

Special Education Law: A Year in Review

Spring Special Education Administrators Conference

South Carolina Department of Education Office of Exceptional Children

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Legislative Issues

I. Rosa’s Law (S. 2781 H.R. 4544)

The bill, signed into law on October 5, 2010 changes all references in Federal law from “mental retardation” to “intellectual disability”.

II. Recognizing the work of Special Education Teachers (H. Congressional Resolution 284)

The resolution, passed 415-0 in the House of Representatives and by voice vote in the Senate, recognizes the amount of work required to be a special education teacher and commends the 370,000 special education teachers for their sacrifice and dedication to individuals with special needs.

IDEA Case Law Up-Date

I. Evaluation Issues

A. The Court found that the school district violated its responsibility under the child find provision of the IDEA when it did not conduct a special education evaluation of a student. The 10th grade student was referred by the school to a mental health counselor since the student failed every subject and the teachers reported that her work was “gibberish and incomprehensible”, she played with dolls in class and urinated on herself in class.

Although the mental health counselor recommended a special education evaluation, the school district did not refer her for an evaluation and instead

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promoted her to the 11th grade. The school did finally conduct an evaluation when the parent made a referral. Compton Unified School District v. Addison 598 F.3d 1181,54 IDELR 71 (United States Court of Appeals, 9th Circuit (2010)).

- B. The Court affirmed the District Court’s conclusion supporting the use of a general education intervention team as part of the regular pre-referral process before a student would be evaluated for special education services. The Court noted that the use of alternative programs is not inconsistent with the IDEA for it is sensible policy for a school to explore options in the regular education environment before designating a child as a special education student. The process did not act as a “roadblock” to prevent the parents from requesting an evaluation at any time. In this case, the parents had never submitted a request to have their child evaluated.
- Lastly, the Court concluded that the IDEA’s procedural safeguards do not apply to general education interventions and therefore the parents do not have a legal right to be part of such team. The mere discussion of a possible special education referral by the team does not become a special education referral triggering the IDEA’s procedural protections. A.P. v. Woodstock Board of Education 370 F.Appx. 202, 55 IDELR 61 (United States Court of Appeals, 2nd Circuit (2010)). Note: This is an unpublished decision.
- C. The United States Department of Education issued a clarification memo that it would be inconsistent with the IDEA’s evaluation procedures for a school to reject a referral for a special education evaluation from a parent and delay the provision of an initial evaluation on the basis that the student has not participated in an RTI (Response to Intervention) strategy or framework. The IDEA allows a parent to request an initial special education evaluation at any time.
- In addition, although the IDEA does not prescribe a specific timeframe from referral for evaluation to requesting parental consent to evaluate, it is the Department’s policy that the school must seek parental consent within “a reasonable period of time” after receiving a referral. If the school does not feel a special education is warranted and denies the parent’s request, the school must provide written notice of refusal to evaluate the student which is subject to a due process hearing or an administrative complaint should the parent challenge the school’s decision. Memorandum to State Directors of Special Education 56 IDELR 50 (United States Department of Education, Office of Special Education Programs (2011)).
- D. The parents sued the school under Section 504 for punitive and compensatory damages based on a hearing officer’s determination that the school did not timely refer the student for an IDEA evaluation.
- The Court, held the use of pre-referral interventions may suggest an timely diagnosis of the student’s psycho-educational problems but they were well intended and did not support the Section 504 liability standard of bad faith or gross departure from acceptable professional standards. Therefore, the 504 claims

were dismissed. D.A. v. Houston Independent School District 629 F.3d 450, 55 IDELR 243 (United States Court of Appeals, 5th Circuit (2010)).

- E. The Court held that the school district could not proceed with an initial special education evaluation when one parent provided written consent for the evaluation and the other parent provided a written refusal to consent to the evaluation. Both parents had equal legal rights in this matter. The parents are free, however, to litigate any dispute regarding their relative educational decision making rights in the family court. In the Matter of J.H. v. Northfield Public School District 52 IDELR 165 (Minnesota Court of Appeals (2009)). Note: This is an unpublished decision.
- F. The Court held that by imposing numerous conditions on the reevaluation (including the requirement that the parents meet with the evaluators prior to and after the evaluations prior to the submission to the Team, that all evaluations be conducted in the presence of the parent and the evaluation shall not be submitted to anyone without parent consent) the parents in effect refused to consent. The Court ordered the parent to consent to the reevaluation and held that the parents were not entitled to an Independent Educational Evaluation at public expense. G.J. v. Muscogee County School District 54 IDELR 76 (United States District Court, Middle District, Georgia (2010)).
- G. There is no requirement under the IDEA that a school district conduct a reevaluation of a child with a disability or additional testing solely to satisfy the eligibility criteria established by the College Board or other testing programs to secure testing accommodations on the SAT/ACT. However, there is nothing in the IDEA that prevents a student from submitting to the College Board or other testing organization the results of testing done as part of a reevaluation. Moreover, there is nothing in the IDEA that bars a District from conducting testing to satisfy the eligibility criteria established by the College Board or other testing programs but such testing generally would not be covered by Part B of the IDEA and would have to be paid for out of an alternate funding source. Letter to Moffit 54 IDELR 130 (United States Department of Education, Office of Special Education Programs (2009))

II. Eligibility Issues

- A. A student with an “other health impairment” was determined by the Team to be no longer eligible for special education since he was demonstrating “age expected success” in the regular education curriculum with modifications and accommodations provided by the regular education staff. The Court, in overturning the hearing officer and district court, concluded that there was no adverse affect on the student’s educational performance requiring special education. The Court clarified that the appropriate question is not whether the disability may affect educational performance but whether in reality it does.

Here, the student's needs could be met through a health plan implemented in the regular class.

In addition, the Court noted that the hearing officer and lower court relied in great part on the testimony of the student's physician. Although a physician's diagnosis and input is important and bears on the team's decision a "physician cannot simply prescribe special education" since they are not a trained educational professional with knowledge of the subtle distinctions that affect IDEA classifications. Marshall Joint School District No.2 v. C.D. 616 F.3d 632, 54 IDELR 307 (United States Court of Appeals, 7th Circuit (2010)).

- B. A 9th grade student diagnosed as having a conduct disorder, bipolar disorder and ADHD was deemed eligible for IEP services under the emotionally disturbed and other health impaired categories. The Court rejected the school's argument that the student was socially maladjusted finding that the student had limited social skills, struggled to pass his classes and failed his standardized tests. In addition, the Court found that his ADHD adversely affected his educational performance based on evidence that he had difficulty focusing during tutoring sessions. The school presented no evidence at the due process hearing relying only on the evidence presented by the parents. Hansen v. Republic R-III School District 56 IDELR 2 (United States Court of Appeals, 8th Circuit (2011)).
- C. The IDEA addresses the timing for completing an initial evaluation but does not address the timing of the public agency's eligibility determination. An initial evaluation must be conducted within 60 days of receiving parental consent for the evaluation, or, if the State establishes a timeframe within which the evaluation must be conducted, within that timeframe. There is no specific timeline for the public agency to make its eligibility determination from the time the parent has requested an initial evaluation, however, a public agency must make eligibility determinations "within a reasonable period of time after the evaluation has been conducted" to ensure that an eligible child with a disability receives a FAPE. Letter to Weinberg 55 IDELR 50 (United States Department of Education, Office of Special Education Programs (2009)).
- D. The school district found the student was no longer eligible as a student with a specific learning disability since there was no severe discrepancy based on the statistical formula used in a computer program that factors in a regression analysis. The Court, in overturning the decision, held that the IDEA prohibits reliance on any one test or formula for determining eligibility. M.B. v. South Orange-Maplewood Board of Education 55 IDELR 18 (United States District Court, New Jersey (2010)).
- E. Under the IDEA, a local education agency is not required to provide students who have left traditional secondary education programs and entered a GED test preparation program with special education services unless the State considers the GED test preparation program to be a part of an appropriate secondary education.

III. IEP/FAPE

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

1. Have the procedures set forth in the IDEA been adequately complied with?
2. Is the IEP reasonably calculated to enable the child to receive educational benefits?

B. Procedural Issues

1. The Court held that a school district did not violate either the IDEA or Section 504 when it refused to convene the IEP Team meeting in the evening as requested by the parents. The Court noted that the IDEA regulations clearly provide that IEP meetings are to be scheduled at a "*mutually* agreed on time and place." 34 C.F.R. § 300.322(a)(2) (emphasis added). Therefore, the hearing officer correctly found that the concept of mutual agreement does not encompass one party's unilateral insistence that an IEP meeting be held at a particular time, especially when that time is after school hours. B.H. v. Joliet School District 54 IDELR 121 (United States District Court, Northern District, Illinois (2010)).

Note: The United States Department of Education has issued guidance that the IDEA requires public agencies to ensure that IEP meetings are scheduled at a "mutually agreed on time and place". Public agencies should be flexible in scheduling IEP Team meetings to accommodate the reasonable requests from parents. However, the IDEA does not require the public agency to schedule the IEP meeting outside of regular school hours or regular business hours to accommodate the parents or their experts. If the parent and the public agency cannot schedule a meeting to accommodate their respective scheduling needs, the public agency must take other steps to ensure parent participation by offering other means of participation (such as individual or conference telephone calls or videoconferencing) Letter to Thomas 51 IDELR 224 (United States Department of Education, Office of Special Education Programs (2008)).

2. A school district was found to have denied a student a FAPE since it did not properly involve the parents in the IEP Team process. The school notified the parents of the date and time of the IEP Team

meeting. The parents informed the school that they were not sure that they could attend the meeting on that date. Thereafter, the school made no attempts such as telephone calls, correspondence, etc. to reach a mutually agreed upon date and time for the meeting. Although they offered to have the parent participate by speakerphone, the Court held that the offer was of no consequence since such alternative methods are available only if neither parent can attend the IEP meeting.

The Court held that a school must include the parents in an IEP meeting “unless they affirmatively refuse to attend”. Drobnicki v. Poway Unified School District 358 F.Appx. 788, 53 IDELR 210 (United States Court of Appeals, 9th Circuit (2009)). Note: This is an unpublished decision.

3. The Court noted that the IDEA requires that when a student on an IEP transfers to a new school district, the new district must provide “comparable services” to the student after consulting with the parents. The Court held that the IEP that was last implemented is the one which applies to the “comparable services” analysis not the IEP that was last developed. In addition, the Court held that the IEP ultimately developed by the district was appropriate and provided a placement in the LRE when it placed the student in a special education class. A.M. v. Monrovia Unified School District 627 F.3d 773, 55 IDELR 215 (United States Court of Appeals, 9th Circuit (2010))
4. The 2008 IDEA regulations gives parents the right to revoke, in writing, consent for the continued provision of IEP services to an otherwise eligible child. In such case, the school district must provide the parents with written notice that all IEP services will be terminated. Such revocation is not subject to challenge in a due process hearing. In the case of parents who have equal legal authority to make educational decisions and one parent provides consent for IEP services and the other parent submits a written revocation, the LEA must provide written notice to both parents that IEP services will be terminated. The IDEA further provides that either parent, after services are ceased due to the revocation of consent, has the right to request an initial evaluation to determine if the child is IEP eligible. Letter to Cox (United States Department of Education, Office of Special Education Programs (August 2009)). In a subsequent letter, OSEP stated “we appreciate that public agencies may have difficulty with this interpretation when both parents with legal authority to make educational decisions on behalf of their child disagree on the revocation of consent.” Nevertheless, OSEP declined the request to modify their interpretation. Letter to Ward (United States Department of Education, Office of Special Education Programs (August 2010))
5. The IEP Team meeting serves as a communication vehicle between parents and school personnel and enables them, as equal participants, to

make joint informed decisions regarding the services that are necessary to meet the unique needs of the child. The IEP team should work towards a general agreement, but the public agency is ultimately responsible for ensuring the IEP includes the services that the child needs in order to receive a free appropriate public education (FAPE). It is not appropriate to make IEP decisions based on a majority "vote." If the team cannot reach agreement, the public agency must determine the appropriate services and provide the parents with prior written notice of the agency's determinations regarding the child's educational program and of the parents' right to seek resolution of any disagreements by initiating an impartial due process hearing or filing a State complaint. Letter to Richards 55 IDELR 107 (United States Department of Education, Office of Special Education Programs (2010)).

6. Although the IEP for a student with a non-verbal learning disability was not fully implemented since the student did not have a classroom aide as provided for in the IEP, the Court concluded that this was not a material failure. The evidence demonstrated that the student made improvements throughout his sixth-grade year despite that fact. His report card reflected As, Bs, and Cs, and showed some improvement in language arts, math, and science. In addition, the student's statewide test scores indicated that he was performing at goal in math and reading, and was proficient in writing. A.P. v. Woodstock Board of Education 370 F.Appx. 202, 55 IDELR 61 (United States Court of Appeals, 2nd Circuit (2010)). Note: This is an unpublished decision.
7. In obtaining parental consent, schools are required to provide the parent all information relevant to the activity so that the parent can signify in writing that he/she understands the action. In seeking consent for the initial provision of special education services, the school is seeking consent to services generally and is not asking the parent to signify that they understand the precise nature of all of the services that would be included in their child's IEP. Letter to Johnson 56 IDELR 51 (United States Department of Education, Office of Special Education Programs (2010)).

C. Substantive Issues

1. The 77 page IEP for a student with multiple disabilities was found to be appropriate by the Court. The teachers' testimony and other evidence supported the conclusion that the student was progressing at a level commensurate with her cognitive profile. The Court also found that the special day school placement in the IEP was less restrictive than the parents proposed home and community based program. Lessard v. Wilton-Lyndeborough Cooperative School District

592 F.3d 267, 53 IDELR 279 (United States Court of Appeals, 1st Circuit (2010)).

2. The Court, in reversing the lower court's decision, held that a student's IEP did not provide a FAPE even though the student's cumulative final grade point average for the school year was 92. The Court noted that the student was not being educated in a regular classroom setting and that under the Rowley standard, grades achieved in a special education class are of "less significance" than grades earned in a regular class. D.S. v. Bayonne Board of Education 602 F.3d 553, 54 IDELR 141 (United States Court of Appeals, 3rd Circuit (2010)).
3. The parents challenged the appropriateness of the student's 8th grade IEP and sought reimbursement for their private school placement. After the Supreme Court remanded the issue back to the District Court after addressing the allocation of the burden of persuasion in IDEA cases, the parents introduced additional evidence before the Court including the IEP which was developed for the student in the 10th grade. The parents alleged that since the 10th grade IEP called for a full time special education placement, his 8th grade IEP which provided for placement in an "inclusion model" classroom was inappropriate. The Court noted that the parents' position "illustrates well the unfortunate incentives created by excessive hindsight-based judging of IEPs..... To interpret the tenth-grade IEP as an admission of fault as to the eighth-grade IEP would discourage school systems from reassessing and updating IEPs out of fear that any addition to the IEP would be seen as a concession of liability for an earlier one. And it would thereby prevent students from receiving appropriate services as their profiles changed." The Court ultimately held that the IEP was reasonably calculated to provide the student with educational benefit and thus offered a FAPE. Schaffer v. Weast 554 F.3d 470, 51 IDELR 177 (United States Court of Appeals, 4th Circuit (2009)).
4. The school district was found to be in violation of the IDEA based on the IEP Team's failure to consider the parents' request to address their daughter's participation in extracurricular activities. The IEP Team had an obligation to consider whether the IEP should include a specific extracurricular activity and, if so, identify the supplementary aids and services necessary. The Court held that the plain language of IDEA regulations establish that the extracurricular and nonacademic activities included in an IEP are not limited to those activities required to educate the disabled child. The IDEA requires a school district to take steps to provide those supplementary aids and services that have been determined appropriate and necessary by the IEP team to afford the disabled student an equal opportunity to participate in extracurricular and nonacademic activities. Independent School District No. 12 v. Minnesota Department of

Education 788 N.W. 2d 907, 55 IDELR 140 (Minnesota Supreme Court (2010)) Review denied by the United States Supreme Court.

5. The Court concluded that a student with Asperger's syndrome was denied a FAPE due to insufficient transition services. The lack of a full transition assessment and resulting transition plan failed to provide measurable goals related to training, education, employment and independent living skills. Dracut School Committee v. Bureau of Special Education Appeals of the Massachusetts Department of Elementary and Secondary Education 55 IDELR 66 (United States District Court, Massachusetts (2010)).
6. The Court affirmed the lower court's ruling that that a child with autism made progress in a special day class without ABA or a one-to-one aide and therefore was provided a FAPE. The District Court observed that parental discontent over the services provided in the IEP, which is required to be reviewed and developed annually, is insufficient to overrule the opinions of the education professionals under the IDEA review process and does not preclude the finding that a child received a FAPE. J.D. v. Kanawha County Board of Education 110 LRP 57258. (United States Court of Appeals, 4th Circuit (2009)). Appeal denied by the United States Supreme Court (2010)
7. A student with multiple disabilities was not afforded a FAPE since the student consistently failed to meet the IEP goals. The Court based its decision on the finding that the IEP included fewer goals than previous IEPs and the remaining goals "were simply new iterations of the previous goals". In addition, the Court found that there was a lack of "reliable objective testing" to measure the student's progress and present level of performance.
As a result the district was order to partially reimburse the parents for the student's private placement. Reimbursement was reduced due to the Court's finding that the parents acted unreasonably. Anchorage School District v. D.K. 54 IDELR 28 (United States District Court, Alaska (2009)).

IV. Related Services

- A. The United States Supreme Court Decision – Irving Independent School District v. Tatro, 104 S. Ct. 3371, IDELR 555:511 (1984).
 1. The United States Supreme Court established a three-prong test for determining whether a particular service is considered a related service under the IDEA. To be entitled to a related service:

- a) A child must have a disability so as to require special education under the IDEA;
 - b) The service must be necessary to aid a child with a disability to benefit from special education; and
 - c) The service must be able to be performed by a non-physician.
- B. A school was ordered to provide a student with individual nursing services as a related service in his IEP. The court followed a “bright line” rule in the Tatro case. Since the services were not required to be administered by a doctor and were supportive services necessary for the student to attend school, they were required related services regardless of the cost (Cedar Rapids Community School District v. Garret F., 25 IDELR 139, United States Supreme Court (1999)).
- C. If the IEP Team has made the determination that transportation is a required related service in the student’s IEP, then it should include transportation for required after-school activities, such as community service activities that are required by the school, as well as for activities necessary to afford the child an equal opportunity to participate in extracurricular activities. Questions and Answers on Serving Children With Disabilities Eligible for Transportation (United States Department of Education, Office of Special Education and Rehabilitative Services (2009)).
- D. The parents challenged the appropriateness of their daughter’s IEP specifically the occupational therapy services. The Court, in concluding the IEP did provided FAPE, stated that the case was basically a disagreement over methodology. Once the requirements of the IDEA are met, questions of methodology are not for a Court to decide. Carlson v. San Diego Unified School District 54 IDELR 213 (United States Court of Appeals, 9th Circuit (2010)). Note: This is an unpublished decision.
- E. The IDEA regulations do not specifically require that an IEP include the exact number of minutes to be provided for each session of each related service, although it is anticipated that most IEPs would include that information in order to meet the requirement that the level of the agency's commitment of resources be clear. A lump sum amount of services such as sixteen weekly sessions totaling 600 minutes would be in compliance. This is a specific amount of time and provides all parties with an understanding of the general commitment of resources by the agency in terms of the number of minutes to be provided over the course of a 16 week semester. However, we agree that there may be special circumstances where the amount of time for each session of related services may vary in order to meet the needs of an individual student and there is nothing in the IDEA that would bar such an arrangement in an IEP. Letter to Mathews 55 IDELR 142 (United States Office of Special Education Programs (2010)).

V. Least Restrictive Environment

- A. The Court remanded the case for a determination whether the IEP Team violated the IDEA's procedural requirements in making a predetermination of placement. In doing so, the Court stated that the standard for determining whether a predetermination of placement occurs is "when an educational agency has made its determination prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives" H.B. v. Las Virgenes Unified School District, 48 IDELR 31 (United States Court of Appeals, 9th Circuit (2007)). This was an unpublished decision. On remand, the Court affirmed the District Court's holding that the school district predetermined the student's placement. The decision to transfer the student from his private placement, made pursuant to a settlement agreement, back to the public school was made before the IEP meeting was held. The Court found that the District's determination to remove the student from the private placement and place him in a public program did not evidence the sort of "open-mindedness" that is necessary. The Court's conclusion was based on findings including the school district administrator's comments at the beginning of the meeting that "we'll talk about a transition plan" bringing the student back to the public school. The Team never discussed the possibility of keeping the student in the private placement even though the district was fully aware of the parents' wishes. H.B. v. Las Virgenes Unified School District 370 F.Appx. 843, 54 IDELR 73 (United States Court of Appeals, 9th Circuit (2010)). Note: This is an unpublished decision.
- B. The Court affirmed the lower court's decision that a student who is deaf with a cochlear implant was placed in the least restrictive placement when placed in a general education classroom. The student was an oral language learner who built on his communication needs by communicating with students who were not disabled. At the IEP meetings the parents insisted on a regular education placement. Although they are not prohibited from later challenging the placement they initially requested, their position supports the conclusion that the IEP provided a FAPE in the least restrictive environment. J.W. v. Fresno Unified School District 55 IDELR 153 (United States Court of Appeals, 9th Circuit (2010))
- C. The Court held that the IEP for a preschooler provided the student a FAPE, both procedurally and substantively, in the least restrictive environment by placing the student in a part-time public program that included both students with disabilities and students without disabilities. The Court rejected the claim by the parents that a private preschool for students without disabilities was the least restrictive environment since the IDEA "makes removal to a private school placement the exception". R.H. v. Plano Independent School District 54 IDELR 211 (United States Court of Appeals, 5th Circuit (2010)). Review denied by the United States Supreme Court.

VI. Unilateral Placements

- A. The United States Supreme Court in Burlington, MA v. Department of Education et al., 105 S. Ct. 1996, IDELR 556:389 (United States Supreme Court (1985)), held that parents may be awarded reimbursement of costs associated with a unilateral placement if it is found that:
1. The school district's IEP is not appropriate;
 2. The parent's placement is appropriate; and
 3. Equitable factors may be taken into consideration
- B. Parental placement at a school which is not state approved or does not meet the standards of the state does not itself bar public reimbursement under the Burlington standard (Florence County School District Four et al. v. Carter, 114 S. Ct. 361, 20 IDELR 532 (United States Supreme Court (1993))).
- C. The parents placed a student who was never deemed eligible for special education in a private residential school. The Court held that the fact that the student has never been deemed eligible did not act as a bar to the parents' right to seek a due process hearing for reimbursement. The Court noted that the school district's argument that the IDEA limits reimbursement to students who have previously received public special education services is unpersuasive for several reasons:
1. It is not supported by the IDEA's statutory text, as the 1997 Amendments to the IDEA do not expressly prohibit reimbursement in this situation;
 2. The School District offered no evidence that Congress intended to supersede the *Burlington* and *Carter* decisions;
 3. It is at odds with IDEA's remedial purpose of "ensur[ing] that all children with disabilities have available to them a [FAPE] that emphasizes special education ... designed to meet their unique needs,"; and
 4. It would produce a rule bordering on the irrational by providing a remedy when a school offers a child inadequate special-education services but leaving parents remediless when the school unreasonably denies access to such services altogether. Forest Grove School District v. T.A., 129 S.Ct. 2484, 52 IDELR 151 (United States Supreme Court (2009)).
- D. The Court held that the parents of a student with multiple disabilities, including an emotional disability, were not entitled to be reimbursed for the costs of a private residential school. The Court found that the parents placed the student in the residential facility primarily for the treatment of her mental health and safety

issues which were segregable from her educational needs. Shaw v. Weast 364 F.Appx. 47, 53 IDELR 313 (United States Court of Appeals, 4th Circuit (2010)).

- E. Parents are only required to provide the school notice one time of their displeasure with their student's IEP and their intent to place their child privately at public reimbursement. They have no legal obligation to notify the school of their intent to keep the student in the private placement for subsequent years since removal from the public school, not enrollment in the private school establishes the regulatory requirement of notice. The IDEA also provides that a Court or hearing officer may consider equitable factors when making a decision on parental reimbursement. Letter to Miller 55 IDELR 293 (United States Department of Education, Office of Special Education Programs (2010)).
- F. Although it was found that the IEP offered a student was not appropriate, the Court held that the grandparent of the student was not entitled to reimbursement for her unilateral private placement since there was no evidence that the private school was appropriate. Although the student was doing well at the private school, evidence of academic progress does not itself establish that the school is offering an appropriate education under the IDEA. The Court stated that the IDEA requires an "identification of the special education services that were lacking in the disabled student's public school and a demonstration that at least some of those services are being provided by the private school." Indianapolis Public Schools v. M.B. 56 IDELR 8 (United States District Court, Southern District, Indiana (2011)).

VII. Behavior and Discipline

- A. The student's IEP Team convened four days into the student's suspension for fighting and bringing a pocket knife to school. The Team decided to place the student in an alternative high school. The parent's attempted to challenge the student's placement before the local school board. They were denied the opportunity to appear in front of the board with their request. The Court concluded the student's constitutional due process rights were not violated since once the IEP Team changed the student's placement, the IEP Team, not the local school board, became the decision maker in regards to future placement changes. The parents could have also requested an expedited due process hearing under the IDEA. Doe v. Todd County School District 55 IDELR 185 (United States Court of Appeals, 8th Circuit (2010))
- B. A student with a learning disability and a speech impairment was arrested for stealing beer. As an alternative to a sentence in juvenile jail, the Court approved his placement in a residential facility. The parents requested that the school district pay for the placement alleging that his IEP was inappropriate since it did not include a behavior intervention plan.

The Court in upholding the IEP held that his behavioral problems did not rise to the level of severity to trigger a need for a behavior plan. Rodriguez v. San Mateo Union High School District 53 IDELR 178 (United States Court of Appeals, 9th Circuit (2009)) This is an unpublished decision.

- C. A student, who was diagnosed as having an Attention Deficit Disorder, was considered a child “at risk” and receiving general education interventions including one-on-one instruction in class, small group instruction and modifications to reduce distractions. An intervention assistance team was convened when the student exhibited continued behavioral problems and referred the student to an outside mental health agency. The student was suspended and ultimately expelled for threatening behavior. The Court held that the school’s failure to convene a manifestation determination review violated the procedural safeguards of the IDEA. When the intervention team referred the student to the outside mental health agency there was sufficient reason to evaluate the student for special education services. The Court ordered compensatory education for the period of time of the student was suspended and that school records of the suspension be expunged. Jackson v. Northwest Local School District 55 IDELR 71 (United States District Court, Southern District, Ohio (2010)).

VIII. Due Process Issues

- A. Hearing Officer Authority/Jurisdiction
1. The hearing officer granted the school district’s Motion to Dismiss the due process hearing complaint finding that the matter was moot since the school district had offered in full the relief requested. The parent had rejected the offer. The Court overturned the dismissal finding that a parent’s decision to reject an offer of settlement would be relevant to an award of attorney’s fees under the IDEA but does not deprive the hearing officer of subject matter jurisdiction. A.O. v El Paso Independent School District 54 IDELR 42 (United States Court of Appeals, Fifth Circuit (2010)). Note: This is an unpublished decision.
 2. The Court affirmed the hearing officer’s order which included a requirement that the school contract with a specific inclusion expert and establish a \$50,000 compensatory education fund which the IEP Team and parent can draw on for funding services, evaluations and training. In so doing, the Court stated that a hearing officer in fashioning an appropriate remedy has the authority to order the district to retain the services of a particular expert who has observed the student and staff and whose testimony was found credible at the due process hearing. In addition, the Court found that the hearing officer properly considered the parties’ conduct and equitable considerations in fashioning the

compensatory education award. Matanuska-Sustina Borough School District v. D.Y. 54 IDELR 52 (United States District Court, Alaska (2010)).

3. As a result of finding the IEP to be inappropriate, the hearing officer ordered that the school district continue to fund the home based program for a student with autism until such time as the district's proposed program is approved by the private company which was supervising his home program.
The Court concluded that the hearing officer did not have such authority. The IDEA gives the IEP Team the responsibility for developing the IEP not the private company. In addition, the Court noted that the potential conflict created by the order was evident. Anchorage School District v. D.S. 54 IDELR 29 (United States District Court, Alaska (2009))
4. The Court held that a 24 year old student with a disability who was denied a FAPE while age eligible for special education services, was entitled to compensatory educational services under an IEP. Ferren C. v. Philadelphia 54 IDELR 274 (United States Court of Appeals, 3rd Circuit (2010))

B. Attorney's Fees

1. The parents rejected a proposed settlement offer that included reimbursement of reasonable attorney's fees and all of the educational relief sought. The Court held that the parents were not entitled to attorney's fees since they were not justified in rejecting the settlement which was made at a resolution session. In overturning the lower court's decision, the Court held that a resolution agreement is enforceable in state or federal court. In addition, the Court did not award attorney's fees incurred before the settlement offer was made since the parents unreasonably protracted the litigation. El Paso Independent School District v. R.R. 591 F.3d 417, 53 IDELR 175 (United States Court of Appeals, 5th Circuit (2010)). Appeal denied by the United States Supreme Court.
2. The Court affirmed an award of \$10,000 in attorney's fees to be paid by the parents' attorney to the school district. The attorney advised his client not to accept the school district's offer of all the relief being sought in the due process hearing. The Court concluded that the continued litigation and stonewalling tactics made the case frivolous, unreasonable and without foundation and an award of attorney's fees was permissible under the IDEA. El Paso Independent School District v. Berry 55 IDELR 186 (United States Court of Appeals, 5th Circuit (2010))
3. The Court refused to consider an offer of settlement made by the school district when it awarded the parents attorney's fees. The offer was made in a mediation session and the IDEA requires that all discussions that occur

in a mediation be kept confidential. J.D. v. Kanawha County Board of Education 571 F.3d 381, 52 IDELR 182 (United States Court of Appeals, 4th Circuit (2009)) Appeal rejected by the United States Supreme Court.

4. The parents were entitled to attorneys fees although the district's settlement offer would have provided the parents of a 9-year-old with ADHD with greater relief than they obtained. The hearing officer ruled that the district denied the student a FAPE by failing to respond to the parents' requests for an IEP meeting after the parents filed a due process complaint. The court ruled that the parents were substantially justified in rejecting the district's offer based on its conduct following the filing of the complaint. Given the district's failure to respond to the parents' requests for an IEP meeting, combined with the parents' concern that the settlement offer was too vague, the court ruled that the parents' rejection of the offer was substantially justified. Brianna O. v. Board of Education of the City of Chicago 55 IDELR 194 (United States District Court, Northern District, Illinois (2010)).

C. Miscellaneous Hearing Issues

1. An LEA is obliged to schedule and hold a resolution meeting within 15 calendar days of receiving the notice of the parent's due process complaint unless both parties mutually waive the resolution meeting in writing. It would be inconsistent with the IDEA for a state to adopt a regulation that would allow suspension of the 15 day timeline when the due process hearing complaint is received shortly before or during the school's winter break. Letter to Anderson (United States Department of Education, Office of Special Education Programs (2010))
2. The District Court affirmed the State Review Officer's holding that the appropriate placement for a student was a home based placement. The school district appealed the decision to the Court of Appeals. The District Court held that the "stay put" placement pending appeal was the home even though the parents sent the student back to public school for the Fall 2009 semester. The Court found that the parents' conduct did not "unambiguously and explicitly" constitute an agreement to change the "stay put" placement. Heffernan v. Sumter County School District 17 55 IDELR 41 (United States District Court, South Carolina (2010)).

IX. Liability Issues

- A. A student was subjected to teasing and name calling at school and online after other students found out she had HIV. The student ultimately withdrew from school and sued the school district for failing to respond to peer harassment under Section 504.
To hold the district liable for disability-based peer harassment, the student is

required to show that: 1) she was an individual with a disability; 2) she was harassed based on her disability; 3) the harassment was so severe or pervasive that it altered the condition of her education; 4) the district knew about the harassment; and 5) the district was deliberately indifferent to it.

The Court dismissed the claims finding that school personnel reacted to each reported incident, met with the alleged harassers, admonished them for their behavior, and informed all interested parents. Therefore, the school was not deliberately indifferent to the incidents of harassment. P.R. v. Metropolitan School District of Washington Township 55 IDELR 199 (United States District Court, Southern District, Indiana (2010))

- B. The parents of a student with autism initiated legal action against the school district and school staff, both in their individual and official capacities, alleging that the use of restraints and seclusion violated the student's constitutional rights. The Court, in affirming the dismissal of the claims, held that the use of such measures was reasonable since the student's IEP authorized their use and therefore the IEP "set the standard of accepted practice". The Court referenced another decision which stated that "we would place educators in a very difficult position if we did not allow them to rely on a plan [the IEP] specifically approved by the student's parents and which they are statutorily required to follow". C.N. v. Willmar Public Schools 591 F.3d 624, 53 IDELR 251 (United States Court of Appeals, 8th Circuit (2010)).
- C. The Court affirmed a finding by the jury that architectural barriers denied a student with cerebral palsy "meaningful access" to the school's program in violation of Section 504 and the Americans With Disabilities Act. However, the Court vacated the jury award of \$115,000 in damages since the award was arbitrary in light of the evidentiary record. The Court remanded the issue of damages for a new trial. Celeste v. East Meadow Union Free School District 54 IDELR 142 (United States Court of Appeals, 2nd Circuit (2010)). Note: This is an unpublished decision.
- D. An occupational therapist sued the parents and school district for negligence for injuries she received when being hit and kicked by a student with autism. The Court dismissed the lawsuit since the OT admitted that, prior to the incident, she was aware of the student's tendency to use physical force and had observed such behavior on previous occasions. The Court noted that it is well established that there is no duty to warn an individual about a potentially dangerous condition of which she/he is actually aware or that may be readily observed by a reasonable person. Johnson v. Cantie 54 IDELR 257 (New York Supreme Court, Appellate Division (2010)).
- E. The parents initiated a lawsuit alleging the school district and staff improperly restrained and mistreated their student who has cerebral palsy, a seizure disorder and is non-verbal. The parents alleged that the student was restrained all day in her wheelchair without educational services and was subjected to cruel and

abusive remarks. The Court held that the special education teacher and paraprofessional were not protected by qualified immunity since the allegations support the conclusion that their conduct was motivated by malice. A reasonable teacher would know that maliciously restraining a child for long period was unlawful.

It is important to note that the Court stated: "...our opinion is one that no reasonable teacher who errs in judgment ought to fear. Qualified immunity is intended to protect officials who make reasonable mistakes about the law. But the immunity simply does not extend protection to an official motivated by the kind of bad faith alleged here." H.H. v. Moffett 335 F.Appx. 306, 52 IDELR 242 (United States Court of Appeals, 4th Circuit (2009)) Note: This is an unpublished decision. See also E.F. v. Oberlin City School District 54 IDELR 123 (Ohio Court of Appeals (2010)).

X. Miscellaneous Issues

- A. The Court issued a Preliminary Injunction allowing a student with autism to bring his service dog to school and school functions. The injury the student would suffer if not allowed to bring his dog to school outweighs any harm potentially incurred by the school district. Kalbfleisch v. Columbia Community School District 53 IDELR 57 (Illinois Circuit Court (2009)) The granting of the Preliminary Injunction was affirmed. . Kalbfleisch v. Columbia Community School District 53 IDELR 266 (Illinois Appellate Court, 5th District (2009)). See also K.D. v. Villa Grove Community School District 55 IDELR 78 (Illinois Appellate Court, 4th District (2010)).

Note: The Department of Justice has issued new ADA, Title II regulations addressing service animals. See: www.ada.gov/regs2010/ADAregs2010.htm

- B. A special education teacher voiced concerns to her supervisor that the school district's special education services were not in compliance with state and federal legal requirements. The teacher, after feeling her concerns were not being addressed, filed a complaint with the Office for Civil Rights (OCR) alleging that the district was denying students with disabilities a free appropriate public education.

The teacher alleged that after filing her complaint, her supervisors began retaliating against her creating an intolerable work environment. She alleged that she was intimidated, her correspondence was not responded to, she was excluded from meetings and her work assignment was changed to locations further from her home. As a result she filed a further complaint with OCR based on retaliation which found merit to her complaint. She ultimately resigned finding it intolerable to continue working in the district.

The teacher then filed a lawsuit based on retaliation under Section 504 and the Americans with Disabilities Act (ADA). The Court of Appeals, in reversing the lower court's dismissal of the action, held that any individual---regardless if they are disabled or a parent of a disabled child---may sue under Section 504 and the

ADA for retaliation for advocating on behalf of individuals who are disabled. Therefore, the former teacher has legal standing to sue. The case was remanded back to the District Court for trial. Barker v. Riverside County Office of Education 584 F.3d 821 (United States Court of Appeals, 9th Circuit (2009)). See also Reinhardt v. Albuquerque Public Schools 595 F.3d 1126, 110 LRP 9870 (United States Court of Appeals, 10th Circuit (2010)).

- C. A student on an IEP lived with his grandmother who is his guardian. The grandmother's house burned down and the grandmother and student relocated to temporary housing in an adjacent school district. The original school district provided special education services for the remainder of the school year but refused services for the next school year when it learned that the student's mother was living in the adjacent district. The Court held that the student was deemed homeless under the McKinney-Vento Act and therefore the original school district must continue to provide the student with an education. Where a homeless child attends school is to be determined based on his or her best interest, which requires "to the extent feasible, keeping a homeless child or youth in the school of origin, except when doing so is contrary to the wishes of the child's or youth's parent or guardian." The Act makes it clear that there is no maximum duration of homelessness. Instead, a school district must accommodate a homeless child for the entire time that they are homeless. Further, it was immaterial that the student's mother lived in another school district since the mother played no role in his education. L.R. v. Steelton-Highspire School District 54 IDELR 155 (United States District Court, Middle District, Pennsylvania (2010)).
- D. The Court invalidated the section of the NCLB Federal regulation that deems teachers who are participating in an alternative route to certification and who demonstrate satisfactory progress toward full certification as a "highly qualified teacher" since the regulation contradicts the statute. The IDEA incorporates by reference the section of the NCLB regulation that has been invalidated. (See IDEA regulation, Section 300.18(a)). Renee v. Duncan 110 LRP 54658 (United States Court of Appeals, 9th Circuit (2010)).). Congress passed legislation in December 2010, effective until 2013, to allow teachers who have enrolled in an alternative route program to be deemed highly qualified. (H.R. 3082).

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

