RECENT DEVELOPMENTS IN 2013: HOT TOPICS AND THE YEAR IN REVIEW

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What a busy year 2013 has been in the world of special education law; and it's not over yet! Below are highlights of hot topics and this year's noteworthy court and agency decisions (so far) in the area of special education.

MONEY DAMAGES/LIABILITY/PERSONAL INJURY GENERALLY

A. Chigano v. City of Knoxville, 61 IDELR 154 (6th Cir. 2013) (unpublished). District employees' failure to notify the arresting police officer that the student at issue had autism did not amount to a "state-created danger" sufficient to support the parents' Section 1983 claim. While a district may be liable for harm caused by a third party if it places a student in a dangerous situation, the district must affirmatively act to create the danger. Here, the parents could not show that there was any affirmative action on the part of the principal or the teacher that created or increased the risk of danger to the student. Thus, the employees did not violate constitutional rights by failing to notify the police officer about her autism, even where the officer said that he would not have arrested her had he known she had autism.

B. Hatfield v. O'Neill, 61 IDELR 211 (11th Cir. 2013) (unpublished). Where former special education teacher was well aware that the profoundly disabled student had undergone brain surgery years before, her alleged striking of the student on the head during a feeding exercise was an obvious use of excessive force. Thus, the teacher is not entitled to summary judgment based upon qualified immunity. In considering whether a teacher's alleged conduct is obviously excessive, a court will consider: 1) the need for corporal punishment; 2) the relationship between that need and amount of punishment administered; and 3) the extent of the injury inflicted. Here, the teacher had no reason to use force against the student and was not acting in self-defense, with a disciplinary purpose, or to protect the student. Rather, according to two of her aides, the teacher struck the student out of frustration based on the student's inability to perform a feeding exercise. While the severity of the student's resulting injury could not be determined based upon the student's limited communication ability, the parents submitted evidence that the student experienced bruising and vomiting after the incident. Further, the teacher's knowledge of the student's prior surgery should have put her on notice that her

alleged conduct was excessive. Thus, her behavior was sufficiently conscience-shocking to be found to violate that student's constitutional rights.

C. S.H. v. Lower Merion Sch. Dist., 113 LRP 36042 (3d Cir. 2013). Agreeing with the 2d, 8th, 9th, 10th and 11th Circuits, the deliberate indifference standard is better suited to serve the remedial goals of Section 504 and the ADA, although this Circuit does not require a showing of intentional discrimination to establish liability under these laws. Where the parent here failed to plead deliberate indifference when the district found the former student to be SLD and placed him in special education for six years when he did not need it, she is not entitled to damages of $127,010 for college tuition, psychotherapy and tutoring services. In addition, there was no evidence that the district knew its eligibility determination was flawed and the district removed the student from special education classes at the parent's request after an IEE revealed the student never had a disability.

D. Hamilton v. Spriggle, 113 LRP 33094 (M.D. Pa. 2013). Where three school district administrators attempted to hide reports of a special education teacher's repeated abuse of students in her classroom, they actively created a dangerous situation for a nonverbal autistic teenager, and their motion to dismiss the parents' Section 1983 claim is denied. The "state-created danger" theory of liability allows parents to hold administrators responsible for an employee's misconduct if the administrators used their authority to create an opportunity for harm that would not have otherwise existed. Here, the special education director and supervisor investigated only one report of abuse reported by the teacher's aides and chose to credit the teacher's statements over those of the aides. When the aides reported concerns to the principal, he reportedly told them that he was unable to intervene, and the special education director instructed the aides not to contact the parents about the allegations or the investigation. "In other words, the directive from all three was to suppress allegations of abuse by keeping the allegations in-house instead of alerting [the student's] parents or the police." Because a jury could find that the teacher's conduct was sufficiently "conscience-shocking," the case may proceed to trial.

E. Herrera v. Hillsborough Co. Sch. Bd., 61 IDELR 137 (M.D. Fla. 2013). Parents have pleaded viable claims under Section 1983, 504 and the ADA, and the district's motion to dismiss is denied. Parents' allegations that district employees knew that their child with a neuromuscular condition had difficulty holding her head upright supported their claim that the district was deliberately indifferent to the student's need for proper positioning on the bus. According to the parents, the district had a history of disregarding the safety of disabled students both before and after the student's death, including sending home a child with an intellectual disability with an unexplained fractured femur, leaving a young child alone on the bus for six hours, letting an LD student off the bus at the wrong location leaving the student to be struck and killed by a car, etc. In addition, the district had specific knowledge of this student's difficulty in holding her head upright, and her most recent IEP recognized the need for proper positioning. Further, the parent and school employees made numerous reports about staff members' failure to position the student properly to prevent an airway obstruction. The parents also alleged facts that demonstrate that the numerous incidents and complaints about the transportation staff's failure to properly handle disabled students put the district on notice that its

transportation staff needed additional or different training. This alleged failure to train could qualify as a municipal policy of deliberate indifference sufficient to support a cause of action under Section 1983 against the district.

F. Griffin v. Sanders, 61 IDELR 157 (E.D. Mich. 2013). Disability discrimination case brought under Section 504 and ADA alleging abuse of a former high schooler with disabilities by two district employees is dismissed. The parent did not allege that the district failed to intervene because of the student's disabilities and, therefore, did not state a claim for disability discrimination under 504/ADA. Although the parent claimed that the district allowed a special education teacher and paraprofessional to physically and sexually abuse the student, she did not claim that the district's failure to act had any connection to the student's disability. However, the parent's Section 1983 claim against the paraprofessional for alleged sexual abuse, as well as a claim against the school district under Title IX may proceed.

G. B.B. v. Appleton Area Sch. Dist., 61 IDELR 187 (E.D. Wis. 2013). District is entitled to judgment on the parents' damages claims under Section 1983 because the teacher's alleged conduct was not sufficiently "conscience-shocking" to amount to a violation of the students' constitutional rights. An educator's use of physical force does not rise to the level of shocking the conscience unless it is obviously excessive under the circumstances and presents a reasonably foreseeable risk of serious bodily injury. Here, neither of the two students allegedly abused by the special education teacher suffered injuries as a result of her actions. In addition, the teacher acted with a pedagogical objective when she allegedly grabbed the students for not following directions, tried to force a fork into one student's mouth when she refused to eat, and squeezed the other's neck when he failed to comply with her instructions. "While not an appropriate way to handle the behavioral problems she confronted, these actions by [teacher], assuming they occurred as reported, can hardly be conscience-shocking."

H. Smith v. School Bd. of Brevard Co., 61 IDELR 160 (M.D. Fla. 2013). While the teaching assistant likely used more force than necessary to obtain compliance when she "slammed" an 8-year-old girl into a chair and shoved her against a table when she failed to sit down as the teacher requested, the assistant's use of force did not violate the student's constitutional rights. An educator's use of force will not violate constitutional rights unless it is "conscience-shocking." In determining whether an en educator's use of force "shocks the conscience," courts will consider the need for corporal punishment, the relationship between that need and the punishment applied, and the extent of the injury inflicted. While the assistant here may have used more force than required, he acted with an educational objective in mind.

I. L.L. v. Tuscaloosa City Bd. of Educ., 60 IDELR 133 (N.D. Ala. 2013). Where school personnel tried to address the behaviors of a teenage boy who sexually assaulted an 8th grader with multiple disabilities, the district is entitled to judgment on the 504, Section 1983 and Title IX damages claims. Liability for disability discrimination and for sexual harassment both require a showing of deliberate indifference on the part of school personnel. The question is not whether the district knew the boy posed a risk of harm to

students in the special education school, but whether the district made a deliberate choice not to take any action in response to a threat. Here, when the district learned of the boy's previous attempt to sexually assault a classmate, it suspended him from school and met with his mother to discuss behavioral interventions. Although the responses were ultimately ineffective, it cannot be said that the district was deliberately indifferent. As for the 1983 claim, the district could not be responsible for harm caused by a third party, unless it affirmatively placed the student in a dangerous situation, which it did not do here.

J. Skinner v. Clark Co. Sch. Dist., 61 IDELR 6 (D. Nev. 2013). Case for money damages under Section 504/ADA is dismissed based upon the complaint's failure to state a claim. Allegations that a bus driver permitted and encouraged an aide to hit and shake a 10-year-old child with bipolar disorder, fasten her to the seat with a belt and scream at her were not enough to support the request for money damages. A parent seeking money damages under 504/ADA must show that the district intentionally discriminated against the student on the basis of disability, that the district knew about the student's need for an accommodation and failed to consider the student's unique needs to ensure any accommodations offered were appropriate. This parent's claims did not mention that the district knew that the student needed accommodations or that the district intentionally discriminated or was deliberately indifferent.

K. D.E. v. Dauphin Sch. Dist., 60 IDELR 98 (M.D. Pa. 2013). Although former LD student went without appropriate special education services for the first 9 years of his public school career, he is not entitled to money damages under Section 504/ADA. Although the district delayed in evaluating the student, it ultimately did conduct evaluations, found the student eligible for speech-language services, and developed IEPs for the student each year thereafter. While the district misclassified the student for two years as having an intellectual disability, neither the misclassification nor the student's improper placement in a life skills program demonstrated the necessary bad faith or gross misjudgment on the part of the district. In fact, as soon as the student's mother notified the district, the district apologized, was not uncooperative and suggested it would correct the error. While the extended failure to provide FAPE may have amounted to negligence, it did not constitute intentional discrimination.

L. Sagan v. Sumner Co. Bd. of Educ., 61 IDELR 10 (M.D. Tenn. 2013). Where the parents of four disabled preschoolers had no evidence that their children suffered serious or lasting harm as a result of a special education teacher's alleged abuse, their initiation of claims under Section 1983 against the school district amounted to a "truly egregious case of misconduct." Thus, the school district may recover a total of $72,118 in attorney's fees with respect to those four cases, but no fees with respect to the fifth one, where the parents presented a plausible claim that the teacher's sticking sharp objects under the child's fingernails "to try to teach her a lesson" amounted to a violation of the child's constitutional rights. In the remaining four cases, however, the parents and their attorneys had no reason to believe the teacher's actions rose to that level. By the time discovery was completed, it should have been apparent to the parents that the

continuation of their lawsuits "based on these flimsy allegations had become unreasonable and their claims had tipped into the territory of frivolity."

M. Fulbright v. Dayton Sch. Dist. No. 2, 61 IDELR 47 (E.D. Wash. 2013). While the district may have been negligent when it canceled the services of the student's 1:1 paraprofessional, it was not responsible under Section 1983 for a series of sexual assaults the student experienced while traveling to and from her sheltered work experience. The parents failed to allege deliberate indifference on the part of the school, which is "a very high standard of fault" required to sustain a cause of action for damages under Section 1983. Under Section 1983, the parents must show that the district recognized the existence of an unreasonable risk and actually intended to expose the student to that risk without regard for the consequences. While the parents here alleged that they notified the district about the student's sexual harassment by a male passenger and asked the district to ensure that she was not left alone again, the district only had knowledge of the sexual harassment. The parents did not show that the district was aware of the possibility of a sexual assault or that it intentionally exposed the student to the risk. While the district's actions might constitute "gross negligence," they do not rise to the "markedly higher standard of deliberate indifference." Thus, the parents' Section 1983 claims are dismissed.

N. Turner v. Houston Indep. Sch. Dist., 61 IDELR 141 (S.D. Tex. 2013). Guardian's substantive due process claims on behalf of 5-year-old student with CP who was allegedly assaulted on the bus by another student are dismissed. A district has no constitutional obligation to safeguard a child from private violence, even though guardian's claim was that the district failed to properly supervise and monitor the students on the bus when it knew the victim was not capable of protecting herself. As a general rule, a district's failure to protect does not constitute a substantive due process violation, unless there is a "special relationship" between the agency and the victim. The 5th Circuit has not extended that exception to include public school students, regardless of whether the particular student has a disability. In addition, 504 and ADA claims are dismissed because the guardian failed to allege that the student was treated differently because of her disability.

BULLYING AND DISABILITY HARASSMENT

A. Dear Colleague Letter, 113 LRP 33753 (OSERS/OSEP 2013). Consistent with prior DCL's published by the Department, bullying of a student with a disability that results in the student's failure to receive meaningful educational benefit constitutes a denial of FAPE under the IDEA that must be remedied. Whether or not the bullying is related to the student's disability, any bullying of a student not receiving meaningful educational benefit constitutes a denial of FAPE under the IDEA. Schools have an obligation to ensure that a student with a disability who is the target of bullying behavior continues to receive FAPE in accordance with his/her IEP, and the school should, as part of its appropriate response to bullying, convene the IEP Team to determine whether, as a result of the effects of the bullying, the student's needs have changed such that the IEP is no longer designed to provide meaningful educational benefit. If this is the case, the IEP

Team must then determine to what extent additional or different special education or related services are needed to address the student's needs and revise the IEP accordingly. The Team should exercise caution, however, when considering a change of placement or location of services and should keep the student in the original placement unless the student can no longer receive FAPE in the current LRE placement. Certain changes to the educational program (e.g., placement in a more restrictive "protected" setting to avoid bullying) may constitute a denial or the IDEA's requirement to provide FAPE in the LRE. Moreover, schools may not attempt to resolve the bullying by unilaterally changing the frequency, duration, intensity, placement, or location of the student's special education and related services. In addition, if the bully is a student with a disability, the IEP Team should review that student's IEP to determine if additional supports and services are needed to address the bullying behavior. (Attached to this DCL is an enclosure entitled "Effective Evidence-based Practices for Preventing and Addressing Bullying").

B. Long v. Murray Co. Sch. Dist., 61 IDELR 122 (11th Cir. 2013) (unpublished). School district was not deliberately indifferent to peer harassment of student who hanged himself, which is the standard that applies in Section 504 and ADA cases. While the school district should have done more to protect a student with Asperger's who committed suicide, there was insufficient evidence of deliberate indifference. The district responded to the complaints it received in a manner that was not clearly unreasonable, and it neither caused additional harassment nor made an official decision to ignore it. On that basis, the dismissal of the parents' Section 504 claim is upheld. While there was little question that the student was severely harassed based on his disability and the district should have done more to stop it and prevent future incidents, the Supreme Court requires a finding that the district deliberately ignored specific complaints. Here, however, the district disciplined the perpetrators and developed a safety plan that allowed the student to avoid crowds in the hallways and to sit near the bus driver. In addition, the district's decision on at least two occasions to meet with the perpetrators and victim together was not clearly unreasonable, and there were numerous cameras and teachers monitoring the hallways. Though the parents claimed that the student continued to be harassed despite these efforts, there was no evidence that any single harasser repeated his conduct once the district addressed it. The parents pointed out that the day after the student's suicide, students wore nooses to school and wrote messages in the bathroom stating "it was your own fault" and "we will not miss you" and that this was an indication of the culture of harassment and of the district's failure to address it. While the district never held any assemblies to discuss bullying and harassment, it took several steps to address the school climate—its code of conduct contained an anti-bullying policy that staff members were expected to read and it conducted a program in which teachers met with small groups of students to instruct them on peer relationships and review the code of conduct. Finally, the district conducted a school tolerance program and implemented a program aimed at improving overall student behavior. Without evidence of deliberate indifference, the parents' case could not proceed and the district court's decision is affirmed.

C. Moore v. Chilton Co. Bd. of Educ., 60 IDELR 274 (M.D. Ala. 2013). Parent's money damages action may proceed where they allege that the district took no action to address severe harassment that resulted in suicide by a student with growth and eating disorders. The parents stated that the student's growth disorder, Blount's disease, made her appear bow-legged, and that she was overweight due to an eating disorder. The parents alleged that the student was harassed on a daily basis, including being called cruel names and pushed and locked into a closet on one occasion. In addition, she was subjected to "pig races," a school bus game in which a male grabs an "ugly," "fat" girl and kisses her in front of jeering students. To establish their discrimination case, the parents must show that: 1) the student had a disability; 2) she was harassed based upon that disability; 3) the harassment was sufficiently severe or pervasive that it altered the condition of her education and created an abusive educational environment; 4) the district knew about the harassment; and 5) the district was deliberately indifferent to it. Because the district appeared to assume the first three elements were met, the 4th and 5th are addressed. The parents adequately alleged that the district knew about the harassment based upon student complaints about it and that administrators, teachers and other staff members witnessed it first-hand and in plain view. In addition, it was sufficient that the parents contended that the district did nothing to stop the harassment, and that, when the student complained, teachers accused her of having a "bad attitude." Thus, the parents' discrimination claims will not be dismissed at this stage.

D. Sutherlin v. Independent Sch. Dist. No. 40, 61 IDELR 69 (N.D. Okla. 2013). Where the parents of a student with Asperger syndrome alleged that the school district disregarded dozens of reports of verbal and physical harassment, their claims under Section 504 and the ADA will not be summarily dismissed. The parents' allegations connect the alleged harassment to the student's disability, since the complaint alleged that the student was "labeled" as having poor social skills and was mocked for his difficulties with socialization. In addition, the complaint alleged that other students called him names such as "retard," "crazy," "creepy," and "freak," which are names that can reasonably be inferred to make a reference to his social difficulties. In addition, the parents alleged that the district had reports of at least 32 incidents of disability-related harassment against their son between 2010 and 2012 but failed to investigate them or take action to prevent further bullying.

E. D.A. v. Meridian Jt. Sch. Dist. No. 2, 60 IDELR 192 (D. Idaho 2013). Case against district will not be dismissed where there is a genuine dispute as to whether school officials knew the student with Asperger syndrome was being harassed and failed to respond. According to the parents, the student was relentlessly bullied verbally and physically and was called names, such as "retard" during gym and had his clothes stolen. To establish discrimination for disability-based bullying, a parent must show: 1) the harassment was sufficiently severe or pervasive that it altered the condition of the student's education and created an abusive educational environment; 2) the district knew about the harassment; and 3) the district was deliberately indifferent. Where there was testimony that the student's out-of-school behavior (such as burning his parents' house down) was triggered at least in part by the bullying, this was sufficient to show that the harassment was severe and denied him equal access to education. In addition, there was

evidence that the P.E. teacher witnessed the bullying and that the student's mother raised the issue during school meetings. Further, after the vice principal learned of an incident, the school undertook little investigation and failed to follow its own anti-bullying procedures.

F. Morton v. Bossier Parish Sch. Bd., 60 IDELR 220 (W.D. La. 2013). Exhaustion of administrative remedies is not required in a 504/ADA case alleging that district inadequately responded to disability harassment of a teenager with diabetes, depression and bipolar disorder. Where the student victim committed suicide, a "common-sense analysis" would make exhaustion futile or inadequate since the district cannot now craft an administrative remedy to alleviate the alleged education deficiencies that the student may have experienced prior to her death.

G. Wright v. Carroll Co. Bd. of Educ., 113 LRP 34730 (D. Md. 2013). The parent's statements at the beginning of the school year that her 5th-grader with autism was afraid of his male classmates does not render the district liable under 504/ADA for a classmate's attack that left the student with two black eyes and a swollen lip. A single instance of peer harassment is not enough to demonstrate that a district is deliberately indifferent. In addition, although the parent claimed that she notified district employees early in the year that her son was afraid of this classmate, she did not elaborate or identify any specific incidents of bullying. As such, the district did not have actual knowledge or peer harassment until the day of the attack and did not ignore the incident that occurred. The district responded to the incident by notifying the parents immediately, inviting the mother to the school and allowing the mother to observe her child in class for three days.

RETALIATION

A. A.C. v. Shelby Co. Bd. of Educ., 60 IDELR 271, 711 F.3d 687 (6th Cir. 2013). Retaliation claims under 504/ADA should not have been dismissed by the district court where a reasonable jury could conclude that the principal reported the parents to child welfare authorities in retaliation for their requests for accommodations for their diabetic child. The elementary school principal testified that she was genuinely concerned by the fluctuations in the second-grader's blood glucose levels, and that was why she reported that they failed to monitor the student's glucose levels, wanting "something horrible" to happen to the student at school so that they could file a lawsuit. However, the parents engaged in protected activities when they asked multiple times in one week that the student's blood testing occur in her classroom rather than the school clinic. The district was aware of that activity and took adverse action when it reported the parents to child welfare authorities. The timing and the content of the initial and follow-up reports raise questions as to the principal's motives and should be heard by a jury. Moreover, while the district offered 10 reasons to show that the principal's reports were legitimate, the parents raised questions as to whether each of those reasons was a pretext for retaliation. Thus, the district court erred in determining that the district's mandatory reporting duty under Tennessee law shielded it from liability and the case is remanded for further proceedings.

RESTRAINT/SECLUSION IN SCHOOLS

A. Muskrat v. Deer Creek Pub. Schs., 61 IDELR 1, 715 F.3d 775 (10th Cir. 2013). Even if school district employees violated district policy when placing a child with developmental disabilities in a timeout room, their conduct did not rise to the level of violating the child's constitutional rights; thus, the parents did not establish liability under Section 1983. To establish a constitutional violation, the parents needed to show that the staff members' conduct was so severe, so disproportionate to the need presented, and so inspired by malice or sadism that it shocked the conscience. The parents failed to show that the student's placement in the timeout room following an incident in which he overturned chairs and knocked items from tables amounted to conscience-shocking behavior. Similarly, three alleged instances of abuse that included a "pop" on the cheek, a slap on the arm, and a few minutes of physical restraint did not amount to a brutal or inhumane abuse of power. While the court may rightly condemn this conduct, it does not rise to the level of a constitutional tort.

B. J.P.M. v. Palm Beach Co. Sch. Bd., 60 IDELR 158, 916 F.Supp.2d 1314 (S.D. Fla. 2013). Although the district omitted some critical information when documenting its use of restraint with an autistic middle schooler, there is no evidence that the district intentionally aggravated the student's behavioral problems by using an inappropriate intervention. The parents' failure to demonstrate intentional discrimination or conscience-shocking behavior entitles the district to judgment on their Section 1983, Section 504 and Title II claims. According to the parents, the district discriminated against the student by restraining him 89 times in 14 months, when it was clear that the use of physical restraint was causing the student to regress behaviorally. While the district's records did not always identify the behavior that prompted staff members to use physical restraint, the parents bear the burden of proving that staff members were deliberately indifferent to the student's needs. "[The district] records show, for the most part, that [the student] was restrained due to his own aggressive or self-injurious behavior," and "[t]he records reveal nothing regarding the intent or knowledge of each person who restrained [the student]." In addition, neither the district's failure to fully document all incidents of restraint nor its failure to conduct an FBA after the first few incidents amounted to the type of "conscience-shocking" behavior that gives rise to liability under Section 1983. Thus, summary judgment is granted in favor of the district on all of the parents' federal claims.

C. Payne v. Peninsula Sch. Dist., 113 LRP 35379 (W.D. Wash. 2013). District's motion to dismiss parent's Section 1983 claim for damages is denied where evidence indicates that the district was well aware of a teacher's ongoing practice of placing young disabled children in a 63 x 68 inch "safe room." While districts are not automatically responsible for a staff member's violation of a child's constitutional rights, a district may be liable under Section 1983 if the parent can show than an individual with policymaking authority ratified the staff person's conduct or if the district has a custom of allowing such conduct to occur. Here, the parent has produced evidence that the district knew of and permitted the teacher's use of the room over time—it was not a one-time event. The evidence raises questions as to whether the district ratified the teacher's use of the safe room and

the district's purported awareness of its use could amount to a "custom" of permitting constitutional violations. Since it is not clear, the district's motion is denied.

EVALUATIONS

A. Letter to Gallo, 61 IDELR 173 (OSEP 2013). Whether school districts are required to obtain consent from parents before collecting academic functional assessment data within an RTI model depends on the purpose of the data collection. Parental consent is required when an FBA is being conducted as part of an initial evaluation or reevaluation of a child to determine if the student qualifies as a child with a disability under IDEA. Thus, in a typical first-tier scenario, where any such data collection would not be focused upon the educational or behavioral needs of an individual child, consent would not be required. "However, parental consent would be required if, during the secondary or tertiary level of an RTI framework for an individual student, a teacher were to collect academic functional assessment data to determine whether the child has, or continues to have, a disability and to determine the nature and extent of the special education and related services that a child needs." A district would not be required to obtain parental consent, however, to review data collected during RTI as part of an initial evaluation or reevaluation because the data would be considered "existing evaluation data" under the IDEA regulations.

B. Letter to State Director of Special Education, 61 IDELR 202 (OSEP 2013). School districts cannot use RTI as a reason to expand the timeline for completing an initial evaluation of a transfer student who was in the process of being evaluated by the former district. Districts must complete evaluations for such students, including highly mobile students, without undue delay and, preferably, on an expedited basis. When a highly mobile child changes districts after the prior district has begun but not completed an evaluation, the new district may not postpone the evaluation until its own RTI process has been completed. While the new district may choose to provide interventions while it is in the process of completing its evaluation, it is inconsistent with IDEA to delay completing it because a child has not participating in an RTI process in the new district.

C. J.B. v. Lake Washington Sch. Dist., 60 IDELR 130 (W.D. Wash. 2013). School district has a legal right to evaluate an interstate transfer student's need for special education services. Both the IDEA and Washington law give the district the right to evaluate whether the student had an ongoing need for special education services and neither requires the district to prove the reasonableness of the proposed evaluation. Nonetheless, the evaluation data from the student's California district supported the new district's request, as the most recent evaluation in California resulted in a finding that the student was not eligible for services.

D. T.J. v. Winton Woods City Sch. Dist., 60 IDELR 244 (S.D. Ohio 2013). Independent psychologist's use of "facilitated communication" approach when evaluating a teenager with severe disabilities renders the evaluation unreliable. According to the results of the independent evaluation, the student was capable of doing academic work at the 9th grade level, which contrasted sharply with the district's evaluation results showing that the

student has a full-scale IQ of 33 and performs at the kindergarten level in math and a 1st grade level in reading. Clearly, the parents' psychologist physically supported the nonverbal student's hand/wrist during testing, which raises questions as to whether the student independently gave correct answers. In addition, the psychologist's expertise is in cognitive abilities and not behavior or communication; thus, the private evaluation could not be used either to rebut the district's measure of the student's cognitive ability or to question the behavioral goals contained in the district's proposed IEP.

INDEPENDENT EDUCATIONAL EVALUATIONS (IEEs)

A. M.Z. v. Bethlehem Area Sch. Dist., 60 IDELR 273 (3d Cir. 2013) (unpublished). Where the hearing officer determined that the district failed to conduct an appropriate reevaluation, the IDEA provides only one option: to order an IEE at public expense. Thus, the hearing officer erred in ordering as a remedy only that the district conduct formal classroom observations and seek parent and teacher input. The district's argument that the hearing officer did not find its reevaluation to be inappropriate is rejected, because the record clearly stated that the assessment tools and strategies were not "sufficiently comprehensive," and it failed to consider the student's ability to apply pragmatic language skills in peer settings on a daily basis. In addition, the reevaluation failed to consider the student's upcoming transition to high school. Thus, the district court correctly ordered an IEE at public expense.

B. M.V. v. Shenendehowa Cent. Sch. Dist., 60 IDELR 213 (N.D. N.Y. 2013). As an initial matter, the parent does not have the right to an IEE at public expense, because she did not disagree with the district's evaluation. Rather, she requested an IEE because she was dissatisfied with the IEP proposed for her son. Even if she had the right to an IEE, however, she failed to show that the district's $1,800 cap on IEEs was unreasonable. Between July 14, 2010 and August 18, 2010, at least 6 public and private clinics in the parent's geographic area were willing to conduct an IEE for $1,800. Although the district was willing to exceed the $1,800 cap if the parent demonstrated the need for an exception, the parent's wish to use a particular neuropsychologist did not amount to "unique circumstances" that would warrant the excess cost. Parent's failure to contact any of the psychologists or neuropsychologists on the list of qualified evaluators supplied by the school district defeated her challenge to the $1,800 cap.

ELIGIBILITY

A. Torda v. Fairfax Co. Sch. Bd., 61 IDELR 4 (4th Cir. 2013) (unpublished). The district did not deny FAPE to a teenager with Down syndrome based on its failure to list auditory processing disorder as his secondary disability in his IEP. This is so, because the IEP addressed all of the student's needs, regardless of his classifications. Teachers gave detailed testimony on how they simplified lessons, paired visual material with oral instruction and checked for comprehension. Thus, there is no reason to disturb the district court's decision that the student received FAPE.

B. G.I. v. Lewisville Indep. Sch. Dist., 113 LRP 34444 (E.D. Pa. 2013) (unpublished). Although the district did not label the autistic student with ADHD, the 6th grader with autism still received FAPE. The district's program addressed the child's difficulty of staying on task and paying attention through a variety of accommodations and by placing him in a 1:1 setting for instruction of new material and a 1:2 setting for reteaching. Given that the IEP was tailored to address the needs of the student, the absence of the ADHD label did not constitute a denial of FAPE.

C. Chelsea D. v. Avon Grove Sch. Dist., 61 IDELR 161 (E.D. Pa. 2013). Even though there was evidence of a severe discrepancy between ability and achievement in math reasoning, the district did not violate IDEA in finding the 9th-grader ineligible for special education. Where the student had no need for specialized instruction, she was not a "child with a disability" under the IDEA. In addition to having one of the disabilities set forth in IDEA, the student must show that she needs specialized instruction because of that disability. Although the student had earned a D in math in eighth grade, those grades stemmed from her failure to complete homework. Her grades improved after she began receiving accommodations for her ADHD and, in 9th grade, she earned a final grade of B- in the general education math curriculum. Further, her scores on a statewide math assessment showed her overall math ability to be at the base-to-proficient level. Where she made solid progress in math without any modifications to the content, methodology, or delivery of instruction, the hearing officer's decision that she did not need specialized instruction for an SLD is upheld.

D. Shafer v. Whitehall Dist. Schs., 61 IDELR 20 (W.D. Mich. 2013). District staff committed a procedural error by deciding, prior to the IEP team meeting, that the student's IEP would classify him primarily as SLD and secondarily as OHI and speech-language impaired and that he would not be classified as autistic. However, a procedural error constitutes a denial of FAPE only if it impedes the child's right to FAPE, significantly impedes the parents' opportunity to participate in the decision making process regarding the provision of FAPE, or causes a deprivation of educational benefits. The ALJ was correct in distinguishing between predetermination of a student's classification and predetermination of an IEP and correctly concluded that the procedural misstep was not fatal because the IEP nevertheless put the student in other eligibility categories and provided him with appropriate services. In addition, the evidence reflected that the parent fully participated in the development of the IEP and the team considered the relevant data, creating an IEP that addressed the student's unique needs. Thus, the failure to classify the student as autistic did not amount to a denial of FAPE.

E. G.H. v. Great Valley Sch. Dist., 61 IDELR 63 (E.D. Pa. 2013). Although student had violent tantrums at home, she had few conflicts at school, according to her teachers. Based upon her solid academic performance and generally good behavior at school, her behavioral problems do not adversely affect educational performance sufficient to make her eligible as a student with an emotional disturbance. Neither her grades nor her state assessment results reflect any negative impact of her behaviors at school, even though her behavior at home included flying into violent tantrums, including one where she grabbed a butcher knife and stabbed a chair. In addition, her teachers testified that she was self-

controlled at school. Further, her private therapy exclusively focused on issues at home, including issues related to her being adopted and difficulty getting along with her mother and sister. Finally, while her hospitalizations required a month-long absence from school, that in itself did not demonstrate an adverse educational impact. In fact, her teacher indicated that following absences, she needed no time to catch up.

F. R.C. v. Keller Indep. Sch. Dist., 61 IDELR 221 (N.D. Tex. 2013). Where the district developed IEPs that addressed all of the ED student's disability-related needs, regardless of whether the student met the criteria for autism or not, a violation of IDEA did not occur. The IDEA does not confer a specific right to be classified under a particular disability category. "The fact that [student] believes he was mislabeled does not automatically mean that he was denied FAPE." Although the parent argued that an "autism" label would have meant that the student was entitled to receive additional services under Texas law, the district provided most of those services.

PROCEDURAL SAFEGUARDS/VIOLATIONS

A. Doug C. v. Hawaii Dept. of Educ., 61 IDELR 91 (9th Cir. 2013). Education Department's failure to reschedule an IEP meeting when requested by the parent amounts to a denial of FAPE to the student. Thus, the case is remanded to the district court to determine the parent's right to private school tuition reimbursement. Where the ED argued that it had to hold the IEP meeting as scheduled to meet the student's annual review deadline, the argument is rejected because the father was willing to meet later in the week if he recovered from his illness and the ED should have tried to accommodate the parent rather than deciding it could not disrupt the schedules of other team members without a firm commitment from the parent. In addition, the ED erred in focusing on the annual review deadline rather than the parent's right to participate in IEP development. While it is acknowledged that the ED's inability to comply with two distinct procedural requirements was a "difficult situation," the ED should have considered both courses of action and determined which was less likely to result in a denial of FAPE. Here, the ED could have continued the student's services after the annual review date had passed and the parent did not refuse to participate in the IEP process. Given the importance of parent participation in the IEP process, the ED's decision to proceed without the parent "was not clearly reasonable" under the circumstances.

B. W.K. v. Harrison Sch. Dist., 61 IDELR 123 (8th Cir. 2013) (unpublished). Although the district did not provide proper notice of the purpose of the emergency IEP meeting, the procedural error was harmless because the parents knew of the student's recent suspension for assault (that required the paraprofessional to receive emergency medical treatment), and they participated in discussions about the new placement. While the district should have informed the parents that the meeting would address the possibility of home instruction, the parent had reason to know that the team would discuss the student's aggressive and violent behaviors. Further, the parents participated in team discussions about the student's placement and the district abandoned its proposal for home instruction based upon the parents' opposition. Since the district's procedural error

did not impede the parents' participation in the IEP process or result in educational harm, the parents were not entitled to private school reimbursement.

C. P.K. v. New York City Dept. of Educ., 61 IDELR 96 (2d Cir. 2013) (unpublished). Parents are entitled to reimbursement for the child's private placement because the proposed IEP did not contain the one-to-one speech-language services that the child required to progress. It is not sufficient that school witnesses testified that such services would have been provided if the student had come to the school's program. Courts hearing reimbursement cases must focus on the terms of the IEP and cannot consider "retrospective testimony" about additional services the district would have offered if the child had actually attended the program.

D. DiRocco v. Board of Educ. of Beacon City Sch. Dist., 60 IDELR 99 (S.D. N.Y. 2013). While the district failed to comply with state and federal regulations when it invited a math teacher who taught 10th, 11th and 12th graders to the IEP meeting to serve as the regular education teacher for a student who was entering high school as a freshman, this did not impede the parents' participation in the IEP process or the student's right to FAPE. The parents' active participation in a discussion about the student's proposed placement in integrated co-teaching classrooms made the violation harmless. In addition, the Team's failure to discuss the student's annual goals at the IEP meeting did not amount to a denial of FAPE, where the parents were provided with a draft IEP prior to the meeting and were allowed to comment on it during the meeting. Further, the private school's dean participated in the meeting by phone and provided the team with updated information about the student's present levels of academic achievement and functional performance, which was accurately reflected in the goals in the draft IEP. Finally, while the district was required to consider private evaluation reports, it was not required to adopt the evaluators' recommendations. Thus, the parents are not entitled to recover the costs of the private school placement.

E. Horen v. Board of Educ. of the City of Toledo Pub. Sch. Dist., 61 IDELR 103 (N.D. Ohio 2013). District's motion for judgment is granted where it made numerous efforts to schedule an IEP meeting with the student's parents who canceled several IEP meetings. One meeting was canceled by them because the district's attorney would be present; three were canceled because the district would not allow them to record the meetings; one other was canceled because the district could not provide licensing information about the student's stay-put special center school. After the cancellations, the district sought updated information about the student's educational performance and developed a draft IEP, but the parents did not respond to the request for updated data or the draft IEIP. "Their doing so kept the cornerstone of an IEP from the builder's hands." While the student had gone without services for some time, it was because the parents would not send her to her stay-put placement. In addition, the student's failure to receive FAPE stemmed from the parents' failure to cooperate with the IEP process, and the district was, therefore, not liable for the student's loss of educational services.

F. Z.F. v. Ripon Unif. Sch. Dist., 60 IDELR 137 (E.D. Cal. 2013). District did not commit a procedural violation when it terminated its contract with a third-party behavioral aide for

a student with autism. The contract termination did not mean that the district was unwilling to consider parental input about the child's transition needs or that the district was unable to meet those needs. Furthermore, the evidence reflected that the parent participated in discussions about the change in aides. Based upon the fact that the child had been provided with 10 different aides since kindergarten (with 4 different ones in the previous year alone), the district members of the IEP team determined that the child did not need an elaborate transition plan to adjust to a new provider. While the parent may have disagreed with the decision, the district did not exclude her from the IEP process when failing to use the previous provider's services beyond the contract's termination date.

G. P.C. v. Milford Exempted Village Schs., 60 IDELR 129 (S.D. Oh. 2013). District predetermined placement prior to the IEP meeting and, therefore, denied FAPE to the student. The district's preplanning notes show that its staff members were "firmly wedded" to a decision to withdraw the student from a private Lindamood-Bell program and return him to his home school to receive reading services. Most troubling was the student's teacher's testimony that the district was prepared to "go the whole distance this year" and force the parents into due process. Clearly, school officials went beyond merely forming opinions and, instead, became impermissibly and "deeply wedded" to a single course of action that the student not continue at the private school. In addition, they made their decision before determining what reading methodology would be used in the public school program and failed to discuss that issue with the parents. In this case, the type of methodology used could mean the difference in whether the student obtained educational benefit and, therefore, it was essential for the parents to participate in a conversation about it.

H. Aikens v. District of Columbia, 61 IDELR 132 (D. D.C. 2013). While the new school selected for the ED student was not identical to the self-contained program recently closed by the district, the student's relocation did not amount to a change of placement. Thus, the district had no obligation to provide the parent with prior written notice of the change or involve her in the decision. A change of setting does not constitute a change of placement unless the substantive differences between the two sites are substantial or material. As such, the district could move its ED program from one school to another without parental involvement as long as the program settings were similar. While the new program is housed in a public high school instead of in a separate building, students in the program would not have contact with typically developing peers unless required by their IEPs. In addition, any differences in the classroom spaces set aside for behavior management were not material or substantial. In essence, the student would be receiving the same program she received in the previous school.

THE FAPE STANDARD

A. K.K. v. Alta Loma Sch. Dist., 60 IDELR 159 (C.D. Cal. 2013). While the parents of an SLD grade schooler may have been dissatisfied with the progress their daughter had made, they are not entitled to reimbursement for the cost of a private Lindamood-Bell program. An IEP offers meaningful educational benefit if it is tailored to the student's

unique needs and is reasonably calculated to produce more than *de minimis* benefits when gauged against the student's abilities. Testimony for district employees showed that the IEP team considered detailed evaluations of the student's skills and limitations and used the information from those evaluations to determine her goals and services. With respect to progress, the student made advancements in the third grade in writing paragraphs on her own and made progress in fluency and reading comprehension, while meeting many third grade standards. Although not progressing as quickly as her nondisabled peers, the student's slow-but-steady progress showed that her IEPs offered meaningful benefit to her.

B. D.C. v. New York City Dept. of Educ., 61 IDELR 25 (S.D. N.Y. 2013). District failed to offer an appropriate placement to an autistic student with a life-threatening seafood allergy when the information presented to the parent during her tour of the proposed school showed that the district was not able to provide a seafood-free environment. Testimony that the special education school could have been made into a seafood-free environment if the parent had accepted the district's placement offer is not sufficient. Courts and hearing officers deciding IDEA private school reimbursement claims cannot consider the services a district "would have" provided in addition to the services identified in the student's IEP. "Prior to making a placement decision, a parent must have sufficient information about the proposed placement school's ability to implement the IEP to make an informed decision as to the school's adequacy." At the time the parent toured the proposed school, the cafeteria included fish on the menu, and school personnel informed the parent that students were free to bring lunches from home which might include fish. In addition, because culinary arts students came from the high school and prepared seafood dishes to be served in the teachers' cafeteria, the child may have been exposed to seafood smells that would trigger an anaphylactic reaction. When failing to promptly inform the parent of its plan to create a seafood-free environment for the student, the district failed to offer an appropriate placement.

PHYSICAL EDUCATION SERVICES

A. Letter to Tymeson, 113 LRP 32487 (OSEP 2013). A district may not refuse to provide P.E. to a preschooler with a disability just because it does not offer P.E. to students generally. While the IDEA regulations do not require a district to provide P.E. to all children receiving a FAPE if the district does not provide it generally to children in the same grades, this only relieves the district of the duty to provide P.E. to all students with disabilities without regard to the content of their IEPs or their unique needs. The regulations do not relieve districts of the duty to provide P.E. to those students with disabilities who have unique needs requiring P.E. and who have IEPs that include P.E. as part of the student's special education and related services.

CHANGE OF PLACEMENT/STAY-PUT

A. R.B. v. Mastery Charter Sch., 61 IDELR 183 (3d Cir. 2013) (unpublished). Charter school's disenrollment of student with Down syndrome before mother filed for a due process hearing violated the Act's stay-put requirement. The school's argument that its

termination of the student from its rolls in accordance with the state's mandatory attendance law required the district of residence to assume responsibility for the student's IEP is rejected. The stay-put placement is the placement identified in the student's last-implemented IEP, which identified the charter school as her educational placement at the time of her disenrollment. Thus, the charter school is responsible for the student's educational services while the parent's FAPE complaint is pending. In addition, the IDEA's stay-put provision preempts a state law requiring districts to disenroll students after 10 consecutive days of absence.

B. A.D. v. State of Hawaii Dept. of Educ., 61 IDELR 181 (9th Cir. 2013). Where the 20-year-old student still had the right to FAPE when he raised his challenge to the State's age limit for special education services, the stay-put provision applied, making the ED responsible for continued payment for private school expenses while the IDEA complaint proceeds. While the ED's claim that the student's right to FAPE had ended under state law at the end of the year that he turned 20, the student filed his due process complaint six weeks before the end of the school year. Thus, he is entitled to the protections of the stay-put provision regardless of whether he was likely to prevail on the merits of his case challenging Hawaii's age rule.

C. P.V. v. School Dist. of Philadelphia, 60 IDELR 185 (E.D. Pa. 2013). While school districts generally have the right to determine the specific schools that students with disabilities will attend, this district's practice of unilaterally transferring autistic students with autism between centralized grade-level programs located in different schools violates the IDEA. Because children with autism typically have difficulty with transitions and changes in routine, a change in the physical location of services would likely be far more traumatic for them than it would be for students with other disabilities. "Accordingly, we must conclude that under the particular facts of our case, [transferring] students with autism to a separate school building in the school district constitutes a change in their 'educational placement' under the IDEA." As such, the district must follow the IDEA's placement procedures, including parent participation and appropriate notice, before transferring students with autism to new schools.

D. J.R. v. Cox-Cruey, 61 IDELR 212 (E.D. Ky. 2013). Parents' request to continue services to a 21-year-old student with TBI while their due process complaint was pending is denied. Kentucky law makes students eligible for public education until they turn 21. Thus, the student's eligibility for IDEA services terminated on her 21st birthday, and the parents' request for a stay-put order while due process is pending is denied.

E. D.K. v. District of Columbia, 113 LRP 34711 (D. D.C. 2013). Transfer of a multiply disabled student from one private school to another is not a change of placement, so the IDEA's stay-put provision does not apply. To show a change of placement, parents must identify a fundamental change in, or elimination of, a basic element of the student's educational program. While the parent argued that the student's current school offered access to nondisabled students while the proposed school was one only for disabled students, this distinction is not pertinent because this student's IEP requires all instruction

and services outside of a general education setting. Thus, in the context of this student's particular program, the locations were equivalent.

DISCIPLINE

A. Anaheim Union High Sch. Dist. v. J.E., 61 IDELR 107 (C.D. Cal. 2013). District had notice of student's likely status as a child with a disability when the Section 504 Team met to discuss the student's panic attacks, inability to complete work, failing grades, inability to remain in class and hospitalization for attempted suicide. Thus, the district had an obligation to conduct a manifestation determination before placing him in an alternative school for disciplinary purposes. A school district is deemed to have knowledge of a student's disability before the misconduct occurred where a teacher or other staff member "expresses concern about a pattern of behavior" to the special education director or other district supervisor. This does not require teachers to suggest a special education evaluation. Rather, the high school AP's attendance at the 504 meeting triggered the knowledge that the student was likely covered by IDEA. Thus, the hearing officer's decision requiring a manifestation determination is upheld.

TRANSITION SERVICES

A. Gibson v. Forest Hills Sch. Dist. Bd. of Educ., 61 IDELR 97 (S.D. Ohio 2013). The district's concerns about the high school student's ability to tolerate a lengthy, contentious IEP meeting that addressed issues well above her level of comprehension did not excuse its failure to include her in postsecondary transition planning. The district took no other steps to ensure that the team considered the student's preferences and interests, which is a procedural violation amounting to a denial of FAPE. The IDEA requires districts to invite students with disabilities to any IEP meeting that will include a discussion of postsecondary goals and transition services. Although the student's IEP meetings tended to be long and adversarial due to the parties' poor relationship, the student's special education teacher conceded that she could have helped the student prepare for an IEP meeting. In addition, the team could have modified or structured the meeting in a way that made the student's attendance easier. Although the procedural violation would not amount to a denial of FAPE if the district took steps to ensure the team considered the student's preferences and interests, the district had not done age-appropriate transition assessments at the time of the IEP meeting. The notion that the student's voluntary choices between classroom tasks that included stapling, shredding documents, and wiping tables provided an accurate picture of her interests and skills is rejected. "This informal approach to determining [the student's] postsecondary preferences and interests was not sufficient," and the court will meet with the parties to determine an appropriate remedy for the flawed transition plan.

B. Maksym v. Strongville City Sch. Dist., 113 LRP 34468 (N.D. Ohio 2013). The district appropriately addressed the transition needs of a high schooler with brain damage and cerebral palsy and the services provided, taken in their entirety, are reasonable calculated to enable the child to benefit. While the parent alleged that his eighth-period placement as an aide in the guidance office for two days per week was just "idle time" for him, it contributed to his employability skills. While the parent argued that no learning took

place during 8th period, the parent failed to point out any requirement that every minute of every school day must provide the maximum educational benefit. Here, the student's IEP focused on the student's functional skills, including reading, math and vocational skills, to enable him to transition into adult life and the 8th period placement furthered these goals. In addition, the student made progress during the school year toward those goals and the student's participation as an "office aide" in the guidance office provided in-school work experience to foster his employability.

METHODOLOGY

A. K.M. v. Tustin Unif. Sch. Dist., 61 IDELR 182 (9th Cir. 2013). (Note: This case reverses and remands two California district court opinions holding that the school district was not required to provide Communication Access Real-time Translation (CART) to a student with a hearing impairment where it offered FAPE under the IDEA). A district's compliance with the IDEA in offering an appropriate IEP does not necessarily establish compliance with the "effective communication" obligations under Title II of the ADA. While the IDEA requires districts to provide a "basic floor of opportunity" to students with disabilities, the ADA requires them to take appropriate steps to ensure that communications with individuals with disabilities are as effective as communications with others. Further, Title II of the ADA requires districts to provide appropriate auxiliary aids and services, including "real-time computer-aided transcription services" when necessary to provide an equal opportunity to participate in district programs and activities. Because the ADA's effective communication requirement differs significantly from the IDEA's FAPE requirement, districts "may be required under the ADA to provide services to deaf or hard-of-hearing students that are different than the services required by the IDEA." The notion that the success of a student's IDEA claims dictates the success of her ADA claims is rejected. Thus, these two cases are remanded to the district courts for further proceedings as to whether each student's district complied with the ADA's effective communication requirement.

EXTENDED SCHOOL YEAR SERVICES

A. Annette K. v. State of Hawaii, 60 IDELR 278 (D. Haw. 2013). In Hawaii, ESY is considered necessary for FAPE where the benefits the student gains during the regular school year would be significantly jeopardized if he were not provided an educational program over the summer. In this case, it was clear that the student with severe dyslexia lost ground quickly every time there was a break in instruction. Indeed, the principal noted that the student was able to make progress in his reading, but "hours, days, weeks later, it's like you're starting fresh." In addition, the student's private reading tutor echoed the same concern, indicating that when she saw him less than 3-5 times per week, she had to spend significant time backtracking.

LEAST RESTRICTIVE ENVIRONMENT

A. D.W. v. Milwaukee Pub. Schs., 61 IDELR 32 (7th Cir. 2013) (unpublished). District's proposed placement in an SDC class for students with intellectual disabilities is the

appropriate LRE where the student will receive FAPE. The student earned poor grades in her less restrictive multi-categorical class and often refused to participate. As a result, the student's IEP team developed a BIP that included several hours of daily 1:1 instruction, modification of assignments and daily progress reports. However, the interventions were not successful, and the team modified the student's IEP again to include class work at the student's instructional level, seating near the teacher and positive feedback. Only after those interventions failed did the district propose the more restrictive SDC placement. "The relevant inquiry is whether the student's education in the mainstream environment was 'satisfactory' (or could be made satisfactory through reasonable measures)."

B. J.T. v. Newark Bd. of Educ., 61 IDELR 27 (D. N.J. 2013) (unpublished). School district has no obligation to offer a resource in-class support program to the SLD student at his neighborhood school. In this case, the student's neighborhood school did not offer the special education services set forth in the student's IEP and a district may offer certain types of programming in a centralized location. In addition, the proposed school was only .8 miles from the student's home.

C. V.M. v. North Colonie Cent. Sch. Dist., 61 IDELR 134 (N.D. N.Y. 2013). Where evidence indicated that the 9th grader with Down syndrome spent a good deal of time in her Regents-level classes crying, sleeping or engaging in off-task behaviors, her parents' request for increased mainstreaming opportunities was not supported. The district offered the student FAPE in the LRE when the IEP team decided that the student needed specialized instruction for reading, math and social studies. While the team did not have any recent assessments of the student's needs (because the parents denied consent for reevaluation since third grade), the team did have available information about the student's performance that reflected that continued placement in mainstream classes was not appropriate. Clearly, the student struggled in her general education math and social studies courses, despite receiving individualized instruction and a significantly modified curriculum. Teachers reported that the instruction provided there was far beyond the student's comprehension level and that she regressed academically and behaviorally as a result. Thus, she would not benefit from mainstream placement for math and social studies and the IEP team was correct in limiting her general education instruction to English and science.

ONE-TO-ONE AIDES

A. Lainey C. v. State of Hawaii, 61 IDELR 77 (D. Haw. 2013). Where the social skills training set out in the autistic student's IEP would have met her needs, a one-to-one aide was not necessary for FAPE. Even though a teacher testified that an aide would be "helpful," that is not the same as being necessary for FAPE. While some witnesses supported the idea of a one-to-one aide, others believed it was unnecessary and the ED's behavioral health specialist testified that an aide might make the student overly dependent on the aide and more isolated socially.

CHARTER SCHOOLS

A. Midlands Math and Business Academy Charter Sch. v. Richland Co. Sch. Dist. One, 60 IDELR 229 (S.C. Ct. App. 2013) (unpublished). Charter school's failure to provide required progress reports for all students with IEPs was an appropriate reason for the sponsor district to revoke the school's charter. The charter school's issuance of IEP progress reports for some students did not excuse its failure to provide them to all students. Because the school violated federal law, the ALJ's decision that state law required the district to revoke the school's charter is affirmed.

ATTORNEYS AND ATTORNEY'S FEES

A. A.L. v. Jackson Co. Sch. Bd., 60 IDELR 187 (N.D. Fla. 2013). District's motion for sanctions is granted because the parent's attorney should have known that the claims that the school district should have revised the student's IEP were groundless. This is so, because the parent attorney was involved in a 2007 Eleventh Circuit case that held that the IDEA's stay-put provision prohibits a district from changing a student's placement after the parent files a due process complaint, unless the parent and the district agree to such a change or a hearing officer orders a new placement. Here, the parties were not able to agree to change the student's program, so the stay-put provision prevented the district from updating the IEP. Because the parent's attorney also represented the student in the Eleventh Circuit case in 2007 which specifically ruled this way, she was "well-aware" of the current law on the stay-put provision. Thus, the district is entitled to recover attorney's fees.

B. Bethlehem Area Sch. Dist. v. Zhou, 61 IDELR 9 (E.D. Pa. 2013). The parent's alleged statement that her lawsuit would "go away" if the district would just pay for her sons to go to a private school may entitle the district to a fee award because she filed her hearing request for an improper purpose. The parent requested several due process hearings regarding the IEPs for her sons over the years, despite the fact that they were making significant progress. Under the IDEA, a prevailing district may recover fees from a parent who has litigated for any improper purpose, such as to cause unnecessary delay or to needlessly increase litigation costs. There are several pieces of evidence that indicate the parent's intent in seeking the hearing was to drive up district costs to the point where it would rather pay for her sons to attend private school than oppose her extensive requests. For example, the parent reportedly told a special education director that "if the district would pay for a private school…this would all go away." While the parent is highly ambitious that her sons achieve all they can, the law does not require a district to maximize a child's potential or "cause him or her to become a second Einstein." Because the district prevailed at the due process hearing and the parent pursued her complaint for an improper purpose, the district is potentially entitled to attorney's fees and a conference will be held to address the issue.

C. Corpus Christi Indep. Sch. Dist. v. D.H., 59 IDELR 43 (S.D. Tex. 2012). Parents' overall fee award is reduced based upon the contract that the parent signed to hire her attorney, which provided that the parent would not attend a resolution meeting or settle her claims without the attorney's consent and that, if she did, she would become personally liable for paying his fees. According to the district, a settlement was imminent after the parent and

school representatives met to resolve her claims prior to the due process hearing, but the parent refused to sign anything at the resolution meeting, saying that her attorney told her not to. Based upon that, the district argued that the fee request after the parent prevailed at the due process hearing should be drastically reduced because the hearing and appeal could have been avoided. Because the attorney's contract was calculated to and did unreasonably lengthen the process, the fee amount is reduced by half the number of hours the attorney logged prior to the resolution session. In addition, the hours the attorney logged between the resolution session and the district's formal settlement offer were eliminated.

PARENTALLY PLACED PRIVATE SCHOOL STUDENTS

A. Letter to Corwell, 61 IDELR 82 (OSEP 2013). Parentally placed private school students whose parents live outside of the U.S. are entitled to participate in equitable services. Under IDEA, the district where the private school is located is responsible for providing for the equitable participation of parentally placed private school students with disabilities by providing them with special education and related services consistent with their numbers and their need. The IDEA does not distinguish between parentally placed private school children whose parents reside in other countries and those whose parents reside in the U.S. with respect to the district's obligation to provide equitable services under the IDEA.

SECTION 504/ADA

A. D.L. v. Baltimore City Bd. of Sch. Comm'rs, 60 IDELR 121, 706 F.3d 256 (4th Cir. 2013). The duty to provide FAPE to students under Section 504 only extends to students attending public schools, not private ones. A district has no obligation to provide Section 504 services to a parentally placed private school student if it has offered the student appropriate public school services.

B. Moody v. New York City Dept. of Educ., 60 IDELR 211 (2d Cir. 2013) (unpublished). While an 11-year-old diabetic student may have preferred eating hot food for lunch, his preference does not require the school district to heat up lunches prepared by his mother. The availability of diabetic-friendly lunch options in the school cafeteria satisfied the district's duty to accommodate the student's disability, and the district only is required to ensure that the student has meaningful access to school lunch and other district programs. Here, the school's cafeteria offered a selection of hot and cold foods that the student could eat. Thus, even if the student sometimes skipped lunch and did not like the food on the school menu, that did not warrant a further accommodation beyond what the district had already provided. In addition, the district monitored the student's blood glucose throughout the day to ensure it stayed within acceptable levels.

C. Kimble v. Douglas Co. Sch. Dist. RE-1, 60 IDELR 221 (D. Colo. 2013). District's position that parents' revocation of consent to an IEP under IDEA amounted to a rejection of a 504 Plan is rejected. However, the district convened a Section 504 meeting to discuss the student's need for accommodations and modifications after the parents

revoked consent to the IEP and the district's attempt to implement the IEP that it has offered as 504 FAPE is appropriate. Thus, the parents cannot hold the district liable for failing to provide accommodations after rejecting the 504 Plan, and the district's obligation to protect the student from discrimination was satisfied when it offered the same services set out in the IEP.

D. G.B.L. v. Bellevue Sch. Dist. #405, 60 IDELR 186 (W.D. Wash. 2013). It was not a "reasonable accommodation" in the fast-paced gifted program for the student with ADHD and a hearing impairment to be able to complete a lesser amount of homework each night than other students. This is so because the gifted program required all students to learn a significant amount of material on their own through homework assignments. The district is not required to make a fundamental alteration or substantial modification to its programs so that students with disabilities can participate. The parents' request to limit the student to two hours of homework per night was not reasonable, as the assigned homework is an essential component of the coursework in the gifted program. In addition, the student would be unable to keep up with class discussions if he completed only 2 hours of homework each night. Further, evidence shows that the student was already completing only part of the assigned homework and was falling behind as a result. Thus, the student could not meet the program's academic standards even with the required accommodation and judgment is granted in favor of the district.

E. Liebau v. Romeo Comm. Schs., 61 IDELR 231 (Mich. Ct. App. 2013) (unpublished). Parent of a nondisabled student did not have standing to challenge the accommodations set forth in another student's Section 504 Plan that provided for a school-wide ban on peanut and tree nut products. Although the parent claimed that she had requested a 504 Plan for her own daughter based on dietary restrictions and nutritional needs, the parent never appealed the district's decision that her daughter did not need accommodations under 504. Addressing the parent's claim that the nut ban violated her daughter's right to equal protection, the district's policy passes constitutional muster as long as it is rationally related to a legitimate governmental interest. Here, the nut ban was necessary to accommodate a school mate's allergy, which was so severe that it was triggered by airborne exposure to nut products. While less-intrusive procedures for accommodating the other student's allergy were attempted, they were determined to be ineffective. In addition, the district's practice of removing offending food items and providing appropriate alternatives did not violate this student's right to be free from unlawful searches and seizures. Not only did school personnel have reason to suspect the student would bring nut products to school, given the parent's repeated statements that she would not comply with the ban, the searches were not excessively intrusive and were necessary to protect the other student's safety.

PARTICIPATION IN NONACADEMIC/EXTRACURRICULAR ACTIVITIES

A. Dear Colleague Letter, 60 IDELR 167 (OCR 2013). Because extracurricular athletics offer benefits such as socialization, fitness, and teamwork and leadership skills, districts must make more of an effort to ensure that students with disabilities have an equal opportunity to participate in athletic programs. Districts should not act on the basis of

generalizations and stereotypes about a particular disability. While students with disabilities do not have a right to join a particular team or play in every game, decisions about participation must be based on the same nondiscriminatory criteria applied to all prospective players. In addition, districts have the obligation to offer reasonable modifications so that students with disabilities may participate. If a particular modification is necessary, the district must offer it unless doing so would fundamentally alter the nature of the activity or give the student with a disability an unfair advantage. For example, using a visual cue to signal the start of the 200-meter dash would not fundamentally alter a track meet or give a student with a hearing impairment an unfair advantage over other runners. If a district does determine that a requested modification is unreasonable, it must consider whether the student could participate with a different modification or accommodation. While some students might be unable to participate in traditional athletic activities, even with modifications and supports, districts should offer athletic opportunities that are separate or different from those offered to nondisabled students in these instances. Such opportunities might include disability-specific team sports, such as wheelchair basketball, or teams that allow students with disabilities to play alongside nondisabled peers. Districts should be flexible and creative when developing alternative programs for students with disabilities.