEA decision to graduate the student from a residential facility, the court agreed with the parents that the stay put placement for a student with autism was a college internship.

m. Miller ex rel Miller v. Bd of Educ of the Albuquerque Public Schs 565 F.3d 1232, 52 IDELR 61 (10th Cir 5/11/9) The Tenth Circuit ducked the "thorny legal issue" of whether or not a previous award of compensatory ed could be deemed a stay put placement.

n Zoe M v. Blessing 52 IDELR 184 (D. Ariz 5/15/9) When transitioning from **ISFP** to public school at age 3, stay put placement is not IFSP

8. Hearing Officer Decision

a. JP by Peterson v. County Sch Bd of Hanover County, VA 516 F.3d 254, 49 IDELR 150 (4th Cir 2/14/8). The **Fourth Circuit** noted that the HO could have offered a more thorough explanation as why he denied a request for tuition reimbursement, but the Court reversed the district court for according no **deference** to the HO decision or its findings of fact. The HO's **findings** of fact were regularly made and not the result of flipping a coin, throwing a dart, etc… Although the HO found all witnesses to be credible, the court held that he sufficiently identified his reasoning in reaching his decision. Contrast, KS by PS & MS v. Freemont Unified Sch Dist 545 F.Supp.2d 995, 49 IDELR 182 (N.D. Calif 2/22/8) The court found the HO decision to be **thorough and careful** and afforded it considerable deference. Nonetheless, the court rejected the HO's findings of fact because of faulty reasoning. HO's reasoning in bolstering credibility of district witnesses because of consistent district records and in reducing the parents'

credibility because parent was advocating for the student were inconsistent with IDEA's philosophy. NB, KS by PS & MS v. Freemont Unified Sch Dist 109 LRP 80008 (N.D. Calif 12/29/9) Court ruled that on remand, HO fixed all problems with credibility analysis, and affirmed HO decision finding FAPE provided.

b. Sch Bd of the City of Norfolk v. Brown ex rel RP 111 LRP 4712 (ED Va. 12/13/10) Court found HO findings to have been regularly made and, therefore, entitled to **4th Cir deference**- even though HO did not expressly state that P's witnesses were more credible than R's Ws and even though HO did not discuss each bit of evidence in a several week hearing.

c. Marshall Joint Sch Dist No 2 v. CD by Brian & Traci D 616 F.3d 632, 54 IDELR 307 (7th Cir 8/2/10) Seventh Circuit reversed HO who had applied the wrong legal standard for eligibility (HO determined that disability could affect ed performance not that id did affect performance; Las Virgienes Unified Sch Dist v SK by JK & BK 54 IDELR 289 (CD Calif 6/14/10) HO decision was **not** entitled to deference because it was not careful and thorough. (no references to testimony or exhibits; serious errors re facts , eg time draft IEP was written); KE by KE & TE v. Independent Sch Dist # 15 54 IDELR 215 (D Minn 5/24/10) Court reversed HO where a number of the HO's findings were not supported by evidence in the record; Suggs v. District of Columbia 679 F.Supp.2d 43, 53 IDELR 321 (D DC 1/19/10) Court remanded case to HO where Ho did not explain his reasoning; HO cannot simply disregard evidence, HO must consider it, evaluate it and explain its impact upon his decision; Fort Osage R-1 Sch Dist v. Sims ex rel BS 55 IDELR 127 (WD Missouri 9/30/10) Court found that HO panel's findings of fact were not supported by the evidence and reversed the decision;

d. Dracut Sch Committee v. Bureau of Sp Educ Appeals 55 IDELR 66 (D Mass 9/3/10) Court reversed HO award of 2 years of extended eligibility as inappropriate because Ho ordered sch dist to graduate the student. Graduation terminated eligibility. Also the court reversed the HO to the extent that he ordered the sch dist to hire the parent's expert. HO could have ordered dist to hire independent consultants with certain credentials at a reasonable rate of pay but HO **abused his discretion** to require dist to hire a specific person.

e. Blake C by Tina F v. Dept of Educ, State of Hawaii 51 IDELR 239 (D. Haw 1/15/9) Court held that HO **erred** by utilizing a relaxed standard rather than the *Rowley* standard for FAPE.

f. DS & AS ex rel DS v. Bayonne Bd of Educ 54 IDELR 141 (3d Cir 4/22/10) The Third Circuit held that the District Court erred in overturning HO's **credibility** without showing a good reason for doing so; Marshall Joint Sch Dist No 2 v. CD by Brian & Traci D 616 F.3d 632, 54 IDELR 307 (7th Cir 8/2/10) Seventh Circuit rejected HO's credibility findings as not supported by the record; Sundbury Public Schs v. Mass Dept of Elementary & Secondary Schs 55 IDELR 284 (D Mass 12/23/10) Court ruled that credibility determinations are the province of the HO; SA by LA v. Exeter Union Sch Dist 110 LRP 69145 (ED Calif 11/24/10) Court rejected arguments that HO improperly determined credibility and ignored certain evidence favorable to parents; GB & DB ex rel JB v. Bridgewater-Puritan Regional Bd of Educ 52 IDELR 39 (D. NJ 2/27/9) Court found no basis for disagreeing with HO's credibility assessments; Garvey Sch Dist 109 LRP 23281 (SEA Calif 2/25/9) HO found district Ws credible and persuasive, but he gave little weight to parent's evaluators who knew little about the student's disability;

g. Henry v. District of Columbia 55 IDEL:R 187 (D DC 11/12/10) Court held that Ho erred by not awarding compensatory education after finding a denial f FAPE. Court ruled that the fact that the parent failed to provide evidence regarding compensatory ed was no excuse (????).

h. Millay ex rel YRM v. Surry Sch Dist 54 IDELR 80 (D. Maine 3/19/10) Court refused to permit party on appeal to submit additional evidence consisting of an expert opinion **analyzing the HO's decision.**

i. Theodore ex rel AG v. District of Columbia 55 IDELR 5 (D.DC 8/10/10) Court ordered parties to brief whether ho decision to dismiss based upon res judicata was correct before they briefed the merits of the claim.

j. Marcus I & Karen I v. State of Hawaii, Dept of Educ 53 IDELR 189 (D. Haw 10/21/9) HO is not bound by previous decisions of other HOs, and HO has authority to use independent judgment in analyzing a case and writing a decision.

k. Pennsbury Sch Dist 107 LRP 63404 (SEA PA 9/25/7) SRO Panel criticized HO decision for relying upon SpEd **literature** concerning best practices and upon **unpublished** decisions from other jurisdictions rather than published opinions decisions setting forth the law.

l. Bd of Educ of Fayette County, KY v. LM ex rel TD 107 LRP 10801 (6th Cir. 3/2/7). The Sixth Circuit held that it is improper for a HO to remand a case to the IEP team for determination of compensatory education. The court reasoned that a hearing officer may not be employed by an LEA, and, therefore, IEP teams, which include LEA employees, cannot be **delegated** the duty of fashioning relief. for an IDEA violation.

m. Mary McLeod Bethune Academy Public Charter Sch v. Bland ex rel TB 534 F,Supp.2d 109, 49 IDELR 183 (D. DC 2/20/8) Court remanded case to HO where the decision provided no explanation of the award of 37.5 hours of **compensatory education** or of the HO's reasoning in getting to that conclusion NOTE On remand, the court approved the HO's explanation of the calculation, 108 LRP 31400 (D.DC 5/27/8).

9. Relief

a. Compensatory education

1) Reid ex rel Reid v. District of Columbia 401 F.3d 516, 43 IDELR 32 (D.C. Cir. 3/25/05). The D.C Circuit developed a **qualitative** standard for awards of compensatory education in order to place disabled students in the same position they would have occupied but for the school district's violation of IDEA. The court rejected the hearing officer's calculation awarding one hour of compensatory education for each day of denial of FAPE. The court also rejected the parents' request of one hour of compensatory education for each hour of denial of FAPE. Instead, the court adopted a more flexible approach based upon the needs of the child who has been denied FAPE. For example some students might require only short intensive compensatory programs targeting specific deficiencies. Other students may require more extended programs, perhaps requiring even more hours than the number of hours of FAPE denied. Accordingly, the court remanded this matter for the submission of evidence as to the student's deficiencies resulting from the denial of FAPE. Friendship Edison Public Charter Sch Collegiate Campus v. Nesbit 53 IDELR 222 (D. DC 11/18/9) Court found that HO properly relied upon evidence to support comp ed award};

2) Hogan v. Fairfax County Sch Bd 654 F.Supp.2d 554, 53 IDELR 14 (E.D. Va. 8/3/9) Noting **equitable** nature of comp ed, court still found that HO erred in denying all comp ed as a result of the uncooperative behavior of the parent; a reduction of the award was appropriate but not a denial.

3) Sch Dist of Philadelphia v. Deborah A ex rel Candiss C 52 IDELR 67 (E.D. Penna 3/24/9) Court approved an award of hour-per-hour **quantitative** formula comp ed; David G v Council Rock Sch Dist 53 IDELR 160 (E.D. Penna 4/9/9) Court approved SRO panel award of one year program for one year denial of FAPE; LT ex rel BT v. Mansfield Township Sch Dist 52 IDELR 293 (E.D.NY 6/24/9) Court awarded seven hours of comp ed for every day of denial of FAPE; Matunuska-Sustina Borough Sch Dist v DY ex rel BY 54 IDELR 52 (D Alaska 2/23/10) Court affirmed HO compensatory ed calculation based upon parent's estimate of hourly rates where sch dist evidence and argument did not provide HO with an alternative hourly rate.

3) Friendship Edison Pub Charter Sch v. Nesbitt 54 IDELR 151 (D DC 4/12/10) Court ordered sch dist to begin providing comp ed even though dist had an **appeal** pending.

4) Many recent compensatory education awards have been **creative:** Draper v. Atlanta Indep Sch System 518 F.3d 1275, 49 IDELR 211 (11th Cir. 3/6/8) The Eleventh Circuit specifically approved of a **private school** placement as a form of compensatory education where the school district continued to use an ineffective reading program for three years despite the student's failure to make progress. Park v. Anaheim Union High Sch. Dist. 106 LRP 23543 (9th Cir. 4/17/6). The Ninth Circuit affirmed an award of compensatory education by a hearing officer in the form of requiring **training** of two of

the teachers who implemented the student's IEP. The hearing officer phrased the award as compensatory education for the student in the form of training for his teachers in order to meet the student's needs. P by Mr & Mrs P v. Newington Bd of Educ 546 F.3d 111, 51 IDELR 2 (2d Cir 10/9/8) The Second Circuit affirmed an award of compensatory ed by a HO that required the school district to **hire an inclusion expert** for a year and to permit him to participate in the development of an FBA for the student; Mr & Mrs C ex rel KC v. Maine Sch Administrative Dist No. 6 49 IDELR 281 (D. Maine 3/17/8) Courts and HOs have broad authority to fashion appropriate relief if there is a violation of IDEA; court awarded compensatory education for a stay put violation.; Ferren C v. Sch Dist of Philadelphia 109 LRP 5365 (E.D. Penna 1/28/9), aff'd Ferren C v. Sch Dist of Philadelphia 612 F.3d 712, 54 IDELR 274 (3d Cir 7/13/10), Court ruled that HO has **broad** authority to impose equitable remedies where IDEA is violated and as compensatory ed awarded three years of services **beyond the maximum age** for eligibility with district continuing as LEA until the comp ed is completed.; Petrina W v. City of Chicago Public Sch Dist 299 53 IDELR 259 (N.D. Ill 12/10/9) Court overruled HO who found that comp ed must end at maximum age of eligibility, and awarded comp ed continuing after students 22d birthday; Where district violated the transition requirements, HO ordered extended eligibility as the remedy; Streck v. Bd of Educ of the East Greenbush Cent Sch Dist 52 IDELR 285 (N.D. NY 7/17/9) Court awarded as comp ed **college remedial reading courses** and an IEE for a neuropsych eval; Student with a Disability 55 IDELR 179 (SEA NY 8/19/10) Noting broad authority to remedy violations, SRO approved a HO decis awarding an **increase** in the number of **hours** of **specialized instruction** rather than parent requested tutoring as the comp ed award; But

see, Dracut Sch Committee v. Bureau of Sp Educ Appeals 55 IDELR 66 (D Mass 9/3/10) reversing Dracut Public Schs 52 IDELR 85 (SEA Mass 3/13/9) in prior outlines (granting extended eligibility and ordering LEA to hire specific person as comp ed).

5) ML ex rel AL v. El Paso Indep Sch Dist 610 F.Supp.2d 582, 52 IDELR 159 (W.D. Tex 4/16/9) The function of compensatory ed is not to punish the district for wrongdoing, it is to make up for any losses suffered by student. Where student no longer had a speech/language impairment, an award of comp ed for speech services is not appropriate; Streck v. Bd of Educ of the East Greenbush Cent Sch Dist 52 IDELR 285 (N.D. NY 7/17/9) Comp ed is intended to remedy past denials of FAPE not to create a comprehensive college program for a student.

6) In re Student with a Disability 55 IDELR 25 (SEA NY 6/11/10) Where SEA denial of FAPE did not result in any educational harm to the student, SRO denied request for compensatory ed; the **broad equitable** powers of a court to grant or deny relief in an IDEA case and upheld the order of the district court (& HO) to deny a compensatory education award where the student's truancy in not attending school for two years made such relief inequitable

7) Henry v. District of Columbia 55 IDEL:R 187 (D DC 11/12/10) Court held that HO **erred** by not awarding compensatory education after finding a denial of FAPE. Court ruled that the fact that the parent failed to provide evidence regarding compensatory ed was no excuse (????); Phillips ex rel JP v. District of Columbia 55 IDELR 101 (D DC 9/13/10) When parent shows a violation of IDEA, the student is entitled to an award of compensatory ed; where parent lawyer fails to submit appropriate evidence, court remanded to HO (???); Stanton ex rel KT v. District of Columbia 680

F.Supp.2d 201, 53 IDELR 314 (D DC 1/27/10) Court remanded compensatory education calculation to HO to make specific findings re student's educational loss and appropriate amount of comp ed; Banks ex rel DB v District of Columbia 720 F.Supp.2d 83, 54 IDELR 282 (D DC 7/6/10) Reid does not require the parent to have a perfect case to get a comp ed award, and HO may grant parent's lawyer more time to put on additional evidence (?? Timelines???); But see, Gill ex rel WG v District of Columbia 55 IDELR 191 (D DC 11/9/10) Court ruled that HO improperly denied comp ed where parent established denial of FAPE but did not link it to educational deficit in the student. Rather than remand, court invited parent's lawyer to submit supplemental evidence; and Wheaten ex rel DW v. District of Columbia 55 IDELR 12 (D DC 7/30/10) Court approved denial of comp ed where HO conducted a fact-intensive analysis and concluded that evidence showed student had improved during relevant time.

8) Ferren C v. Sch Dist of Philadelphia 612 F.3d 712, 54 IDELR 274 (3d Cir 7/13/10) Third Circuit ruled that sch dist did not comply with its comp ed duty merely by funding three years of comp ed, rather in this case facts required that district write IEPs for the comp ed despite fact that the student was no longer eligible for FAPE having graduated; Bd of Educ of City of Chicago v. Ill State Bd of Educ 55 IDELR 133 (ND Ill 9/29/10) Court found that HO did not err when she gave sch dist ten days to begin providing compensatory ed previously ordered 7 months earlier in another HO decis.

9). In re Student with a Disability109 LRP 76698 (SEA NY 11/20/9) SRO rejected HO comp ed award of a 1:1 program as inconsistent with LRE and instead ordered an individualized reading program over the summer.

10). Bd of Educ of Fayette County, KY v LM ex rel TD 478 F.3d 307, 47 IDELR 122 (6th Cir. 3/2/7) It is inappropriate for HO to **delegate** the type or amount of compensatory education to the IEP team; But see, In re Student with a Disability 110 LRP 30672 (SEA NY 05/03/10) SRO approved of HO remand to IEPT to determine which compensatory ed services are needed.

11) , Newport Public Schs 109 LRP 9847 (SEA Mich 2/2/9) After a 29 day hearing, HO awarded 768 hours of compensatory education to be delivered by a certified SpEd teacher with an endorsement in autism.

b. Reimbursement/ Unilateral Placement

1) Forrest Grove Sch Dist v. TA 129 S.Ct. 2484, 52 IDELR 151 (U.S. 6/22/9) The Supreme Court held that it is not a prerequisite to reimbursement under IDEA that a child have been previously enrolled in and receive services from a public school. The Court noted that under its previous rulings in *Burlington* and *Carter*, courts have broad authority to grant appropriate relief when there has been a violation of IDEA. The Court held that the 1997 amendments do not limit that authority. The ambiguous language of the provision at issue was not sufficient to effectuate a repeal by implication of *Burlington* and *Carter*.

2). AC & MC ex rel MC v. Bd of Educ of the Chappaqua Cent Sch Dist 553 F.3d 165, 51 IDELR 147 (2d Cir. 1/16/9) Reimbursement for a unilateral placement is appropriate where 1) the school district denied FAPE to the student; 2) the parent private school placement is appropriate; and 3) equitable factors do not preclude the relief. See, In re Student with a Disability 109 LRP 69484 (SEA NY 10/19/9) (Same statement of standard); Letter to Miller 110 LRP 73646 (OSEP 5/5/10) OSEP opined that

reimbursement for unilateral placement is an equitable remedy and that courts and HOs generally have **discretion** to determine both the appropriateness and the amount of reimbursement based upon the equities of a particular fact situation.

3.) *FIRST PRONG*: MS by Simchick v. Fairfax County Sch Bd 553 F.3d 315, 51 IDELR 148 (4th Cir 1/14/9) **Fourth Circuit** affirmed district court denial of reimbursement for the 2005-06 school year because **FAPE** denied, but district court erred in failing to analyze each school year separately; AC & MC ex rel MC v. Bd of Educ of the Chappaqua Cent Sch Dist 553 F.3d 165, 51 IDELR 147 (2d Cir. 1/16/9) 2d Circuit reversed district court and upheld SRO concluding that FAPE was not denied, rejecting parents argument that a 1:1 aide would foster learned helplessness; Regional Sch Dist No 9. Bd of Educ v. Mr & Mrs P ex rel MP 51 IDELR 241 (D.Conn 1/12/9) Court awarded reimbursement where IEP was deficient in several areas, including AT and transportation; Madison Metropolitan Sch Dist v. PR by Teresa & Rusty R 51 IDELR 269 (W.D. Wisc 2/25/9) Court awarded reimbursement reprimanding school dist for playing semantics by first agreeing that a student needed a preschool placement and later characterizing that as a unilateral placement for which it was not responsible; EG & MG ex rel AG v. City Sch Dist of New Rochelle 606 F.Supp.2d 384, 52 IDELR 228 (S.D. NY 3/16/9) Court denied reimbursement where IEP taken as a whole was reasonably calculated to lead to ed benefit; KC by MC & WC v. Mansfield Indep Sch Dist 618 F.Supp.2d 568, 52 IDELR 103 (N.D. Tex 3/26/9) Where transition plan did address student's interest but not her interest in music because she had low skills in that area, FAPE provided and reimbursement denied; JA & EA ex rel MA v. East Ramapo Cent Sch Dist 603 F.Supp.2d 684, 52 IDELR 196 (S.D. NY 3/24/9) Court denied

reimbursement where dist program provided FAPE despite denying 10 additional hours of ABA services; Caitlin W v. Rose Tree Media Sch Dist 52 IDELR 223 (E.D. Penna 5/15/9) Where no denial of FAPE, reimbursement denied; RH v. Fayette County Sch Dist 53 IDELR 86 (N.D. Ga 9/1/9) Where student made consistent progress in School, FAPE therefore no reimbursement; Snyder by Snyder v. Montgomery County Public Schs 53 IDELR 151 (D.Md 9/29/9) Court denied reimbursement rejecting parent argument that district agreement in IEP to a private placement was evidence that prior year IEPs denied FAPE; Washoe County Sch Dist 109 LRP 77994 (SEA NV 11/30/9) SRO denied reimbursement noting that even if parents' private placement is superior, district provided FAPE In re Student with a Disability 52 IDELR 148 (SEA NY 4/1/9) Despite minor defects in a transition plan, FAPE provided therefore SRO denied reimbursement; Klein Independent Sch Dist 51 IDELR 265 (SEA Tex 1/9/9) HO awarded reimbursement where district denied FAPE by failing to draft an IEP to meet the student's individual needs; CH by Hayes v. Cape Henlopen Sch Dist 606 F.3d 59, 54 IDELR 212 (#d Cir 5/25/10) Third Circuit denied reimbursement where there was no violation of IDEA; Alcanes Union HS Dist 110 LRP 37635 (SEA Calif 6/25/10) No reimbursement ordered by HO where no denial of FAPE; Tracy N ex rel Nicholas N v. Dept of Educ, State of Hawaii 715 F.Supp.2d 1093; 54 IDELR 216 (D Haw 5/21/10) (same); JG & JG ex rel JG v. Briarcliff Manor unified Free Sch Dist 682 F.Supp.2d 387, 54 IDELR 20 (SD NY 1/29/10) (same); JL v. Francis Howell R-3 Sch Dist 54 IDELR 5 (ED Mo. 2/17/10) (same – even where private school program is a better fit); NS by Stein v. District of Columbia 709 F.Supp.2d 57, 54 IDELR 188 (D DC 5/4/10) Court ordered reimbursement where denial of FAPE; KG ex rel CG v. Sheehan 111 LRP 6572 (D RI 12/30/10) Court

denied reimbursement where parent had predetermined that only a private sch was appropriate; contrast, Sundbury Public Schs v. Mass Dept of Elementary & Secondary Schs 55 IDELR 284 (D Mass 12/23/10) (**opposite conclusion**- court awarded reimbursement even though parent favored a private sch and moved to the sch dist hoping to get LEA to fund private sch for the student.)

4). *SECOND PRONG:* Mary Courtney T v. Sch Dist of Philadelphia 52 IDELR 211 (3d. Cir 7/31/9) Third Circuit denied reimbursement where FAPE denied, but parent **private placement was not appropriate** because it resulted from the student's medical needs rather than her need for SpEd; Ashland Sch Dist v. Parents of Student RJ 53 IDELR 176 (9th Cir. 12/7/9) Ninth Circuit denied reimbursement where private residential placement was not appropriate because it was a result of risky and defiant out of school behaviors (sneaking out and a relationship with school janitor); Ashland Sch Dist v. Parents of Student EA 53 IDELR 177 (9th Cir. 12/7/9) Ninth Circuit denied reimbursement where private residential placement in a psychiatric hospital was not appropriate where it was primarily to meet medical and not educational needs of the student; Omidian ex rel KO v. be of Educ of the New Hartford Cent Sch Dist 52 IDELR132 (N.D.NY 3/31/9) Even though FAPE denied, court denied reimbursement where parent's private placement was inappropriate because it did not off the individualized counseling the student needed; CB by BB & CB v. Special Sch Dist No 1, Minneapolis 52 IDELR 283 (D. Minn 7/20/9) Reimbursement denied where parent's private placement did not serve general ed students therefore not sensitive to LRE; GR V. New York City Dept of Educ 53 IDELR 9 (S.D.NY 8/7/9) Ct reversed SRO for applying the wrong standard and awarded reimbursement holding that parent need only

show that private placement is designed to permit progress not that student actually made progress; CB by Baquerizo V. Garden Grove Unified Sch Dist 53 IDELR 39 and 260 (C.D. Calif 9/1/9) citing *Carter* court awarded reimbursement where private placement met student's needs rejection district argument that school did not meet state standards as not relevant; Hunter Weber ex rel EW v. Bureau of Special Educ Appeals 53 IDELR 83 (D. Mass 9/4/9) Court denied reimbursement where private placement inappropriate because it did not offer OT services; Los Angeles Unified Sch Dist 109 LRP 76217 (SEA Calif 11/30/9) HO denied reimbursement where private preschool inappropriate; In re Student with a Disability 110 LRP 30672 (SEA NY 05/03/10) SRO found parent's placement inappropriate where a one hour per day class did not address the student's primary deficits: behavior and language skills; NL by Lordo v Sp Sch Dist of St Louis County 54 IDELR 78 (ED Mo 3/23/10) Court denied reimbursement where parent's private parochial school did not meet his needs; Stevens ex rel EL v NY City Dept of Educ 54 IDELR 84 (SD NY 3/18/10) (same- no specialized instruction); Contrast, AD & MD ex rel ED by Bd of Educ of the City Sch Dist of the City of NY 690 F.Supp.2d 193, 54 IDELR 9 (SD NY 2/9/10) Court overruled SRO finding that parent placement was appropriate; parent placement need not meet SEA standards or even IDEA FAPE standard, rather privates sch must only provide specialized instruction to meet the unique needs of the student.

5). *THIRD PRONG:* Forest Grove v. TA 53 IDELR 213 (D.Oregon 12/8/9) District court denied reimbursement based upon a balance of **equitable factors**: placement was for medical treatment rather than educational needs; parents failed to give notice; parents placed student in first facility recommended by their MD without

considering cheaper alternatives; SW v. New York City Dept of Educ 109 LRP 18611 (S.D.NY 3/30/9) Court affirmed SRO denial of reimbursement where parents showed a lack of good faith to cooperate where they failed to give notice of placement until 7 months after enrollment and where they signed K with private school agreeing to seek reimbursement; Shipler v. Maxwell 52 IDELR 279 (D.Md 7/23/9) Court reduced reimbursement for the period of time that district was not given notice by parent of unilateral placement; Shipler v. Maxwell 53 IDELR 216 (D.Md 11/30/9) Court refused to reconsider prior ruling noting that nothing in IDEA requires a court or HO to deny or reduce reimbursement for failure to give notice, rather it is discretionary; Hogan v. Fairfax County Sch Bd 654 F.Supp.2d 554, 53 IDELR 14 (E.D. Va. 8/3/9) Parents' failure to cooperate, adversarial tone and failure to return phone calls did not warrant denial of reimbursement, but court reduced reimbursement by 1/6th; Eschenasy ex rel Eschenasy v. New York City Dept of Educ. 604 F.Supp2d, 52 IDELR 66 (S.D. NY 3/25/9) Court held that equities favored reimbursement where parents acted reasonably and private school was reasonably priced; NR ex rel TR v. Dept of Educ City of New York Court overruled SRO and awarded reimbursement finding that where parents gave notice and cooperated with district, equities favored reimbursement; AH v. New York City Dept of EDUC 53 IDELR 44 (S.D.NY 8/21/9) Court denied reimbursement where parent paid $5K deposit before IEPT meeting and failed to notify district of unilateral placement; Caitlin W v Rose Tree Media Sch Dist 52 IDELR 223 (E.D. Penna 5/15/9) Court denied reimbursement where student left for private placement 2 weeks before parents raised concerns about IEP; Hunter Weber ex rel EW v. Bureau of Special Educ Appeals 53 IDELR 83 (D. Mass 9/4/9) Court denied reimbursement where parents failed

to give notice of private placement; Erik K by John K and Beth K v. Naperville Sch Dist No.203 53 IDELR 144 (N.D. Ill 10/6/9) District court reversed prior dismissal of reimbursement claim where parents produced correspondence showing that they gave notice of private placement; Chriho Sch Dist 110 LRP 2794 (SEA RI 11/20/9) Ho ruled that parent was not within the safety exception to notice requirement where school district provided a 1:1 aide who constantly supervised the child, therefore no "**likely physical harm**;" Cobb County Sch Dist 109 LRP 72062 (SEA Ga 11/2/9) Where parents violated collaborative spirit of IDEA by refusing to accept all relief requested in complaint, HO reduced reimbursement award; CH by Hayes v. Cape Henlopen Sch Dist 606 F.3d 59, 54 IDELR 212 (3d Cir 5/25/10) Third Circuit denied reimbursement in part because of the parent's noncooperation in scheduling IEPT meetings; Sundbury Public Schs 110 LRP 22290 (SEA Mass 4/9/10) HO denied reimbursement where parents failed to give 10 day notice; Stevens ex rel EL v NY City Dept of Educ 54 IDELR 84 (SD NY 3/18/10) (same); Maynard ex rel GM v. District of Columbia 701 F.Supp.2d 116, 54 IDELR 158 (D DC 4/5/10) Court affirmed HO denial of reimbursement where parent acted unreasonably by giving LEA little time, etc; Contrast, MH & EK ex rel PH v. NY City Dept of Educ 54 IDELR 221 (SD NY 5/10/10) Where parents cooperated and sch dist gave parents the "runaround" equities favored reimbursement; and Bowertown Area Sch Dist 110 LRP 26532 (SEA Penna 1/26/10) HO found equities favored reimbursement where sch dist only offered an IEP at the 11th hour; and RB & HZ ex rel CZ v NY City Dept of Educ 713 F.Supp.2d 235, 54 IDELR 223 (SD NY 5/5/10) Court excused parent's failure to give notice where LEA never gave parents a final notice of placement and no evidence that parents were uncooperative.

6) Richardson Indep Sch Dist v. Michael Z & Carolyn Z ex rel Leah Z 580 F.3d 286, 52 IDELR 277 (5th Cir. 8/21/9) Fifth Circuit developed new test for reimbursement for **residential** placements: 1) Is the residential placement essential for the student to receive educational benefit and 2) Is the primary purpose of the services provided to allow the student to receive educational benefit.

7) Atlanta Independent Sch Dist v. SF by MF & CF 55 IDELR 97 (ND Ga 9/16/10) court ruled that parents are not required to reimburse sch dist for private sch tuition ordered by a HO even if HO decision is overturned on appeal.

c. Other Relief

1). JT by Harrell v. Missouri State Bd of Educ 109LRP 6540 (D. Missouri 2/4/9)Where IDEA has been violated, the court and HO have **broad powers** to fashion an appropriate equitable remedy (citing the SCt in Burlington); In Re Student With A Disability 52 IDELR 239 (SEA **WV** 4/8/9) (HO has broad powers to grant appropriate relief)

2) Egs of **CREATIVE** RELIEF BA by Randall v. State of Missouri 54 IDELR 77 (ED Mo 3/24/10) Court, noting broad powers to remedy violation of IDEA, court rejected conclusion that HO panel did not have authority to award relief including the installation of **surveillance** equipment; City of Chicago Sch Dist # 299 110 LRP 51158 (SEA Ill 6/23/10) Where HO found transition plan completely inadequate, HO ordered an **IEE** that would thereafter drive the new transition process; Miami Dade County Sch Bd 110 LRP 38102 (SEA FL 2/24/10) HO ordered LEA to reimburse parents for the purchase of an **AT device**; Matunuska-Sustina Borough Sch Dist v DY ex rel BY 54

IDELR 52 (D Alaska 2/23/10) Court rejected dist argument that HO lacked authority to require LEA to hire a **specific individual** as an inclusion expert.

3) Ferren C v. Sch Dist of Philadelphia 109 LRP 5365 (E.D. Penna 1/28/9) Court ruled that HO has **broad** authority to impose equitable remedies where IDEA is violated; Congress expressly contemplated and intended that courts and HOs would fashion remedies not specifically enumerated in IDEA. (NB see 3d Circuit decision)

4) Chambers ex rel chambers v. Sch Dist of Philadelphia 53 IDELR 139 (3d. Cir 11/20/9) Third Circuit ruled that compensatory and punitive damages are not available in lawsuits under IDEA.

10. Enforcement of HO Decision

No significant cases.

11. Appeal Issues

a. Exhaustion of Administrative Remedies

1.) Strum v. Bd of Educ of Kanawha County 51 IDELR 192 (W.Va. SCt 12/2/8) **West Virginia** Supreme Court of Appeals held that a party must first exhaust administrative remedies by pursuing a due process hearing before filing an action in court for a violation of **Policy 2419**; State of West Virginia v. Beane 680 S.E.2d 46, 52 IDELR 199 (**W. Va**. SCt 5/4/9) State supreme court reversed trial court order requiring a school district to provide a nurse for a student as a part of an **abuse and neglect** proceeding. Because school district was not a party, it was denied procedural due process. Workman, J. dissenting would have required exhaustion by dp hearing first especially as to whether trail court had jurisdiction of IEP issue; Bess v. Kanawha County Bd of Educ 53 IDELR

71 (S.D.**WV** 9/17/9) Where teacher notes show that student was excluded from school because of autism, exhaustion not required.

2) Dismissed for failure to first have dp hearing: Harris v. Metropolitan Govt of Nashville & Davidson County 52 IDELR 41 (M.D. Tenn 2/25/9); Scott v. State of Hawaii, Dept of Educ 52 IDELR 35 (D. Hawaii 3/5/9); Reyes v. Valley Stream Sch Dist 52 IDELR 105 (E.D. NY 3/26/9); JH & SN ex rel JH v. Egg Harbor township Bd of Educ 52 IDELR 188 (D.NJ 5/11/9); Alaimo v. Bd of Educ TriValley Cent Sch Dist 52 IDELR 292 (S.D. NY 7/6/9); Karlen ex rel JK & DK v. Westport Bd of Educ 638 F.Supp.2d 293, 53 IDELR 17 (D.Conn 7/29/9); CS by RS & VS v. Oak Lawn – Hometown Sch Dist 123 53 IDELR 227 (N.D. Ill 10/22/9); Dallas ex rel Dallas v. Roosevelt Union Free Sch Dist 644 F.Supp.2d 287, 53 IDELR 54 (E.D. NY 8/11/9) (Even where major allegations are race discrimination, dp hearing required first where at least some of the relief could be granted at dp hearing); EM v. Bd of Educ of the City of east Orange 53 IDELR 25 (NJ Superior Ct 8/4/9) (especially where agency expertise or judgment is required, exhaustion necessary; Payne ex rel DP v. Penninsula Sch Dist 598 F.3d 1123, 54 IDELR 72 (9th Cir 3/18/10) The Ninth Circuit, by a 2 – 1 vote, required parents to exhaust admin remedies by a dp hearing where student was injured while locked in a 5x6 foot safe room that was specifically mentioned in the student's IEP. Ninth Circuit noted that HO should have first crack on educational issues presented; ML & BL ex rel ZL v Frisco Independent Sch Dist 55 IDELR 73 (ED Tex 6/15/10) (Court refused to overrule HO ruling on a statute of limitations. Parent was required to first **exhaust** administrative remedies by pursuing dph to conclusion before appealing.); Helsing v. Avon Grove Sch Dist 54 IDELR 284 (ED Penna 6/30/10) (exhaustion required where 1983 & ADA issues have

same facts as IDEA claim); . Brooks ex rel Brooks v. Central Dauphin Sch Dist 54 IDELR 48 (M.D. Penna 2/26/10) Court dismissed parent's claim for failure to exhaust administrative remedies where parent failed to comply with HO directive to amend her complaint by clarifying her claims; Spellman v. Clarksville Montgomery County Sch System 55 IDELR 160 (MD Tenn 10/21/10) Court dismissed parent action for access to educational records for failure to exhaust thru dph, finding that educational records claims are covered by IDEA.

3). Haden C by Tracey C v. Western Placer Unified Sch dist 52 IDELR 189 (E.D. Calif 5/11/9) Court required exhaustion before a parent could enforce a **settlement** (not clear if from resolution meeting) because interpretation of meaning of the agreement is clear therefore dp hearing necessary.

4). SA by LA & MA v. Tulare County Office of Educ 109 LRP 1507 (E.D. Calif 1/5/9) Court held that a parent may appeal the result of a **state complaint**. Contrast opposite decisions.

6). Exhaustion **excused**: Dean ex rel Dean v. Sch Dist of the City of Niagara Falls 615 F. Supp.2d 63, 53 IDELR 159 (N.D.NY 5/7/9) and 52 IDELR 261 (N.D.NY 3/12/9) Court excused exhaustion where school district failed to notify parent of her procedural safeguards; Zeichner v. Mamaroneck Union Free Sch Dist 881 N.Y.S..2d 883, 52 IDELR 264 (N.Y. SCt 6/24/9) Court denied district argument re exhaustion where it is school district responsibility to file dp to override lack of consent to evaluate; Alexis R v high Tech Middle Media Arts Sch 53 IDELR 15 (S.D. Calif 8/3/9) (not required where need for relief becomes known after dp hearing); Rodriguez ex rel CR v. Casa Grande Elem Sch Dist No. 4 55 IDELR 192 (D Ariz 11/8/10) Court

excused exhaustion in negligence action where no IDEA issues were raised; Sabaski v. Wilson County Bd of Educ 55 IDELR 291 (Tenn Ct App 12/17/10) exhaustion not required for state law claims of assault and battery and false imprisonment claims vs staff who allegedly manhandled student.

7). BH ex rel KH v. portage Sch Bd of educ109 LRP 6536 (W.D. Mich 2/2/9) (exhaustion required although complaint for § 504)

b. Deference to Hearing Officer's Decision

1). MS by Simchick v. Fairfax County Sch Bd 553 F.3d 315, 51 IDELR 148 (4th Cir 1/14/9) **Fourth Circuit** ruled that the findings of fact by a HO are entitled to great deference and are prima facie correct; JP by Peterson v. County Sch Bd of Hanover County, VA 516 F.3d 254, 49 IDELR 150 (4th Cir. 2/14/8) Although **Fourth Circuit** noted that HO decision denying reimbursement could have offered a more thorough explanation as to its reasoning, court reversed district court for affording **no** deference to HO decision or its findings. Although HO found all witnesses credible, court held that HO sufficiently identified his reasoning and that his findings were regularly made, not the result of throwing a dart or flipping a coin. County Sch. Bd. of Henrico County v. Z.P. by R.P. 42 IDELR 229 (4th Cir 2/11/05). By a 2 to 1 vote, the **Fourth Circuit** panel held that the District Court erred by not giving due deference to the hearing officer's decision. The court found the hearing officer's decision to be **careful**, **thorough** and supported by the record. Although hearing officers are required to give appropriate deference to professional educators regarding issues of educational methodology, this does not mean that a decision in favor of the parents evidences failure to give such deference. The hearing officer observes witness testimony and is in the best

position to weigh the testimony. (More deference where case turns on competing testimony.) ; Snyder by Snyder v. Montgomery County Pub Schs 53 IDELR 151 (D. Md 9/29/9) Court gave deference to findings that were **regularly made;** ST v. Weast 54 IDELR 83 (D. Md 3/18/10) Court deferred to HO decision where findings of fact were not irregular; Sch Bd of the City of Norfolk v. Brown ex rel RP 111 LRP 4712 (ED Va. 12/13/10) Court found HO findings to have been regularly made and, therefore, entitled to 4th Cir deference- even though HO did not expressly state that P's witnesses were more credible than R's Ws and even though HO did not discuss each bit of evidence in a several week hearing.

2). JAW v. Fresno Unified Sch Dist 611 F.Supp.2d 1097, 52 IDELR 194 (E.D. Calif 4/27/9) Courts give HO decisions that are **careful and thoughtful** more deference; DS & AS ex rel DS v. Bayonne Bd of Educ 54 IDELR 141 (3d Cir 4/22/10) The Third Circuit held that the District Court erred in overturning HO's **credibility** without showing a good reason for doing so;

3). Ashland Sch Dist v. Parents of Student EA 53 IDELR 177 (9th Cir. 12/7/9) Ninth Circuit standard for review of HO decision is modified de novo. A reviewing court must give deference to the HO's findings particularly where they are thorough and careful. The court must also respond to the HO's resolution of each material issue before reaching a different conclusion. But court exercises independent judgment; Compton Unified Sch Dist v AF 54 IDELR 225 (CD Calif 4/26/10) Court gives more deference to HO decisions that are careful, impartial, and **sensitive** to the complexities of the issues presented; Matunuska-Susitna Borough Sch Dist v DY ex rel BY 54 IDELR 52 (D Alaska 2/23/10) Court gives great deference to HO decision that is

careful and thoughtful; SA by CA v. Exeter Unified Sch Dist 110 LRP 69145 (ED Calif 11/24/10) Court gave deference to HO decision that was thoughtful, legal, **impartial** and correct.

4). Doe by Doe v Marlborough Public Schs 54 IDELR 283 (D Mass 6/30/10) The court gave no deference to HO decision where HO used wrong legal analysis re failure to achieve IEP goals; Las Virgienes Unified Sch Dist v SK by JK & BK 54 IDELR 289 (CD Calif 6/14/10) HO decision was **not** entitled to deference because it was not careful and thorough. (no references to testimony or exhibits; serious errors re facts , eg time draft IEP was written); KE by KE & TE v. Independent Sch Dist # 15 54 IDELR 215 (D.Minn 5/24/10) Court gave HO no deference where the decision was not supported by evidence in the record; Stanton ex rel KT v. District of Columbia 639 F.Supp.2d 1, 53 IDELR 16 (D. DC 7/30/9) Court gave no deference where findings of fact were inconsistent with the record.

5). WT & KT ex rel JT v. Bd of Educ Sch Dist of NY City 716 F.Supp.2d 270, 54 IDELR 192 (SD NY 4/15/10) Even though the court was troubled by the HO's findings, court affirmed holding that it must give substantial deference to HO decision and was not free to substitute its own judgment.

6).TY & KY ex rel TY v. New York City Dept of Educ, region 4 584 F.3d 412, 53 IDELR 69 (2d Cir 10/9/9) Deference to HO is particularly important when assessing an IEPs **substantive adequacy** because administrative agencies have substantive expertise; AC & MC ex rel MC v. Bd of Educ of the Chappaqua Cent Sch Dist 553 F.3d 165, 51 IDELR 147 (2d Cir 1/16/9) Second circuit held that district court erred in failing to give SRO deference. Deference is particularly important where there

are questions as to the substantive adequacy of an IEP; CB ex rel ED v. Pittsford Central Sch Dist 54 IDELR 149 (WD NY 4/15/10) Deference accorded.

7). KS by PS &MS v. Freemont Unified Sch Dist 545 F.Supp.2d 995, 49 IDELR 182 (N.D.Calif 2/22/8) Court afforded HO decision deference, then shredded it. Credibility findings were rejected because of faulty reasoning: that district witnesses were corroborated by district documents= invalid. Deducting credibility points from testimony of father because he was an advocate was inconsistent with IDEA collaborative processes. Crediting school district expert who had no contact with child while rejecting parent expert because he had had no contact with child was inappropriate.

8). Maynard ex rel GM v. District of Columbia 701 F.Supp.2d 116, 54 IDELR 158 (D DC 4/5/10) Court gave HO decision that was sufficiently detailed to permit the court to understand its basis.

9). GB & DB ex rel JB v. Bridgewater-Puritan Regional Bd of Educ 52 IDELR 39 (D. NJ 2/27/9) Court gave HO determination "special weight."??

c. Hearing Officer Immunity

1) BJS ex rel NS v State Educ Dept, et al 699 F.Supp.2d 586, 55 IDELR 74 (WD NY 3/23/10) Court held that SRO had absolute quasi-judicial immunity from suit, and that such immunity prevents lawsuits even where actions are erroneous, in excess of authority, malicious or in bad faith; BDS by Douglas-Smith v. Southhold Union Free Sch Dist 52 IDELR 264 (E.D.NY 6/24/9) Court ruled that state SRO is entitled to **absolute quasi-judicial immunity** and dismissed all claims for money damages; MO by CO &LO v. Indiana Dept of Educ 635 F.Supp.2d 847, 52 IDELR 93 (N.D. Ind 3/31/9)

Court ruled that second tier SROs are entitled to absolute quasi-judicial immunity from suit. Court balances factors.

d. Representation by Lawyer

1. In Winkelman by Winkelman v. Parma City Sch. Dist ___U.S.____, 127 S.Ct. 1994, 47 IDELR 281 (5/21/2007) the Supreme Court ruled by a 7 to 2 margin that the IDEA grants independent enforceable rights to parents as well as students. Accordingly, the court concluded that parents may pursue IDEA appeals in federal **court** without being represented by an attorney. NOTE: parents may proceed pro se in a due process hearing. See, discussion of new federal regulation effective 21/31/8 regarding representation by a lay advocate in a due process hearing.

2. The federal regulations were amended effective December 31, 2008 to make an important change to the policy interpretation by OSEP regarding the representation of parties (primarily parents) by **non-lawyers** in due process hearings. Prior to the change, it had been the long-standing interpretation of OSEP that a non-lawyer could represent parents at a due process hearing in much the same way that a lawyer could represent a party. After certain lower courts declared such a practice to be a violation of "unauthorized practice" statutes, OSEP changed 34 C.F.R. Section 300.512 (a)(1) to specify that whether a party has the right to be represented by a non-lawyer at a due process hearing shall be determined by state law.

2. Anika T by John T & Simone T v. Unionville-Chadds Ford Sch Dist 52 IDELR 68 (E.D. Penna 3/24/9) Following Winkleman, parents have standing to sue on their own behalf and to represent themselves under both IDEA and §504.

4. Moore v. Rutherford County Sch Dist 53 IDELR 262 (M.D. Tenn 12/7/9) Parent alleged that she could not respond to discovery requests because there are no SpEd lawyers that will represent parents in Tennessee. Magistrate recommended dismissal. Recommendation adopted at 110 LRP 1410.

5. Nicholas W by Melanie W v. Northwest Indep Sch Dist 53 IDELR 43 (E.D. Tex 8/25/9) Court dismissed FAPE action where parent's attorney refused to obey orders of the court; court rejected argument that neglect was excusable because of the exceptionally **pressing workload** of all lawyers practicing school law; DC & AC ex rel TC v Klein Independent Sch Dist 711 F.Supp.2d 739, 54 IDELR 187 (SD Tex 5/5/10) Court held in response to criticism of representation at dph that there is **no right to effective assistance of counsel** under IDEA.

e. Jury Trial

1. Doe v. Westerville City Sch Dist 109 LRP 1827 (S.D. Ohio 1/5/9) Parties appealing a dp hearing decision in court are not entitled to a jury trial. Because money damages are not available, Seventh Amendment does not apply.

f. Insurance

1). Sch Union No 37 v United National Ins Co 617 F.3d 554, 55 IDELR 34 ((1st Cir. 8/19/10) First Circuit held that policy exclusion for other than monetary damages did not apply to court ordered reimbursement under IDEA; Sch Bd of the City of Newport News v. Commonwealth of Virginia 689 S.E.2d 731, 54 IDELR 59 (Va. SCt 2/25/10) State supreme court held that appeals of IDEA decisions are court actions rather than administrative proceedings and reimbursement award is equivalent to damages, therefore

insurance policy exclusions did not apply and ins co had to defend sch bd in IDEA actions and pay any damages.

2). Progressive Michigan Insurance Co v Calhoun Intermediate Sch Dist 54 IDELR 295 (Mich Ct App 7/6/10) State appeals court held that an insurance company could not sue school district to contest whether certain nursing services provided to the student were required under IDEA. Court denied the claim by the ins co and stated that to rule otherwise would open an avenue for third parties to **second guess educational decisions** made by parents and sch districts through **proper IDEA channels**.

g. Appeal Issues In General

1). Friendship Edison Pub Charter Sch v. Nesbitt 54 IDELR 151 (D DC 4/12/10) Court ordered sch dist to begin providing comp ed even though dist had an **appeal** pending.

2). Atlanta Independent Sch Dist v. SF by MF & CF 55 IDELR 97 (ND Ga 9/16/10) court ruled that parents are not required to reimburse sch dist for private sch tuition ordered by a HO even if HO decision is overturned on appeal.

B. Selected Hot Button Special Education Issues

1. Seclusion and Restraints

a. The Controversy

1). Early in 2009, a study was released, "School is Not Supposed to Hurt: An Investigative Report on The Use of Seclusion and Restraint in Schools," Disability Rights Network (January 2009) available at http://www.napas.org/sr/SR-Report.pdf

(chronicling abusive misuse of restraint and seclusion for children with disabilities resulting in deaths or injuries.)

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

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

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

b. Recent cases

1). Letter to Weiss 55 IDELR 173 (USDOE 1/26/10) Secretary Duncan opined that although he shared concerns re seclusions and restraints, it is currently up to states to determine whether they can be used in schools. IDEA encourages the use of positive behavioral interventions and supports but does not prohibit other measures.

2). Payne ex rel DP v. Penninsula Sch Dist 598 F.3d 1123, 54 IDELR 72 (9th Cir 3/18/10) The Ninth Circuit, by a 2 – 1 vote, required parents to exhaust admin

remedies by a dp hearing where student was injured while locked in a 5x6 foot safe room that was specifically mentioned in the student's IEP. Ninth Circuit noted that HO should have first crack on educational issues presented; (NOTE this decision **implies** that a seclusion and restraint case could be a violation of IDEA.); Alleyne v. NY State Educ Dept 691 F.Supp.2d 322, 54 IDELR 51 (ND NY 2/24/10) Court upheld state law banning aversives and noted that it was consistent with IDEA's clear preference for positive behavior supports.

3). CN by JN v. Williams Public Schs 591 F.3d 624, 53 IDELR 251 (8th Cir. 1/7/10) Eighth Circuit held that a teacher did not violate a student's constitutional rights by using seclusion and restraints where the student's IEP expressly permitted seclusion and restraints to manage behaviors; But see, Doe v. Sumner County Bd of Educ 55 IDELR 95, 96, 136 & 137 (MD Tenn 9/20/10) Court dismissed 504 and ADA claims but allowed certain constitutional claims in cases filed by multiple parents alleging abuse at school by a teacher; JDP by Pope v. Cherokee County Sch Dist 55 IDELR 44 (ND GA 8/18/10) Court held that restraint of a student with autism and mental impairment by staff holding both ankles and wrists was not a violation of 504or ADA.

4). CB v. Sonora Sch Dist 54 IDELR 293 (ED Calif 3/8/10) Court denied immunity and allowed suit against personnel to continue where staff ignored the bip of an 11 year old with a mood disorder that caused him to freeze in place, cross arms and keep his head down, instead calling the police and having him handcuffed and put in the back of a squad car. Court allowed suit against police to go on; sch dist had settled; McElroy by McElroy v. Tracey Unified Sch dist 52 IDELR 187 (N.D. Calif 5/12/9) and 53 IDELR 119 (N.D. Calif 9/17/9) Allegations that staff repeatedly restrained a student with a

disability and educated him in a pup tent barricaded by cafeteria tables stated cause of action for § 1983 violation; no qualified immunity; DD by Davis v. Chilton County Bd of Educ 110 LRP 5489 (M.D.Alabama 9/17/9) (same conclusion re §1983); But see Nicholson v. Freeport Union Free Sch Dist 902 NYS.2d 192, 54 IDELR 258 (NYS Ct App Div 6/8/10) Where parent could not show that school district was aware of the fact that an out of state placement used aversives to curb behaviors including electric shocks, which would be unlawful under state law, no §1983 cause of action.

5). Student with a Disability 110 LRP 18447 (SEA NY 3/11/10) SRO found FAPE and rejected parent challenge to bip claiming aversives were necessary. SRO found that IEP/bip addressed behaviors and that aversives were prohibited by state law; Bryant ex rel DB v NY State Educ Dept 55 IDELR 38 (ND NY 8/26/10) Noting IDEA's preference for positive behavior interventions, Court dismissed claim vs SEA re regulation prohibiting aversives does not constitute a denial of FAPE where parents alleged that reg would take away a viable option for behavior management;

6). Pequot Lakes Indep Sch Dist #186 109 LRP 55000 (SEA Minn 6/26/9) Investigator found that school district violated state law by failing to conduct an FBA before student to seclusion time outs.

7). BD &DD ex rel CD v. Puyallup Sch Dist 53 IDELR 120 (W.D.Wash 9/10/9) Court ruled that staff providing a voluntary quiet room was not an unlawful aversive under state law ; King v. Pioneer Regional Educ Service Agency 53 IDELR 196 (Georgia Ct App 11/5/9) State appeals court ruled that SEA's general supervisory responsibilities under IDEA do not include being subject to tort-like damages; therefore

dismissed action for damages vs. SEA officials when student hanged himself in a seclusion room.

8). Sabaski v. Wilson County Bd of Educ 55 IDELR 291 (Tenn Ct App 12/17/10) exhaustion not required for state law claims of assault and battery and false imprisonment claims vs staff who allegedly manhandled student; Rodriguez ex rel CR v. Casa Grande Elem Sch Dist No. 4 55 IDELR 192 (D Ariz 11/8/10) Court excused exhaustion in negligence action vs bus aide for failing to stop driver from holding an 11 year old girl with a mental disability upside down by her ankles, where no IDEA issues were raised;

9) Jaccari J v. Bd of Educ of the City of Chicago Dist No. 299 52 IDELR 280 (N.D.Ill 7/22/9) Court ruled that **incident reports** showing the use of physical restraints are educational records under FERPA and **IDEA** and ordered district to produce the incident reports for the grandparents of a student with an emotional disturbance.

10). West Baton Rouge Parish Sch Dist 53 IDELR 245 (SEA Louisiana 6/22/9) HO held that because teacher restrained second grade student with autism by holding a hand over his mouth for convenience rather than for safety reasons, this constituted a violation of **IDEA**.

c. Forecast

1). Look for more cases alleging violations of IDEA (See cases on Bullying/Harassment/Safety

2). Also look for possible changes in IDEA in reauthorization- especially the sections regarding behaviors/FBA/BIP etc

2. Educational vs Medical or Other Needs

a. Richardson Indep Sch Dist v. Michael Z & Carolyn Z ex rel Leah Z 580 F.3d 286, 52 IDELR 277 (5th Cir. 8/21/9) The Fifth Circuit reversed a district court reimbursement award, holding that only costs directly related to the student's education are recoverable in a unilateral placement in a **residential** facility. IDEA ensures that children with disabilities receive a meaningful education but it was not intended to shift the costs of treating a disability to the school district. Fifth Circuit took a position closer to the Seventh Circuit (primarily educational) than the Third Circuit (are the medical and educational services intertwined

b. Shaw v. Weast **UNPUBLISHED** 364 F.Appx. 47, 53 IDELR 315 (4th Cir 1/26/10) **FOURTH Circuit** in unpublished opinion ruled that a school district is only required to provide a residential placement if it is necessary for the child to make any educational progress. Where the residential placement is required for medical, social or emotional problems that are segregable from the learning process, the district does not have to pay for it. ?).{Note the Fourth Circuit had previously adopted the Third Circuit "inextricably intertwined" test. See, *Burke County Bd. of Educ. v. Denton,* 895 F.2d 973, 980, 16 IDELR 432 (4th Cir. 1990)}

c. Mary Courtney T v. Sch Dist of Philadelphia 52 IDELR 211 (3d. Cir 7/31/9) Third Circuit denied reimbursement where FAPE denied, but parent private placement was not appropriate because it resulted from the student's **medical** needs rather than her need for SpEd; Ashland Sch Dist v. Parents of Student RJ 588 F.3d 1004, 53 IDELR 176 (9th Cir. 12/7/9) Ninth Circuit denied reimbursement where private residential placement was not appropriate because it was a result of risky and defiant out

of school **behaviors** (sneaking out and a relationship with school janitor); Ashland Sch Dist v. Parents of Student EA 587 F.3d 1175, 53 IDELR 177 (9th Cir. 12/7/9) Ninth Circuit denied reimbursement where private residential placement in a **psychiatric** hospital was not appropriate where it was primarily to meet medical and not educational needs of the student;

d. Linda E ex rel SE v. Bristol Warren Regional Sch Dist 55 IDELR 218 (D RI 12/1/10) and 55 IDELR 196 (11/5/10) Court ruled that the school district needed to provide a residential placement where the student's behavioral problems were not segregable from her educational needs. A teacher had reported the student's behavior problems at school and student had threatened another student.

e. Student with a Disability 110 LRP 54907 (SEA WY 07/08/10) Complaint investigator found that a school district was not responsible for a psychiatric hospitalization that was needed for medical but not educational reasons; Placer County Mental Health Dept 110 LRP 41039 (SEA Calif 7/8/10) HO ruled that a school district was not required to fund a residential placement that was not necessary for educational purposes. Student's violent behaviors occurred outside the classroom.

f. Forest Grove v.TA 53 IDELR 213 (D.Oregon 12/8/9) District court denied reimbursement based upon a balance of equitable factors: placement was for medical treatment rather than educational needs; parents failed to give notice; parents placed student in first facility recommended by their MD without considering cheaper alternatives. The court noted that the deciding factor was that the placement was for the student's **drug abuse and behavioral** problems.

g North St Paul-Maplewood Independent Sch Dist # 622 55 IDELR 118 (SEA Minn 6/7/11) Complaint investigator found that where a student's separation anxiety did not impact his education, his IEP need not address the anxiety.

3. Recession/Bad Economy

a. . ND v. State of Hawaii, Dept of Educ 600 F.3d 1104, 54 IDELR 111 (9th Cir 4/5/10), affirming 53 IDELR 186 in previous outline, Ninth Circuit ruled that 17 **furlough Fridays,** enacted because of the bad economy, was not a stay put violation. Current placement means the educational program of the student. Furlough days applied to all students. To rule otherwise would give parents veto power over the management of the schools See, DK & AK by Kellet v. State of Hawaii, Dept of Educ 53 IDELR 187 (D. Haw 10/22/9) (similar facts, etc); ND v. State of Hawaii, Dept of Educ 55 IDELR 220(D Haw 11/28/10) Because furlough Fridays were not a change of placement, there was no stay put violation.(See also 55 IDELR 219)(same case)

b. Dept of Educ, State of Hawaii 54 IDELR 106 (SEA HI 1/22/10) HO rejected parent challenge to Furlough Fridays as a failure to implement. HO found evidence of academic progress and therefore found the implementation failure to be not material (correct standard???); Dept of Educ, State of Hawaii 110 LRP 11547 (SEA HI 1/22/10) Ho rejected parent argument that Furlough Fridays violated LRE- inability to interact with non-disabled peers on those days.

c. Washington County Public Schs 53 IDELR 105 (SEA Md 4/27/9) State investigator found no violation where LEA faced **unexpected staff shortages**- in this case physical therapists where LEA offered to provide make-up sessions;

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

1). MB by Berns v. Hamilton Southeastern Schs 55 IDELR 4 (SD Ind 8/10/10) "Given the reality of **limited resources**…" IDEA does not require districts to devote "unlimited resources" to assist a student in reaching his highest potential; here ½ day kindergarten = FAPE, full day not required.

2). Ashland Sch Dist v. Parents of Student EA 587 F.3d 1175, 53 IDELR 177 (9th Cir. 12/7/9) Ninth Circuit found that the District Court had not abused its discretion by considering the alleged **excessive cost** of a residential placement where the court concluded that the placement was for medical and not educational needs.

3). Forest Grove v.TA 53 IDELR 213 (D.Oregon 12/8/9) Among the equitable factors weighed by the court in deciding to deny reimbursement was the fact that the parents chose arguably the **most expensive** placement available.

4). Contrast, WH by BH & KH v. Clovis Unified Sch Dist 53 IDELR 121 (E.D.Calif 9/10/9) District court declined to stay its order finding student eligible pending an appeal to the Ninth Circuit where district failed to show likelihood of success on appeal and equities favor SpEd for the student over money savings for the district.

5). Jaccari J v. Bd of Educ of the City of Chicago Dist No. 299 690 F.Supp.2d 687, 55 IDELR 17 (N.D.Ill 7/12/10) Although losing party generally pays court costs, court held that parents who qualified as in forma pauperis and who raised allegations in good faith and lost did not have to pay court costs.

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

f. Letter to Atkins-Lieberman 110 LRP 73608 (OSEP 6/30/10) There is no provision under IDEA that allows a reduction in state financial support based upon a change in the age range of children served. The requirement that next year's financial support of the excess SpEd costs not be below the previous year's support is not affected by eliminating 3 and 4 year olds. (MOE)

g.. Letter to East 110 LRP 73642 (OSEP 6/14/10) MOE requirement re maintaining level of financial support includes the level of support from agencies other than the SEA. This is not a new interpretation. (MOE)

4. IEP Implementation

a. Van Duyn ex rel Van Duyn v. Baker Sch Dist 5J 481 F.3d 770, 47 IDELR 182 (9th Cir. 4/3/7) The Ninth Circuit followed the lead of the 5th and 8th circuits holding that a school district's failure to implement an IEP must be **material** to constitute a violation of IDEA. Minor discrepancies between the services actually provided and those specified in the IEP do not constitute a violation. A material failure occurs when the services provided by a school fall significantly short of the IEP services.

b. Shaun M by Kookie W v. Hamamoto 53 IDELR 185 (D.Haw 10/22/9) Failure to implement was material where 3 year old transitioning from Part C had no services for 26 days; Los Angeles Unified Sch Dist 110 LRP 1131 (SEA Calif 12/28/9) HO found failure to implement to be material where IEP called for 1:1 Aide, but frequent pullouts of the aide prevented preschooler with mental retardation from accessing the curriculum and endangered her safety; Banks ex rel DB v District of Columbia 720 F.Supp.2d 83,

54 IDELR 282 (D DC 7/6/10) Court ruled that a failure to implement must be material to constitute a denial of FAPE; In re Student with a Disability 54 IDELR 210 (SEA NY 3/31/10) SRO overruled HO award of comp ed, finding that misuse of resource room time for testing accommodations was not a material failure to implement; Dept of Educ, State of Hawaii 54 IDELR 106 (SEA HI 1/22/10) HO rejected parent challenge to Furlough Fridays as a failure to implement. HO found evidence of academic progress and therefore found the implementation failure to be not material (correct standard???); Student with a Disability 110 LRP 20100 (SEA NY 3/16/10) SRO found a failure to implement to be material and denial of FAPE where school district discontinued after school instruction that was contained on the student's IEP; Student with a Disability 110 LRP 22976 (SEA VA 3/3/10) Ho found failure to implement bip to be material where it lasted over 10 months and resulted in multiple removals of the student from class.

c. Contrast, DD by VD v. New York City Bd of Educ 465 F.3d 503, 46 IDELR 181 (2d Cir. 10/12/6) The Second Circuit **rejected** district's argument that partial implementation of IEPs constituted the necessary "substantial compliance." The Court held that substantial compliance in IDEA refers only to a district's right to receive funding. The FAPE obligation, on the other hand, requires "compliance."

d. Anderson & Steele ex rel AJ v. District of Columbia 606 F.Supp.2d 86, 52 IDELR 100 (D.DC 3/30/9) Teacher's failure to send monthly progress reports was not a denial of FAPE.

e. Miami Dade County Sch Bd 110 LRP 38102 (SEA FL 2/24/10) HO ordered LEA to reimburse parents for the purchase of an AT device, noting that the failure to implement caused deprivation of educational benefit; Baltimore City Schs 110

LRP 72202 (SEA Md. 6/29/10) State complaint investigator found violation where LEA failed to implement IEP and failed to provide transportation on a reliable basis; Lyon Count Sch Dist 110 LRP 73249 (SEA NV 2/16/10) State complaint investigator found that failure to provide an AT device, a computerized Braille notebook, called for on IEP was a denial of FAPE.

f. Reinhart v. Albuquerque Public Sch Bd of Educ 595 F.3d 1126, 110 LRP 9870 (10th Cir. 2/16/10) Speech language pathologist filed successful state complaint alleging that inaccurate caseload lists deprived students of services on their IEPs. Tenth Circuit ruled that subsequent reduction in her caseload was an adverse action for §504 purposes.

5. Predetermination

a. Deal v. Hamilton County 392 F.3d 840, 42 IDELR 109 (6th Cir. 1//16/04). Where the school district had already **predetermined** the student's program and services **before** the IEP Team meeting, the parents were denied the opportunity to meaningfully participate in the IEP process. Accordingly, the district denied FAPE for the student.

b. JD by Davis v. Kanawha County Bd of Educ 48 IDELR 159 (S.D.WV 8/3/7) The fact that the district had prepared a **draft** IEP for discussion was not predetermination where the parents offered suggestions and changes, many of which were adopted in the IEP; TP & SP ex rel SP v. Mamaroneck Union Free Sch Dist 554 F.3d 247, 51 IDELR 176 (2d Cir 2/3/9) Second Circuit reversed district court and found no predetermination; The fact that staff discussed possible placements before the IEPT meeting and that a consultant prepared a chart comparing the recommendations of both sides, did not show predetermination where parents participated and the team accepted several recommendations made by the parents; Hensley v. Colville Sch Dist 109 LRP

6538 (Wash Ct App 2/3/9) state appellate court held that it was not predetermination because the district staff had a brief caucus during the IEPT meeting; AG & CG ex rel NG v. Frieden 52 IDELR 65 (S.D.NY 3/25/9) No predetermination despite premeeting preparations, where mom participated and IEP reflected mom's request for a PT evaluation; RR & DR ex rel MR v. Scarsdale Union Free Sch Dist 615 F.Supp.2d 283, 52 IDELR 185 (S.D.NY 5/14/9) No predetermination despite premeeting discussions re goals and placements; Temacola Valley Unified Sch Dist 109 LRP 74851 (SEA Calif 11/23/9) HO found no predetermination despite draft IEP and premeeting discussions where changes were made to the draft at the suggestion of parents; Alamo Heights Independent Sch Dist 110 LRP 36348 (SEA Tex 4/12/10) HO ruled no predetermination where school staff had pre-team meetings and discussions about the IEP but they came to IEPT meeting with an **open mind**;

c. In Re Student With A Disability 52 IDELR 239 (SEA **WV** 4/8/9) HO ruled that school district predetermined the result of a **manifestation** determination review, thereby depriving the parents of their right to participate.

d. JD by Davis v. Kanawha County Bd of Educ 48 IDELR 159 (S.D.WV 8/3/7) Where the parents had **derailed** the IEP process before an IEP could be completed after five IEP team meetings in the same year in which parents fully participated, there was no predetermination.

e. In Re Student with a Disability 108 LRP 45824 (SEA WV 6/4/8) Where the district issued a **prior written notice** to the parents explaining that their requests would be denied **before** the IEP team meeting, HO found that the school denied FAPE to the student by predetermining the student's placement. In re Student with a Disability 108

LRP 26467 (SEA WV 12/19/7) Where the IEP was **fully written** and not changed prior to the eligibility meeting, HO held that the district unlawfully predetermined the placement.

f. Where courts and hearing officers find **no predetermination** in the sense of Deal v. Hamilton County, supra, they are likely to uphold the IEP; Winkleman v. Parma City Sch Dist Bd of Educ109 LRP 76161 (N.D. Ohio 10/28/9) and 53 IDELR 215 (N.D. Ohio 11/30/9) Court found no predetermination where district desired to place student in a public school and parents were involved in IEPT meeting; Seladoki v. Bellaire Local Sch Dist Bd of Educ 53 IDELR 153 (S.D. Ohio 8/28/9) Court found no predetermination where parents actively participated in the IEPT meeting; Memphis City Schs 52 IDELR 275 (SEA Tenn 5/21/9) HO found no predetermination where district considered mom's views re ABA services but rejected them Bentonville Sch Dist 53 IDELR 276 (SEA Ark 7/30/9) Ho found no evidence of predetermination; ST v. Weast 54 IDELR 83 (D. Md 3/18/10) Court deferred to HO decision ruling no predetermination where findings of fact were not irregular; SA by CA v. Exeter Unified Sch Dist 110 LRP 69145 (ED Calif 11/24/10) Court rejected claim of predetermination where school district listened to parent concerns and incorporated some of her suggestions into IEP, noting that parent does not have veto powers; Fort Osage R-1 Sch Dist v. Sims ex rel BS 55 IDELR 127 (WD Missouri 9/30/10) Court denied parent claim of predetermination where parents and their experts and advocates were actively involved in IEPT meetings and their input resulted in changes to IEP components; KaD by KyD v Solana Beach Sch Dist 54 IDELR 310 (SD Calif 7/23/10) Court affirmed HO finding of no predetermination where meeting notes showed that parent proposals were discussed in detail at IEPT meeting.

g. Where courts or hearing officers conclude that the IEP was **predetermined**, however, they are likely to find a denial of FAPE. See, Marrieta Valley Unified Sch Dist 110 LRP 36308 (SEA Calif 6/9/10) Where IEPT members came to the meeting with a **closed mind** and did not consider parent suggestions, HO found predetermination and denial of FAPE; Kaliope R by Irene D & George R v. NY State Bd of Educ 54 IDELR 253 (ED NY 6/1/10) Court ruled that parents stated a cause of action against **SEA** for violation of IDEA by alleging that it adopted a policy directing IEP teams to deny 12:2:2 student/teacher/aide ratio for students who need them to make academic progress. If proven, court noted that it would constitute unlawful predetermination; Deer Valley Unified Sch Dist 54 IDELR 206 (SEA Ariz 3/12/10) HO found predetermination where school district refused to consider parent proposal for private day school and discussed only home school under guise of LRE; DB & LB ex rel HB v. Gloucester Township Sch Dist 55 IDELR 224 (DNJ 11/17/10) Where school district staff reached definitive conclusions regarding program and placement before the IEPT meeting, Court found that their **closed minds** constituted predetermination and denial of FAPE.

h. LMP ex rel EP, DP & KP v. Sch Bd of Broward County 53 IDELR 49 (S.D. Fla 8/18/9) Court granted parent's discovery request regarding services provided to other students with autism because it goes to the heart of their predetermination claim, noting court order exception to FERPA and state law.

6. Bullying/ Harassment/Safety

a. Shore Regional High Sch. Bd. of Educ. v. P.S. 381 F.3d 194, 41 IDELR 234 (3d Cir. 8/30/04) A school district's failure to stop **bullying** may constitute a denial of

FAPE. Despite repeated complaints by the parents the bullying continued; the student became depressed and the school district developed an IEP. The harassment continued and the student attempted suicide. The Third Circuit agreed with the hearing officer that the unabated harassment and bullying made it impossible for the student to receive FAPE.

b. Gagliardo v. Arlington Central Sch Dist 489 F.3d 105, 48 IDELR 1 (2d Cir. 5/30/7) The Second Circuit held that the school district had denied FAPE by permitting bullying and **harassment** of the student, but denied reimbursement where the parent placement lacked the trained professionals the student needed as a result of the bullying; . Patterson v. Hudson Area Schs 551 F.3d 438, 109 LRP 351 (6th Cir 1/6/9) Court denied summary judgment in Title IX action where a school district failed to stop the tormenting of a student with an emotional disturbance who was on an IEP.

c. Lillbask ex rel Mauclaire v. State of Connecticut Dept. of Educ. 397 F.3d 77, 42 IDELR 230 (2d Cir. 2/2/05). The Second Circuit Court of Appeals ruled that an IDEA hearing officer has the authority to review IEP **safety** concerns. The court provided an expansive interpretation of the jurisdiction of the hearing officer, ruling that Congress intended the hearing officer to have authority over any subject matter that could involve a denial of or interference with a student's right to receive FAPE, including safety concerns that might affect receipt of FAPE. See also, Los Angeles Unified Sch Dist 110 LRP 1131 (SEA Calif 12/28/9) HO found failure to implement to be material where IEP called for 1:1 Aide, but frequent pullouts prevented preschooler with mental retardation endangered her safety.

d. Wallingford-Swarthmore Sch Dist 110 LRP 26499 (SEA Penna **LV** 3/14/10) Ho ruled that the IEP did not provide FAPE. A teenager with multiple disabilities and a special vulnerability to **bullying** as a victim of past bullying caused the student to be unable to function in a large public school. Accordingly an IEP to be delivered in a large public school could not provide meaningful ed benefit. HO ordered small private school as placement. (**Impact** of bullying on student's **needs**)

e. West Baton Rouge Parish Sch Dist 53 IDELR 245 (SEA Louisiana 6/22/9) Ho held that because teacher restrained second grade student with autism by holding a hand over his mouth for convenience rather than for safety reasons, this constituted a violation of IDEA; McElroy by McElroy v. Tracey Unified Sch Dist 52 IDELR 187 (E.D. Calif 5/12/9) Allegations that staff restrained a student with disabilities and educated him in a pup tent barricaded by cafeteria tables stated a cause of action under §1983; Pequot Lakes Indep Sch Dist #186 109 LRP 55000 (SEA Minn 6/26/9) Investigator found that school district violated state law by failing to conduct an FBA before student to seclusion time outs. But see, BD &DD ex rel CD v. Puyallup Sch Dist 53 IDELR 120 (W.D.Wash 9/10/9) Court ruled that staff providing a voluntary quiet room was not an unlawful aversive under state law; Harrisburg City Sch Dist 55 IDELR 149 (SEA Penna WC 5/26/10) HO rejected parent assertion that bullying was a denial of FAPE where the student made academic progress; Township HS Dist 214 54 IDELR 107 (SEA Ill 2/4/10) HO took into account that the student was a victim of bullying in ruling that a threat he made was a **manifestation** of his disability; Aganam Public Schs 111 LRP 1357 (SEA Mass 12/28/10) HO ruled that a student did not need a bus monitor where seating change addressed bus bullying incident and where student was receiving

FAPE; Sabaski v. Wilson County Bd of Educ 55 IDELR 291 (Tenn Ct App 12/17/10) exhaustion not required for state law claims of assault and battery and false imprisonment claims vs staff who manhandled fragile student, placed her in "quiet room" and when she resisted restraint had her arrested and taken to jail.

f. Salem Public Schs 110 LRP 33055 (SEA Mass 5/14/10) Although recognizing that a school district has the obligation to provide FAPE while keeping the student **safe,** HO rejected parent claim where the student was called names and hit but the evidence showed that the student often instigated the aggressive behaviors; Georgetown Public Schs 55 IDELR 147 (SEA Mass 9/2/10) HO found no violation of IDEA where school did everything it could to make the student safe, but the students multiple disabilities made her unsafe.

g. Plock v. Bd of Educ of the Freeport HS Dist, No. 145 53 IDELR 267 (Ill.App.Ct 12/8/9) Court struck down district plan to install **video and audio** recording devices after substantiated allegations of abuse of SpEd students as a violation of state eavesdropping statute.

h. Also see, the new hot button issue on seclusion and restraints

7. Methodology

a. Parents cannot compel a specific **methodology**; Lessard v. Wilton-Lyndeborough Coop Sch Dist 592 F.3d 267, 53 IDELR 279 (1st Cir 1/20/10) First Circuit ruled that where student made progress FAPE provided despite IEPT refusal to use the methodology preferred by parents; Xenon Public Schs 110 LRP 31562 (SEA Mass 5/24/10) (same); Desoto County Sch Bd 110 LRP 38104 (SEA Fla 3/29/10)Failure to use parent's preferred methodology- total communication- did not deny FAPE; Souderton

_____ 52 IDELR 6 (E.D. Penna 2/12/9) Court rejected a challenge by parent to a particular methodology as not based upon peer-reviewed research to the extent practicable. Where Orton Gillingham method was a "best practice," it was sufficient. {See related case at: Jonathan H by John H & Susan H v. Souderton Area Sch Dist 562 F.3d 527, 52 IDELR 31 (3d Cir 4/14/9)}; Shakopee Indep Sch Dist 52 IDELR 10 (SEA Minn 3/18/9) Complaint investigator found that as long as FAPE is provided, the choice of educational methodology is left to the discretion of the school district.

b. Concord Public Schs 110 LRP 51493 (SEA Mass 9/3/10) HO relied upon the John M court's reasoning in ruling that a change from a single teacher to a co-taught classroom was a change in methodology, and not a change in placement, which therefore did not violate stay put.

c. In Re: Student With a Disability 51 IDELR 87 (SEA WV 8/19/8) If FAPE is provided, questions of methodology are best left to the discretion of professional educators.

d. Seladoki v. Bellaire Local Sch Dist Bd of Educ 53 IDELR 153 (S.D. Ohio 8/28/9) Court ruled that choice of methodology by school district must be based upon the individual needs of a student. Court rejected parent's argument that all children with autism require 30-40 hours per week of **ABA** services; Wilson County Bd of Educ 54 IDELR 268 (SEA Tenn 3/15/10) Parents could not dictate ABA methodology where school district's "eclectic" program provided meaningful ed benefit in the LRE; Contrast, MH & EK ex rel PH v. NY City Dept of Educ 54 IDELR 221 (SD NY 5/10/10) Court

credited testimony of psychologist that student with autism would receive no benefit from district program and awarded reimbursement for ABA therapy.

8. Parent's Right to Participate in the IEP Process

a. Alexis v. Bd. of Educ. for Baltimore County Public Sch. 268 F.Supp.2d 551, 40 IDELR 7 (D.Md. 10/6/3). The District Court found that the Supreme Court's emphasis on procedural safeguards in Rowley concerned adequate parental involvement and **participation** in the process of formulating the IEP rather than strict adherence to the laundry list of procedural items contained in the IDEA.

b. JD by Davis v. Kanawha County Bd of Educ 48 IDELR 159 (SD WVa 8/3/7) Although parents have a right to meaningful participation in the IEP process, they do not have a right to **dominate** the process. The court found that the parent hijacked and derailed the IEP team process; In re Student with a Disability 52 IDELR 306 (SEA NY 4/12/9) SRO found that parents right to participate was not violated where IEPT considered but rejected the conclusions of the parents' private psychologist; Tuscaloosa County Bd of Educ 110 LRP 54745 (SEA Ala 6/9/10) HO rejected participation claim where parent attended all meetings and the team discussed her concerns and implemented most of her recommendations; Red Clay Sch Dist 54 IDELR 270 (SEA Del 5/25/10) HO panel found meaningful participation; Minnesota Special Sch Dist # 001 110 LRP 44951 (SEA Minn 5/17/10) State complaint investigator found no violation of right to participate where principal required parent to comply with visitor policy requiring that she sign in after parent threatened the student's teacher; Independent Sch Dist of Boise No. 1 110 LRP 32057 (SEA Idaho 3/23/10) HO rejected participation claim where IEPT read parent's expert's report, sent him written question, met with the

expert and he provided written follow-up even though IEPT did not adopt his recommendations;

c. Winchester Bd of Educ 110 LRP 14850 (SEA Conn 2/4/10) Ho found that egregious **procedural** violations denied parent the right to meaningful participation. School district failed to invite persons knowledgeable about student to IEPT; failed to write goals while parent present at IEPT meeting –instead doing it 3 days later by selecting goals for a form bank of standard goals.; Adams County Sch Dist 55 IDELR 210 (SEA Colo 8/13/10) Investigator ruled that school district procedural violation in using an IEP as PWN without all required contents deprived parents of the right to meaningful participation; Contrast, Shoreline Sch Dist 110 LRP 12540 (SEA Wash 2/4/10) HO ruled that procedural violation of no PWN re what evaluations would be conducted did not violate participation rights where parent objected to all evaluators.

d. Corona-Norco Unified Sch Dist 110 LRP 15982 (SEA Calif 2/22/10) HO found that school district was justified in holding IEPT **meeting without** the parent present where district made and documented efforts to reschedule meeting with no explanation by parent for unavailability; Haxen ex rel RH v. South Kingston Sch Dept 55 IDELR 289 (D RI 11/22/10) Magist J held that school district did not violate participation rights by failing to invite parents to IEPT meeting by oversight where team reconvened the next day with parents and parents did attend a follow-up IEPT meeting and their input resulted in change in number of hours of aide support; Mahoney ex rel BM v. Carlsbad Unified Sch Dist 52 IDELR 131 (S.D. Calif 4/8/9) Court found that parents were able to participate meaningfully even though their private provider was not invited to IEPT meting;

e. JW by JEW & JAW v. Fresno Unified Sch Dist 611 F.Supp.2d 1097, 52 IDELR 194 (E.D. Calif 4/27/9) Court noted that parental participation in the IEPT process is the cornerstone of IDEA. Accordingly the fact that parents previously supported mainstreaming does not constitute a **waiver** of their right to challenge the placement, but it does lend support to the conclusion that the placement was appropriate at the time, aff'd 55 IDELR 153.

f. Dallas Independent Sch Dist 110 LRP 36304 (SEA TX 4/27/10) HO ruled that right to participate does not give the parent the right to **tape record** an IEPT meeting , except where parent can show that recording was necessary in order to participate.

g. Sch Bd of Manatee County v. LH 53 IDELR (M.D. Fla 3/30/9) District's policy prohibiting parent's psychologist from observing student as part of an evaluation violated IDEA; Weymouth Public Schs 52 IDELR 116 (SEA Mass 2/20/9) Based upon state statute, HO ordered school district to permit the parents to **observe** the student's program for 13 hours; East Whittier City Sch Dist 109 LRP 50618 (SEA Calif 7/17/9) HO ruled that district did not violate state law by restricting observation by parents expert witnesses to four 30 minute periods;

h. Mat-Su Borough Sch Dist 55 IDELR 55 (SEA Alaska 7/18/10) HO found that school district refusal to discuss the particular school/location at IEPT meeting seriously impaired parent right to participate. Although location of services is generally an administrative decision, here student had severe sensory issues and the school setting was closely tied to her ability to benefit from IEP.

9. Least Restrictive Environment

a. P by Mr & Mrs P v. Newington Bd of Educ 546 F.3d 111, 51 IDELR 2 (2d Cir 10/9/8) Second Circuit adopted the two pronged ***Oberti* test** (can the regular ed classroom with supplemental aids and services be satisfactorily achieved for the student; if not, has the student been mainstreamed to the maximum extent appropriate.). Where district made significant efforts to include child in general ed classroom with a variety of supplemental aids and modifications, 74% inclusion was LRE placement; Roseville City Elementary Sch 110 LRP 1168 (SEA Calif 12/23/9) Where student attacked other students and disrupted the general ed classroom, HO approved special day class as LRE placement.

b. Lessard v. Wilton-Lyndeborough Coop Sch Dist 592 F.3d 267, 53 IDELR 279 (1st Cir 1/20/10) **First** Circuit rejected parent's LRE argument holding that LEA's special day school was less restrictive than the home instruction placement sought by the parents.; RH by Emily H & Matther H v. Plano Independent Sch Dist 54 IDELR 211 (5th Cir 5/27/10) Interpreting its own Daniel RR test, the **Fifth** Circuit ruled that the LEA's inclusion preschool class was LRE for a preschool student rather than parent's private preschool with general ed classes. Court noted that under IDEA, placement in a private school is the exception!

c. NL by Lordo v Sp Sch Dist of St Louis County 54 IDELR 78 (ED Mo 3/23/10) Court affirmed HO panel decision that LEA violated LRE by pacing second grader in a special ed school after his having made academic progress in a self contained class; GB & LB ex rel NB v tuxedo Union Free Sch Dist 55 IDELR 228 (SD NY 9/30/10) Court ruled that placing a four year old with pervasive developmental disorder

in a self-contained classroom with little chance to interact with non-disabled peers violated the LRE mandate. Court found that school district failed to supplementary aides and services in a less restrictive setting, such as aide used successfully in past; CP & JD ex rel MD v. State of Hawaii, Dept of Educ 54 IDELR 218 (D Haw 5/17/10) Court ruled that self contained one-on-one classroom coupled with a plan of gradual inclusion was LRE placement; Southern York County Sch Dist 55 IDELR 242 (SEA Penna **JM** 9/29/10) HO found that LRE placement was homebound instruction for student with disease that prevented him from coming to school; webcam sessions provided some interaction with peers; Rosedale Union Elem Sch Dist 110 LRP 37643 (SEA Calif 6/29/10) HO found that LRE placement for anti-social and mentally impaired student was a special day class with low student teacher ratio; HO found that no degree of modifications to the general curriculum would provide benefit; Ft Bend Independent Sch Dist 110 LRP 49278 (SEA TX 6/25/10) HO found that self-contained special ed class was the LRE placement for a student with a mental impairment and speech impairment; Glendale Unified Sch Dist 54 IDELR 306 (SEA Calif 6/23/10) HO found that a special day class was the LRE placement for a six year old with autism, noting that the modifications to the general curriculum that she would require would isolate the student from her peers and disrupt their learning; Wilson County Bd of Educ 54 IDELR 268 (SEA Tenn 3/15/10) Parents could not dictate ABA methodology where school district's "eclectic" program provided meaningful ed benefit and was the LRE placement under IDEA; Portales Municipal Sch Dist 110 LRP 70712 (SEA NM 9/10/10) HO ruled that LEA violated LRE by placing a student at home rather than in classroom with modifications suggested by parent autism expert.

d. Geffre ex rel SG v. Leola Sch Dist 44-2 53 IDELR 156 (D.SD 9/25/9) Court reversed HO and found that because of the students improving behavior, the alternative placement was no longer LRE; Millay ex rel YRM v. Surry Sch Dist 109 LRP 79729 (D. Maine 12/22/9) Court found LRE violation where district failed to explain what exposure student would have to non-disabled peers; Fresno Unified Sch Dist 52 IDELR 150 (SEA Calif 4/28/9) HO found LRE violation where district failed to show that student could not be educated in a less restrictive setting with the use of supplementary aids and services; Los Angeles Unified Sch Dist 109 LRP 76217 (SEA Calif 11/30/9) HO found 70% general ed not LRE where preschool student with autism was just learning to develop social skills; West Baton Rouge Parish Sch Dist 53 IDELR 245 (SEA Louisiana 6/22/9) HO held that where teacher restrained second grade student with autism , LRE violated.??

e. Richard Paul E by Anette SB v. Plainfield Community Sch Dist 202 52 IDELR 130 (N.D.Ill 4/9/9) IDEA requires **mainstreaming** only to the maximum extent **appropriate**; JW by JEW & JAW v. Fresno Unified Sch Dist 611 F.Supp.2d 1097, 52 IDELR 194 (E.D. Calif 4/27/9) Court rejected parent challenge to general ed placement for a sixth grader with a cochlear implant, finding the placement to be LRE, aff'd 55 IDELR 153; Gavrity ex rel MG v. New Lebanon cent Sch Dist 53 IDELR 152 (N.D.NY 9/29/9) School district has an obligation to select the least restrictive setting that can confer educational benefit under LRE provision; therefore, fact that they considered more restrictive setting does not mean IDEA violated; James & Lee Anne D ex rel Sarah D v. Bd of Educ of Aptakisic-Tripp Community Consol Dist No. 102 52 IDELR 281 (N.D. Ill 7/22/9) Court ok'ed program with 30% of student's time in general education as LRE;

Dan M ex rel Colin M v. Dept of Educ, State of Hawaii 53 IDELR 255 (D.Haw 12/18/9) IDEA's strong preference for mainstreaming is not absolute and court upheld pull out instruction where student was not engaged in the general ed class; Thompson R-2J Dist 53 IDELR 63 (SEA Colo 4/3/9) District was correct to select mainstream placement even though student reacted badly and was hospitalized; Richland County Sch Dist One 52 IDELR 208 (SEA SC 4/10/9) Despite strong preference, mainstreaming is not required where the benefits obtainable in a separate setting outweigh any marginal benefit from mainstreaming; Santa Anna Unified Sch Dist 53 IDELR 133 (SEA Calif 9/14/9) HO OK'ed general ed classroom as LRE for a nine year old with an SLD; Poway Unified Sch Dist 53 IDELR 208 (SEA Calif 10/21/9) HO approved special day class on general ed campus as LRE placement for a teenager with autism.

f. North Bend Sch Dist 110 LRP 26485 (SEA Penna 4/24/10) The LRE **preference** for educating a child in her **neighborhood school** is not a right; where another school better suited her needs, HO ruled LRE & 300.116(c) not violated.

g. CB by BB & CB v. Special Sch Dist No 1, Minneapolis 52 IDELR 283 (D. Minn 7/20/9) Reimbursement denied where **parent's private placement** did not serve general ed students therefore not sensitive to LRE;

h. Deer Valley Unified Sch Dist 54 IDELR 206 (SEA Ariz 3/12/10) HO found predetermination where school district refused to consider parent proposal for private day school and discussed only home school under **guise** of LRE;

i. Barron ex rel DB & NB v State of South Dakota 55 IDELR 126 (D SD 9/30/10) Court ruled that state decision to close school for the deaf comported with the LRE requirements of IDEA.

j. In re Student with a Disability109 LRP 76698 (SEA NY 11/20/9) SRO rejected HO compensatory education award of a 1:1 program as inconsistent with LRE and instead ordered an individualized reading program over the summer.

k. L by Mr & Mrs F v. North Haven Bd of Educ 624 F.Supp.2d 163, 52 IDELR 254 (D. Conn 9/10/9) Court rejected blanket policy that general education must constitute 80& of student's time; placement must be decided on a case-by-case basis.

l. Letter to Anonymous 53 IDELR 127 (OSEP 3/30/9) OSEP provided opinion that IDEA requires **charter** schools, whether themselves a separate LEA or not, to ensure the availability of the full continuum of placements and that students with disabilities are placed in the LRE.

m. In re Student with a Disability 110 LRP 68414 (SEA VA 9/1/10) HO ruled that when FAPE and LRE compete, the FAPE requirement overrules the LRE requirement (?? Not inclusion; q = LRE placement that is appropriate)

n. ADDITIONAL RESOURCE: Mark C Weber, "A Nuanced Approach to the Disability Integration Presumption," 156 U. Pa. L. Rev. PENNumbra 174 (2007)

10. Court Issues: Immunity, Standing, Mootness, etc.

a. **Immunity**

CB v. Sonora Sch Dist 54 IDELR 293 (ED Calif 3/8/10) Court denied immunity and allowed suit against police personnel to continue after school district settled where staff ignored the bip of an 11 year old with a mood disorder that caused him to freeze in place, cross arms and keep his head down, instead calling the police and having him handcuffed and put in the back of a squad car.

b. **Mootness/Ripeness**

1). AM by Marshall v. Monrovia Unified Sch Dist 627 F.3d 773, 55 IDELR 215 (9th Cir 12/15/10) Ninth Circuit reversed an award of attorney's fees against parents for litigating after claim became frivolous. Where parents sought reimbursement for home education, fact that student died during litigation did not render their claim moot.

2). BC by LC v. Colton-Pierpont Cent Sch Dist 53 IDELR 252 (2d Cir 12/21/9) Second Circuit held that parents' complaint was mooted by a change in state law providing the relief sought by the parents – a declaration that home-schooled children are eligible to receiv3e special ed; John M. by Christine M & Michael M v. Bd of Educ of the Evanston Township HS Dist No. 202 52 IDELR 73 (N.D. Ill 3/16/9) Where stay put placement provided all relief sought by parents and district agreed to keep it, court dismissed FAPE lawsuit as moot;

3). Hawkins v. District of Columbia 54 IDELR 91 (D DC 3/10/10) Court ruled that where parent had received all of the substantive relief, this moots the complaint; District of Columbia v. Strauss (D.DC 4/14/9) 607 F.Supp.2d 180, 52 IDELR 126 (D.DC 4/14/9) LEA decision to fund IEE at issue mooted dp complaint seeking evaluation; DR by Robinson v. Government of District of Columbia 637 F.Supp.2d 11, 53 IDELR 19 (D.DC 7/21/9) Court dismissed complaint as moot where parent had obtained all relief sought including evaluations, comp ed and revisions to IEP;

4). Bd of Educ, Massapequa Union Free Sch Dist v. CS by RS 54 IDELR 45 (ED NY 3/4/10) The case was mooted by the student's graduation; MO by CO & LO v. Duneland Sch Corp 53 IDELR 182 (N.D.Ind 10/29/9) Court held that student's

graduation mooted parents' IDEA claims; Contrast, KB ex rel JB v. Haldeon Bd of Educ 52 IDELR 263 (D.NJ 6/30/9) Court held that graduation from middle school district did not moot request for IEE.

5). AO ex rel MW v. El Paso Indep Sch Dist 52 IDELR 227 (W.D. Tex 3/30/9) Court overruled HO dismissal of complaint as moot by relief provided by district where state complaint form asked for relief…"to the extent known," and parents alleged they did not know all relief sought.

6). MM by Matthews v. Government of District of Columbia 607 F.Supp.2d 168, 52 IDELR 128 (D.DC 4/13/9) Court dismissed complaint as not ripe where time for district to evaluate the student had not yet run; Zoe M v. Blessing 52 IDELR 184 (D. Ariz 5/15/9) Court dismissed complaint based upon surmised future legislative action, finding no case and controversy.

c. **Standing** (No significant cases.)

d.. **Private Right of Action** (No significant cases.)

e. **Other Issues**

1). **Removal.**

a. SB ex rel HP v. Florida Sch for the Deaf & Blind 54 IDELR 99 (MD Fla 2/19/10) After losing dph before HO, guardian brought a separate state court action challenging district procedures and the involuntary commitment of the student. School district removed the action to federal court, parent objected and court ruled no federal jurisdiction over state law claims; Contrast, Shea & Esteves ex rel Shea v. Union Free Sch Dist of Massapequa 682 F.Supp.2d 239, 54 IDELR 11 (ED NY 2/5/10) Court declined to remand to state court parent complaint citing violation of IDEA, a federal

statute; and BK by Webster & Corrigan-Webster v. Dunbar Public Schs 54 IDELR 314 (MD NC 7/20/10) Court allowed removal of parents challenge to SRO decision despite parent argument that state law established a higher FAPE standard.

b. PR, MR & NR ex rel SR v. Central Texas Autism Center 52 IDELR 222 (W.D.Tex 5/15/9) Where claim was based in tort and not upon IDEA, Court held that an evaluator who created a BIP could not remove the case to federal court; Kabfliesch by Kabfliesch v. Columbia Community Sch Dist Unit #4 644 F.Supp.2d 1084, 53 IDELR 2 (S.D.Ill 8/5/9) Federal court granted parent's motion to return case to state court where complaint was not based upon IDEA and there was no federal question.

2). **Pleading/Service**.

a.Jonathan H by John H & Susan H v. Souderton Area Sch Dist 562 F.3d 527, 52 IDELR 31 (3d Cir 4/14/9) after considering the wording of IDEA procedural safeguards, Third Circuit held that 90 day appeal period does not apply to **counterclaims** filed by the responding party. Reversing 49 IDELR 277 (E.D. Penna 3/20/8) cited in last year's outline; Miller ex rel Miller v. Bd of Educ of the Albuquerque Public Schs 565 F.3d 1232, 52 IDELR 61 (10th Cir 5/11/9) Tenth circuit refused to consider district counterclaim seeking reimbursement for comp ed provided where the school district had not raised the issue before the district court; Houston Indep Sch Dist v. VP by Juan & Sylvia P 566 F.3d 459, 52 IDELR 62 (5th Cir 4/23/9) Where school district had notice that parents were seeking reimbursement, fact that parents did not file a counterclaim to district complaint seeking reversal of HO decision did not prevent reimbursement.

b. CB ex rel EB v. Pittsford Cent Sch Dist 53 IDELR 75 (W.D.NY 9/15/9) Noting IDEA's confidentiality provisions, court rejected a school district's motion to strike a parents complaint as an "**anonymous** pleading" because the parent and child identified themselves only by initials. Contrast, SR & MC ex rel MC v. Bd of Educ of New York City 49 IDELR 255 (S.D. NY 2/25/8) Court held that neither FERPA nor IDEA gave the parents a right to pursue a federal court action without stating the **names** of the parents and the child. Court gave parents one week to provide the names.

c. Bd of Educ County of Nicholas v. HA by Monica A 54 IDELR 246 (SD WV 6/15/10) Court found LEA complaint sufficiently plead despite parent claim that it was frivolous and an attempt to bully a pro se parent. DW v. Delaware Valley Sch Dist 109 LRP 80026 (M.D. Penna 12/29/9) Court held that parents met the requirements of notice pleading; Contrast, Hutchinson v District of Columbia 54 IDELR 245 (D DC 6/17/10) Court dismissed parent complaint as insufficiently plead where complaint was 2 sentences and lacked sufficient details.

d. DL ex rel JL & RL v. Unified Sch Dist No 497 596 F.3d 768, 54 IDELR 1 (10th Cir 2/23/10) Tenth Circuit held that where district court had given parents an opportunity to submit a brief explaining their allegations and they declined, parents had abandoned their IDEA claim.

3). **Collateral Estoppel/Res Judicata**

a. NB **UNPUBLISHED** Davis v. Hampton Public Schs 55 IDELR 122 (**4th Cir** 10/1/10) **Res judicata** prevented a former student from

relitigating claims that a school district had misdiagnosed him. A previous judgment on an IDEA claim (based upon statute of limitations) precluded this claim;

b. JG by Stella G v. Baldwin Park Unified Sch Dist 55 IDELR 2 (CD Calif 8/11/10) Where the parent filed multiple dpcs alleging the same issues or multiple complaints where the parent could have raised other issues in a previous complaint, Court affirmed the HO's dismissal of the later complaints under res judicata and collateral estoppel; Theodore ex rel AG v. District of Columbia 55 IDELR 5 (D DC 8/10/10) Court ordered parties to argue the correctness of the HO's dismissal of the claim under res judicata as already having been litigated rather than arguing the merits of the case.

c. Dept of Educ, State of Hawaii v. Karen I ex rel Marcus I 618 F.Supp.2d 1239, 52 IDELR 129 (D.Haw 4/10/9) Federal court dismissed appeal where a prior ruling by a state court prevented the claim on the basis of res judicata; Marcus I & Karen I v. State of Hawaii, Dept of Educ 53 IDELR 189 (D.Haw 10/21/9) Because IDEA requires annual review of IEPs, there can be no res judicata effect for rulings on previous IEPs.

4). **Pendant State Causes of Action**. (no significant cases)

5). **Interlocutory Appeals** SA by LA & MA v. Tulare County Office of Educ 109 LRP 10904 (E.D.Calif 2/10/9) Court denied district motion to certify prior ruling for interlocutory appeal to appellate court.

6). **Class Certification** Blunt v. Lower Merion Sch Dist 53 IDELR 46 (E.D.Penna 8/19/9) Court declined to certify class action alleging wrongful removal of black students from general education, noting that IDEA decisions are necessarily based

upon individualized analysis.??; CG v. Commonwealth of Penna, Dept of Educ 53 IDELR 150 (M.D. Penna 9/29/9) Dist court certified a class action re the manner that SEA distributes IDEA funds;

7). **Supremacy Clause** Disability Law Center of Alaska v. Anchorage Sch Dist 581 F.3d 936, 53 IDELR 2 (9th Cir. 9/9/9) Ninth Circuit held that District Court erred in awarding attorneys fees vs parent attorney under state law. IDEA provisions as federal law is supreme; In Re Student With A Disability 52 IDELR 239 (SEA **WV** 4/8/9) HO held that to the extent that the state Safe Schools Act conflicts with IDEA, the federal statute prevails; . Fairlawn Bd of Educ 110 LRP 26395 (SEA NJ 3/25/10) HO ruled that fed law (=stay put) trumps state law provision permitting administrative ho to grant relief pending outcome of an admin hearing.

8). **Stay on Appeal** WH by BH & KH v. Clovis Unified Sch Dist 53 IDELR 121 (E.D.Calif 9/10/9) District court declined to stay its order finding student eligible pending an appeal to the Ninth Circuit where district failed to show likelihood of success on appeal and equities favor SpEd for the student over money savings for the district; Friendship Edison Pub Charter Sch v. Nesbitt 54 IDELR 151 (D DC 4/12/10) Court ordered sch dist to begin providing comp ed even though dist had an **appeal** pending.

9). **Temporary Injunction** Alleyne v. NY State Educ Dept 691 F.Supp.2d 322, 54 IDELR 51 (ND NY 2/24/10) Court upheld state law banning aversives and noted that it was consistent with IDEA's clear preference for positive behavior supports, but permitted a temporary injunction allowing private school in Massachusetts to continue using aversive techniques on NY student pending resolution of lawsuit.

10). **Court Costs** Jaccari J v. Bd of Educ of the City of Chicago Dist No. 299 690 F.Supp.2d 687, 55 IDELR 17 (N.D.Ill 7/12/10) Although losing party generally pays court costs, court held that parents who qualified as in forma pauperis and who raised allegations in good faith and lost did not have to pay court costs.

11. Discipline/ Manifestation Determination

a. In Re Student With A Disability 52 IDELR 239 (SEA **WV** 4/8/9) Under IDEA'04 changes, conduct is a **manifestation** of a disability only if 1) the disability caused or is substantially related to the conduct, or 2) the conduct is the direct result of the failure to implement the IEP.

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

c. Questions and Answers on Discipline Procedures 52 IDELR 231 (OSERS 6/1/9) (NB OSERS offers guidance in the situation where consent is revoked); Questions and Answers on Procedural Safeguards and Due Process Procedures 52 IDELR 266 (OSERS 6/1/9).(NB OSERS clarifies that a school district may still go directly to court for a temporary injunction to remove a student for safety reasons. In OSERS' opinion a district need not exhaust administrative remedies in that situation.); Questions and Answers on Serving Children with Disabilities Eligible for Transportation 53 IDELR 268 (OSERS 11/1/9) (NB OSERS clarifies that because a school bus suspension may be a

change of placement, it may trigger all of the IDEA disciplinary protections , including educational services to enable student to access the general curriculum)

d. District of Columbia v. Doe ex rel Doe 611 F.3d 888, 54 IDELR 275 (DC Cir 7/6/10) DC Circuit ruled that HO did not exceed his authority where he **reduced** a disciplinary **suspension.** HO reduced a 45 day suspension to an 11 day suspension noting the trivial nature of the infraction and finding that the more lengthy suspension denied FAPE to the student. Court notes that in legislative history Congress intended to strip schools of the unilateral authority they traditionally had to exclude children with disabilities. Note this reverses the district court decision at 573 F.Supp.2d 57, 51 IDELR 8 (D.DC 8/28/8) cited in previous outlines.

e. Doe by Doe v. Todd County Sch Dist 625 F.3d 459, 55 IDELR 185 (8 th Cir. 11/12/10) Eighth Circuit held that school district did not violate a student's constitutional rights by failing to change his IAES. 4 days into suspension IEPT changed his suspension to a placement at an alternative high school. Only IEPT, not school board could change placement.

f. In Re Student With A Disability 52 IDELR 239 (SEA **WV** 4/8/9) HO **reversed** an expulsion and a finding of no manifestation where the school district MDT was a 20 minute meeting with no discussion of the student's disabilities or the possibility that they were related to his misconduct and ignored teacher reports stating that he was easily manipulated into wrongdoing; In Re Student with a Disability 108 LRP 45824 (SEA WV 6/4/8) HO overturned finding of no manifestation where the student's IEP noted that his violent behaviors are likely caused by his disabilities and where MD team reached opposite conclusion on similar behavior two months earlier. HO ruled that

kicking a teacher was a manifestation of PDD and ADHD; In re Student with a Disability 108 LRP 60701 (SEA Va 8/13/8) Where school bus video showed 13 year old with intermittent explosive disorder discussing his plan to attack another student, the later attack was not a manifestation; In re Student with a Disability 53 IDELR 173 (SEA Wisc 4/8/9) HO overturned the expulsion of a 13 year old because the MDR team did not consider all relevant data, including a behavioral evaluation; Marietta Valley Unified Sch dist 53 IDELR 108 (SEA Calif 5/14/9) HO overturned an expulsion because the MDR team did not consider relevant information and where the conduct of looking under bathroom stalls was directly and substantially related to the student's cognitive impairment; Township HS Dist 214 54 IDELR 107 (SEA Ill 2/4/10) HO took into account that the student was a victim of **bullying** in ruling that a threat he made was a manifestation of his disability;

g. Elk Grove Unified Sch Dist 109 LRP 5817 (SEA Calif 1/14/9) HO **upheld** school district conclusion that student's behavior in threatening football coaches and cursing was not a manifestation of his ADHD and upheld suspension.

h. Olympia Sch Dist 52 IDELR 178 (SEA Wash 3/17/9) HO ruled that school district was not required to hold a **manifestation determination** review where the suspension was for only two days and there was no pattern indicating a change of placement; Florida Sch for the Deaf & Blind 53 IDELR 32 (SEA Fla 3/24/9) Where student was disenrolled for safety reasons, HO held no change in placement and therefore a manifestation determination was not required.??? Contrast, George A by Tameka A v. Walingford Swathmore Sch Dist 53 IDELR 84 (E.D. Penna 9/3/9); LK by Henderson v.

_____ 55 IDELR 47 (ED NC 6/23/10) Court permitted surrogate parent to sue SEA over SRO discipline decision and failure to hold MDR.

i. China Spring Sch Dist 110 LRP 36343 (SEA TX 4/30/10) HO found IAES appropriate where misconduct was **not** a manifestation and school district provided FAPE during the suspension.; Miami-Dade County Sch Bd 55 IDELR 59 (SEA FL 4/28/10) HO upheld MDR ruling that student's conflicts with other students were not a result of failure to implement his IEP where counseling sessions were held every other week rather than weekly as per bip; Christina Sch Dist 110 LRP 26225 (SEA Del 4/6/10) State complaint investigator ruled that LEA correctly determined that a student's misconduct in carrying a weapon during the commission of a felony was not a manifestation of her ADHD; Hermitage Sch Dist 110 LRP 26513 (SEA Penna CS 2/18/10) HO ruled that student's misconduct was not a manifestation of his ADHD where he served as a lookout for more than 20 minutes which could not fairly be attributed t impulsivity; Westford Public Schs 55 IDELR 27 (SEA Mass 7/6/10) HO found student conduct in preparing a list of **75** students he wanted to **kill** was not a manifestation of his social anxiety and emotional impairment.

j. Jackson v. Northwest Local Sch Dist 55 IDELR 104 (SD Ohio 9/1/10) Court ruled that sch dist **should have** been aware that a third grader with ADHD had a disability instead of providing intervention services for two years. Her RtI team recommended a mental health eval but never a SpEd eval; Court found school district violated IDEA by not having manifestation determination even tough **not** yet found **eligible**. See also 55 IDELR 71 (SD Ohio 8/3/10)(Magist J decis)

k. Student with a Disability 54 IDELR 209 (SEA Wisc 3/18/10) Where a student's post-expulsion IEP did not address the behaviors that lead to expulsion (especially counseling) HO found denial of FAPE.

l. Smithton R-VI Sch Dist 110 LRP 22863 (SEA Mo 4/8/10) HO ordered student to 45 day IAES because his physical aggression in a general ed class was likely to result in **injury** to himself or others. HO considered severity and ongoing nature of the attacks and threats to kill himself; Saddleback Valley Unified Sch Dist 109 LRP 5815 (SEA Calif 1/7/9) Where a student had previously engaged in self-injurious behaviors, but had not done so for the last year, HO found that IAES was not justified by the **safety exception**;

m. Bisbee Unified Sch Dist No. 2 54 IDELR 39 (SEA Ariz 1/6/10) HO ruled that school district was not justified in removing a student to an IAES for **serious bodily injury**. Student kicked principal, but statutory definition was not met where principal had swelling and went home but did not seek medical attention and drove 200 miles the next day; Southern York County Sch Dist 54 IDELR 305 (SEA Penna DD 5/11/10) HO noted statutory definition of serious bodily injury as "…substantial risk of death, extreme pain, obvious disfigurement or the impairment of the function of a bodily member, organ or mental facility…" Here no medical treatment sought and staff who were assaulted did not miss any work time, therefore IAES placement overturned by HO; Student with a Disability 54 IDELR 139 (SEA Kansas 2/26/10) SRO upheld HO who ruled no serious bodily injury where no pain medication was given at the hospital and the paraprofessional who was struck returned to work the next day.

n. Smith v. James C Hormel Sch at the Virginia Institute of Autism 53 IDELR 261 (E.D. Va 12/8/9) Where parent failed to cooperate to find alternative placement for student after his expulsion, court held no violation of IDEA; Hollingsworth v. Hackler 110 LRP 697 (Texas Ct App 12/31/9) Court held that parents had a right to and did participate in the manifestation determination, but where the MDR results in a finding of no manifestation, parents have no right to participate in the **IAES** determination.?? Contrast, Delaware Dept of Educ 110 LRP 1303 (SEA Del 12/11/9) State investigator found that school district violated IDEA by failing to provide an appropriate alternative placement after an expulsion.

o. Upper St Clair Sch Dist 110 LRP 57903 (SEA Penna 6/4/10) Ho found that fact that student brought a knife to school was enough to trigger the "dangerous **weapon**" provision justifying an IAES placement. HO found that **intent** to possess a knife was not required.

p. Smith v. James C Hormel Sch of Virginia Institute of Autism 54 IDELR 75 (WD Va 3/26/10) Court ruled that FAPE provided despite 2 month period without services after expulsion where district took quick action to offer alternatives.

q. Osseo Sch Dist #279-01 53 IDELR 35 (SEA Minn 2/13/9) HO held that school district did not violate IDEA by calling the **police** when student got into a fist fight in PE. There was no change in placement and the student's IEP and BIP were properly administered. Contrast, Hough by Abbott v. Shakopee Public Schs 608 F.Supp.2d 1087, 53 IDELR 232 (D.Minn 3/30/9) school district requirement that students with disabilities submit daily to intrusive searches violated their Fourth Amendment rights and was struck down by the Court.

r. In re Student with a Disability 110 LRP 35352 (SEA Del 5/26/10) State complaint investigator found that the discipline rules of IDEA apply to students with disabilities in charter schools

12. Extended School Year

a. In Re Student With a Disability 108 LRP 25080 (SEA WV 11/12/7) Applying Fourth Circuit precedent, HO found that where evidence did not reveal serious regression after school breaks that would **significantly jeopardize** gains made by the student, student did not require ESY services to receive FAPE.

b. LF by Ruffin v. Houston Independent Sch Dist 55 IDELR 10 (SD NY 8/4/10) Court affirmed HO who had found that school district correctly concluded that the student was not entitled to ESY where no previous regression; fact that student was later given ESY does not invalidate the 2007 decision not to give ESY; Colorado Springs Dist 11 110 LRP 22639 (SEA Colo 1/8/10) State complaint investigator ruled that LEA correctly concluded that the student did not qualify for ESY services because he did not show significant regression; Foxborough Public Schs 55 IDELR 120 (SEA Mass 7/29/10) HO ruled that standard for ESY is significant regression, noting that all children regress during breaks.

c. Buffalo Lake-Hector Independent Sch Dist #2159 55 IDELR 85 (SEA Mass 7/7/10) State complaint investigator found that school district committed a procedural violation by failing to provide PWN regarding changes made to a student's ESY program.

13. Mediation and Settlement

a. JD by Davis v. Kanawha County Bd of Educ 571 F.3d 381, 52 IDELR 182 (4th Cir. 7/9/9) **Fourth Circuit** held that mediation discussions under IDEA are **confidential.** Accordingly where the school district offered a settlement stating that the terms would be the same terms as a failed mediation, district could not use the settlement offer to prove that it had made a more favorable settlement offer than the relief obtained by the parent at the due process hearing; Wittenberg ex rel JW v. Winston Salem/Forsyth County Bd of Educ 53 IDELR 45 (M.D.NC 8/19/9) Because mediation discussions are confidential, court agreed to place a mediation agreement under seal.

b. Bethlehem Area Sch Dist v. Zhou 54 IDELR 311 (ED Penna 7/23/10) Court rejected parent's motion to strike parts of complaint seeking atty fees vs parent that mentioned that the parent had made a statement to the mediator that she was just trying to **drive up** school district **costs**. Court ruled that testimonial exclusion rules must be enforced only to the extent that the evidence serves a public good transcending the normal principle of using all means to determine the truth. Court found the public good behind mediation confidentiality is to encourage compromise and settlement. Here the parent acted with intention to the contrary, therefore, **confidentiality** does not apply. **????** (Query: ethical problem for mediator…)

c. El Paso Independent Sch Dist v. Richard R ex rel RR 53 IDELR 175 (5th Cir 12/16/9) Fifth Circuit held that agreements from resolution session are enforceable. Accordingly a parent's refusal to accept an offer of all educational relief sought was unreasonable and no attorney's fees were awarded to parent's lawyer.

d. SC by Poland v. Union Township Sch Corp 54 IDELR 254 (ND Ind 6/1/10) Court ruled that under general **policy** of confidentiality for settlement negotiations, court exclude a letter by school district counsel during settlement negotiations.

d. State of Missouri ex rel St Joseph's Sch Dist v. Missouri Dept of Elementary & Secondary Educ 54 IDELR 124 (Missouri Ct App 3/30/10) LEA filed a dph asking HO panel to enforce settlement agreement. HO panel declined stating a lack of authority. Court reversed stating that HO panel had the authority and a clear **duty** to rule as to whether a **settlement** agreement was in effect. Citing exhaustion principles, remanded. (NB cases re HO authority as to settlements is all over the map.); Springfield Local Sch Dist Bd of Educ v. Jeffrey B 55 IDELR 158 (ND Ohio 10/25/10) Court ruled that HO had jurisdiction to rule on alleged breach of a settlement agreement even where agreement specified it was enforceable in court; parents could file dph over any matter related to identification, evaluation, placement or FAPE; Traverse Bay Intermediate Sch Dist v. Michigan Dept of Educ 615 F.3d 622, 55 IDELR 1 (6th Cir 8/4/10) Sixth Circuit did not reach the issue alleged by the LEA- that the SRO lacked authority to hear an appeal of a decision to deny a parent's request to incorporate a settlement agreement into a dismissal order. (decided on other grounds); Contrast, Lara v. Lynwood Unified Sch Dist 53 IDELR 18 (C.D.Calif 7/29/9) Where settlement did not result from a mediation or resolution session, court held it had n**o jurisdiction** to enforce the settlement;

e. Haden C by Tracey C v. Western Placer Unified Sch dist 52 IDELR 189 (E.D. Calif 5/11/9) Court required **exhaustion** before a parent could enforce a

settlement (not clear if from resolution meeting) because interpretation of meaning of the agreement is clear therefore dp hearing necessary;

f. Irvine Unified Sch Dist 53 IDELR 204 (SEA Calif 9/28/9) HO held that IDEA settlement **waiver** releasing district from"… violations that might occur as a result of this agreement…" was ambiguous and did not prevent parents from pursuing a reevaluation claim; Matunuska-Susitna Borough Sch Dist v DY ex rel BY 54 IDELR 52 (D Alaska 2/23/10) Court ruled that even though a mediation **agreement** was from the same year, parents could still challenge LRE violation where prior complaint concerned only implementation????; Contrast, Bristol Township Sch Dist v. SW ex rel SM 55 IDEKLR 103 (ED Penna 9/3/10) Court ruled that a settlement release covered all claims against a district that could have been raised even though not included in the current complaint. Court rejected argument that parent did not intend release to be so broad. See 55 IDELR 72 (Mgst J decis)(same case)

h. Woods ex rel TW v Northport Pub Schs 110 LRP 33252 (WD Mich 6/3/10) NB Mediator named as a **party**; no explanation given. Court denied motion to strike LEA defenses alleging that HO (OAH) caused delays that increased the cost of litigation

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

C. Other IDEA Issues

1. Identification/ Child Find

a. Compton Unified Sch Dist v. Addison 598 F.3d 1181, 54 IDELR 71 (9th Cir. 3/22/10) By a 2-1 vote, Ninth Circuit rejected school district argument that because of PWN language, only an **action or refusal** is a violation. The Ninth Circuit held that a parent could file a dpc on any matter related to identification, evaluation, FAPE or placement, so, therefore, child find violations are actionable.

b. Regional Sch Dist No. 9 Bd of Educ v. Mr & Mrs M ex rel MM 53 IDELR 8 (D.Conn. 8/7/9) The standard for triggering the **child find** duty is **suspicion** of disability rather than factual knowledge of a qualifying disability. Here District violated child find duty by failing to evaluate a 16 year old after she was hospitalized in a psychiatric facility; Anello v. Indian River Sch Dist 109 LRP 7262 (D. Delaware 2/6/9) Court affirmed HO Panel's conclusion that district violated its child find obligation by not earlier identifying a child with a disability; Delaware College Prepatory Academy 53 IDELR 135 (SEA Del 7/30/9) HO Panel ruled that a charter school/LEA violated its child find obligation under IDEA by failing to identify a student as eligible where his extreme behaviors caused him to be suspended almost weekly; Sch Bd of the City of Norfolk v Brown ex rel RP 111 LRP 4712 (ED Va 12/13/10) Court found child find violation where district overlooked clear signs of psychiatric issues, physical aggression, threats, multiple suspensions; Meridian Sch Dist 223 55 IDELR 30 (SEA Ill 9/9/10) HO ruled that sch dist violated its child find obligation where it offered only general ed interventions to student with a hearing impairment. Despite repeated requests from parent for a SpEd evaluation, dist offered only "RtI."; Pemberton Township Bd of Educ

110 LRP 50551 (SEA NJ 8/11/10) HO noted that child find requires a district to evaluate for SpEd where there is a suspicion of disability.

c. DK et al v. Abington Sch Dist 54 IDELR 119 (ED Penna 3/25/10) Court ruled that although in hindsight, student had some symptoms of ADHD, the facts did not give the school district a sufficient basis to suspect that she had a disability to trigger child find obligation; Baldwin-Whitehall Sch Dist 55 IDELR 273 (SEA **CS** Penna 9/17/10) HO found no child find violation where student lacked many requirements for ED; Ft Osage R-1 Sch Dist 110 LRP 57773 (SEA Missouri 9/3/10) HO Panel ruled that diagnosis of ADHD alone not sufficient to trigger child find violation where no evidence that disability adversely affected ed performance (?????);

d. Jamie S v. Milwaukee Public Schs 52 IDELR 257 (E.D.Wisc 6/9/9) Court imposed additional interventions and appointed a court monitor because the district had made only minimal efforts to remedy past findings of systemic child find violations.

e. Happ v. Switzerland of Ohio Local Sch Dist 52 IDELR 256 (S.D. Ohio 6/10/9) Court returned case to HO where HO had failed to determine whether a five month delay by district constituted a child find violation.

f. DL v. District of Columbia 55 IDELR 6 (D DC 8/10/10) Court ruled in class action that DC fell short of its child find obligations which resulted in its missing about **half** the kids with disabilities that it should have identified.

2. Eligibility

a. Letter to Anonymous 55 IDELR 172 (OSEP 1/13/10) OSEP pointed out that a gifted student is not eligible under IDEA unless he also has a disability.

b. Marshall Joint Sch Dist No 2 v. CD by Brian & Traci D 616 F.3d 632, 54 IDELR 307 (7th Cir 8/2/10) Seventh Circuit reversed HO who found student eligible solely upon physician's opinion that the student could benefit from adaptive PE. The Seventh Circuit noted that a physician may not simply **prescribe** special education; IEPT must consider relevant factors.

c. Alvin Indep Sch Dist v. AD by Patricia F 503 F.3d 378, 48 IDELR 240 (5th Cir. 10/4/7) The fifth Circuit affirmed a holding that despite a fifth grader's ADHD, he was not eligible for special education. The student consistently received passing **grades**, he succeeded on statewide tests and he was achieving in social situations. Accordingly, he did not by reason thereof "need special education and related services," and, therefore, he was not a child with a disability as defined by the IDEA; LaMesa-Spring Valley Sch Dist 109 LRP54643 (SEA Calif 8/20/9) Where student performed well academically, he did not need SpEd and was ineligible; Austin Indep Sch Dist 109 LRP 72834 (8/21/9) Where student got average grades, HO ruled not eligible; Contrast, WH by BH & KK v. Clovis Unified Sch Dist 52 IDELR 258 (E.D. Calif 6/8/9) Court held that student with ADHD was eligible despite good grades and passing scores on the state exams where he needs assistance in order to complete his written assignments; State of Hawaii, dept of Educ v. Zachary B by Jennifer B Court found 10 year old with ADHD eligible despite average scores on exams where he was unable to access the general curriculum; Williamson County Bd of Educ v. CK ex rel CK 52 IDELR 40 (M.D.Tenn 2/27/9) Court ruled that district violated IDEA by not finding student eligible where his grades fluctuated and he had difficulty paying attention in class. This = sufficient adverse effect upon performance despite passing grades and 143 IQ; But see Brenne C by

_____ 55 IDELR 3 (MD Penna 8/11/10) Court found district refusal to reconsider eligibility even after IEE showed student eligible, constituted a denial of FAPE; good grades did not prove student didn't need specialized instruction where parents and tutors did extensive work with student outside school.

d. Hood v. Encinitas Union Sch Dist 47 IDELR 213 (9th Cir. 4/9/7) The Ninth Circuit applied the **Rowley standard** to an eligibility issue. Where the student consistently received above average grades despite her disability, she received educational benefit, and therefore, was not eligible for SpEd. **NOTE**: Some legal scholars have questioned whether the *Rowley* test is too restrictive for eligibility purposes, Weber, Mark "The IDEA Eligibility Mess," http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1206202

e. Letter to Anonymous 55 IDELR 172 (OSEP 1/13/10) OSEP pointed out that a gifted student is not eligible under IDEA unless he also has a disability.

f. Marshall Joint Sch Dist No. 2 v. CD by Brian & Traci D 51 IDELR 242 (W.D.Wisc 1/8/9) Court affirmed HO decision finding child eligible; school district erred by considering the effect of his disability on his educational **performance** only **after** modification and accommodations were in place, noting few students would be eligible under that standard; Contrast, EM by EM & EM v. Pajaro Valley Unified Sch Dist 53 IDELR 41 (N.D. Calif 8/27/9)Where student improved when teacher in general ed setting used interventions such as small group settings, court affirmed ho decision finding student not eligible.

g. Nguyen v. District of Columbia 681 F.Supp.2d 49, 54 IDELR 18 (D DC 2/1/10) Court found student to not be eligible where parent did not prove a link between his depression and his poor academic performance. The student's **absenteeism**, truancy and drug use affected his performance.

h. JPEH by Campbell v. Hookset Sch Dist 52 IDELR 262 (D.NH 6/30/9) Court found no violation where school district **exited** student from SpEd where it showed that the student was able to benefit from his education without any specialized instruction or related services; Chase ex rel KC v. Mesa County Valley Sch Dist #51 53 IDELR 72 (D.Colo 9/17/9) Court ruled that school district properly exited student from SpEd based upon classroom performance and assessments, and fact that district continued 30 minutes per week of resource room consultation as needed during the transition was permissible; BT by Mary T v. Dept of Educ, State of Hawaii 637 F.Supp.2d 856, 52 IDELR 290 (D.Haw 7/7/9) and 53 IDELR 256 (D. Haw 12/17/9) Court granted injunction prohibiting district from exiting student from SpEd at age 20, where general ed students were permitted to attend school past age 20; MO by CO & LO v. Duneland Sch Corp 53 IDELR 182 (N.D.Ind 10/29/9) Court held that student's graduation mooted parents' IDEA claims, noting that by earning a diploma the parents could not make out a case that his IEP hindered his right to FAPE; Petrina W v. City of Chicago Public Sch Dist 299 53 IDELR 259 (N.D. Ill 12/10/9) Court overruled HO who found that comp ed must end at maximum age of eligibility, and awarded comp ed continuing after students 22d birthday

i Maus ex rel KM v. Wappingers Central Sch Dist 54 IDELR 10 (SD NY 2/9/10) Court ruled that student was not eligible despite ADHD and Aspergers

Syndrome where he excelled academically and therefore no **adverse effect** (2d Cir rule only academics); AJ by CLJ & CJ v. Bd of Educ, E Islip Union Free Sch Dist 679 F.2d 299, 53 IDELR 327 (ED NY 1/8/10) Under 2d cir rule, social and behavioral effects of a disability not enough for adverse impact for eligibility; Corpus Christi Independent Sch Dist 110 LRP 36341 (SEA Tex 2/22/10) HO found that student was not eligible despite ADHD diagnosis where there was no showing that disability adversely affects educational performance; Independent Sch Dist No 564 110 LRP 67679 (SEA Minn 10/22/10) HO found student not eligible where parents did not show that ADHD adversely impacted the student's educational performance; Baldwin-Whitehall Sch Dist 55 IDELR 273 (SEA **CS** Penna 9/17/10) HO found student not eligible where no evidence that anxiety affected ed performance.

j. Letter to Goldman 53 IDELR 97 (OSEP 3/26/9) OSEP opines that a student who withdraws from public school and enrolls in a **private** school or home school does not lose his eligibility. If she reenrolls, she remains eligible, gets an IEP and may need to be reevaluated.

j. Chariho Sch Dist 52 IDELR 57 (SEA RI 3/11/9) HO ruled that school district erred by not finding student eligible under **OHI** when he clearly had ADD and ED and his behaviors impacted his learning; Eschenasy ex rel Eschenasy v. New York City Dept of Educ. 604 F.Supp2d, 52 IDELR 66 (S.D. NY 3/25/9) Court found IDEA violation where school district failed to find student with an **emotional disturbance** eligible where she engaged in self destructive behaviors; In re Student with a Disability 110 LRP 1171 (SEA NY 12/4/9) SRO ruled that a history of angry outbursts and some sadness was not sufficient to make a student eligible with an emotional

disturbance; Lakeside Joint Sch Dist 110 LRP 24088 (SEA Calif 4/13/10) HO ruled that student who attacked two other students was not eligible under ED because fear was for short period of time and because fear was of specific individuals and not other students or school in general;

k Ellenberg v. New Mexico Military Institute 572 F.3d 815, 52 IDELR 181 (10th Cir 7/10/9) Although IDEA eligibility will in the majority of cases also establish a substantial limitation on a major life activity for §504, the mere presence of an IEP is not enough. Tenth Circuit held that the evidence did not establish that the student's OCD substantially limited her ability to learn, therefore not eligible for §504; Chicago Sch Dist 299 54 IDELR 304 (SEA Ill 3/5/10) Where student met the eligibility criteria for eligibility HO found school district violated IDEA despite §504 plan with a plethora of accommodations;

li. Lakeville Indep Sch Dist # 194 53 IDELR 206 (SEA Minn 8/5/9) State investigator held that LEA violated IDEA by refusing to consider an evaluation in determining eligibility. SEA had given LEA **bad advice** in this regard.

3. Evaluation

a. Questions & Answers on IEPs, Evaluations & Reevaluations 54 IDELR 297 (OSERS 6/1/10)

b. Freemont Unified Sch Dist 109 LRP 23265 (SEA Calif 2/20/9) HO ruled that school district failed to comply with its duty to evaluate a three year old with autism who would drop to the ground to avoid tasks. HO noted that district has a duty to evaluate **both** for **eligibility** purposes **and to identify** student's **needs**.

c. Letter to Torres 110 LRP 319 (OSEP 4/7/9) A **screening** to determine instructional strategies is not an evaluation under IDEA and consent is not required. But screenings may not be used to delay an evaluation to determine eligibility.

d. Montgomery County Intermediate Unit 109 LRP 62289 (SEA Penna 2/27/9) **Delay** of 1 ½ years in evaluating student was a denial of FAPE. Contrast, MM by Matthews v. Government of District of Columbia 607 F.Supp.2d 168, 52 IDELR 128 (D.DC 4/13/9) Court dismissed complaint as premature where time for district to evaluate the student had not yet run; Jones ex rel AJ v. district of Columbia 646 F.Supp.2d 62 , 53 IDELR 47 (D.DC 8/19/9) (same).

e. Pemberton Township Bd of Educ 110 LRP 50551 (SEA NJ 8/11/10) HO noted that child find requires a district to evaluate for SpEd where there is a suspicion of disability.

f. Garvey Sch Dist 109 LRP 23281 (SEA Calif 2/25/9) Ho found school district's OT evaluation to be **appropriate**.

g. Springfield Sch Committee v. Doe 53 IDELR 158 (SEA Mass 6/8/9), affirmed by court 53 IDELR 158, HO noted that where IEP stated that student had problems handling school responsibilities, fact the he was truant 32 days in a two month period should have caused district to reevaluate the student.

4. Other IEP Issues

a. Rowley Standard

1). JL & ML ex rel KL v. Mercer Island Sch Dist 575 F.3d 1025, 52 IDELR 241(9th Cir. 8/6/9) The Ninth Circuit held that the **Rowley standard** of

a basic floor of opportunity is still the standard for FAPE. Congress has not referenced *Rowley* in subsequent amendments to IDEA and has not otherwise altered the definition of FAPE. If Congress had intended to change the FAPE standard, it would have expressed a clear intent to do so. Reverses district Court opinion to the contrary. See amended opinion same conclusion: 592 F.3d 938, 53 IDELR 280 (9th Cir 1/13/10)

2). KC by MC & WC v. Mansfield Indep Sch Dist 618 F.Supp.2d 568, 52 IDELR 103 (N.D. Tex 3/26/9) Neither '97 amendments nor "04 amendments alters *Rowley* standard.; Greenville County Sch Dist 52 IDELR 179 (SEA Calif 5/20/9) *Rowley* still good law.

3). But see, Blake C by Tina F v. Dept of Educ, State of Hawaii 51 IDELR 239 (D. Haw 1/15/9) Court held that 9th Circuit decision in Hellgate alters *Rowley* standard. Court reasons that change to "meaningful" educational benefit from merely some benefit, requires a court to consider a child's capabilities in order to determine meaningfulness??? (decided before Mercer Island)

4). State of Hawaii v. Dept of Educ v. MS & JS ex rel MS 243 P.2d 1054, 55 IDELR 292 (Hawaii Intermediate Ct App 12/17/10) Court rejected parent argument that trial court applied wrong standard. Court ruled that under either some benefit or meaningful benefit standard, FAPE was provided.

b. IEPs In General

1). L.B. & J.B. on behalf of K.B. v. Nebo Sch. Dist., Bd. of Educ., et al, 379 F.3d 966, 41 IDELR 206 (10th Cir. 8/11/2004). The IEP is the basic mechanism through which each child's individual goals are achieved. The IDEA contains both

procedural requirements to ensure proper development of the IEP and substantive requirements to ensure that each child receives FAPE.

2). Questions & Answers on IEPs, Evaluations & Reevaluations 54 IDELR 297 (OSERS 6/1/10)

3). Letter to Matthews 55 IDELR 142 (OSEP 1/7/10) OSEP opined that an IEP need not always state the number of minutes for each related service session, although in most cases it would be necessary.

4). Letter to Irby 55 IDELR 231 (OSEP 02/21/10) OSEP noted that where physical education is required for all students, an IEPT may not cut out PE in order to free up time for additional reading instruction.

c. IEPs and FAPE

1). Strum v. Bd of Educ of Kanawha County 51 IDELR 192 (W.Va. SCt 12/2/8) The **purpose** of West Virginia **Policy 2419** like the policy underlying IDEA is to provide FAPE to children with disabilities.

2). Shaffer by Shaffer v. Weast 554 F.3d 540, 51 IDELR 177 (4th Cir 1/29/9) **Fourth Circuit** held that the parents could not use the student's 10th grade IEP that calls for a full time sped placement to show that the 8th grade IEP featuring inclusion classes denied FAPE. To interpret the later IEP as an admission of fault would discourage districts from assessing students and updating IEPs out of fear of liability. A student's needs may change from year to year; See In re Student with a Disability 109 LRP 56648 (SEA NY 3/13/9) (same conclusion).

3). MS by Simchick v. Fairfax County Sch Bd 553 F.3d 315, 51 IDELR 148 (4th Cir 1/14/9) **Fourth Circuit** ruled that district court erred by combining several

school years to analyze whether FAPE provided. FAPE must be determined for each separate school year in question.

4). AK by JK & ES v. Alexandria City Sch Bd 484 F.3d 672, 47 IDELR 245 (4th Cir 4/26/7), rehearing en banc den. 107 LRP 42702 (4th Cir. 7/27/7) **Fourth Circuit** reversed a decision in favor of the school district and held that a teenager with multiple disabilities was denied FAPE where his IEP failed to identify a particular school as a placement. Where the IEP specified only a "private day school," the court held that the parents were not able to fairly evaluate whether the proposed placement was appropriate. Where the district had not determined whether such a school even existed, and the parents proved that two of five schools to which the district had applied summarily rejected this student, FAPE denied. The Court noted that a school district need not always specify a **particular school** in an IEP, but on these facts it was necessary.

5). JD by Davis v. Kanawha County Bd of Educ 48 IDELR 159 (SD WVa 8/3/7) IDEA guarantees only the basic floor of opportunity not the **maximizing of potential;** (FAPE does not require the best possible education.); JD by JA v. Nisksquua Central Sch Dist 52 IDELR 250 (N.D.NY 6/19/9); Gavrity ex rel MG v. New Lebanon cent Sch Dist 53 IDELR 152 (N.D.NY 9/29/9); KS by PS & MS v. Freemont Unified Sch Dist 109 LRP 80008 (N.D. Calif 12/29/9); Clairborne County Sch System 109 LRP 23840 (SEA TN 3/23/9)(IDEA requires the educational equivalent of a serviceable **Chevy** not a Cadillac); Baltimore County Public Schs 53 IDELR 174 (SEA Md 6/29/9); Bentonville Sch Dist 53 IDELR 276 (SEA Ark 7/30/9); Doe by Doe v. Hampden-Wilbraham 715 F.Supp.2d 185, 54 IDELR 214 (D Mass 5/25/10); Allyson B By Susan B & Mark B v. Montgomery County Intermediate Unit # 23 54 IDELR 164 (ED Penna

3/31/10); Antiguano ex rel PA v. Wantaugh Union Free Sch Dist 53 IDELR 283 (ED NY 1/4/10); JL & ML ex rel KL v. Mercer Island Sch Dist 55 IDELR 164 (WD Wash 10/6/10); MB by Berns v. Hamilton Southeastern Schs 55 IDELR 4 (SD Ind 8/10/10); MP by Perusse v. Poway Unified Sch Dist 54 IDELR 278 (SD Calif 7/12/10); Clarksville-Montgomery County Sch System 55 IDELR 58 (SEA Tenn 6/28/10) (all = not potential maximizing);

6). Allyson B By Susan B & Mark B v. Montgomery county Intermediate Unit # 23 54 IDELR 164 (ED Penna 3/31/10) Court rejected parent argument that FAPE was denied because there is a gap between student and her non-disabled peers; A school district is not required to **"close the gap"** in order to provide FAPE; JL & ML ex rel KL v. Mercer Island Sch Dist 55 IDELR 164 (WD Wash 10/6/10)(same); MP by Perusse v. Poway Unified Sch Dist 54 IDELR 278 (SD Calif 7/12/10); Montgomery Public Schs 110 LRP 28732 (SEA Md 1/14/10)

7). Middleboro Public Schs 110 LRP 50021 (SEA Mass 3/11/10) HO held that where a student's excessive **absenteeism** prevented him from accessing the curriculum, the school district did not deny FAPE; In re Student with a Disability 55 IDELR 25 (SEA NY 6/11/10) Where absenteeism by the student caused a loss of educational benefits, school district did not deny FAPE; Harrisburg City Sch Dist 55 IDELR 149 (SEA Penna WC 5/26/10) HO found FAPE provided where the student's poor grades were the result of excessive absenteeism; Dept of Educ, state of Hawaii 54 IDELR 271 (SEA HI 4/30/10) On remand from court for comp ed, HO found that student was absent 60 of 90 days and that before he could benefit from comp ed he first needed to attend school; Corpus Christi Independent Sch Dist 110 LRP 49276 (SEA TX 7/2/10)

HO ruled that it was the student's truancy and not alleged problems with her IEP that prevented the student from making educational progress. See, Nguyen v. District of Columbia 681 F.Supp.2d 49, 54 IDELR 18 (D DC 2/1/10) Court found student to not be eligible where parent did not prove a link between his depression and his poor academic performance. The student's **absenteeism**, truancy and drug use affected his performance.

8). DS & AS ex rel DS v. Bayonne Bd of Educ 54 IDELR 141 (3d Cir 4/22/10) Distinguishing the language in Rowley that **passing from grade to grade** is evidence of FAPE, the Third Circuit limited this language to general education classes; the court held that passing grades in special ed classes where the student was well below grade level is evidence that the IEP is inadequate.

9). CG & LG ex rel BG v. NY City Dept of Educ 55 IDELR 157 (SD NY 10/25/10) Court held that FAPE provided for child with **autism** despite lack of ABA services where IEP was reasonably calculated to provide meaningful benefit; Deer Valley Unified Sch Dist 110 LRP 51424 (SEA Ariz 7/22/10) HO rejected parent's claim that student needed a placement with only other autistic children; HO found placement in a residential facility = FAPE. Contrast, Dept of Educ, State of Hawaii 110 LRP 24142(SEA HI 4/1/10) HO found the IEP offering only 5 hours of ABA was a denial of FAPE where student could not benefit from an IEP with less than 30 hours of ABA per week.

10). Smith v. James C Hormel Sch of Virginia Institute of Autism 54 IDELR 75 (WD Va 3/26/10) Court ruled that FAPE provided despite 2 month period without services after **expulsion** where district took quick action to offer alternatives.

11). Bougades ex rel MB v. Pine Plains Central Sch Dist 53 IDELR 42 (S.D.NY 8/25/9) FAPE **denied** where student made no progress on any of his 27 IEP goals in one year and regressed in reading the next year; Cone ex rel Cone v. Randolph County Schs 53 IDELR 113 (M.D.NC 9/22/9) Court held that IEP denied FAPE where it failed to meet student's individual needs because it lacked necessary supports and lacked consistency across environments; Millay ex rel YM v. Surry Sch Dist 632 F.Supp.2d 38, 52 IDELR 251 (D. Maine 6/18/9) Magistrate held FAPE denied where district did not show that placement could meet the student's individual needs; District of Columbia v. Bryant-James ex rel ET 109 LRP 79863 (D.DC 12/28/9) FAPE denied where student's IEP does not reflect his needs as shown by assessments; NS by Stein v. District of Columbia 709 F.Supp.2d 57, 54 IDELR 188 (D DC 5/4/10) Court found denial of FAPE where IEP lacked present levels of performance, supplementary aides and services and failed to offer the needed pull-out services; Montgomery Public Schs 110 LRP 28735 (SEA Md 3/29/10) HO found denial of FAPE where a group of kids were "mainstreamed" from a FT program to general ed classes without regard to the individual needs of the student; Montour Sch Dist 110 LRP 26536 (SEA **JM** Penna 3/23/10) HO found that "meaningful benefit" means providing a chance for significant learning, therefore, IEP that had goals that were inconsistent with evaluation reports and that failed to deal with student difficulties with transitions was inadequate;

12). LF by Ruffin v. Houston Independent Sch Dist 53 IDELR 116 (S.D. Tex 9/21/9) **(FAPE provided);** Osseo Sch Dist #279-01 53 IDELR 35 (SEA Minn 2/13/9) HO held that school district did not deny FAPE by calling the **police** when student got into a fist fight in PE. There was no change in placement and the student's

IEP and BIP were properly administered. RF & JF ex rel NF v. Warwick Sch Dist 51 IDELR 240 (E.D. Penna 1/15/9); Greenville County Sch Dist 52 IDELR 179 (SEA Calif 5/20/9); JL v. Francis Howell R-3 Sch Dist 54 IDELR 5 (ED Mo. 2/17/10) (FAPE provided – even where private school program is a better fit); MH & HN ex rel JN v New York City Dept of Educ 700 F.Supp.2d 356, 54 IDELR 165 (SD NY 3/25/10) Court rejected parent allegations that charter school program denied FAPE as one-size-fits-all; Jaccari J by Sandra J v. Bd of Educ of the City of Chicago Dist No. 299 54 IDELR 53 (N.D.Ill 2/23/10) Court found FAPE where student made great progress in reading and behaviors even though his standardized test scores declined; JDG by Gomez v. Colonial Sch Dist 55 IDELR 197 (D. Del 11/2/10) Court affirmed HO panel who found FAPE provided where student lacked the potential to achieve his previous academic goals and IEPT switched the focus to independent living skills.

13). Doe by Doe v Marlborough Public Schs 54 IDELR 283 (D Mass 6/30/10) Court ruled that **graduation** does not end the FAPE requirement.; See, Lakeland Area Sch Dist 55 IDELR 182 (SEA Penna/GS 5/30/10) An LEA is responsible for providing FAPE under IDEA and the duty cannot be contracted away. Placing a child in a therapeutic setting does not relieve the LEA of the duty to provide FAPE.

14). Barron ex rel DB & NB v State of South Dakota 55 IDELR 126 (D SD 9/30/10) Court ruled against parents on merits of suit vs SEA where state decision to close its school for the deaf was not shown by parents to result in a denial of FAPE;

15). Tracy N ex rel Nicholas N v. Dept of Educ, State of Hawaii 715 F.Supp.2d 1093; 54 IDELR 216 (D Haw 5/21/10) Failure to have IEP in effect at

beginning of year is not a denial of FAPE where the parties agreed to reassess the student's situation later.

16). JW by JEW & JAW v. Fresno Unified Sch Dist 626 F.3d 341, 55 IDELR 153 (9th Cir 10/19/10) Without discussion, Ninth Circuit adopted FAPE decision by lower court in April 2009 affirms 52 IDELR 194.

d. Retrospective vs. Prospective Analysis of IEPs

1. D.F. & D.F. ex rel N.F. v. Ramapo Cent. Sch. Dist. 105 LRP 57524 (2d Cir. 11/23/05). The Court notes that the case raises an issue as to whether it is proper to utilize **prospective** or **retrospective** analysis of an IEP. The court stated that an IEP is a snapshot not a retrospective. In striving for appropriateness, an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, i.e., at the time the IEP was formulated.

2. MS by Simchick v. Fairfax County Sch Bd 553 F.3d 315, 51 IDELR 148 (4th Cir 1/14/9) **Fourth Circuit** expressly rejects retrospective analysis. Court rules that in some situations, evidence of actual progress may be relevant to a determination of whether a challenged IEP was reasonably calculated to confer educational benefit; and Shaffer by Shaffer v. Weast 554 F.3d 540, 51 IDELR 177 (4th Cir 1/29/9) **Fourth Circuit** held that in some cases receiving evidence after a due process hearing would do only minimal harm to the role of the HO and not serve to prolong the process. Here court found it appropriate to look at post-due process hearing evidence of the student's educational progress.

3. (IEP is reviewed by "**snapshot** rule" taking into account what was objectively reasonable at the time IEP drafted, not in hindsight); TA v. District of

_____ 620F.Supp.2d 86, 52 IDELR 216 (D.DC 6/1/9) Mere fact that student regressed under IEP does not mean that the IEP was deficient when written; Marcus I & Karen I v. State of Hawaii, Dept of Educ 53 IDELR 189 (D. Haw 10/21/9) IEPs are snapshot documents and they must be assessed only by analyzing the information available at the time they were written; Doe by Doe v Marlborough Public Schs 54 IDELR 283 (D Mass 6/30/10) (snapshot not a retrospective)

4. Other courts and hearing officers, however, continue to look at whether or not the student actually makes academic **progress** when reviewing a challenged IEP. See, KE by KE & TE v. Independent Sch Dist # 15 54 IDELR 215 (D.Minn 5/24/10) Court found that HO erred by refusing to consider grades.

e. IEP Team

1.) Compton Unified Sch Dist 110 LRP 37614 (SEA Calif 6/21/10) Where the district failed to provide documentation that it had made efforts to include father in IEPT meeting, HO found procedural violation that seriously impaired parent's right to participate, therefore, denial of FAPE; JN v District of Columbia 677 F.Supp.2d 314, 53 IDELR 326 (D DC 1/11/10) Court reversed HO and found serious procedural violation where school district had IEPT meeting without parents where district made only 3 attempts and parents called each time with alternative dates; Contrast, JG & JG ex rel JG v. Briarcliff Manor unified Free Sch Dist 682 F.Supp.2d 387, 54 IDELR 20 (SD NY 1/29/10) Court ruled that school district acted appropriately where it held IEPT meeting without parents after several attempts; Corona-Norco Unified Sch Dist 110 LRP 15982 (SEA Calif 2/22/10) HO found that school district was justified in holding IEPT **meeting without** the parent present where district made and documented efforts to

reschedule meeting with no explanation by parent for unavailability; Dept of Educ, State of Hawaii 110 LRP 65432 (SEA Hawaii 9/21/10) HO ruled that school district denied FAPE by its insufficient efforts to invite parents to an IEPT meeting. District sent fax to parents on the business day before the meeting and telephoned them just before the meeting.

2). Prince Georges County Public Schs 109 LRP 76845 (SEA Md 8/12/9) state Investigator held that school district violated IDEA by failing to get parental consent before **excusing** a teacher from an IEPT meeting.

3). JD by Davis v. Kanawha County Bd of Educ 48 IDELR 159 (SD WVa 8/3/7). Where parents had derailed the IEP process after five IEP Team meetings for the same IEP, parents could not claim predetermination.

4). Letter to Richards 55 IDELR 107 (OSEP 1/7/10) OSEP ruled that IEPT decisions are not made by majority vote. The LEA is responsible for providing FAPE. Even if the rest of the team reaches a consensus, the chair may "overrule" other members. If the team does not reach a consensus, parent gets PWN and may exercise procedural safeguards.

5). In re Student with a Disability 52 IDELR 306 (SEA NY 4/12/9) SRO found that IEPT properly consider the conclusions of the parents' private psychologist even though the team rejected them; Clark County Sch Dist 109 LRP 77992 (SEA Nevada 11/17/9) Parents do not have **veto** power over IEPT decisions, but team must consider parent suggestions; Independent Sch Dist of Boise No. 1 110 LRP 32057 (SEA Idaho 3/23/10) HO rejected parent claim that IEPT failed to consider the input of their expert where IEPT read parent's expert's report, sent him written question, met with the expert

and he provided written follow-up even though IEPT did not adopt his recommendations; Millay ex rel YM v. Surry Sch Dist 55 IDELR 254 (D Maine 12/8/10) Court rejected parent contention that IEPT should have deferred to parents' specialist on deaf-blind education as to all questions on programming and placement at the expense of all other professionals on IEPT.

6). Winkleman v. Parma City Sch Dist Bd of Educ109 LRP 76161 (N.D. Ohio 10/28/9) and 53 IDELR 215 (N.D. Ohio 11/30/9) Court found no IDEA violation for failure to timely complete IEP process where parents failed to respond to multiple efforts to **schedule** an IEPT meeting.

7). Mahoney ex rel BM v. Carlsbad Unified Sch Dist 52 IDELR 131 (S.D. Calif 4/8/9) Court held that school district did not violate IDEA by failing to invite parent's private **provider** to an IEPT meeting; Horen ex rel DH v. Bd of Educ of the Toledo City Sch Dist 109 LRP 6599 (N.D. Ohio 1/23/9) and 53 IDELR 79 (N.D. Ohio 9/8/9) School district lawyers did not violate parent's rights by advising district that parents could not exclude district's **lawyers** from an IEPT meeting; Anderson & Steele ex rel AJ v. District of Columbia 606 F.Supp.2d 86, 52 IDELR 100 (D.DC 3/30/9) Failure to have **teacher** at IEPT meeting was a procedural error, but no denial of FAPE; SH by AH & EH v. Plano Independent Sch Dist 54 IDELR 114 (ED Tex 3/31/10) Court affirmed HO ruling that failure to have representative of a private school at IEPT meeting was a denial of FAPE because it resulted in an inappropriate placement;

8). BH by SH v. Joliet Sch Dist # 86 54 IDELR 12 (D Ill 3/22/10) School district refusal to convene an IEPT meeting after school hours did not constitute a basis for a discrimination claim under §504.

9). Horen ex rel DH v. Bd of Educ of the Toledo City Sch Dist 109 LRP 6599 (N.D. Ohio 1/23/9) and 53 IDELR 79 (N.D. Ohio 9/8/9) School district lawyers did not violate parent's rights by advising district that parents could not **tape record** an IEPT meeting; . Dallas Independent Sch Dist 110 LRP 36304 (SEA TX 4/27/10) HO ruled that right to participate does not give the parent the right to **tape record** an IEPT meeting, except where parent can show that recording was necessary in order to participate.

f. Related Services

1. Shrewsbury Public Schs 54 IDELR 137 (SEA Mass 2/18/10) HO, citing *Tatro*, noted that a student's entitlement to OT and PT as related services depended upon whether he needed the related services in order to benefit from special education.

2. Letter to Goldman 55 IDELR 202 (OSEP 1/27/10) OSEP agreed with a speech language pathologist that a NJ regulation permitting the use of related services provider who are not certified violates 300.156(b). OSEP said that it is working with NJ to come up with alternative solutions such as alternate routes to certification.

3. Letter to Matthews 55 IDELR 142 (OSEP 1/7/10) OSEP opined that an IEP need not always state the number of minutes for each **related service** session, although in most cases it would be necessary.

4. Marshall Joint Sch Dist No.2 v CD by Brian & Traci D 616 F. 3d 632, 54 IDELR 307 (7th Cir 8/2/10) Court concluded that the student did not need specialized instruction. Any need for PT or OT, therefore, was not relevant.

5. Petit v. US Department of Education 55 IDELR 288 (D DC 12/21/10) Court ruled that USDOE did not exceed its authority in enacting regulations excluding the mapping of a student's **cochlear implant** as a related service under IDEA.

6. Questions and Answers on Serving Children with Disabilities Eligible for Transportation 53 IDELR 268 (OSERS 11/1/9) (NB OSERS clarifies that because a school bus suspension may be a change of placement, it may trigger all of the IDEA disciplinary protections , including educational services to enable student to access the general curriculum)

7. Garden Grove Unified Sch Dist 53 IDELR 278 (SEA Calif 12/3/9) HO ruled that school district denied FAPE by cutting off a student's **transportation**, finding that the student needed transportation as a related service in order to benefit from his education; Los Angeles Unified Sch Dist 53 IDELR 138 (SEA Calif 9/2/9) HO ruled that where the student didn't need a shorter ride to benefit from his education, school district did not deny FAPE by changing his school bus route; Harris v. Metropolitan Govt of Nashville & Davidson County 52 IDELR 41 (M.D. Tenn 2/25/9) Parent argued that son's incarceration for an a rape on the school bus resulted from inappropriate transportation provisions on his IEP, dismissed based upon exhaustion; Richmond County Sch Dist 52 IDELR 55 (SEA Ga 3/10/9) HO found that school district denied FAPE by failing to offer support services when student began refusing to board school bus after driver changed; Prince Georges County Public Sch Dist 52 IDELR 273 (SEA Md 4/7/9) State investigator found that district violated IDEA by failing to consider appropriate behavior strategies after a student with autism began experiencing behavior issues while riding the school bus; Baltimore City Schs 110 LRP 72202 (SEA Md.

6/29/10) State complaint investigator found violation where LEA failed to implement IEP and failed to provide transportation on a reliable basis; Round Valley Unified Sch Dist 110 LRP 37061 (SEA Ariz 4/2/10) HO found LEA did not violate IDEA by failing to provide reimbursement for parent's transportation where IEP did not provide transportation and student not entitled to transportation as a related service; South Hunterdon Regional Bd of Educ 54 IDELR 208 (SEA NJ 2/25/10) HO ruled that student did not need transportation in order to benefit from her IEP, therefore, transportation was not required as a related service.

8. AC & MC ex rel MC v. Bd of Educ of the Chappaqua Cent Sch Dist 553 F.3d 165, 51 IDELR 147 (2d Cir. 1/16/9) 2d Circuit reversed district court and upheld SRO concluding that FAPE was not denied, rejecting parents argument that a **1:1 aide** would foster learned helplessness; Blanchard by Blanchard v. Morton Sch Dist 52 IDELR 3 (W.D.Wash 2/19/9) Court ruled for school district in challenge by parents to the individual selected to be 1:1 aide where individual was qualified; Los Angeles Unified Sch Dist 110 LRP 1131 (SEA Calif 12/28/9) HO found failure to implement to be material where IEP called for 1:1 Aide, but frequent pullouts of the aide prevented preschooler with mental retardation from accessing the curriculum and endangered her safety; Jaccari J by Sandra J v. Bd of Educ of the City of Chicago Dist No. 299 54 IDELR 53 (N.D.Ill 2/23/10) Court affirmed HO who ruled that a student did not need an 1:1 aide as a related service.

9. Kabfliesch by Kabfliesch v. Columbia Community Sch Dist Unit #4 53 IDELR 57 (Ill.Cir.Ct. 8/24/9) Court issued an injunction under Illinois state law requiring school district to permit 5 year old with autism to bring his **service dog** to

school, affirmed on appeal at Kabfliesch by Kabfliesch v. Columbia Community Sch Dist Unit #4 53 IDELR 266 (Ill.App.Ct 12/16/9), and Kabfliesch by Kabfliesch v. Columbia Community Sch Dist Unit #4 6644 F.Supp.2d 1084, 53 IDELR 2 (S.D.Ill 8/5/9)(removal inappropriate); KD by Michelle D & Bradley D v. Villa Grove community Sch Dist 302 110 LRP 5463 (Ill.CirCt 11/24/9) Court ruled that under state law a school district could not prevent a first grader with autism from bringing his service dog to all school functions; KD by Michelle D & Bradley D v. Villa Grove Community Unit Sch Dist # 302 Bd of Educ 403 Ill.App.3d 1062, 936 NE.2d 690, 55 IDELR 78 (Ill App Ct 8/24/10) Given state statute , court ordered that a 6 year old with autism could bring his service dog to school.

10. Los Angeles Unified School District 110 LRP 30539 (SEA Calif 5/19/10) Although OT services might have helped a student, school district was not obligated to include OT as a related service in her IEP where evaluation showed that she did not have any motor skill deficits that impacted her school performance.

11. Poway Unified Sch Dist 53 IDELR 244 (SEA Calif 10/28/9) Despite the fact that a 13 year old with a hearing impairment could not hear every word said in her classroom, a HO found that a school district was not obligated to provide **real time close captioning** as a related service because she did not need the captioning in order to benefit from her education.

12. Maine Sch Admin Dist # 72 53 IDELR 207 (SEA Maine 9/18/9)State investigator found that school district violated IDEA by not providing **vision therapy** as a related service where student needed it to benefit.

13. (NB the first three cases are all by the same court) F by Fasnacht v. Missouri Bd of Educ 53 IDELR 50 (E.D. Missouri 8/18/9) Court ruled that because IDEA definition of related services is broad, and therefore related services could include **audio and video surveillance** to ensure that staff are implementing an IEP; JT by Harrell v. Missouri State Bd of Educ 109 LRP 6540 (E.D. Missouri 2/4/9) Court denied a motion to dismiss holding that a court or HO could issue an order requiring the use of audio and video surveillance as a related service under IDEA.; C by Connor v. Missouri State Bd of Educ 53 IDELR 81 (E.D. Missouri 9/8/9) Court denied motion to dismiss because audio and video surveillance could be a related service under the broad IDEA definition; Contrast Plock v. Bd of Educ of the Freeport HS Dist, No. 145 53 IDELR 267 (Ill.App.Ct 12/8/9) Court struck down district plan to install video and audio recording devices after substantiated allegations of abuse of SpEd students as a violation of state eavesdropping statute.

14. JH by Hesse v. Los Angeles Unified Sch Dist 54 IDELR 195 (CD Calif 3/29/10) For purposes of stay put, **HO decision** is treated as an **agreement** between parties. (Here school district had to fund additional speech and behavioral services ordered by HO pending appeal.)

15. Union City Schs 53 IDELR 137 (SEA 8/6/9) HO ruled that **counseling** for problems a student was having at home was not a required related service because he did not need the counseling to receive FAPE.

g. Other Placement Issues

1. AK by JK & ES v. Alexandria City Sch Bd 484 F.3d 672, 47 IDELR 245 (4th Cir 4/26/7), rehearing en banc den. 107 LRP 42702 (4th Cir. 7/27/7) **Fourth Circuit**

reversed a decision in favor of the school district and held that a teenager with multiple disabilities was denied FAPE where his IEP failed to identify a particular **school** as a placement. Contrast, CRR by Russell v. Water Valley Sch Dist 44 IDELR 243 (N.D. Miss 3/17/8) The "educational placement" that must be identified by an IEP is an educational program and not a particular institution or location.

2. Letter to Anonymous 53 IDELR 127 (OSEP 3/30/9) OSEP provided opinion that IDEA requires **charter** schools, whether themselves a separate LEA or not, to ensure the availability of the full continuum of placements and that students with disabilities are placed in the LRE. There is no requirement that every placement on the continuum be used, but they must be available;

3. Blunt v. Lower Merion Sch Dist 53 IDELR 46 (E.D.Penna 8/19/9) Court declined to certify class action alleging wrongful removal of black students from general education, noting that IDEA decisions are necessarily based upon individualized analysis.??

4. Questions and Answers on Providing Services to Children with Disabilities During an H1N1 Outbreak 53 IDELR 269 (OSERS 12/1/9) OSERS clarified that if there is a long term exclusion for health reasons, the LEA must consider the continuum of alternative placements.

h. Transition

1. Questions and Answers on Secondary Transition 52 IDELR 230 (OSERS 6/1/9) OSERS clarifies the requirements for summaries of performance required as part of the transition process.

2. Dracut Public Schs 52 IDELR 85 (SEA Mass 3/13/9) HO found that district violated the transition requirements where transition plan failed to address communication and organizational needs of the student; City of Chicago Sch Dist # 299 110 LRP 51158 (SEA Ill 6/23/10) Where HO found transition plan completely inadequate, HO ordered an **IEE** that would thereafter drive the new transition process;

3. KC by MC & WC v. Mansfield Indep Sch Dist 618 F.Supp.2d 568, 52 IDELR 103 (N.D. Tex 3/26/9) Where transition plan did address student's interest but not her interest in music because she had low skills in that area, **FAPE** provided; Rosinsky by Rosinsky v. Green Bay Area Sch Dist 53 IDELR 193 (E.D.Wisc 10/9/9) Transition plan was appropriate; In re Student with a Disability 52 IDELR 148 (SEA NY 4/1/9) Despite minor defects in a transition plan, FAPE provided; Dept of Educ, State of Hawaii 53 IDELR 34 (SEA Hawaii 4/30/9) Ho found that transition plan was appropriate and FAPE provided where the plan addressed the student's educational needs and it contained appropriate goals; Burnsville Indep Sch Dist # 191 53 IDELR 66 (SEA Minn 7/22/9) State investigator approved of transition plan and goals as appropriate for the student; Milford Bd of Educ 55 IDELR 113 (SEA Conn 4/19/10) HO found transition plan to be appropriate and in compliance with IDEA where goals identified and classes and internships provided for; Student with a Disability 110 LRP 70710 (SEA NM BA 7/19/10) HO found that transition plan met IDEA requirements where the student was provided with numerous activities and opportunities to explore vocational interests.

4. Rosinsky by Rosinsky v. Green Bay Area Sch Dist 53 IDELR 193 (E.D.Wisc 10/9/9) Where district failed to invite service providers but they attended the IEPT meeting at the parents' invitation, any procedural violation was harmless; Los

_____ 110 LRP 34448 (SEA Calif 6/3/10) Although school district committed a procedural violation by failing to create a transition plan, HO found no harm where transition services provided were adequate.

i. IEP & Behavior/BIP/FBA

1. Lathrop R-II Sch Dist v. Gray ex rel DG 611 F.3d 419, 54 IDELR 276 (8th Cir 7/2/10) Eighth Circuit affirmed a decision that a student's IEP adequately addressed the student's behaviors. IDEA does not require a bip – only that IEP address behaviors that interfere with learning of student or others and here behaviors addressed.

2. Imagine Charter Schs at E. Mesa 55 IDELR 112 (SEA Ariz 5/14/10) Except for **discipline** cases where behavior is a manifestation, there is no requirement under IDEA for a behavior plan. The only general requirement is that if a student's behavior interferes with learning, positive behavior interventions and other supports must be adopted by the IEPT and here HO found no evidence of behaviors interfering with learning, therefore rejected parent request for a bip; L by Mr & Mrs F v. North Haven Bd of Educ 624 F.Supp.2d 163, 52 IDELR 254 (D. Conn 9/10/9) Given the limitations of the student's **BIP**, Court found that IEPT did not err in recommending a private placement; Special Sch Dist of St Louis County 110 LRP 36327 (SEA MO 4/30/10) HO panel ruled that school district was not required to develop a bip and that the IEP adequately addressed the student's behaviors; In re Student with a Disability 110 LRP 21880 (SEA NY 3/22/10)SRO rejected parent claim that student needed a bip where IEP addressed student's behaviors

3. RH v. Fayette County Sch Dist 53 IDELR 86 (N.D. Ga 9/1/9) Although student had significant behavioral problems at home, court found her behaviors did **not**

interfere with her learning or that of others, therefore no duty for school district to consider behavioral strategies and interventions etc; Conner ex rel IC v. New York City Dept of Educ 53 IDELR 192 (S.D.NY 10/13/9) Court ruled that school district had no obligation to conduct an FBA where the fidgeting and anxiety of a grade school student with Asperger's syndrome did not impede his learning or the learning of others; Lathrop R-II Sch Dist v. Gray ex rel DG 53 IDELR 77 (W.D. Missouri 9/11/9) Court ruled that school district took appropriate steps to address the student's behaviors in the 6th and 7th grades. District conducted an FBA, developed a behavior management plan, provided staff training on autism and hired staff and providers experienced in autism. FAPE provided; Geffre ex rel SG v. Leola Sch Dist 44-2 53 IDELR 156 (D.SD 9/25/9) Court ruled that HO erred by failing to consider the student's behavioral progress; Freemont Unified Sch Dist 109 LRP 23265 (SEA Calif 2/20/9) HO ruled that school district failed to comply with its duty to evaluate the behavior needs of a three year old with autism who would drop to the ground to avoid tasks; Exeter Union Sch Dist 109 LRP 77660 (SEA Calif 12/7/9) HO ruled that district plan to transition student from behavioral services offered by a nonpublic agency to a school based behavioral support plan was appropriate; Roseville City Elementary Sch 110 LRP 1168 (SEA Calif 12/23/9) Where student attacked other students and disrupted the general ed classroom, HO approved special day class as LRE placement. HO found that the behaviors of the student could not be improved in the regular classroom; Prince Georges County Public Sch Dist 52 IDELR 273 (SEA Md 4/7/9) State investigator found that district violated IDEA by failing to consider appropriate behavior strategies after a student with autism began experiencing behavior issues while riding the school bus; Baltimore City Schs 100 LRP

5526 (SEA Md 11/4/9) Investigator found violation where IEP failed to address student's behaviors despite assessment data showing that it was a problem; Great Valley Sch dist 55 IDELR 86 (SEA Penna WC 5/12/10) Where the student engaged in severe behaviors that endangered his safety and **interfered** with his education, HO ruled that school district denied FAPE by designing an IEP that did not address the student's behavioral needs; Student with a Disability 54 IDELR 209 (SEA Wisc 3/18/10) Where a student's post-expulsion IEP did not address the behaviors that lead to expulsion (especially counseling) HO found denial of FAPE; Sch Bd of the City of Norfolk v Brown ex rel RP 111 LRP 4712 (ED Va 12/13/10) Court found child find violation where district overlooked clear signs of psychiatric issues, physical aggression, threats, multiple suspensions and IEP ignored the student's behavior issues; Wallingford- Swathmore Sch Dist 110 LRP 68486 (SEA Penna **GS** 8/30/10) HO found denial of FAPE where IEP did not adequately address the student's maladaptive behaviors. District regularly changed bip but did so without an fba or consulting with parent violating 300.324(a)(2)(i).

4. Doe by Doe v. Hampden-Wilbraham 715 F.Supp.2d 185, 54 IDELR 214 (D Mass 5/25/10); An LEA is only obligated to address a student's behavior issues while in school; school district did not have to address in-home behaviors by student.

5. CB v. Sonora Sch Dist 54 IDELR 293 (ED Calif 3/8/10) Court denied immunity and allowed suit against personnel to continue where staff ignored the bip of an 11 year old with a mood disorder that caused him to freeze in place, cross arms and keep his head down, instead calling the and having him handcuffed and put in the back of a squad car.

6. Mountain Home Sch Dist 110 LRP 66223 (SEA Ark 8/7/10) HO found denial of FAPE where new district failed to implement bip of a transfer student.

7. Student with a Disability 110 LRP 18447 (SEA NY 3/11/10) SRO found FAPE and rejected parent challenge to bip claiming aversives were necessary. SRO found that IEP/bip addressed behaviors and that **aversives** were prohibited by state law; BD &DD ex rel CD v. Puyallup Sch Dist 53 IDELR 120 (W.D.Wash 9/10/9) Court ruled that staff providing a voluntary quiet room was not an unlawful aversive under state law.

8. Also see, "the new section above on Seclusion and Restraints

j. Services Not Based Upon Category

1. In Re Student With a Disability 108 LRP 25080 (SEA WV 11/12/7) One of the **fundamental concepts** of the IDEA is that each child with a disability should receive an IEP that is **individualized** to his individual needs. The IDEA does not concern itself with labels but whether a student with a disability is receiving a free and appropriate public education. A disabled child's IEP must be tailored to the unique needs of that particular child. The child's identified needs, not the child's disability category, determine the services that must be provided to the child; In re Student with a Disability 108 LRP 26467 (SEA WV 12/19/7) The **category** of eligibility is not relevant once a student is determined eligible; services are determined by the individual needs of the student and not her categories of eligibility; In Re Student With A Disability 52 IDELR 239 (SEA WV 4/8/9) (same); But See, Weissburg v. Lancaster Sch Dist 591 F.3d 1255, 53 IDELR 249 (9th Cir 1/14/10) Ninth Circuit ruled that because state law provides that students

classified with autism have a legal right to a teacher with autism certification, parents were prevailing party in action to change category from mentally impaired to autism.

2. Pohorecki v. Anthony Wayne Local Sch Dist 637 F.Supp.2d 547, 53 IDELR 22 (N.D. Ohio 7/23/9) Court held that IDEA does not require that children be classified by disability. IDEA requires that a child who needs special education and related services receives an appropriate education. Court specifically rejected an alleged denial of FAPE based upon refusal to add another category of eligibility.

3. Seladoki v. Bellaire Local Sch Dist Bd of Educ 53 IDELR 153 (S.D. Ohio 8/28/9) Court ruled that choice of methodology by school district must be based upon the individual needs of a student. Court rejected parent's argument that all children with autism require 30-40 hours per week of ABA services; Deer Valley Unified Sch Dist 110 LRP 51424 (SEA Ariz 7/22/10) HO rejected parent's claim that student needed a placement with only other autistic children; HO found placement in a residential facility = FAPE.

k. Assistive Technology

1. Bd of Educ v. Mr & Mrs P ex rel MP 51 IDELR 241 (D.Conn 1/12/9) Court awarded reimbursement where IEP was deficient in several areas, including AT; Jaccari J by Sandra J v. Bd of Educ of the City of Chicago Dist No. 299 54 IDELR 53 (N.D.Ill 2/23/10) Court found FAPE where student did not need AT device; Montgomery County Bd of Education 110 LRP 44415 (SEA Ala SM 4/30/10) HO found FAPE provided despite parent request for AT; Team referred student for an AT evaluation which showed that he made progress and was successful in assessing the curriculum without AT services

2. Cheyenne Mountain Sch Dist 109 LRP 54684 (SEA Colo 5/20/9) State investigator found no violation of IDEA; parent had claimed that IEP did not properly document the "voice machine" assistive technology device; Salem-Keizer Sch Dist 110 LRP 45519 (SEA OR 7/23/10) State complaint investigator found that FAPE not denied by failing to provide a weighted lap belt/blanket where parent did not request or mention it at IEPT meeting and evals did not mention that student would benefit from the device; Lyon Count Sch Dist 110 LRP 73249 (SEA NV 2/16/10) State complaint investigator found that failure to provide an AT device, a computerized Braille notebook, called for on IEP was a denial of FAPE.

3. Bentonville Sch Dist 53 IDELR 276 (SEA Ark 7/30/9) HO found FAPE provided even though school district removed an AT device from the student's IEP, where the parents failed to show that the student **needed** the device to benefit from his education; Contrast, Miami Dade County Sch Bd 110 LRP 38102 (SEA FL 2/24/10) HO ordered LEA to reimburse parents for the purchase of an AT device, noting that the failure to implement by failing to order AT device specified on IEP caused deprivation of educational benefit;

4. Questions & Answers on the National Instructional Materials Accessibility Standards (NIMAS) 55 IDELR 80 (OSERS 8/1/10) OSEP clarified which students with blindness and print disabilities are eligible to use NIMAS materials.

l. Transfer Students

1. Questions & Answers on IEPs, Evaluations & Reevaluations 54 IDELR 297 (OSERS 6/1/10) Includes a Q&A discussion of rules re transfer students-under IDEA'04; a transfer student on IEP from another state must receive **comparable**

services until the new school district decides to adopt his old IEP or develops a new IEP of its own.

2. AM by Marshall v. Monrovia Unified Sch Dist 627 F.3d 773, 55 IDELR 215 (9th Cir 12/15/10) Ninth Circuit ruled that school district provided FAPE by providing services to a transfer student that **approximated** the IEP in effect at the time of the transfer. District did not err in providing in-home instruction which is what student had been getting despite being labeled "general ed" setting on IEP.

3. Prince Georges County Public Schs 109 LRP 77683 (SEA Md 6/29/9) When a student on an IEP transfers to another district in the same state, the new district must provide comparable services until the new district conducts any necessary evaluations and develops a new IEP. Here investigator found a **violation** of IDEA because comparable services were not provided; Compton Unified Sch Dist 110 LRP 37614 (SEA Calif 6/21/10) HO found denial of FAPE where school district failed to implement old IEP or provide comparable services after student transferred; William County Schs 110 LRP 68578 (SEA Tenn 10/20/10) HO found denial of FAPE where new district failed to provide comparable services to a transfer student; new district provided significantly fewer hours of specialized instruction; Mountain Home Sch Dist 110 LRP 66223 (SEA Ark 8/7/10) HO found denial of FAPE where new district failed to implement bip of a transfer student.

4. Mokena Sch Dist 159 110 LRP 36563 (SEA Ill 01/20/10) HO found that school district **complied** with IDEA where it substantially implemented the student's IEP from the previous district after the student transferred.

m. Personnel Decisions

1. Blanchard by Blanchard v. Morton Sch Dist 52 IDELR 3 (W.D.Wash 2/19/9) Court ruled for school district in challenge by parents to the individual selected to be 1:1 aide where individual was qualified; Los Angeles Sch Dist 54 IDELR 269 (SEA Calif 5/20/10) Where school district provided a qualified teacher capable of meeting the student's needs, HO ruled FAPE provided; District had no obligation to assign the teacher preferred by parent.

2. Clairborne County Sch System 109 LRP 23840 (SEA TN 3/23/9) HO held that personnel decisions are the province of the school district so long as FAPE is provided.

3. Tustin Unified Sch Dist 110 LRP 1194 (SEA Calif 4/13/10) Finding that a parent could not dictate that a particular psychologist conduct an evaluation because the district has the right to select any qualified personnel to conduct an evaluation, HO overrode parent's lack of consent for a psychoeducational assessment of student with Aspergers.

n. No Attorney Fees for IEPT Meetings

1. Jeremiah B v. Dept of Educ, State of Hawaii 54 IDELR 21 (D. Haw 1/19/10) Mgst Judge ruled that P's attorney's **fees** petition must be reduced because hours spent at a resolution meeting are not reimbursable.

o. Four Corners of IEP

1. CG & BS ex rel AS v. Five Town Community Sch Dist 513 F.3d 279, 49 IDELR 93 (1st Cir. 1/18/8) Where IEP was still in progress and not completed because of parents' noncooperation, it was necessary to look beyond the four corners of

the IEP. See, OO by Pabo v. District of Columbia 573 F.Supp.2d 41, 51 IDELR 9 (D.DC 8/27/8) Court approved considering evidence outside the IEP document; JP &RP v. Enid Public Schools 53 IDELR 112 (W.D. Okla 9/23/9) Court looked beyond the four corners of a "quite sparse" IEP and found that FAPE was provided where the services received were calculated to provide educational benefit.

2.MF by TM v. Irvington Union Free Sch Dist 719 F.Supp.2d 302, 54 IDELR 288 (SD NY 6/17/10) Court expressly rejects "four corners" of IEP rule. Although the IEP failed to mention a developmental reading class, other evidence made it clear that the class was offered at IEPT meeting; Moreland Sch Dist 55 IDELR 90 (SEA Calif 7/26/10) HO ruled that the fact that the IEP did not identify the exact location of a special day class was not a denial of FAPE where parent was orally informed of the location.

3. Contrast, Systema by Systema v. Academy Sch Dist No. 20 538 F.3d 1306, 50 IDELR 213 (10th Cir. 8/26/8) Tenth Circuit held that FAPE analysis is limited to the written IEP document itself and should not include any proposals made at IEP team meeting. Court limited review to the four corners of the IEP; Systema by Systema v. Academy Sch Dist No. 20 53 IDELR 226 (D.Colo 10/30/9) Restricting analysis to the four corners of the IEP, court found FAPE denied; court did not consider testimony of district witnesses regarding their oral offers to provide services that were not specified on the IEP document.

4 See also hybrid, AK by JK & ES v. Alexandria City Sch Bd 484 F.3d 672, 47 IDELR 245 (4th Cir 4/26/7), rehearing en banc den. 107 LRP 42702 (4th Cir. 7/27/7) **Fourth Circuit** found IEP itself insufficient, yet considered evidence that parents

contended that no day school that matched the IEP description existed. Court at first appeared to limit review to the four corners of the IEP, but then expanded inquiry; ST v. Weast 54 IDELR 83 (D. Md 3/18/10) Court ruled that HO did not violate Fourth Circuit precedent by considering a July IEPT meeting to be a continuation of a May IEPT meeting.

p. Notice of IEPT Meeting

1. Dept of Educ, State of Hawaii 110 LRP 65432 (SEA Hawaii 9/21/10) HO ruled that school district denied FAPE by its insufficient efforts to invite parents to an IEPT meeting. District sent fax to parents on the business day before the meeting and telephoned them just before the meeting.

2. Compton Unified Sch Dist 110 LRP 37614 (SEA Calif 6/21/10) Where the district failed to provide documentation that it had made efforts to include father in IEPT meeting, HO found procedural violation that seriously impaired parent's right to participate, therefore, denial of FAPE; JN v District of Columbia 677 F.Supp.2d 314, 53 IDELR 326 (D DC 1/11/10) Court reversed HO and found serious procedural violation where school district had IEPT meeting without parents where district made only 3 attempts and parents called each time with alternative dates; Contrast, JG & JG ex rel JG v. Briarcliff Manor unified Free Sch Dist 682 F.Supp.2d 387, 54 IDELR 20 (SD NY 1/29/10) Court ruled that school district acted appropriately where it held IEPT meeting without parents after several attempts; Corona-Norco Unified Sch Dist 110 LRP 15982 (SEA Calif 2/22/10) HO found that school district was justified in holding IEPT **meeting without** the parent present where district made and documented efforts to reschedule meeting with no explanation by parent for unavailability;

3. Christiana Sch Dist 109 LRP 24050 (SEA Del 4/3/9) Complaint investigator rejected parent argument that IEPT meeting notice violated IDEA and state regs where notice gave only 8 days notice rather than the 10 days required by state regs. Parent knew about the meeting a month earlier when prior meeting was cancelled at parent's request because of scheduling problem and parent agreed to the new meeting date.

q. Extra Curricular Activities

1. Independent Sch Dist No. 12 v Minnesota Dept of Educ 788 N.W.2d 907, 55 IDELR 140 (Minn SCt 10/7/10) State Supreme Court reversed appellate court and held that IDEA requirements concerning extracurricular activities are not limited to those that would provide educational benefit. IDEA requires that districts ensure that each child with a disability participates in extracurricular activities to the maximum extent appropriate and with equal opportunity. Reverses Independent Sch Dist No. 12 v Minnesota Dept of Educ 767 N.W.2d 748, 52 IDELR 265 (Minn Ct App 6/23/9) (cited in previous outlines)

r. Specific School

1. TY & KY ex rel TY v. New York City Dept of Educ, Region 4 584 F.3d 412, 53 IDELR 69 (2d cir 10/9/9) IDEA provision requiring the anticipated location of services be specified on an IEP does not require that a particular school be specified. The provision refers to a general type of educational program. The Second Circuit emphasized that it was not holding that an LEA can assign a student to a school that is unable to implement his IEP.

2. NS ex rel JS v. State of Hawaii, Department of Educ 54 IDELR 250 (D Haw 6/9/10) Court held that the school or physical location where a placement will be implemented is not a required component of an IEP; Red Clay Sch Dist 54 IDELR 270 (SEA Del 5/25/10); Moreland Sch Dist 55 IDELR 90 (SEA Calif 7/26/10) (all same); But See, Mat-Su Borough Sch Dist 55 IDELR 55 (SEA Alaska 7/18/10) HO found that school district refusal to discuss the particular school/location at IEPT meeting seriously impaired parent right to participate. Although location of services is generally an administrative decision, here student had severe sensory issues and the school setting was closely tied to her ability to benefit from IEP.

3. See also, cases under o. Four Corners of IEP, above

s. Educational Needs Only

(See cases in the section for the new hot button issue – Educational vs. Medical Needs)

t. IEP Content Reflects Evaluation Data

1. District of Columbia v. Bryant-James ex rel ET 109 LRP 79863 (D.DC 12/28/9) FAPE denied where student's IEP does not reflect his needs as shown by assessments.

2. Baltimore City Schs 100 LRP 5526 (SEA Md 11/4/9) Investigator found violation where IEP failed to reflect the results of assessments in the IEP statement of present levels of performance.

3. Pequot Lakes Indep Sch Dist #186 109 LRP 55000 (SEA Minn 6/26/9) IEP not properly amended when OT eval came back saying student needs OT.

u. Graduation

1. Doe by Doe v Marlborough Public Schs 54 IDELR 283 (D Mass 6/30/10) Court ruled that graduation does not end the FAPE requirement.; KB ex rel JB v. Haldeon Bd of Educ 52 IDELR 263 (D.NJ 6/30/9) Court held that graduation from middle school district did not moot request for IEE. Contrast, Bd of Educ, Massapequa Union Free Sch Dist v. CS by RS 54 IDELR 45 (ED NY 3/4/10) The case was mooted by the student's graduation; MO by CO & LO v. Duneland Sch Corp 53 IDELR 182 (N.D.Ind 10/29/9) Court held that student's graduation mooted parents' IDEA claims; Dracut Sch Committee v. Bureau of Sp Educ Appeals 55 IDELR 66 (D Mass 9/3/10) Court reversed HO award of 2 years of extended eligibility as inappropriate because Ho ordered sch dist to graduate the student. Graduation terminated eligibility.

2. RY ex rel IX v State of Hawaii, Dept of Educ 54 IDELR 4 (D Haw 2/17/10) Court held that by graduating student while dph was pending, LEA violated stay put;

v. Generalization of Skills

1. Doe by Doe v. Hampden-Wilbraham 715 F.Supp.2d 185, 54 IDELR 214 (D Mass 5/25/10); An LEA is only obligated to address a student's behavior issues while in school; school district did not have to address in-home behaviors by student.

5. Other Procedural Safeguards Issues

a. Procedural Safeguards In General

1. Dean ex rel Dean v. Sch Dist of the City of Niagara Falls 615 F. Supp.2d 63, 53 IDELR 159 (N.D.NY 5/7/9) and 52 IDELR 261 (N.D.NY 3/12/9) Court

excused exhaustion where school district failed to notify parent of her procedural safeguards;

b. Independent Educational Evaluation

1. Letter to Anonymous 55 IDELR 106 (OSEP 1/4/10) OSEP ruled that when a parent requests an IEE , a school district may ask why a parent objects to the district evaluation, but it may not require parents to explain or unreasonably delay IEE. Thus casting doubt upon validity of state regulation requiring an explanation.

2. Interboro Sch Dist 109 LRP 56717 (SEA Penna 6/9/9) HO rejected request for IEE at public expense where parents commissioned the IEE **before** they had a school **district evaluation** to disagree with; Montgomery County Intermediate Unit 110 LRP 37067 (SEA Penna **GS** 5/8/10) Because there is no obligation to pay for an IEE absent a preexisting disagreement with a district issued evaluation, HO denied reimbursement for IEE obtained by parents before district completed its eval; DZ v. Bethelehem Area Sch Dist 54 IDELR 323 (Penna Commonwealth Ct 7/27/10)Court upheld HO decision that a parent request for an IEE was premature where school district had not yet completed its eval; PL by Linzzo v. Charlotte-Mecklenburg Bd of Education (WD NC 7/23/10) Court affirmed SRO ruling that denying parents IEE where parents violated IDEA procedures by obtaining IEE before district had a chance to consider the request.

3. Garvey Sch Dist 109 LRP 23281 (SEA Calif 2/25/9) HO **denied** IEE **at public expense** where district evaluation is **appropriate.** HO found district OT evaluation appropriate despite lack of fine motor assessment and denied IEE at public expense; Capistrano Unified Sch Dist 52 IDELR 272 (SEA Calif 5/13/9) HO ruled that

school district did not have to pay for IEE, finding district eval appropriate despite the fact that the evaluator administered a parent questionnaire for kids under 3, two days after the child turned 3; In Re Student with a Disability 54 IDELR 235 (SEA Idaho 5/19/10) HO denied IEE where school district reevaluation was appropriate; Pocono Mountain Sch Dist 110 LRP 37173 (SEA Penna **WC** 4/6/10) (same); Broward County Sch Bd 55 IDELR 26 (SEA Fla 2/8/10)(same); Council Rock Sch Dist v. Bolick 55 IDELR 285 (ED Penna 12/22/10) Court ruled that HO erred by ordering an IEE at public expense because school district eval did not include enough detail; court found that district eval complied with regs.

4. Manheim Township Sch Dist 109 LRP 62296 (SEA Penna 3/10/9) HO **awarded** IEE at public expense where school psychologist failed to properly assess a student's cognitive abilities and applied a faulty statistical formula; Anaheim City Schs 110 LRP 36310 (SEA Calif 6/14/10) HO found that evaluator made numerous errors that invalidated the results of an evaluation and awarded IEE; Miami-Dade County Sch Bd 110 LRP 38158 (SEA Fla 5/25/10) HO awarded IEE at public expense where the school district was not appropriate; Waynesboro Area Sch Dist 110 LRP 68609 (SEA Penna **JM** 10/6/10) HO rule parents entitled to IEE where district eval was substantively inadequate

5. JP by EP & EP v. Ripon Unified Sch Dist 52 IDELR 125 (E.D. Calif 4/14/9) Court excused school district's **delay** of over 3 months after IEE request before filing due process where district produced correspondence showing ongoing settlement discussions with parents.

6. Brenne C by Edward C & Donna C v. Southern York County Sch Dist 55 IDELR 3 (MD Penna 8/11/10) Court found district refusal to reconsider eligibility

even after IEE showed student eligible, constituted a denial of FAPE; good grades did not prove student didn't need specialized instruction where parents and tutors did extensive work with student outside school.

7. KB ex rel JB v. Haldeon Bd of Educ 52 IDELR 263 (D.NJ 6/30/9) Court held that graduation from middle school district did not moot request for IEE.

c. Prior Written Notice

1. Letter to Lieberman 52 IDELR 18 (OSEP 8/15/8) OSEP said that an LEA may use the **IEP** form as PWN, but only where the IEP contains **all** of the information required by 34 CFR § 300.503; Adams County Sch Dist 55 IDELR 210 (SEA Colo 8/13/10) Complaint investigator ruled that school district procedural violation in using an IEP as PWN without all required contents deprived parents of the right to meaningful participation(Standard for state complaints???);

2. Comb v. Benji Sp Ed Academy, Inc 55 IDELR 162 (SD Tex 10/15/10) **PWN not required** Court dismissed SEA rejecting parent's claim that SEA takeover of a financially strapped charter school was a change of placement warranting PWN; French by French v. New York State Dept of Educ 55 IDELR 128 (N.D. NY 9/30/10) Court ruled that PWN was required but failure to provide was not actionable where no deprivation of educational benefit or right to participate; MPG ex rel JP v. NY City Dept of Educ 55 IDELR 37 (SDNY 8/27/10) Court held that failure to give PWN was harmless where parent had actual notice of placement; Shoreline Sch Dist 110 LRP 12540 (SEA Wash 2/4/10) HO ruled that procedural violation of no PWN re what evaluations would be conducted did not violate participation rights where parent objected to all evaluators; Buffalo Lake-Hector Independent Sch Dist #2159 55 IDELR 85 (SEA Mass 7/7/10) State

complaint investigator found that school district committed a procedural violation by failing to provide PWN regarding changes made to a student's ESY program.

3. Student with a Disability 110 LRP 30639 (SEA Mont 3/12/10) State complaint investigator ruled that PWN was not required to parent request to amend IEP because not discussed at IEPT meeting. ???

d. Parental Consent

1. 34 C.F.R. Sections 300.300 and 300.9 were amended effective December 31, 2008 to provide that parents are now permitted to **revoke** in writing their consent for the continued provision of special education and related services after having received services. School districts are no longer able to use mediation or a due process hearing to seek to override or challenge the parents' lack of consent. School districts will not be deemed to be in violation of IDEA for denial of FAPE where the parent has revoked consent to the continued provision of special education and related services. Jefferson County Bd of Educ 110 LRP 2743 (SEA Alabama 9/29/9) Parent revoked consent and then student had several disciplinary infractions. Parent then sought to have the student immediately reclassified as eligible and filed for dp. HO ruled that parent cannot turn SpEd off and on like a **faucet.** HO found no violation by the district in taking a reasonable time to reevaluate the student; Minnesota Special Sch Dist # 001 110 LRP 44951 (SEA Minn 5/17/10) State complaint investigator ruled that school district erred by failing to acknowledge that parent revoked consent for a portion of a student's bip.

2. Letter to Johnson 110 LRP 73644 (OSEP 6/3/10) OSEP ruled that an LEA may not require a parent to sign a consent form indicating that he understands the

action for which consent is sought as a prerequisite to evaluation, reevaluation or the provision of services.

3. In Re RW & Orange County Social Services Agency v. AW 109 LRP 17060 (Calif App Ct 3/26/9) State appellate court affirmed juvenile court decision to limit parent's educational decision-making rights and to order consent to a residential placement over parent's objections.

4. Whitter Union HS Dist 53 IDELR 170 (SEA Calif 9/15/9)Court affirmed HO decision **overriding** consent for **reevaluation**; Reyes v. Valley Stream Sch Dist 52 IDELR 105 (E.D. NY 3/26/9) (other eval after initial eval); Bangor Sch Dist 109 LRP 37603 (SEA Maine 3/10/9); Tustin Unified Sch Dist 110 LRP 1194 (SEA Calif 4/13/10) Finding that a parent could not dictate that a particular psychologist conduct an evaluation because the district has the right to select any qualified personnel to conduct an evaluation, HO overrode parent's lack of consent for a psychoeducational assessment of student with Aspergers.; Pemberton Township Bd of Educ 110 LRP 50551 (SEA NJ 8/11/10) HO overrode lack of consent where student had multiple disciplinary infractions and LEA suspected disability under child find duty.

5. Houston Independent Sch Dist 110 LRP 38147 (SEA TX 6/18/10) HO found that LEA did not violate IDEA by not performing an evaluation where parent placed restrictions on consent form and picked it apart; GJ by EJ & LJ v. Muscogee County sch Dist 704 F.Supp.2d 1299, 54 IDELR 76 (MD GA 3/25/10) Court ruled that by placing numerous **conditions** on consent to reevaluation, requiring a specific evaluator and demanding that the reeval not be used in litigation, parents did not give consent at all;

6. Gwinnett County Sch Dist 53 IDELR 341 (SEA GA 1/4/10) HO ruled that, given the equities, parents could not challenge IEP after first refusing to consent to triennial reevaluation.

e. Access to Records/ Confidentiality

1. Letter to Anonymous 53 IDELR 235 (US Dept of Educ 12/17/8) The federal Department of Education interprets the 2008 changes to FERPA regulations. Concerning the greater flexibility given to school administrators where there is a threat to health or safety, it stated that where officials have a rational basis for concluding that there is a significant and articulatable threat to the **safety or health** of the student or others, they may release personally identifiable information contained in an educational record.

2. Letter to Brousaides 110 LRP 73612 (OSEP 6/9/10) OSEP ruled that LEAs must maintain documentation or **records** of their provision of FAPPE to students with disabilities. SEA determines the form of the documentation that is required.

CG & SB v. Commonwealth of Penna, Dept of Educ 52 IDELR 72 (M.D. Penna 3/16/9) SEA **violated** IDEA & FERPA by submitting a discovery response that provided enough detailed information to personally identify the students receiving SpEd even though their names were not released; In re Students with Disabilities 109 LRP 3187 (SEA Montana 2/27/9) State compliance officer ruled that a district violated IDEA and FERPA when it destroyed student records without notice to parents and where the persons who destroyed the records were not properly trained in confidentiality requirements; Washoe County Sch Dist 109 LRP 78026 (SEA NV 4/2/9) School district violated FERPA and IDEA when it deleted emails to parent concerning the child's

education from their server without notifying parent; Contrast, Hensley v. Colville Sch Dist 109 LRP 6538 (Wash Ct App 2/3/9) Where parent could not clearly identify what student records had not been provided, court found no unlawful denial of access to records.

3. Medici v. Pocono Mountain Sch Dist 54 IDELR 87 (MD Penna 3/16/10) Court refused to dismiss parent suit for **testing protocols** holding that it was unclear whether the documents were educational records under FERPA.

4. Spellman v. Clarksville Montgomery County Sch System 55 IDELR 160 (MD Tenn 10/21/10) Court dismissed parent action for access to educational records for failure to **exhaust** thru dph, finding that educational records claims are covered by IDEA.

5. Albuquerque Public Schs 53 IDELR 275 (SEA NM 8/26/9) HO held that by filing a dp complaint, parents **waive** any claim that school district may not review the student's records. Despite FERPA and IDEA privacy provisions, access to the student's educational records is a vital part of the school district's right to defend and its right to a fair hearing.

6. Disability Law Center of Alaska v. Anchorage Sch Dist 581 F.3d 936, 53 IDELR 2 (9th Cir. 9/9/9) Ninth Circuit recognized an exception to FERPA permitting **protection and advocacy** organizations to review educational records and to investigate allegations of abuse/neglect of persons with disabilities.

7. AB v. Clarke County Sch Dist 52 IDELR 99 (M.D. Ga 3/30/9) Court denied the request of parents of a student with disabilities for the educational and social services records of **another student** who had allegedly sexually assaulted their daughter,

citing privacy concerns and a lack of relevance. Contrast, Blunt v. Lower Merion Sch Dist 52 IDELR 191 (E.D. Penna 5/7/9) Although recognizing that other students have a privacy interest in their ed records, court ordered district to produce records to class plaintiffs alleging that black students with disabilities did not receive appropriate services. Court ordered district to first redact names, addresses and ssn#s; . LMP ex rel EP, DP & KP v. Sch Bd of Broward County 53 IDELR 49 (S.D. Fla 8/18/9) Court granted parent's discovery request regarding services provided to other students with autism because it goes to the heart of their predetermination claim, noting court order exception to FERPA and state law.

8. Jaccari J v. Bd of Educ of the City of Chicago Dist No. 299 52 IDELR 280 (N.D.Ill 7/22/9) Court ruled that **incident reports** showing the use of physical restraints are educational records under FERPA and IDEA and ordered district to produce the incident reports for the grandparents of a student with an emotional disturbance.

9. SA by LA & MA v. Tulare County Office of Educ 53 IDELR 111 (E.D.Calif 9/24/9) Court upheld school district policy of only producing hard copies of **emails** that were actually placed in a student's file, rather than all emails wherever kept, in response to documents requests. Court found policy consistent with FERPA.

10. CB ex rel EB v. Pittsford cent Sch Dist 53 IDELR 75 (W.D.NY 9/15/9) Noting IDEA's confidentiality provisions, court rejected a school district's motion to strike a parents complaint as an "**anonymous** pleading" because the parent and child identified themselves only by initials. JA v. Gutierrez, Preciado & House, LLP 108 LRP 66191 (Cal Ct App 10/21/8) A school district and its law firm had a right to disclose student records to **codefendants** in a lawsuit despite FERPA and state laws re privacy.

11. Hough by Abbott v.Shakopee Public Schs 608 F.Supp.2d 1087, 53 IDELR 232 (D.Minn 3/30/9) Court rejected the argument that students with disabilities do not have a reasonable expectation of **privacy** at school, holding that a school district requirement that students with disabilities submit daily to intrusive searches violated their Fourth Amendment rights and was struck down by the Court.

12. Letter to Anonymous 109 LRP 25224 (FPCO 4/6/9) FPCO ruled that parent could not force district to remove a document with a diagnosis of pervasive developmental disorder from a student's educational records. The fact that the parents disagreed with the SpEd director re eligibility is not sufficient basis to have the document removed from the educational records under the FERPA **amendment** policy.

13. Wittenberg ex rel JW v. Winston Salem/Forsyth County Bd of Educ 53 IDELR 45 (M.D.NC 8/19/9) Because **mediation** discussions are confidential, court agreed to place a mediation agreement under seal.

14. Plainfield Bd of Educ v. RN 52 IDELR 249 (D.Conn 6/26/9) Court denied school district motion to submit entire administrative record under seal rather than requiring it to first redact all personally identifiable information.

f. Transfer of Rights

(No significant cases)

g. State Complaint Procedures

1. Reinhart v. Albuquerque Public Sch Bd of Educ 595 F.3d 1126, 110 LRP 9870 (10th Cir. 2/16/10) **Any entity** may file a state complaint. Speech language pathologist filed successful state complaint alleging that inaccurate caseload lists deprived students

of services on their IEPs. Tenth Circuit ruled that subsequent reduction in her caseload was an adverse action for §504 purposes.

1. SA by LA & MA v. Tulare County Office of Educ 109 LRP 1507 (E.D. Calif 1/5/9) and 109 LRP 10904 (E.D.Calif 2/10/9) Court held it is OK to appeal state complaint ruling to court without exhausting dp procedures; and ; Independent Sch Dist No. 12 v Minnesota Dept of Educ 767 N.W.2d 748, 52 IDELR 265 (Minn Ct App 6/23/9) School district appealed state complaint ruling to state court.

2. Examples of some recent state complaint findings: Baltimore City Schs 110 LRP 72202 (SEA Md. 6/29/10); Oregon City Sch Dist 110 LRP 39205 (SEA OR 6/23/10); North St Paul-Maplewood Independent Sch Dist # 622 55 IDELR 118 (SEA Minn 6/7/11); In re Student with a Disability 110 LRP 35352 (SEA Del 5/26/10); Minnesota Special Sch Dist # 001 110 LRP 44951 (SEA Minn 5/17/10); Christina Sch Dist 110 LRP 26225 (SEA Del 4/6/10); Lyon Count Sch Dist 110 LRP 73249 (SEA NV 2/16/10); Colorado Springs Dist 11 110 LRP 22639 (SEA Colo 1/8/10); Salem-Keizer Sch Dist 110 LRP 45519 (SEA OR 7/23/10); Student with a Disability 110 LRP 54907 (SEA WY 07/08/10); Buffalo Lake-Hector Independent Sch Dist #2159 55 IDELR 85 (SEA Mass 7/7/10).

3. Eg.s 2009: Shakopee Indep Sch Dist 52 IDELR 10 (SEA Minn 3/18/9); Christiana Sch Dist 109 LRP 24050 (SEA Del 4/3/9); Washoe County Sch Dist 109 LRP 78026 (SEA NV 4/2/9); Prince Georges County Public Schs 53 IDELR 33 (SEA Md 3/31/9); Thompson R-2J Dist 53 IDELR 63 (SEA Colo 4/3/9); Prince Georges County Public Sch Dist 52 IDELR 273 (SEA Md 4/7/9); Cheyenne Mountain Sch Dist 109 LRP 54684 (SEA Colo 5/20/9); Pequot Lakes Indep Sch Dist #186 109

LRP 55000 (SEA Minn 6/26/9); Prince Georges County Public Schs 109 LRP 77683 (SEA Md 6/29/9); Burnsville Indep Sch Dist # 191 53 IDELR 66 (SEA Minn 7/22/9); Lakeville Indep Sch Dist # 194 53 IDELR 206 (SEA Minn 8/5/9); Prince Georges County Public Schs 109 LRP 76845 (SEA Md 8/12/9); Baltimore City Schs 100 LRP 5526 (SEA Md 11/4/9); Delaware Dept of Educ 110 LRP 1303 (SEA Del 12/11/9).

h. Other Procedural Safeguards

(1). Surrogate Parents (No significant cases)

(a) LK by Henderson v. North Carolina Dept of Educ 55 IDELR 47 (ED NC 6/23/10) Court permitted surrogate parent to sue SEA over SRO discipline decision.

(2). Homeless Child

(a). LR by GR v Steelton-Highspire Sch Dist 54 IDELR 155 (MD Penna 4/7/10) Court ruled that the school district where the student resided when his home burned down was the LEA that was responsible for continuing to enroll him and implement his IEP even though he had moved with relatives to another district because the student was within the definition of **homeless** under the McKinney-Vento Act which is adopted by IDEA.

6. Procedural Violations

a. Bd of Educ of City of Chicago v Illinois State Bd of Educ 55 IDELR 133 (ND Ill 9/29/10) Court held that the school district failure to provide any specialized instruction was a **substantive** denial of FAPE as well as a procedural violation, therefore, no need to prove educational harm.

b. Compton Unified Sch Dist 110 LRP 37614 (SEA Calif 6/21/10) Where the district failed to provide documentation that it had made efforts to include father in IEPT meeting, HO found procedural violation that seriously **impaired** parent's right to **participate**, therefore, denial of FAPE; Los Angeles Unified Sch Dist 110 LRP 34448 (SEA Calif 6/3/10) Although school district committed a procedural violation by failing to create a transition plan, HO found no harm where transition services provided were adequate; Hawkins v. District of Columbia 54 IDELR 91 (D DC 3/10/10) Court ruled that where parent had received all of the substantive relief, this moots the procedural violations alleged in the complaint, no **educational harm** done; Winchester Bd of Educ 110 LRP 14850 (SEA Conn 2/4/10) Ho found that egregious procedural violations denied parent the right to meaningful participation. School district failed to invite persons knowledgeable about student to IEPT; failed to write goals while parent present at IEPT meeting –instead doing it 3 days later by selecting goals for a form bank of standard goals.; Shoreline Sch Dist 110 LRP 12540 (SEA Wash 2/4/10) HO ruled that procedural violation of no PWN re what evaluations would be conducted did not violate participation rights where parent objected to all evaluators; Smith v. District of Columbia 55 IDELR 219 (D DC 11/30/10) To be actionable, a procedural violation must result in educational harm; French by French v. New York State Dept of Educ 55 IDELR 128 (N.D. NY 9/30/10) Court ruled that PWN was required but failure to provide was not actionable where no deprivation of educational benefit or right to participate; JDG by Gomez v. Colonial Sch Dist 55 IDELR 197 (D. Del 11/2/10) Court affirmed HO Panel ruling that a late resolution session was a harmless procedural error.

b. Anderson & Steele ex rel AJ v. District of Columbia 606 F.Supp.2d 86, 52 IDELR 100 (D.DC 3/30/9) (Failure to have teacher at IEPT meeting and teacher's failure to send monthly progress reports were procedural violations, and because no **educational harm,** were not a denial of FAPE.); Mahoney ex rel BM v. Carlsbad Unified Sch Dist 52 IDELR 131 (S.D. Calif 4/8/9) (even if failure to invite parent's private provider is a procedural violation, where there was no evidence that it impeded parent's **right to participate**, no violation.); Caitlin W v Rose Tree Media Sch Dist 52 IDELR 223 (E.D. Penna 5/15/9) (district committed procedural violation in failing to respond to dp complaint, but harmless); JD by JA v. Nisksquua Central Sch Dist 52 IDELR 250 (N.D.NY 6/19/9) (procedural violations harmless); Conner ex rel IC v. New York City Dept of Educ 53 IDELR 192 (S.D.NY 10/13/9) (even if failure to conduct BIP, procedural error and no evidence of harm); Dan M ex rel Colin M v. Dept of Educ, State of Hawaii 53 IDELR 255 (D.Haw 12/18/9) (even if failure to note change in math class on IEP document, procedural violation was harmless where student attended correct math class and no ed harm resulted.)

7. Section 504, ADA, Section 1983, etc

a. See major changes to §504 described in detail beginning on page 2 of this outline.

b. Reinhart v. Albuquerque Public Sch Bd of Educ 595 F.3d 1126, 110 LRP 9870 (10th Cir. 2/16/10) Speech language pathologist filed successful state complaint alleging that inaccurate caseload lists deprived students of services on their IEPs. Tenth Circuit ruled that subsequent reduction in her caseload was an adverse action for §504 **discrimination** purposes; BH by SH v. Joliet Sch Dist # 86 54 IDELR

_____ School district refusal to convene an IEPT meeting after school hours did not constitute a basis for a discrimination claim under §504; unlike, IDEA, the **504** definition of **FAPE** requires a showing of **discrimination**; Anika T by John T & Simone T v. Unionville-Chadds Ford Sch Dist 52 IDELR 68 (E.D. Penna 3/24/9) Following Winkleman, parents have standing to sue on their own behalf and to represent themselves under both IDEA and §504.

c. Mark H ex rel Michelle H and Natalie H v. Hamamoto 620 F.3d 1090, 55 IDELR 31 (9th Cir 8/26/10) Ninth Circuit reversed summary judgment vs parents , finding that they established fact issues re §504 failure to accommodate and deliberate indifference.

d. Ellenberg v. New Mexico Military Institute 572 F.3d 815, 52 IDELR 181 (10th Cir 7/10/9) Although IDEA eligibility will in the majority of cases also establish a substantial limitation on a **major life activity** for §504, the mere presence of an IEP is not enough. Tenth Circuit held that the evidence did not establish that the student's OCD substantially limited her ability to learn, therefore not eligible for §504; Chicago Sch Dist 299 54 IDELR 304 (SEA Ill 3/5/10) Where student met the eligibility criteria for eligibility HO found school district violated IDEA despite §504 plan with a plethora of accommodations;

e. DL ex rel JL & RL v. Unified Sch Dist No 497 596 F.3d 768, 54 IDELR 1 (10th Cir 2/23/10) Tenth Circuit rejected IDEA, 504, Title II and constitutional claims by a parent. Parents could not show that her child's absences from school were caused by an alleged policy of a Kansas district that it would not serve non-resident children with autism

f. Barker v. Riverside County Office of Educ 584 F.3d 821, 109 LRP 67281 (9th Cir 10/23/9) Ninth Circuit held that a **teacher** who claimed that she was treated differently by a school district after she **voiced** a concern that the district's special ed services were not complaint with federal and state laws stated a claim under §504 and ADA. "Congress recognized that disabled individuals may require assistance from others to defend their rights."

g. PP by Michael P & Rita P v. West Chester Area Sch Dist 585 F.3d 727, 53 IDELR 109 (3d Cir. 11/2/9) Noting that there are few federal statutes as related as IDEA and §504, the Third Circuit applied the IDEA **2 year** statute of limitations to §504 actions.

h. Mumid v. Abraham Lincoln High Sch 618 F.3d 789, 55 IDELR 33 (8th Cir 8/25/10) Eighth Circuit ruled that school district policy of delaying SpEd evaluations for English language learners until they had attended an alternative ELL school for 3 years did not violate Title VI as national origin discrimination.

i. BH ex rel KH v. Portage Sch Bd of Educ 109 LRP 6536 (W.D. Mich 2/2/9) Court required parents to exhaust under IDEA before pursuing a § 504 action for **retaliation**

j. Payne ex rel DP v. Penninsula Sch Dist 598 F.3d 1123, 54 IDELR 72 (9th Cir 3/18/10) The Ninth Circuit, by a 2 – 1 vote, required parents to **exhaust** admin remedies by a dp hearing where student was injured while locked in a 5x6 foot safe room that was specifically mentioned in the student's IEP. Ninth Circuit noted that HO should have first crack on educational issues presented; Helsing v. Avon Grove Sch Dist 54

IDELR 284 (ED Penna 6/30/10) Court held that exhaustion required where 1983 & ADA issues have same facts as IDEA claim.

k. CB v. Sonora Sch Dist 54 IDELR 293 (ED Calif 3/8/10) Court denied immunity and allowed §1983 suit against personnel to continue where staff ignored the bip of an 11 year old with a mood disorder that caused him to freeze in place, cross arms and keep his head down, instead calling the police and having him handcuffed and put in the back of a squad car; JDP by Pope v. Cherokee County Sch Dist 55 IDELR 44 (ND GA 8/18/10) Court held that restraint of a student with autism and mental impairment by staff holding both ankles and wrists was not a violation of 504or ADA where no bad faith or intentional discrimination; TM by Benson v. San Francisco Unified Sch Dist 53 IDELR 322 (ND Calif 1/19/10) Court denied summary judgment where parent alleged that a specialist based a fifth grader's placement upon race rather than her SpEd needs stating a claim under §1983; Doe v. Sumner County Bd of Educ 55 IDELR 95, 96, 136 & 137 (MD Tenn 9/20/10) Court dismissed 504 and ADA claims but allowed certain constitutional claims in cases filed by multiple parents alleging abuse at school by a teacher;

l. Bess v. Kanawha County Bd of Educ 53 IDELR 71 (S.D.**WV** 9/17/9) Settlement agreement that waives IDEA claims does not cover claims under §504, ADA or §1983.

8. NCLB Issues

a. Connecticut v. Duncan 612 F.3d 107, 110 LRP 40269 (2d Cir 7/13/10) Second Circuit held that a state's challenge to NCLB was not ripe for review. State wanted to assess Sped & ELL students at instructional level rather than grade level. USDOE denied

request without providing an opportunity for a hearing. Court ruled that the USDOE must first address the claims at the administrative level.

b. Pontiac City Sch Dist v. Secretary of US Dept of Educ 512 F.3d 252, 108 LRP 792 (6th Cir 1/7/8) Districts from three states sought a ruling that NCLB was an **unfunded mandate**. Sixth Circuit held that plaintiffs had stated a cause of action and denied a motion to dismiss; Pontiac City Sch Dist v. Secretary of US Dept of Educ 584 F.3d 253, 108 LRP 65523 (6th Cir 10/16/9) Sixth Circuit held that the unfunded mandate clause of NCLB means that any requirement by USDOE to require states to fund the excess cost of NCLB is **unenforceable**.

c. Prince Georges County Public Schs 53 IDELR 33 (SEA Md 3/31/9) State investigator held that the fact that a 3 year old with autism was denied a **highly qualified teacher** for several weeks was a denial of FAPE, but because the HQT requirement does not create a private right of action, relief was denied????? See, Blanchard by Blanchard v. Morton Sch Dist 52 IDELR 3 (W.D.Wash 2/19/9) Court ruled for school district in challenge by parents to the individual selected to be 1:1 aide where individual was qualified;

9. Disproportionality

(No significant cases)

10. Part C/ Early Intervention

a. Zoe M v. Blessing 52 IDELR 184 (D. Ariz 5/15/9) The new Part C stay put rule is clear: when transitioning from **ISFP** to public school at age 3, stay put placement is not IFSP

b. AG & CG ex rel NG v. Frieden 52 IDELR 65 (S.D.NY 3/25/9) Court found that an IFSP that provided 20 hours of ABA services, rather than the parents requested 30 hours, was appropriate where parent expert admitted that student was making some ed progress at 20 hours.

c. OSEP Early Childhood Transition Facts 109 LRP 77099 (OSEP 12/1/9) OSEP provides guidance regarding the timing of notice and evaluation requirements for children transitioning from Part C to Part B.

11. Private Schools

a. RH by Emily H & Matther H v. Plano Independent Sch Dist 54 IDELR 211 (5th Cir 5/27/10) Court noted that under IDEA, placement in a **private school** is the **exception**! Accordingly in interpreting its own Daniel RR test, the **Fifth** Circuit ruled that the LEA's inclusion preschool class was LRE for a preschool student rather than parent's private preschool with general ed classes.

b. Children's Center for Developmental Enrichment v. Machle 612 F.3d 518, 54 IDELR 273 (6th Cir 7/16/10) Sixth Circuit held that a private school was not liable for violations of IDEA, and therefore, a private school also may not receive an award of attorney's fees against a parent under IDEA.

c. Letter to Goldman 53 IDELR 97 (OSEP 3/26/9) OSEP opines that a student who withdraws from public school and enrolls in a **private** school or home school does not lose his eligibility. If she reenrolls, she remains eligible, gets an IEP and may need to be reevaluated.

d. Letter to Eig 52 IDELR 136 (OSEP 1/28/9) OSEP stated that where a student attends a private school out of state, his home school district must

evaluate the student for eligibility at the request of the parent. (The parents may then enroll him in home district where he is entitled to FAPE; if he remains in private placement, the local LEA is responsible only for portionate services.)

12. Attorneys' Fees

a. In Arlington Cent. Sch. Dist Bd. of Educ v. Murphy 548 U.S. 291, 126 S.Ct. 2455, 45 IDELR 267 (6/16/06) the Supreme Court ruled that a parent who prevails in an IDEA case is not entitled to recover **expert** witness fees under the Act's provision allowing recovery of reasonable attorney's fees and costs.

b. JD by Davis v. Kanawha County Bd of Educ 53 IDELR 315 (4th Cir. 1/26/10) **Fourth Circuit** ruled that parents previous attorney could not get an attorneys fees award against the father. Court refused to reconsider decision that fees belong to the parent not the attorney. Attorney argued that this would have a chilling effect upon FAPE litigation as attorneys would feel that they would have to take retainers up front. Court ruled that if there was a dispute, former attorney could pursue an action against parents for failure to pay the attorney.

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

d. Letter to Irby 55 IDELR 264 (OSEP 2/12/10) The purpose of the resolution meeting is to give the school district a better understanding of the parent's

complaint and an opportunity to resolve the dispute. Although the parent is required to participate in the **resolution meeting**, the law does not require the parent to have an open mind as to settlement. OSEP noted that a failure to consider a reasonable settlement could have attorney's fees implications; Jeremiah B v. Dept of Educ, State of Hawaii 54 IDELR 21 (D. Haw 1/19/10) Magistrate Judge ruled that P's attorney's **fees** petition must be reduced because hours spent at a resolution meeting are not reimbursable.

e. Weissburg v. Lancaster Sch Dist 591 F.3d 1255, 53 IDELR 249 (9th Cir 1/14/10) Ninth Circuit ruled that because state law provides that students classified with autism have a legal right to a teacher with autism certification, grandparents were prevailing party in action to change category from mentally impaired to autism. Unlike parents who are attorneys, Ninth Circuit awarded attorney's fees to lawyer **grandparents** who represented child.

f. District of Columbia v. Strauss (D.DC 4/14/9) 607 F.Supp.2d 180, 52 IDELR 126 (D.DC 4/14/9) While LEA decision to fund IEE at issue mooted dp complaint, it did not convert LEA to prevailing party status because district did not obtain judicial relief; to award attorney fees would punish parents who were right to complain in the first place

g. El Paso Independent Sch Dist v. Richard R ex rel RR 53 IDELR 175 (5th Cir 12/16/9) Fifth Circuit held that agreements from resolution session are enforceable, therefore actions of parent lawyer were unreasonable, but court refused to award attorneys fees vs parent lawyer because school dist was not the **prevailing party;** Chavez ex rel Chavez v. Bd of Educ of Tularosa Municip Schs 52 IDELR 229 (D.NM

2/24/9) SEA denied FAPE to student but parents not prevailing party where no change in the parties legal relationship;

h. Dept of Educ, State of Hawaii v. Karen I & Marcus I 53 IDELR 157 (D. Haw 9/21/9) Where HO took it upon himself to conduct 2d hearing after being reversed **without a remand** by the state court, federal court refused to award attorneys fees based upon order that should never have been issued.

i. District of Columbia v. Jeppsen ex rel MJ 514 F.3d 1287, 49 IDELR 121 (D.C. Cir 2/1/8) Without reaching the issue of whether a **parent** may be awarded attorneys fees when the school district appeals and the parents win (2d, 6th & 9th Circuits do not allow; 7th and 10th Circuits do allow; DC Cir not yet decided), Court remanded the case for factual development.

j. Damian J v. Sch Dist of Philadelphia 109 LRP 79549 (3d Cir 12/23/9) Third Circuit affirmed District court reduction of 5% of attorney's fee lodestar calculation where parent prevailed on core issue but not on other issues.

13. Parent Rights – in Student's Education

a. Ciarrochi v. Clearview Regional HS Dist 54 IDELR 285 (D NJ 6/25/10) Court found that a parent failed to state a cause of action vs school district where he alleged **emotional distress** because his son failed to learn how to read.

b. Ponce v. Clovis Unified Sch Dist 54 IDELR 226 (ED Calif 4/16/10) After allowing time to amend, the court dismissed the complaint of two brothers against their school district. Plaintiffs were minors proceeding without counsel. The court allowed them time to amend to include their parents as parties so they could proceed without counsel per *Winkleman*, but they refused.

c. Anika T by John T & Simone T v. Unionville-Chadds Ford Sch Dist 52 IDELR 68 (E.D. Penna 3/24/9) Following *Winkleman*, parents have standing to sue on their own behalf and to represent themselves under both IDEA and §504.

14. Maintenance of Effort

a. Letter to Atkins-Lieberman 110 LRP 73608 (OSEP 6/30/10) There is no provision under IDEA that allows a reduction in state financial support based upon a change in the age range of children served. The requirement that next year's financial support of the excess SpEd costs not be below the previous year's support is not affected by eliminating 3 and 4 year olds.

b. Letter to East 110 LRP 73642 (OSEP 6/14/10) MOE requirement re maintaining level of financial support includes the level of support from agencies other than the SEA. This is not a new interpretation.

15. Technology

a. Southern York County Sch Dist 55 IDELR 242 (SEA Penna **JM** 9/29/10) HO found that LRE placement was homebound instruction for student with disease that prevented him from coming to school; webcam sessions provided some interaction with peers (**virtual school**).

b. Questions & Answers on the National Instructional Materials Accessibility Standards (NIMAS) 55 IDELR 80 (OSERS 8/1/10) OSEP clarified which students with blindness and print disabilities are eligible to use NIMAS materials.

c. See the section on Assistive Technology

16. Collaborative Process

a. Schaffer v. Weast 546 U.S. 49, 126 S.Ct. 528, 44 IDELR 150 (11/14/5). The Supreme Court noted that the IEP process is designed to be collaborative in nature.

b. KG ex rel CG v. Sheehan 111 LRP 6572 (D RI 12/30/10) Ct denied reimbursement in part where parent violated the collaborative spirit underlying IDEA by cancelled IEPT meetings, stacked meetings with private sch personnel; and urged IEPT member not to vote for a placement;