Hearing Officers & Mediators' Training
Homewood & Hampton Inn Downtown Richmond
May 18, 2017

AGENDA

Thursday, May 18

7:30 - 8:00 a.m.	**Registration**
8:00 - 8:15 a.m.	Welcome / Announcements / Introductions **Ron Geiersbach**
8:15 - Noon	"Special Education Law Updates" **Art Cernosia**
Noon - 1:00 p.m.	**LUNCH**
1:00 - 3:30 p.m.	Art Cernosia, continued
3:30 - 4:00 p.m.	Virginia Education Legislative Update **Zach Robbins** Department of Education

(Mr. Cernosia will schedule breaks during his presentation)

VITA

ARTHUR W. CERNOSIA

PERSONAL INFORMATION

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PROFESSIONAL EXPERIENCE

January 1988 to Present
EDUCATION CONSULTANT
Self-Employed

Provides consultation, training and technical assistance to state education agencies, local education agencies, parents/advocacy organizations and administrative hearing officers, mediators and administrative complaint investigators throughout the nation in the area of special education law and policy.

January 1988 to February 1999
EDUCATION CONSULTANT
Northeast Regional Resource Center
Burlington, Vermont

Provided consultation, technical assistance and training to state education agencies, parents/advocacy organizations and local education agencies in the area of special education law and policy in the eight Northeastern states.

August 1986 to September 1988
ATTORNEY
McNeil, Murray & Sorrell, Inc.
Burlington, Vermont

Private practice of law with a concentration in the area of education law, particularly special education.

January 1981 to July 1986
ASSISTANT ATTORNEY GENERAL
Vermont Department of Education
Montpelier, Vermont

Provided technical and legal assistance to Department staff, local school district personnel and parents regarding legal issues in education with special emphasis in civil rights matters; coordinated the special education due process hearing, mediation

and administrative complaint systems; represented the Department in court and administrative hearings; formulated Department positions and policies.

March 1980 to January 1981

CONSULTANT
Vermont Department of Education, Montpelier, Vermont

Provided technical assistance, resources, and in-service training to aid school districts in complying with special education law, Title IX, Title VII and related laws and regulations regarding discrimination.

November 1978 to July 1979

ATTORNEY with Blodgett and McCarren, Burlington, Vermont

Advisor to Student Legal Services Office at the University of Vermont; prepared pleadings and supporting memoranda; factual investigations; interviewed clients; research.

September 1976 to June 1978

TEACHER of Social Studies and Education Policy at Piedmont School, Charlotte, North Carolina

January 1974 to June 1976

ASSISTANT in the Southern Illinois University Ombudsperson's Office, Carbondale, Illinois.

Conducted special fact-finding and hearing panels; interviewed clients; problem solving; prepared records and reports; frequent counseling; frequent contact with all facets of the University; University policy analysis.

Worked with the University Legal Counsel's Office in preparing training materials for schools in implementing the Education For All Handicapped Children Act (PL 94-142, now the IDEA) and Title IX of the Education Amendments of 1972.

September 1972 to June 1973

TEACHER of Social Studies at DeKalb High School, DeKalb, Illinois

UNIVERSITY/COLLEGE EXPERIENCE

July 1982 to July 2014

Education Law Institute, University of Vermont, Burlington, Vermont.

Initiated the Institute which addressed the on-going needs of the education community in areas of academic offerings, in-service training and policy development.
Initiated graduate education courses in Education Law and Special Education Law.

January 1979 to May 1982.

ADJUNCT FACULTY MEMBER, St. Michael's College, Winooski, Vermont in the Master's of Science in Administration Program

EDUCATION

LAW SCHOOL

Southern Illinois University School of Law, Carbondale, Illinois
Juris Doctor Degree

UNDERGRADUATE

Northern Illinois University, DeKalb, Illinois; B.A.
Major: Political Science
Minor: Secondary Education

LICENSING

Admitted to practice law in the State of Vermont and the United States District Court, District of Vermont.

RELATED VOLUNTEER ACTIVITIES

Surrogate Parent for students with disabilities in state custody.
Special Education Advisory Committee member.

References Provided Upon Request.

Special Education Law Up-Date

Virginia Hearing Officer/Mediator Training

Virginia Department of Education

May 2017

Presenter: Art Cernosia, Esq.
Williston, Vermont

IDEA Final Regulations

Significant Disproportionality

The United States Department of Education issued final IDEA regulations on December 19, 2016 (see 81 Federal Register 92376) regarding significant disproportionality issues. The regulations address a number of issues related to significant disproportionality in the identification, placement, and discipline of students with disabilities based on race or ethnicity.

The final regulations:

- Establish a standard approach that States must use in determining whether significant disproportionality based on race or ethnicity is occurring in the state and in its districts.
- Require that States address significant disproportionality in the incidence, duration, and type of disciplinary actions, including suspensions and expulsions, using the same statutory remedies required to address significant disproportionality in the identification and placement of children with disabilities.
- Clarify requirements for the review and revision of policies, practices, and procedures when significant disproportionality is found. Districts will be required to identify and address the factors contributing to

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significant disproportionality as part of comprehensive, coordinated early intervening services (CEIS).

- Provide that support through additional flexibilities in the use of CEIS. Prior to these final regulations, districts identified as having significant disproportionality were not permitted to use their required 15 percent set aside for CEIS in order to serve students with disabilities, even if the district had identified racial disparities in the discipline and placement of children with disabilities. Likewise, CEIS funds could not be used to serve preschool children. Now, with these final regulations, districts identified as having significant disproportionality will have the flexibility to use their CEIS set aside to assist students with disabilities and preschool children with and without disabilities.

Source: Fact Sheet: Equity in IDEA (United States Department of Education, December 12, 2016)

Case Law Update

I. Child Find/Evaluation Issues

A. The Court held that a student who was identified by the school district as having a speech and language impairment was denied a FAPE since the school's evaluation was not sufficiently comprehensive. Although the Court found that the school was on notice that the student might have a disorder on the autism spectrum it never assessed the student to determine if he was autistic. The school relied on an "informal observation" (30-40 minutes) by its school psychologist who did not feel that the student required an autism evaluation. Note: The parents were never notified of the school's intent to have the psychologist observe their student or the psychologist's conclusions.

The Court stated:

> ...if a school district is on notice that a child may have a particular disorder, it must assess that child for that disorder, regardless of the subjective views of its staff members concerning the likely outcome of such an assessment. That notice may come in the form of expressed parental concerns about a child's

> symptoms, ..., of expressed opinions by informed professionals, ..., or even by other less formal indicators, such as the child's behavior in or out of the classroom. A school district cannot disregard a non-frivolous suspicion of which it becomes aware simply because of the subjective views of its staff, nor can it dispel this suspicion through informal observation.

The Court concluded that the student's IEP goals were "likely inappropriate" since the Team relied on incomplete assessment information. In addition, FAPE was denied since without a sufficiently comprehensive evaluation the parents were deprived of vital information. As a result, the parents right to meaningfully participate in the IEP process was substantially hindered.
The Court remanded the matter back to the District Court to determine the appropriate remedy. Timothy O. v. Paso Robles Unified School District 67 IDELR 227 (United States Court of Appeals, 9th Circuit (2016)).

B. A student with a disability received a reevaluation in 2009 consisting of a psychological evaluation, education assessment, speech/language assessment and an OT evaluation. In 2012, a Team met to review existing information including the 2009 evaluations, student report cards and teacher observations. Based on the review, the school members of the Team determined that no new evaluation data was needed to determine the student's continued eligibility and the necessary special education services to be provided.
In 2014, the parents requested an IEE at public expense consisting of a neuropsychological evaluation, speech/language assessment and an OT evaluation. The school district then offered to conduct a full evaluation including those requested by the parents. The parents declined. The school provided written notification to the parents that it refused to pay for the IEE. In response, the parents initiated a due process hearing.
The Court, in affirming the ALJ, held that the parents were not entitled to an IEE at public expense since they never disagreed with the school's evaluation. In so concluding, the Court held that the 2012 Team meeting solely reviewing existing data did not constitute an evaluation under the IDEA.
The Court stated that the parents could have disagreed in 2012 that no additional data was needed and then requested a reevaluation. If

the school did not reevaluate the parents could have taken the issue to a due process hearing. Also, the parents could have allowed the evaluations in 2014 to be conducted. If they disagreed with the results, the parents would then have the right to request an IEE at public expense.
Finally, the Court held that since the parents were not in disagreement with any school evaluation, the school district did not have an obligation under the IDEA to request a due process hearing when it refused to pay for the IEE. F.C. v. Montgomery County Public Schools 68 IDELR 6 (United States District Court, Maryland (2016)).

C. A student was evaluated and found not to be eligible for IEP services. The parents then requested that the school pay for an independent educational evaluation (IEE) consisting of a neuropsychological evaluation and a functional behavior assessment. The school refused the request and initiated a due process hearing. The ALJ concluded that the school's evaluation was appropriate and therefore the school was not obligated to pay for an IEE.
After the due process hearing the parents obtained an IEE, paid for by the parents' legal counsel, which concluded the student was eligible for IEP services. The parents filed an appeal of the ALJ's decision to District Court and filed a Motion to Supplement the Record by introducing the IEE they obtained.
The Court denied the Motion. The Court concluded that the parents had made a tactical decision not to obtain the IEE for use at the due process hearing. There was no evidence to show that the IEE had been requested before the hearing. The Court stated that IDEA proceedings in federal court are not meant to be new trials which would render due process hearings as a "mere dress rehearsal". Therefore, the IEE would not be considered by the Court on appeal. E.P. v. Howard County Public School System 68 IDELR 249 (United States District Court, Maryland (2016)).

D. The parents alleged that the school failed to assess their student for dyslexia and dysgraphia in the reevaluation and requested a publicly funded Independent Educational Evaluation (IEE). The school refused and initiated a due process hearing. The Court found that the school evaluated the student for a specific learning disability and evaluated him for "reading and writing inefficiencies". The school's reevaluation did not refer to specific reading and writing disorders such as dyslexia or dysgraphia.
In a memorandum decision, the Court, in affirming the ALJ and

District Court, concluded that the school's reevaluation was appropriate thus denying the parent's request for a publicly funded IEE. The school assessed the student in all areas related to his disability as required by the IDEA by broadly assessing the student for reading fluency and fine motor skills aimed at identifying any writing deficiencies. Avila v. Spokane School District 81 No. 14-35965 (United States Court of Appeals, 9th Circuit (2017)). Note: A memorandum decision is not precedent except as provided by Ninth Circuit Rule.

E. The United States Department of Education issued a guidance letter stating that if the parent requests an IEE at school expense because they feel that the school did not assess all of the students educational needs, the school cannot "cure" the issue by conducting that evaluation. Upon a request for a publicly funded IEE, the school must either grant the parent's request to fund the IEE or request a due process hearing. At the hearing the school would have the burden of proving its evaluation was appropriate. Letter to Carroll 116 LRP 46076 (United States Department of Education, Office of Special Education Programs (2016)).

II. Eligibility Issues

A. A student was found eligible for IEP services in the second grade under the category of specific learning disability since she had a deficit in reading fluency. The student was found no longer eligible by the Team in seventh grade based on her straight A average in school, performance on standardized tests, individual reading tests which included reading fluency, parent input, and teacher and school psychologist observations.

The parent obtained two IEEs which found comparable scores on some tests but found low scores on reading fluency based on other tests. The Team reviewed the IEE reports and affirmed its finding of ineligibility.

The hearing officer found the student was not SLD and did not need special education. The District Court affirmed the conclusion that the student was not SLD but did not address the need for special education. The parents appealed.

The Court of Appeals vacated the decision and remanded for further consideration. The Court found that although a student's overall academic success and standardized test scores can be relevant considerations whether a student has a SLD there must be "consideration of the nexus between those academic measures and

the area of the child's deficiency". It was not "readily apparent" that the hearing officer or the District Court engaged in the nexus analysis. The District Court also did not give proper consideration to the results of the IEEs.

The Court observed, that based on the comments to the IDEA regulations and guidance from OSEP, that a student's high academic performance could mask her learning disability. Therefore, a student's strong academic performance is not determinative of the student's eligibility for special education. Mr. and Mrs. Doe v. Cape Elizabeth School District 68 IDELR 61 (United States Court of Appeals, 1st Circuit (2016))

B. A student in 2nd grade who experienced increasing behavioral challenges and a suicide threat was referred to the school's counseling center. The student was diagnosed with ADHD, a Bipolar Disorder and ODD. A Student Study Team decided that the school's behavior specialist would develop a behavior support plan and a one to one paraprofessional was assigned to the student who was in a general education class. His behavior and academic performance improved.

Based on the parent's request, the school agreed to conduct a special education evaluation. A school psychologist performed a psychoeducational assessment and a functional analysis. Based on all of the assessments, the Team concluded that the student was not eligible for special education. After the student was subsequently admitted to a psychiatric hospital the school conducted another assessment. Again the Team found the student did not qualify for special education. The parents challenged the decision.

The ALJ found the student was not disabled and therefore not eligible. The District Court concluded that although the student was disabled as having a SLD, OHI and ED, the student was not "in need of special education" since the general education interventions and accommodations provided the student in the classroom were effective in improving the student's performance.

The Court of Appeals reversed holding that the services the student was receiving constituted "specially designed instruction". The Court found important that the services, including mental health counseling, ongoing intensive services from a behavior specialist and assistance from a one-on-one paraprofessional were not services offered to general education students. In addition, the Court found several procedural violations (such as denial of access to full educational records) that interfered with the parent's right to be a meaningful participant. The Court remanded the matter to the

District Court to determine the appropriate remedy. L.J. v. Pittsburg Unified School District 68 IDELR 121 (United States Court of Appeals, 9th Circuit (2016)). Amended decision issued in February, 2017 at 117 LRP 6572 (United States Court of Appeals, 9th Circuit (2017)).

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 parents of a student with autism initiated a due process hearing alleging that FAPE was denied. Among the allegations, the parents argued that the school violated their IDEA rights to be meaningful participants at their student's IEP meetings by holding two meetings during the summer while the parents were out of the country.
The Court, in affirming the hearing officer and lower court, found no violation. The school had offered numerous dates to the parents for an IEP meeting and also offered alternative means of participating through telephone or videoconferencing. The parents did not accept the offer. Further, the school recorded the summer meetings and provided them with transcripts. Another IEP Team meeting was called when the parents returned. At that meeting the parents submitted an IEE and alternative placement options which were considered but rejected by the IEP Team. The Court held that a parent's "right of participation is not a right to 'veto' the agency's proposed IEP". Therefore, the Court concluded that there was no denial of FAPE since the school made significant efforts to involve the parents in the IEP process. Dervishi v. Stamford Board of Education 68 IDELR 3 (United States Court of Appeals, 2nd Circuit (2016)) Note:

This is an unpublished Summary Order.

2. The parent appealed an ALJ's decision that FAPE had been provided to her student. Among the issues raised on appeal was parental involvement at the IEP Team meeting. The school district scheduled the meeting to last two hours. The parents, her advocate and her education consultant attended but the consultant stated she could only stay for two hours. At the end of the two hours, the district representative stated that the IEP Team would continue the meeting to finish the IEP since it "expired" in a few days. In addition, he stated that the IEP Team would also meet at a later date to consider amendments to the IEP. At that point the parent, her advocate and the educational consultant left the meeting although the remaining members of the Team continued to complete the IEP.
   The Court concluded that there was no IDEA violation since the parent was afforded an opportunity for "substantial participation". Here, unlike the Doug C. (9th Circuit 2013) decision cited by the parents, the parent attended the IEP meeting for two hours. The school district also followed through on its commitment by holding two additional IEP Team meetings with parental participation shortly thereafter in order to make additions to the IEP. Pangerl v. Peoria Unified School District 69 IDELR 133 (United States District Court, Arizona (2017)).

3. A parent of a student with autism challenged the appropriateness of her student's IEP both on procedural and substantive grounds. Procedurally, the parent alleged that her inability to visit the proposed IEP placement significantly impeded her right to be a meaningful participant in the IEP decision making process. The student's home school notified the parent about the school where her student would receive services and listed the staff member to call to set up a visit. The parent stated that she was unable to reach the staff member before she had to leave on vacation before the school year started. The parent then made a unilateral placement in a private special education school.
   The Court upheld the appropriateness of the IEP both procedurally and substantively. In this case, the parent actively participated in the IEP Team's development of her student's IEP. Therefore, she was provided with the

opportunity to be a meaningful participant. The Court held "parents do not have the right under the IDEA to visit assigned school options either before the recommendation is finalized or prior to the school year". J.B. v. New York City Department of Education 69 IDELR 184 (United States District Court, Eastern District, New York (2017)). See also John and Maureen M. v. Cumberland Public School 65 IDELR 231 (United States District Court, Rhode Island (2015))

4. The IDEA does not address the use of audio or video recording at IEP meetings. Therefore, the State Education Agency or Local Education Agency has the option to require, prohibit, limit or otherwise regulate the use of recording devices at IEP meetings. Such policy must be uniformly applied and provide an exception when necessary to ensure that the parent understands the IEP process.
   If the policy requires that parents provide the school notice before permitting the recording device at an IEP Team meeting, the school must schedule the meeting at a time that allows the parent to meet that notice requirement. Letter to Savit 67 IDELR 216 (United States Department of Education, Office of Special Education Programs (2016)).

5. The parent of a 20 year old student who is autistic, intellectually disabled, asthmatic, and has a obsessive compulsive disorder, mood disorder and pica challenged three of her student's IEPs.
   The Court found that there were four procedural violations of state law and the IDEA in each IEP. The first violation related to the consideration of evaluation information. The Court noted that the IDEA requires that the IEP Team consider the most recent evaluation information in developing/revising an IEP. The Court then concluded "it therefore follows that the burden rested with the [school district] to demonstrate which evaluative materials were reviewed during each [IEP] meeting in reaching the terms of the IEPs". The other three procedural violations (lack of an FBA, sufficient speech-language services and parental counseling/training) violated state law requirements for the provision of IEP services to students with autism.
   The Court concluded that when taken together, these procedural violations displayed a "pattern of indifference to

the procedural requirements of the IDEA and carelessness in formulating the [student's] IEPs". The cumulative effect of the procedural violations resulted in a denial of FAPE.
The Court remanded the case back to the District Court to determine "what, if any, relief" the student is entitled to as a result of the FAPE deprivations for three school years. It was noted that a compensatory education award would extend services beyond the student's 21st birthday and left the mechanics of structuring such award to the Court's "sound equitable discretion". L.O. v. New York City Department of Education 822 F.3d 95, 67 IDELR 225 (United States Court of Appeals, 2nd Circuit (2016))

6. The guardian of a student with a disability initiated a due process hearing seeking reimbursement for the student's private education alleging that two IEPs developed for the student were inappropriate. The guardian removed the student from public school in 2007 and has litigated the issue of private education reimbursement for every school year since 2007.
In the latest due process hearing request, the guardian alleged that the school district violated the procedural requirements of the IDEA by failing to conduct necessary evaluations. As a result, it was alleged that the school was unable to properly identify the student's present levels of performance and develop appropriate IEP goals and services.
The Court held that even though the school district admitted it did not have updated information regarding the student's performance, which made it difficult to develop appropriate IEPs, there was no denial of FAPE. The Court concluded that any procedural violation of the IDEA "is excused because they were directly caused by the guardian". The guardian repeatedly rescheduled assessment sessions, did not provide timely authorization for the school to observe the student and "unreasonably withheld" information regarding the student. In addition, the IEP Team understood that they lacked updated information and developed IEPs which called for the IEP to be reviewed 30 days after the IEP was implemented. Lastly, the Court rejected the guardian's argument that the IEP was in violation of the LRE requirement. There is no legal obligation that the IEP document itself address the four factors listed in the Rachel H. v. Holland judicial decision for determining placement under the IDEA. Baquerizo v. Garden

Grove Unified School District 826 F.3d 1179, 68 IDELR 2 (United States Court of Appeals, 9th Circuit (2016)).

7. A student with multiple disabilities, who was 20 at the time of the due process hearing, was denied a FAPE based on her IEP's post-secondary transition component. The school did not conduct age appropriate assessments related to her post-secondary goals until the student was 19 years old. In addition, she was not invited to participate at the IEP Team meetings where her post-secondary transition needs were discussed nor did the school take appropriate steps to ensure her preferences and interests were considered by the IEP Team.

   The Court concluded that the lack of appropriate transition assessments and the failure to adequately take into account her preferences and interests resulted in loss of educational opportunities denying her a FAPE even though she did make progress in school. The Court did note that the student's lack of attendance at the IEP Team meetings did not result in a denial of FAPE. As the District Court noted the student "is unlikely ... [to be able] to express her preferences and desires for her future" in a direct manner. The Court remanded the case for further consideration of attorney's fees. Gibson v. Forest Hills School District Board of Education 68 IDELR 33 (United States Court of Appeals, 6th Circuit (2016)). Note: This is an unpublished decision.

8. OSEP issued a policy letter clarifying that the periodic progress reporting requirement for IEP goals applies to post-secondary transition goals although the IDEA regulations do not specifically identify "postsecondary goals" as an area for which a public agency must report student progress. OSEP stated that "we assume that there would be a relationship between the academic and functional goals of a transition-aged student and that student's postsecondary goals, and that it would be necessary for a public agency to report on a student's progress in meeting postsecondary goals". For adult students as determined under state law, the periodic progress reports would need to be provided to the adult student. States could also choose to provide progress reports to both the student and parents concurrently. Letter to Pugh 117 LRP 3733 (United States Department of Education, Office of Special Education Programs (2017)).

9. The United States Department of Education, Office of Special Education Programs, issued guidance regarding the requirement to translate education documents, such as IEPs, into the native language of parents who are limited English proficient (LEP). The guidance document is based on an interpretation of Title VI of the Civil Rights Act of 1964 which prohibits discrimination on the basis of race, color, or national origin in any educational program or activity that receives Federal financial assistance.
The guidance cites previous Department of Justice interpretive guidance which stated that "an effective LEP plan includes the translation of 'vital written materials' into the language of each frequently-encountered LEP group eligible to be served and/or likely to be affected by a recipient's program".
Whether a document is "vital written material" depends upon the importance of the program, information, encounter, or service involved, and the consequence to the LEP person if the information in question is not provided accurately or in a timely manner. As a result, OSEP stated that the U.S. Department of Education:

> .... declares that a student's IEP is vital, and that other documents related to a student's special education program, as well as their regular education program, will also often meet these criteria because they will be vital to parents understanding their children's education placement, progress, and recommendations from the district.
> Under Title VI, all vital documents, including a student's IEP, must be accessible to LEP parents, but that does not necessarily mean that all vital documents must be translated for every language in the district. For example, a timely and complete oral interpretation or translated summary of a vital document might suffice in some circumstances. A district must, however, be prepared to provide timely and complete translated IEPs to provide

> meaningful access to the IEP and the parental rights that attach to it. This is because a parent needs meaningful access to the IEP not just during the IEP meeting, but also across school years to monitor the child's progress and ensure that IEP services are provided.

Dear Colleague Letter 116 LRP 44552 (United States Department of Education, Office of Special Education Programs (2016)).
Note: This guidance document was not based on IDEA requirements which do not address the issue of translation of IEPs.

10. The case involved a student who is visually impaired and also has developmental disabilities. An IEP was developed which called for 240 minutes of services from a teacher of the visually impaired (TVI) per month. At the end of the meeting, the parent signed the IEP agreeing with the goals and services but did not agree that it provided a FAPE. The parent initiated a due process hearing.
A week after the IEP was developed the school discovered that the IEP included a mistake and that TVI services were to be provided at 240 minutes per week. The school unilaterally amended the IEP without ever informing the parent or providing a revised IEP. The parent found out of the change during the first day of the due process hearing. Also, at the hearing school district witnesses testified that school intended to provide the student with 300 minutes of TVI services per week.
The Court held that FAPE was denied. The Court noted that if the school discovered that the IEP did not reflect the parties' agreement, "it was required to notify [the parent] and seek her consent for any amendment" or to call another IEP Team meeting to discuss IEP revisions. By unilaterally changing the IEP, the school district denied the parent their right to have an accurate IEP to be able to monitor and seek enforcement of the services their student was to receive. The Court noted that "Congress was as concerned with parental participation in the *enforcement* of the IEP as it was in its formation".
In addition, although the IEP included a checked box that the student needed assistive technology devices the IEP did not

specify what AT devices would be provided. The failure to specify the AT devices that were to be provided to the student also infringed on the right of the parent to participate in the IEP process denying FAPE. M.C. v. Antelope Valley Union High School District 69 IDELR 203 (United States Court of Appeals, 9th Circuit (2017)).

11. At the IEP Team meeting for a student with multiple disabilities the Team proposed that the student be taught a specific reading program called SPIRE. A Prior Written Notice (PWN) was sent to the parents after the meeting which stated that the school "proposed to provide [the student] with 60 minutes of daily SPIRE instruction". The actual IEP sent to the parents stated that the student would receive specially designed instruction in literacy but did not identify or mention SPIRE. SPIRE instruction was never provided to the student due to the parent's initial concerns about the program.
The parent then initiated a due process hearing alleging that her student was denied a FAPE since the school did not provide SPIRE instruction. The hearing officer and the District Court both held that the PWN constitutes part of the IEP and thus the school was in violation of the IEP. The Court of Appeals reversed.
The Court first discussed the fact that the IDEA does not require schools to include the specific methods it intends to use in the IEP. It appeared to the Court that the IEP deliberately excluded the use of SPIRE instruction to give "school officials a degree of flexibility when implementing" the IEP.
The Court also discussed the relationship between the IEP and the PWN. It stated:

> After viewing the IEP and Written Prior Notice requirements in tandem, it is evident that the IDEA envisions the IEP as an agreed-to general framework of a child's educational program that provides schools with a certain degree of flexibility in accomplishing the outlined objectives, while a Written Prior Notice is meant to spell out more specific, but not binding, proposals for implementing that framework. (emphasis added)

Ms. M. v. Falmouth School Department 69 IDELR 86 (United States Court of Appeals, 1st Circuit (2017)).

C. Substantive Issues

1. In a unanimous decision the United States Supreme Court clarified the FAPE standard under the IDEA as established by the Court's previous decision in Board of Education of the Hendrick Hudson Central School District, et al. v. Rowley, et al. (102 S. Ct. 3034, 553 IDELR 656 (1982)). In doing so, the Court rejected the lower Court's decision which held that a FAPE means that an IEP confer an educational benefit "merely…more than de minimis".
The Supreme Court held that although their decision lays out a "general standard, not a formula" a school must offer an IEP "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances". The IEP provisions reflect "Rowley's expectations that, for most children, a FAPE will involve integration in the regular classroom and individualized special education calculated to achieve advancement from grade to grade". The Court noted that this decision does not attempt to elaborate on what "appropriate progress" will look like from case to case which requires the IEP Team to have a prospective judgment of the child's circumstances based on a "fact intensive exercise". For those children not "fully integrated" in a regular classroom the IEP need not necessarily "aim for grade-level advancement" although the IEP must be "appropriately ambitious in light of his circumstances".
The Court observed that an IEP is a collaborative effort between families and school representatives to develop a plan for pursuing "academic and functional advancement". When a dispute does occur a Court "may fairly expect that those [school] authorities be able to offer a cogent and responsive explanation for their decision" (emphasis added) to show that the IEP offered the child a FAPE.
The Court vacated and remanded the decision back to the Court of Appeals. Endrew F. v. Douglas County School District RE-1 117 LRP 9767 (United States Supreme Court (2017)).

2. Note: This 4th Circuit case preceded the Supreme Court's decision in Endrew.

A student who was disabled under the category other health impairment had IEPs for his kindergarten and 1st grade years. The parents objected to the 2nd grade IEP developed since it did not provide the student a one to one aide, extended school services or have a full time nurse assigned to the school. The parents initiated a due process hearing. The hearing officer found the IEP was appropriate. The District Court affirmed the hearing officer.

On appeal, the parents argued that the District Court did not use the correct legal standard in determining whether the IEP offered a FAPE. The parents contended that the 1997 and 2004 statutory amendments to the IDEA replaced the FAPE standard in the Rowley decision of the Supreme Court. They argued that the correct standard is now "meaningful" rather than "some" educational benefit.

The Court of Appeals affirmed the District Court. In doing so, the Court held that: "In this circuit, the standard remains the same as it has been for decades: a school provides a FAPE so long as a child receives some educational benefit, meaning a benefit that is more than minimal or trivial, from special instruction and services".

O.S. v. Fairfax County School Board 804 F.3d 354, 66 IDELR 151 (United States Court of Appeals, 4th Circuit (2015))

3. The parents of a preschool student with a speech impairment initiated a due process hearing alleging multiple procedural violations of the IDEA and a substantive denial of FAPE. The Court held that the student was substantively denied a FAPE since the speech services in the IEP were not based on any peer-reviewed research or individualized for the student's unique needs. There was no citation or reference of any peer-reviewed research for the methods employed in the student's IEP. Thus, the Court concluded the IEP was not reasonably calculated to enable the student to receive educational benefit. The Court rejected the parents' allegations that procedural violations also denied the student a FAPE. The Court remanded the case for further proceedings on the issues of reimbursement and compensatory education. L.M.H. v. Arizona Department of Education 68 IDELR 41 (United States District Court, Arizona (2016)). On appeal.

IV. Related Services/Assistive Technology

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 first grade student was diagnosed with several medical conditions including allergies to certain foods, dust, mold, etc., asthma, a swallowing disorder, seizure disorder and feeding difficulties. His IEP called for a one on one aide to provide instructional, physical and environmental supports.
Protocols were in place in the event the student choked on food or a foreign object, if anaphylaxis occurred or if he went into respiratory arrest. Some staff in the school were trained to perform the Heimlich maneuver and to administer CPR as necessary. The parents wanted the student's IEP to require that the student's aide be trained in these procedures. The Coordinator of Special Services would not allow her to be trained since it would set a precedent and the aide already "had too much on her plate".
The parents requested a due process hearing under the IDEA, Section 504 and the ADA. The Administrative Law Judge dismissed the Section 504 and ADA claims for lack of jurisdiction. The ALJ concluded that the IEP met IDEA standards.
On appeal, the District Court granted summary judgment for the school district on all of the claims.
The Court of Appeals affirmed the summary judgment order regarding the IDEA claim. The Court remanded the Section 504 and ADA rulings back to the District Court since the basis of the District Court's Order ruling was not apparent. The District Court has been directed to clarify its reasoning in disposing of the parents' Section 504 and ADA discrimination, reasonable accommodation, retaliation

and FAPE claims. SE.H. v. Board of Education of Anne Arundel County Public Schools 67 IDELR 198 (United States Court of Appeals, 4th Circuit (2016)). Note: This is an unpublished decision.

V. Placement/Least Restrictive Environment

A. The U.S. Department of Education issued a Dear Colleague letter to reaffirm its commitment to "inclusive preschool programs" and to reiterate that the IDEA's LRE requirements apply to preschool children with disabilities. The Team must consider whether the child can be provided services in a regular education setting with supplementary aids and services before the Team considers placement in more restrictive settings. Although there is no definition of a regular preschool setting, the Department "for data collection purposes" defines it as a program that includes at least 50% of children who are not on IEPs.
The letter also states that if the placement team determines that placement in a regular private preschool program is necessary to provide FAPE to the child in the LRE, the school district is responsible for ensuring that the tuition associated with that placement for the period of time necessary to implement the IEP is provided at no cost to the parents. Dear Colleague (United States Department of Education, Office of Special Education Programs (2017))

B. In 1993, a class action lawsuit was filed by a group of parents of students with disabilities against the school district seeking, among other outcomes, a full continuum of special education and related services at sites as close to the home of the student with a disability as possible.
A Consent Decree was negotiated between the class and the school district. A few years later, the attorney representing the class obtained Court approval for the "effective elimination of special education centers". The school district appealed the ruling. Mediation and further negotiations occurred over the years resulting in a stipulation that required the school district to decrease enrollment in special education centers by 33% by 2015. By 2014, 8 of the 18 special education centers had been closed to enrollment. In addition, a letter from the Special Education Administration stated that all pre-school aged students with disabilities would be sent to general education schools rather than special education centers. The parents of students who were attending special education centers were not invited to be part of the negotiations or provide input.

A group of parents who want to maintain their students in special education centers sought to intervene in the class action lawsuit challenging the new school district policy. Their request was denied by the District Court.
The Court of Appeals reversed allowing them to intervene. The Court observed that the denial of intervention would impair their ability to safeguard the interests of their students in seeking retention of the special education centers as placement options. The Court rejected the argument that the parents, if dissatisfied, may seek a due process hearing challenging their student's placement decision. Individual due process hearings would be a "comparatively inefficient and ineffective means of achieving system wide relief". Smith v. Los Angeles Unified School District 67 IDELR 226 (United States Court of Appeals, 9th Circuit (2016))

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 if the placement is "proper". Florence County School District Four et al. v. Carter, 114 S. Ct. 361, 20 IDELR 532 (United States Supreme Court (1993)).

C. The parents of a student who is emotionally disturbed unilaterally placed their student in a residential treatment facility before a scheduled IEP Team meeting was convened to discuss the student's academic, behavioral and anxiety needs.
The IEP Team did not agree to place the student in a residential facility. The parents subsequently placed the student in private school and sought reimbursement by requesting a due process

hearing.

The parties settled the dispute. The school agreed to reimburse the parents for tuition for the 9th grade and fall semester of the 10th grade. The parents agreed to give the school 30 days notice if they intended to re-enroll their student in the school. The parents provided such notice in November of the 10th grade year.

The school convened an IEP Team meeting in December. The parents and their advocate were involved in the discussion and many of their suggestions were incorporated into the IEP although the IEP was not yet finalized. At the end of the meeting the parents stated that they wanted their student to remain at the private school and possibly take a class or two at the public school to ease her way back in.

After several attempts to schedule another IEP Team meeting to finalize the IEP the parents responded that there was no need for any further Team meeting unless the Team would agree to place the student in the private school. No further IEP Team meeting was held.

The parents initiated a due process hearing seeking reimbursement for the private tuition for the student's second semester in 10th grade. The hearing officer ordered reimbursement. The District Court reversed finding that the school complied with both the procedural and substantive IDEA requirements.

The Court of Appeals denied reimbursement on the grounds that the parents' actions were unreasonable. The IDEA provides that private tuition "may be reduced or denied…upon a judicial finding of unreasonableness with respect to the actions taken by the parents". (20 U.S.C. 1412(a)(10)(C)(iii)(III)) In so holding, the Court stated:

> In sum, the record indisputably reveals that the parents adopted an "all-or-nothing" approach to the development of [the student's] IEP and that they thereby adamantly refused to consider any of [the school district's] alternative proposals that did not involve [the student] remaining at the [private school] for the spring 2012 semester. As the district court supportably found, the parents' actions "broke down" the IEP-development process, resulting in an incomplete IEP for [the student] for the spring 2012 semester. We conclude that the parents' actions, well-intentioned as they may have been, constituted an unreasonable approach to the IEP-development process, rather than the

collaborative or interactive approach envisioned by the IDEA.

Rockwall Independent School District 67 IDELR 108 (United States Court of Appeals, 5th Circuit (2016)).

VII. Behavior and Discipline

A. The federal Office of Special Education and Rehabilitative Services (OSERS) issued a guidance document regarding behavioral supports and discipline issues under the IDEA.

The IEP Team must consider and, when determined necessary for ensuring FAPE, include or revise behavioral supports in the IEP of a student exhibiting behavior that impedes his or her learning or that of others. As part of the development, review and, as appropriate, revision of the IEP, IEP Teams should determine whether behavioral supports should be provided in any of three areas: (1) special education and related services, (2) supplementary aids and services, and (3) program modifications or supports for school personnel. The IEP should contain behavioral supports supported by evidence since the IDEA specifically requires that services be based on peer-reviewed research to the extent practicable.

In terms of placement, the guidance emphasizes that "placement teams may not place a child with a disability in special classes, separate schooling, or other restrictive settings outside of the regular educational environment solely due to the child's behavior when behavioral supports through the provision of supplementary aids and services could be provided for that child that would be effective in addressing his or her behavior in the regular education setting".

Regarding short term disciplinary removals, OSERS observed that a growing number of longitudinal studies have found that suspensions from school does not deter misbehavior. While the IDEA permits schools to implement short term disciplinary removals (under 10 school days), such removals may indicate a need to review and revise the IEP to address the student's behavioral needs. OSERS expressed concern that some SEAs and LEAs have "erroneously interpreted" the IDEA that characterize the 10 day short term suspension period as "free days".

In addition, improper use of certain exclusionary measures could rise to the level of a disciplinary removal. These exclusionary disciplinary measures could include: □A pattern of office referrals, extended time excluded from instruction (e.g., time out), or extended restrictions in privileges; repeatedly sending children out of school on "administrative leave" or a "day off" or other method of sending

the child home from school; repeatedly sending children out of school with a condition for return, such as a risk assessment or psychological evaluation; or regularly requiring children to leave the school early and miss instructional time (e.g., via shortened school days). Dear Colleague Letter 68 IDELR 76 (United States Department of Education, Office of Special Education and Rehabilitative Services (2016)).

B. OCR issued a guidance document on the use of restraint and seclusion under Section 504 and the ADA. The document makes clear that it "does not add additional requirements for complying with existing statutes". In addition, it is important to be aware of any state law requirements which may apply.
OCR opined that although the use of restraint and seclusion is not per se prohibited by Section 504/ADA, it may constitute discrimination in violation of the law. Such circumstances may include: (1) unnecessary different treatment of students with disabilities and students who are non-disabled; (2) a policy, practice, procedure or criterion that has a discriminatory effect on students with disabilities: or (3) when the use of restraint and seclusion denies a student's right to FAPE.
OCR also clarified that Section 504 covers actions by school officials, employees and everyone over whom a school exercises some control. This would include individuals who are contracted or have some other arrangement with the district, such as School Resource Officers (SRO) whether they work for the school district or for a non-district law enforcement agency. Dear Colleague Letter: Restraint and Seclusion of Students With Disabilities 116 LRP 53792 (United States Department of Education, Office for Civil Rights (2016)).

C. A 12 year old junior high school student on an IEP based on his ADHD took a picture of another student sitting on a toilet in a bathroom stall without a door. The Vice Principal investigated the incident and determined that the behavior was a violation of the other student's privacy and amounted to a felony warranting suspension from school.
A manifestation determination review meeting concluded that the behavior was not a manifestation of the student's disability. The student was then placed in a disciplinary alternative educational placement for 60 days.
The Vice Principal also encouraged the parent of the other student to file a criminal charge. A criminal charge was filed but eventually

dismissed.

The student with a disability and his parents then filed a complaint with OCR alleging that the school retaliated against the student based on his disability. OCR determined there was no violation of Section 504 since the school had a legitimate reason for taking disciplinary action against the student.

The student and his parents then filed a due process hearing request. The hearing officer upheld the school district's decision. The decision was appealed to District Court with additional claims based on Section 504 and the equal protection and due process clauses of the Constitution. The Court dismissed all claims.

The parents then appealed the Section 504 claim dismissal to the Court of Appeals. The Court affirmed the dismissal. The Court found that the parents did not allege facts supporting the allegation that the school acted based on the disability or that the behavioral infraction was the result of the student's ADHD. C.C. v. Hurst-Euless-Bedford Independent School District 67 IDELR 111 (United States Court of Appeals, 5th Circuit (2016)). Note: This is an unpublished decision.

In a related matter, the parents initiated a due process hearing alleging that the school district violated the IDEA when it did not reconsider the placement of the student in the alternative program after the juvenile authorities declined to prosecute him for the felony of invasive visual recording. The parents did not challenge the Team's conclusion that the student's behavior was not a manifestation of his disability.

The Court of Appeals held that there was no obligation to review the alternative placement for the reasons stated in the District Court's decision. The Court found the only relevance of the juvenile authority's decision was to the question of whether the student engaged in conduct punishable as a felony. The IEP Team did not make that determination and the parents presented no legal argument as to how the decision of a criminal justice authority affects any decision actually made by the IEP Team. C.C. v. Hurst-Euless-Bedford Independent School District 67 IDELR 254 (United States Court of Appeals, 5th Circuit (2016)). Note: This is an unpublished decision. Petition to appeal to the United States Supreme Court denied.

VIII. Harassment/Bullying Issues

A. The parent of a student who is autistic made a unilateral private

placement alleging her student was denied a FAPE in his public school, in part, based on his being bullied by other students. The parent requested a due process hearing seeking reimbursement.
The hearing officer found that the student was denied a FAPE due to the fact that he was the victim of bullying which resulted in his learning opportunities being substantially restricted. Reimbursement was awarded.
The school district subsequently revised his IEP which called for public school placement. The IEP included a one on one paraprofessional, a behavior support plan and a crisis plan. The crisis plan was developed to address any future bullying the student might experience. The parent requested another due process hearing challenging the new IEP. The hearing officer found that the new IEP offered the student a FAPE.
On appeal, the Court found that there are "no magic words" that an IEP must include to constitute a sufficient discussion of prior bullying incidents. The parents asserted that the school was obligated to implement all of the recommendations stated in an Office for Civil Rights (OCR) guidance document addressing bullying of students with disabilities. The Court, in upholding the IEP, stated that the OCR document is "merely inspirational" and provides recommended guidance for schools, not legal requirements. The Court noted that "it appears that that Mother was seeking a guarantee that the student would not be subjected to any bullying" if he returned to public school. The Court concluded "that type of guarantee is not required to provide a FAPE."
J.M. v. Hawaii Department of Education 69 IDELR 31 (United States District Court, Hawaii (2016)).
Note: It is interesting that the parents raised the OCR guidance letter interpreting Section 504 in the IDEA due process hearing. There was no mention in the decision of a similar guidance letter issued by the U.S. Office of Special Education Programs addressing bullying of students under the IDEA.

B. A high school student with ADHD and a nonverbal learning disability was verbally and physically harassed at school by other students. The student was insulted by homophobic slurs.
The parents, one of whom was employed by the school, reported the incidents to the school. They also repeatedly emailed the principal with their concerns. The principal responded but not always to the satisfaction of the parents.
After the student had graduated, the student and his parents sued the school district alleging violations of Section 504 and the ADA. The

lawsuit alleged that the district discriminated against the student based on his disability by failing to prevent their student from being harassed.

The Court held that in order to prevail the student and parents needed to prove: (1) the student was an individual with a disability; (2) he was harassed by fellow students based on his disability; (3) the harassment was sufficiently "severe, pervasive, and objectively offensive" that it effectively prevented him from access to the educational benefits/opportunities at school; (4) the school knew about the harassment; and (5) the school was "deliberately indifferent" to it.

The Court first raised doubts whether the harassing conduct was based on his disability. Even if it was, the Court concluded that the school was not deliberately indifferent. The school investigated each reported incident and used disciplinary measures such as warnings, parent conferences, detentions and suspensions against the offending students. The school also assigned a paraprofessional to follow the student during the school day to monitor his safety. A school is not held to the legal standard of eliminating student on student harassment. The Court therefore granted a motion for summary judgment for the school district. S.B. v. Board of Education of Harford County 819 F.3d 69, 67 IDELR 165 (United States Court of Appeals, 4th Circuit (2016))

IX. Due Process Issues

A. Due Process Hearing Complaint Requests

1. A parent of a student who is visually impaired initiated a due process hearing alleging, among other issues, that the school violated the IDEA by "failing to adequately document the services provided by a teacher of the visually impaired".
   At the hearing, the parent first learned that the school unilaterally changed her student's IEP by increasing the amount of services the student would receive.
   The ALJ ruled for the school district. On appeal, the District Court held that the parents "waived" the argument that the school's failure to accurately specify the amount of services in the IEP resulted in the parent's being denied the opportunity to meaningfully participate in the IEP process. The ALJ had restated the issues for the hearing which omitted the adequacy of TVI services. The District Court held that since the parent did not object to the restatement of issues by

the ALJ and never sought to amend the complaint, they could not raise the issue on appeal.
The Court of Appeals overturned the ruling. The Court applied Rule 15 of the Federal Rules of Civil Procedure which provides that an issue "tried by the parties express or implied consent…must be treated in all respects as if raised in the pleadings". Since both sides presented extensive evidence regarding the school's offer of services the issue had not been waived.
In a footnote, the Court stated:

> It is apparently common practice in IDEA cases is for ALJs to restate and reorganize the issues presented by the parties. See J.W., 626 F.3d at 442; Ford ex rel. Ford v. Long Beach Unified Sch. Dist., 291 F.3d 1086, 1090 (9th Cir.2002). We question the wisdom of such a procedure where the parents are represented by counsel and the complaint states the issues intelligibly, as was the case here. A party bringing a due process complaint is entitled to frame the issues it wishes to present and should not be put in the difficult position of contradicting the presiding official who will soon be the trier of fact. In such circumstances, failure to object will not be deemed a waiver of any claim fairly encompassed in the complaint.
> (See footnote 2.)

M.C. v. Antelope Valley Union High School District 69 IDELR 203 (United States Court of Appeals, 9th Circuit (2017)).

B. Jurisdiction/Party Status

1. The parents of a student with a disability initiated a due process hearing challenging the amount of occupational therapy (OT) their student was receiving. Under state law, another agency (Health Department) determines and provides the amount of OT that is deemed medically necessary. The parents alleged that the OT provided was not sufficient to

meet their student's educational and medical needs. The parents and the local educational agencies involved settled their dispute leaving only the Health Department as the defending party in the hearing.

The Administrative Law Judge found that the Department did not offer an adequate amount of OT services to meet the student's medical needs. Additional OT services were ordered along with compensatory OT services. The Department appealed alleging that the ALJ lacked jurisdiction since the Department has its own appeal procedures.

The Court, in reversing the District Court's decision, held that a parent may initiate a due process hearing seeking a review of the Department's determination of medically necessary services in a student's IEP. Therefore, the ALJ has jurisdiction to determine whether the OT services in the student's IEP, "whether medically or educationally necessary", are appropriate since they are deemed related services under the IDEA. Douglas v. California Office of Administrative Hearings 67 IDELR 228 (United States Court of Appeals, 9th Circuit (2016). Note: This is an unpublished decision.

Additional Note: In reading judicial decisions, it is important to determine whether the Court is interpreting specific state and/or IDEA legal requirements.

2. OSEP issued an informal policy guidance letter which stated that a parent may file a due process complaint against a State Education Agency (SEA). The hearing officer has the authority to determine, based on the facts and circumstances in the case, whether the SEA is a proper party to the due process hearing. Letter to Anonymous 69 IDELR 189 (United States Department of Education, Office of Special Education Programs (2017)).

3. The parent filed an administrative complaint with the State Education Agency (SEA). The parent alleged that the school district's refusal to reimburse her for $300 in charges from her child's doctor for his participation in phone conferences with school personnel about the reevaluation of the child violated the IDEA.

   The SEA investigated and concluded that the school district did not violate IDEA. Therefore, the school district was not ordered to reimburse the parent for the doctor's consultation

time.
The parent then filed a due process complaint naming the school district and the SEA as parties. The parent's claimed that the SEA did not comply with the state's complaint investigation regulations by failing to review all relevant information, failing to independently determine whether the school district violated the IDEA, and failing to address each allegation in her complaint.
The ALJ dismissed the SEA finding it was not a proper party to the due process hearing. The parent appealed.
The Court affirmed the ALJ's ruling that the SEA was properly dismissed. The Court held that since it "as the SEA, was not involved in the actual provision of [the child's] IEP." (citing Chavez v. New Mexico Public Education Department, 621 F.3d 1275, 1283 (10th Circuit 2010)) the SEA should not be a party to the due process hearing.
It should be noted that the parent also brought identical allegations against the SEA in state court. The state court granted the SEA's Motion for Summary Judgment.
Coningsby v. Oregon Department of Education 68 IDELR 159 (United States District Court, Oregon (2016)).

4. The parent of a child who was found eligible for special education as a child with an intellectual disability disputed the categorical label. She signed the eligibility report but crossed out the word that she "agreed"with the decision and inserted the word "acknowledge".
The parent then initiated a due process hearing challenging her student's first IEP. The hearing officer and Circuit Court both found that since the parent did not consent to the eligibility determination as required by Virginia regulation she was not entitled to challenge the IEP. The Virginia Court of Appeals reversed.
The Court held that the additional State consent requirements were subject to the limitation under the IDEA regulations. (see 34 CFR 300.300(d)(2)). The IDEA permits a state to have additional consent requirements as long as those requirements "ensure that a parent's refusal to consent does not result in a failure to provide the child with a FAPE". Therefore, a "child's entitlement to special education .....cannot be contingent on parental consent to the eligibility determination". In addition, the Court found that the meaning of "consent" is not the same as the meaning of "agreement".

The Court remanded the matter back to Circuit Court to determine if the child is eligible for special education and, if so, whether the IEP provided a FAPE. J.V. v. Stafford County School Board 792 S.E.2d 186, 69 IDELR 13 (Virginia Court of Appeals (2016)).

C. Stay Put

1. A student had an IEP developed in May of the school year that called for two stages of implementation. The first stage called for the student to receive services individually from a teacher and paraprofessional for the remainder of the school year. Stage two of the IEP called for the student to start the next school year in a self-contained classroom. The parents allowed the stage one services to be implemented but objected to the self-contained class called for in stage two. Over the summer the family moved to a different school district within the same state. The new school district proposed an IEP which called for the student's placement in a self-contained classroom similar to the stage two part of the IEP from the former school district. The parents filed for a due process hearing and sought a "stay put" order.
The ALJ held that the self contained class was the stay put placement. The District Court agreed denying the parent's motion for a preliminary injunction. The parents appealed the Court's ruling.
The Court of Appeals in a 2-1 decision held that the partially implemented two stage IEP was the current educational placement under the "stay put" provision. Since the IEP had already been implemented under stage one it constituted the "then current educational placement". N.E. v. Seattle School District 69 IDELR 1 (United States Court of Appeals, 9th Circuit (2016)).
Note: The majority opinion never addressed the transfer provision under the IDEA in its analysis. The dissent in a footnote concluded the transfer provision did not apply since the student did not transfer districts within the same academic year. See 20 U.S.C. Section 1414(d)(2)(C).

2. The parents of a student with autism and the school district entered into a settlement agreement which called for three independent consultants to evaluate the student and recommend a program. The parties agreed that they would be

bound by the recommendation of the consultants regarding an appropriate special education program and placement. While the agreement was being implemented, the school district agreed to fund the student's home based program for the school year.
An IEP was then developed for the school year based on the consultants' recommendations. The IEP called for the student to be placed in a public school within the district with special education services provided. The parents rejected the IEP and initiated a due process hearing seeking reimbursement of their home based program and placement in an out of state school. The parents also contended that under the "stay put" rule, the school was obligated to continue to fund the home based program during the pendency of the due process hearing and appeals.
The Court of Appeals, in reversing the District Court's decision regarding "stay put", held that the current placement was the home program that the school had agreed to fund for the previous school year. Although the school only agreed to fund the home placement on a temporary basis under the settlement agreement, the "stay put" obligation is rooted in statute not contract. Therefore, the parties' intent as to the duration of the publicly funded home placement did not alter the school's obligation under "stay put". The Court remanded the matter to the District Court to calculate the cost of the home program, as specified in the settlement agreement, to be reimbursed to the parents. Dervishi v. Stamford Board of Education 68 IDELR 3 (United States Court of Appeals, 2nd Circuit (2016)). Note: This is an unpublished Summary Order. But see K.D. v. Department of Education 665 F.3d 1110, 58 IDELR 2 (United States Court of Appeals, 9th Circuit (2011)).

3. The parents of a student with autism placed their student, under the state's school choice law, in a charter school that was in another school district. The charter school developed an IEP that listed the charter school as the student's school of attendance.
Before the next school year, the charter school notified the parents that it would not readmit their student since it did not have adequate staff to implement the IEP. The parents filed a due process hearing complaint.
While the hearing request was pending, a "stay put" issue was

raised. The ALJ refused to order the student back to the non-resident charter school. The parents appealed and asked the Court to order the school district to pay for private schooling as the "stay put" placement and in the alternative asked for an order requiring the charter school to fully implement the IEP while the matter was pending. The District Court issued a preliminary injunction ordering the student be enrolled in the charter school.

The parents appealed seeking public payment of an unidentified private school as the "stay put" placement. The Court of Appeals affirmed the lower Court's injunctive order. The IEP in place at the time the due process hearing was requested listed the charter school as the school of attendance. Therefore, the charter school was "stay put" and the school district had no obligation to fund the private school. Smith v. Cheyenne Mountain School District 12 68 IDELR 4 (United States Court of Appeals, 10th Circuit (2016)).

4. The parents of a student with a disability initiated a due process hearing challenging the IEP's proposed change of placement from a school based setting to home tutoring. As an initial matter, the parents asked the Administrative Law Judge for a "stay put" order allowing the student to return to school as provided by the last agreed upon IEP. The ALJ issued the order.

   The parents and school district subsequently settled the placement dispute through mediation. The ALJ closed the case based on the settlement.

   The parents then initiated a lawsuit seeking attorney's fees related to the "stay put" order. The Court, in reversing the District Court, held that the parents were not a prevailing party under the IDEA and therefore were not entitled to attorney's fees. The ALJ "stay put" order was not a ruling on the merits of the parent's due process hearing complaint and did not alter the legal relationship of the parties. Tina M. v. St. Tammany Parish School Board 67 IDELR 54 (United States Court of Appeals, 5th Circuit (2016)) But see A.P. by Pursley v. Board of Educ. for City of Tullahoma, Tenn. 67 IDELR 69 (United States District Court, Eastern District, Tennessee (2015).

D. Statute of Limitations

1. A parent requested a due process hearing in April of 2010. The ALJ dismissed 11 of the parent's claims as being time barred by the statute of limitations. The ALJ found for the school district on the remaining claims. The District Court affirmed finding that neither of the two exceptions (specific misrepresentations by the LEA that it had resolved the issues or the withholding of information from the parents by the LEA required to be provided by the IDEA) in the IDEA to the statute of limitations applied.
The Court of Appeals reversed and remanded for further proceedings. The Court adopted the "discovery rule". The Court stated:

> The text and purpose of the IDEA, the DOE's interpretation of the Act, and the legislative history of the 2004 amendments all lead us to the same conclusion. We hold the IDEA's statute of limitations requires courts to apply the discovery rule without limiting redressability to the two-year period that precedes the date when "the parent or agency knew or should have known about the alleged action that forms the basis of the complaint." § 1415(f)(3)(C).

The Court remanded the matter to the District Court to determine whether the parents "knew or should have known" about the alleged actions that formed the basis of their due process complaint. Avila v. Spokane School District 81 117 LRP 11513 (United States Court of Appeals, 9th Circuit (2017)).

E. Hearing Officer Authority

1. The parents of a student with a disability prevailed in a due process hearing which found that their student was denied a FAPE. The hearing officer ordered reimbursement for private services obtained by the parents and new assessments. A new IEP was to be developed based on the new assessments. An award of compensatory education was also ordered for "intensive occupational therapy" for five hours per week for a three month period.
The Court of Appeals found that the hearing officer used the correct legal standard in determining compensatory

education—that is "compensatory education should provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place". However, the Court held that the compensatory award was not sufficient since it did not address other areas where the student did not make meaningful educational progress.

The Court recognized the "difficulty inherent" in determining an appropriate compensatory award and that further assessments may be needed in the "complicated work" of fashioning a remedy. If so, the hearing officer or court "should not hesitate to order" additional assessments. B.D. v. District of Columbia 817 F.3d 792, 67 IDELR 135 (United States Court of Appeals, District of Columbia Circuit (2016))

Note: The Court did not address the legal obligation of the hearing officer to issue a final decision and order within the IDEA timeframes. A hearing officer is without authority to extend the timeline on their own initiative.

2. The parents of a student who was blind, hearing impaired, autistic and intellectually disabled was placed a the State School for the Blind and Deaf. The parents brought a due process hearing challenging the IEP revised for their student changing the student's placement to a local school district. The parents asked for an order placing the student in an out of state private residential school for the blind (Perkins School). The hearing officer and the District Court both concluded that the student was denied a FAPE and the local school district was not an appropriate placement. The Court ordered compensatory services to be provided at "an appropriate residential school" to be determined by the student's IEP Team.

   The Court of Appeals, adopting the reasoning from the 6th and D.C. Courts of Appeal, held that the lower court violated the IDEA by delegating the placement issue to the IEP Team. The Court stated:

   > Allowing the educational agency that failed or refused to provide the covered student with a FAPE to determine the remedy for that violation is simply at odds with the review scheme set out at § 1415(i)(2)(C). Furthermore, as noted by [the parent], such an approach could trap

> [the student] in an endless cycle of costly and time-consuming litigation. That is, by remanding the placement issue to the IEP team, [the parent] will have no recourse but to seek another due process hearing, and potentially file another federal lawsuit should the IEP team refuse to place [the student] at Perkins.

The Court remanded the placement issue back to the District Court to determine if the student should be placed at the Perkins School. M.S. v. Utah School for the Deaf and Blind 67 IDELR 195 (United States Court of Appeals, 10th Circuit (2016)).

3. A hearing officer found that three IEPs for a 14 year old student with autism denied the student a FAPE. The hearing officer ordered (2008) that a new IEP be developed and 990 hours of compensatory education be provided to "further the goals of the student's current or future IEP". The order further provided that the form of compensatory services be decided by the parent and include services "after school, on weekends, or during the summer and may be used after the student reaches 21 years of age".

   In 2013, the parents contacted the school seeking to use the compensatory education award to cover part of the student's college tuition. An impasse over payment resulted in the filing of a lawsuit by the adult student and his parents in 2015. The Court refused to grant the school district's Motion to Dismiss. In its ruling the Court held that a post-secondary education is generally not part of required compensatory education services However, the "Court declines to find that no circumstances could arise where an appropriate use of a compensatory education award could entail some form of post-secondary or college level expense". Stapelton v. Penns Valley Area School District 67 IDELR 268 (United States District Court, Middle District, Pennsylvania (2016)).

4. A hearing officer concluded that a student was denied a FAPE by his school district. However, the hearing officer declined to order compensatory education since the parents "did not offer any evidence at the due process hearing of the type and quantum of compensatory education needed" to remedy the denial.

The Court remanded the matter back to the hearing officer holding that a hearing officer cannot simply reject any award of compensatory education.

A hearing officer who finds that she/he needs more information to make the required individualized assessment of what an appropriate award of compensatory education is needed has two options:

1. The hearing officer can provide the parties additional time to supplement the record; or
2. The hearing officer can order additional assessments.

Lee v. District of Columbia 69 IDELR 56 (United States District Court, District of Columbia (2017)).

Note: A hearing officer cannot extend the 45 day hearing timeline on their own initiative to supplement the evidentiary record. Any extension must be in response to a request from a party.

5. OSEP addressed the timeline for taking corrective actions ordered by a State Education Agency in an administrative complaints or by a hearing officer in a due process hearings. Generally, the IDEA requires that all noncompliance is corrected as soon as possible, and in no case later than one year after the State's identification of the noncompliance. See 34 CFR § 300.600(e).

   However, OSEP stated:

   > The one-year timeline for the correction of noncompliance in 34 CFR § 300.600(e) is not intended to limit an SEA's authority or flexibility to determine the appropriate remedy or corrective action necessary to resolve a complaint in which the SEA has found that the public agency has failed to provide appropriate services to a child or group of children with disabilities. We recognize that in some circumstances providing the remedy ordered in the SEA's complaint decision could take more than one year to complete (e.g., the SEA orders an action, such as compensatory services, the provision of which, will extend beyond one year; the corrective action timeline is extended

because the parent or adult student fails to take action that is essential to implementation of the SEA's decision; the parties mutually agree to extend the timeline for implementation).

If the implementation of the State complaint corrective actions requires more than one year to carry out, the SEA must, consistent with its general supervisory authority, continue to follow-up to ensure implementation of the decision, even after the one-year timeline ends.
Note that the guidance letter also applied the same analysis to hearing officer orders. Although it is expected that the order will be implemented "within a reasonable period of time" or within the timeline in the order (unless appealed), there may be specific factual circumstances when the order cannot be fully complied with within one year. Letter to Zirkel 68 IDELR 142 (United States Department of Education, Office of Special Education (2016)).

6. The school never filed a written response to the parent's due process complaint within 10 days as required by the IDEA. The Court held in such a situation "the ALJ must not go forward with the hearing. Rather, it must order a response and shift the cost of the delay to the school district, regardless of who is ultimately the prevailing party". The Court remanded the issue for a determination of what prejudice the parent suffered as a result of the school's failure to respond and determine the award of "appropriate compensation".
Note that the Court in a footnote stated even if there is not a Motion to Compel a response, the ALJ/hearing officer should "raise the issue sua sponte at the pre-hearing conference". This is especially important when the parent is pro se.
The Court further noted that it is not addressing a situation where the school district brings a due process hearing and the parents do not file a response. In such a situation, "different considerations may apply". M.C. v. Antelope Valley Union High School District 69 IDELR 203 (United States Court of Appeals, 9th Circuit (2017)).

F. Evidence/Burden of Proof

1. A week after the IEP was developed for a student with a

visual impairment, the school discovered that the IEP included a mistake and that services were to be provided at 240 minutes per week instead of 240 minutes per month. The school unilaterally amended the IEP without ever informing the parent or providing a revised IEP. The parent found out of the change during the first day of the due process hearing. The Court held, in most situations (unless state law provides otherwise), the party alleging a violation of the IDEA has the burden of proving the challenged IEP does not provide FAPE. However, if there is a procedural violation which deprived the parent of the knowledge of what services were being offered their student in "kind or duration", the burden of proof shifts. The school district then has the burden to show that the services the student actually received were "substantially reasonable". M.C. v. Antelope Valley Union High School District 69 IDELR 203 (United States Court of Appeals, 9th Circuit (2017)).

2. The parents of a student with autism who is non-verbal requested a due process hearing. The student used an augmentative communication device in order to communicate in school. Unknown to the school staff, the parents used the device to make hundreds of recordings of what transpired during the school day to see whether their student's needs were being met.
The parents submitted the recordings as a proposed exhibit. The school district objected and asked the hearing officer to rule that such recordings were in violation of the state's wire tapping law. The hearing officer determined that she did not have jurisdiction to rule on the state law issue. She admitted the recordings subject to her determinations of relevance and materiality. The school district appealed her ruling to Court by suing the hearing officer and the student's parents.
The Court held that the hearing officer had "a duty to, under the extremely relaxed evidentiary rules, admit the recordings" at the due process hearing. The hearing officer may determine the admission of evidence "to what a reasonable person would need to make the decision in the case before her". The Court refused to issue an order requiring the IDEA hearing officer to rule on the state's wire tapping law.
Further, the Court noted that based on the unique facts of this case, the parents were not in violation of the state law since it fell within the statutory exception of "vicarious consent".

Independent School District No.19 of Carter County v. Kroblin Case No. CV-2016-49 (Oklahoma District Court, Carter County (2016)).

3. The parents of a student with autism agreed to new assessments as part of the student's reevaluation. At the parent's request the IEP Team began developing a new IEP while the assessments were pending. The parents then notified the school district that they had made a unilateral placement. The following day a proposed IEP was sent to the parents which was later amended after the assessments were completed.

   A week later the parents initiated a due process hearing seeking reimbursement for their private placement. While the hearing was pending the parents obtained a private Independent Educational Evaluation. The IEE report was provided to the parent's attorney, however, the IEE was not shared with the school district until the week before the hearing in compliance with the IDEA's five day rule. Although the hearing officer allowed the IEE report to be admitted as an exhibit, she refused to consider the report which found that the IEP was not appropriate. The parents appealed.

   The Court upheld the hearing officer's refusal to consider the IEE. The Court stated that compliance with the five day rule "does not guarantee that a particular piece of evidence is relevant to a particular issue". The appropriateness of an IEP must be examined based on what was known to the IEP Team at the time the IEP was developed. The parents decision to wait until the "eve of the hearing" to provide the IEE to the school district "circumvented the collaborative Team process established under the IDEA" by not providing an opportunity for the Team to consider whether the IEP should be amended based on the IEE report. Doe v. Richmond Consolidated School District 67 IDELR 264 (United States District Court, Massachusetts (2016)).

4. In a decision that found FAPE was provided both procedurally and substantively, the Court of Appeals agreed with the District Court that the ALJ's decision was entitled to little deference since it was not "thorough and careful". Specifically, the Court noted "the ALJ's analysis is dominated by block quotations from various documents and legal

standards, lacks detailed discussion of witness testimony, especially of expert witness testimony and fails to consider the record as a whole." Forest Grove School District v. Student 69 IDELR 27 (United States Court of Appeals, 9th Circuit (2016)) Note: This is an unpublished decision.

G. Timelines

1. The parents of a student with autism who is non-verbal and relies on an augmented communications system challenged the implementation of their student's IEP. The parents filed four due process hearing complaints which were consolidated.

   The parents argued that the ALJ erred when she issued her decision 124 days after the final due process hearing. Similarly, the parents asserted that the ALJ erred by issuing her decision 388 days after the first due process complaint was filed and by waiting to decide the first two hearing complaints until after a hearing regarding the third and fourth complaints.

   Although neither party expressly requested consolidation of the complaints, the ALJ consolidated the three complaints, extended the timeline, and scheduled an additional hearing to hear evidence regarding the third complaint. Before the pre-hearing conference for the third complaint, the parents filed a fourth due process complaint. Because the four complaints contained similar issues, testimony, and evidence, the ALJ consolidated the complaints, extended the timeline of the case, and scheduled a hearing.

   The Court concluded that the ALJ did not err by consolidating the four due process complaints. The parents consented to the first two consolidations and the third and fourth complaints involved the same core issues and evidence as the first complaint.

   However, the Court found that the ALJ violated the IDEA's timeline requirements by issuing her decision more than four months after the final due process hearing and seven months from the date after the fourth complaint was filed. The IDEA allows a hearing officer to extend a decision deadline "at the request of either party." See 34 C.F.R. § 300.515(c) (emphasis added). Here, the ALJ herself requested both time extensions and stated that "[a] simple email agreeing to the request by either party to the OAH will suffice to grant the

extension." The Court stated, "Despite the Court's misgivings about the four month delay it took the ALJ to render her decision after the final due process hearing, the procedural violation was not a per se denial of a FAPE and [the parents] have not shown that the delay negatively impacted a substantive right of Student or Parents -- which is required for a procedural violation to constitute a denial of a FAPE." Oskowis v. Sedona-Oak Creek Unified School District 67 IDELR 150 (United States District Court, Arizona (2016)).

2. The Office of Special Education Programs issued a letter stating that if a due process complaint is submitted regarding disciplinary issues (disciplinary change of placement, manifestation determinations, behavior that is substantially likely to result in injury) under 34 CFR 300.532(a), expedited due process procedures are mandatory. Therefore, the due process hearing must occur within 20 school days of the filing of the complaint with a hearing decision issued within 10 school days of the hearing. A hearing officer has no authority to extend the timeline of an expedited hearing at the request of a party or parties.

   If a due process request includes both disciplinary and non-disciplinary matters, the hearing officer has discretion on how to manage the case before them. A hearing officer may decide that it is prudent to bifurcate the hearing. In such case the disciplinary issue would be subject to the expedited hearing timelines while the non-disciplinary issues would be subject to a separate hearing under the standard hearing timelines. Letter to Snyder 67 IDELR 96 (United States Department of Education, Office of Special Education Programs (2015)).

3. OSEP issued a guidance letter stating that parties to a due process hearing may not mutually waive the expedited due process hearing timelines and have disciplinary matters heard under the standard 45 day due process hearing timeline. If a due process complaint includes a disciplinary issue covered under 34 CFR 300.532, an expedited hearing is mandatory. Letter to Zirkel 68 IDELR 142 (United States Department of Education, Office of Special Education (2016)).

H. Exhaustion of Administrative Remedies

1. A student with cerebral palsy was on an IEP which called for

one-on-one paraprofessional support. Her parents also provided her with a trained service dog which assisted her by increasing her mobility and assisting with some physical tasks. The school administrators prohibited the service dog from coming to school reasoning that the dog would not be able to provide any support that the paraprofessional could not provide.

The family filed a complaint with OCR. OCR found that the school violated the ADA by not allowing the student to bring her service dog to school. After the family moved to a neighboring school district which welcomed the service dog, the family initiated a lawsuit against the school, the principal and the school district alleging violations of the ADA, Section 504 and state disability law seeking monetary damages.

The United States Supreme Court, in a unanimous decision, vacated the Appeals Court's decision dismissing the lawsuit for failing to first exhaust the IDEA's due process hearing system. The Supreme Court held that the exhaustion of the IDEA due process hearing process is limited to issues where the "gravamen" of the complaint is an alleged denial of FAPE.

The Supreme Court remanded the case back to the Court of Appeals decision for further consideration. The Court of Appeals was instructed by the Supreme Court to determine if the "gravamen" of the lawsuit was based on a FAPE claim or a discrimination claim which would not require exhaustion of the IDEA due process hearing system. Fry v. Napoleon Community Schools 137 S.Ct. 743, 69 IDELR 116 (United States Supreme Court (2017)).

2. The parents of a student with autism initiated legal action against the school district and special education personnel seeking damages under the ADA, Section 504 and Section 1983 for alleged abuse.

The alleged abuse included allegations that the special education teacher punished the student "by pulling her undergarments so hard into a 'wedgie' that the student's underwear was torn". Also, they alleged that the student was put in a dark closet. As a result, the parents contend the student does not want to enter the school building thus resulting in both academic and emotional harm. As a result of her problems the student's father has left his job to stay at

home and take care of their student.
The Court, in affirming the District Court, dismissed the case for failure to exhaust IDEA due process hearing remedies. The Court refused to excuse the exhaustion of IDEA due process proceedings simply because the parents were seeking monetary damages. The Court stated that "Our exhaustion inquiry therefore focuses on 'the source and nature of the alleged injuries for which he or she seeks a remedy,' not the specific remedy sought."
The alleged injuries were educational injuries that could be redressed to some degree by an IDEA due process hearing officer. The allegations of academic harm and lack of access to the student's educational programs are unambiguously educational in nature. Carroll v. Lawton Independent School District No. 8 805 F.3d 1222, 66 IDELR 210 (United States Court of Appeals, 10th Circuit (2015)).

I. Due Process Hearing Decisions

1. The United States Office of Special Education Programs (OSEP) issued a policy letter stating that a SEA must retain due process hearing findings and decisions under the IDEA for a three year period. The three year period starts when the final expenditure report under Part B is submitted.
Since States generally submit its final expenditure report two and half years after it received the Part B grant, the record retention period can extend to five and half years from the date the record was created. OSEP opined "We view that five and a half year time period as the most reasonable minimum time period during which States must make due process and State level review [if a state has a two tiered hearing system] findings and decisions available to the public…".
OSEP also encourages States to have a longer retention period to promote public access policies. The letter does not address any state record retention requirements which may be longer than the IDEA requirement.
In addition, there is an exception if any litigation, claim or audit is started before the expiration of the retention period. In that case the records must be retained until final action is taken resolving the issue. Letter to Anonymous 117 LRP 9087 (United States Department of Education, Office of Special Education Programs (2017))

J. Miscellaneous Issues

1. OSEP believes that parents may invite individuals who do not meet the criteria in 34 CFR 300.512(a)(1) (any party to a due process hearing to be accompanied by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities) to observe their child's due process hearing without opening it to the public. This could include inviting to such hearing a family member of the child or educational professionals or others not involved in the specific issues of the hearing but who are interested in learning more about due process proceedings or who are there to provide general support to the parent or child.

   In these situations, OSEP believes that it would be reasonable to expect that attendance at a hearing not open to the public should be limited to individuals who have some direct relationship to the parties and/or a personal need to understand the conduct of proceedings generally. We believe that permitting parents to invite observers, just as States may invite school district personnel with legitimate educational interests in accordance with its established criteria, to observe a due process hearing not open to the public, is consistent with the principles of fairness and equity that are inherent in the due process procedures under the IDEA. However, inviting members of the press serving in their official capacity would require opening the hearing to the public.

   Further, it is important to note that for both open and closed hearings, the IDEA requires that a hearing officer conduct a fair and impartial due process hearing. In carrying out this duty, a hearing officer may be able to remove any individual in attendance whose behavior is disruptive or otherwise interferes with conducting a fair and impartial hearing. See 34 CFR 300.511(c)(1)(iii). Letter to Eig 68 IDELR 109 (United States Department of Education, Office of Special Education Programs (2016))

2. The parent filed a motion with the ALJ to compel the school district to provide a court reporter for all pre-hearings involved in conducting the due process hearing. The ALJ denied the motion. The District Court affirmed.

   The Court of Appeals stated that the IDEA gives the parents the right to a written, or at the option of the parents, an

electronic record of the hearing. (See 34 CFR 300.512(a)(4)) Therefore, the Court held that there must be a record of only the final hearing and not all pre-hearings leading up to the due process hearing. The parents were not entitled to transcripts of such preliminary hearings. A.L. v. Jackson County School Board 66 IDELR 271 (United States Court of Appeals, 11th Circuit (2016)).

Note: In the event there would be a need for a preliminary factual hearing on a pre-hearing Motion, such as what the stay put placement is, it is recommended that the hearing be recorded.

X. Charter Schools

A. The Office of Special Education Programs and Rehabilitative Services (OSERS) issued a detailed question and answer guidance document regarding the application of the IDEA to charter schools. OSEP has made clear that all IDEA rights apply to students with disabilities or students suspected of having a disability who attend charter schools.

It is important to determine which LEA, under State law, is responsible for ensuring FAPE and providing other IDEA rights although the State Educational Agency (SEA) has the ultimate responsibility for ensuring compliance.

Charter schools must provide or arrange to provide all IEP services either directly or through contract with other public or private providers. The IDEA does not allow a charter school to limit needed IEP services.

The IDEA's provisions regarding LRE requires that a continuum of placements be available. If the charter school does not have the LRE setting determined by the IEP Team, the LEA must arrange to contract with another agency for such services at no cost to the parent. Frequently Asked Questions about the Rights of Students With Disabilities in Public Charter Schools Under the IDEA (United States Department of Education, Office of Special Education and Rehabilitative Services (2016)).

B. The Office for Civil Rights (OCR) issued a detailed question and answer guidance document regarding the application of Section 504/ADA to charter schools. OCR made it clear that students with disabilities in charter schools have the same protections under Section 504 as other public school students with disabilities.

The protections apply to recruitment/admissions, evaluations, FAPE,

LRE, discipline, accessibility and disenrollment actions.
OCR did opine that if a charter school's charter is to serve students with a specific disability, such as autism, that information is permitted to be in recruitment information and admission decisions. However, charter schools cannot discourage/refuse admission to students who have another disability such as a student who is autistic and deaf.
OCR also clarified that charter schools cannot provide "significant assistance" to other entities, including private entities, that discriminate on the basis of disability. This includes a prohibition by the charter school from renting facilities that are inaccessible to or unusable by individuals with disabilities. Frequently Asked Questions about the Rights of Students With Disabilities in Public Charter Schools Under Section 504 of the Rehabilitation Act of 1973 (United States Department of Education, Office for Civil Rights (2016)).

C. The United States Department of Education issued a guidance letter regarding the responsibility of virtual schools under the IDEA. The guidance defines a virtual school as "a public school that offers only virtual courses: instruction in which children and teachers are separated by time and/or location. In addition, interaction occurs via computers and/or telecommunications technologies and the school generally does not have a physical facility that allows children to attend classes on site."
If a virtual school is its own Local Education Agency (LEA) under state law, the virtual school is responsible for ensuring the IDEA requirements are met unless state law assigns responsibility to some other entity. If the virtual school is part of an LEA that includes other public schools, the LEA of which the charter school is a member is responsible for ensuring compliance.
If a virtual school is its own LEA, but the family resides in a different LEA, the State has the discretion to determine which LEA is responsible for ensuring compliance with the IDEA and the provision of FAPE. As with other public schools, the State Education Agency (SEA) must exercise general supervision to ensure that the education standards of the State and IDEA requirements are met. This includes the adoption of policies, procedures and programs that are consistent with, or adopt, the SEA's policies under Part B of the IDEA. Dear Colleague Letter 116 LRP 34386 (United States Department of Education, Office of Special Education and Rehabilitative Services (2016)).

XI. Section 504/ADA Discrimination Issues

A. The parents, on behalf of their daughters, asserted various claims against their school district and state department of education. They alleged, among other claims, a violation of Section 504 and the ADA based on the school district's "policy" which disproportionally placed students with disabilities who were eligible for IEP services in non-credit bearing courses intended for students at risk of not meeting state performance standards.

The Court of Appeals affirmed the District Court's judgment for the school district on the Section 504 and ADA claims. The Court held that a student is not automatically disabled under Section 504 or the ADA by virtue of being eligible for special education services under the IDEA.

The Court stated:

> ...an IDEA disability is not equivalent to a disability as cognizable under the ADA and Section 504. Plaintiffs, therefore, cannot rely solely on "receipt of special education" to establish an ADA or Section 504 disability.... Those seeking relief pursuant to ADA or Section 504 must come forward with "additional evidence" -- beyond simply their eligibility for IDEA coverage -- showing their eligibility for the remedies afforded by the ADA and Section 504.

B.C. v. Mount Vernon School District 837 F.3d 152, 68 IDELR 151 (United States Court of Appeals, 2nd Circuit (2016)).

B. The United States Office for Civil Rights (OCR) issued a guidance document regarding Section 504 and students with ADHD. Under the ADA and Section 504, a student with a disability is one who has a physical or mental impairment that substantially limits one or more major life activities. An impairment, such as ADHD, that substantially limits any major life activity, not just a major life activity related to learning or school such as a GPA, would be considered a disability under Section 504. Some examples of a major life activity that could be substantially limited by ADHD include concentrating, reading, thinking, and functions of the brain.

OCR emphasized that if a student is evaluated under the IDEA and is found ineligible because he or she does not need special education, the school district must still consider if the student could

be covered by Section 504. OCR will presume, unless there is evidence to the contrary, that a student with a diagnosis of ADHD is substantially limited in one or more major life activities and therefore covered by Section 504. If the student is taking medication, the school district cannot consider any ameliorative effects of that medication, or any other mitigating measure, when evaluating whether the student is substantially limited in a major life activity. Additionally, implementation of intervention strategies, such as interventions contained within a school's RTI program, cannot be used to delay or deny the Section 504 evaluation.

If a student who is covered by only Section 504 (not IEP eligible) needs services and/or supports, the school is obligated to provide FAPE. Under Section 504, a FAPE is the provision of regular or special education and related aids and services designed to meet the student's educational needs as adequately as the needs of students without disabilities are met.

Although not explicitly required by the Section 504 regulations, school districts often document the elements of an individual student's FAPE under a written Section 504 plan. OCR stated:

> While there is no specific Section 504 requirement for such a plan or what the plan should contain, a Section 504 Plan often includes the regular or special education and related aids and services a student needs, and the appropriate setting in which the student should receive those services, also called the student's "placement." A written plan is often a useful way to document that the school district engaged in a process to identify and address the needs of a student with disabilities and to communicate, to school personnel, the information needed for successful implementation. A Section 504 Plan for a student with ADHD, for example, could include behavioral interventions, assistance with organization, and additional time to complete assignments or tests.

[Note: A written Section 504 plan may be required by local Section 504 policy. It would be deemed essential best practice to have a written plan for the student]

If, as a result of a properly conducted evaluation, it is determined that the student with a disability under Section 504 does not need additional services or supports, the district is not required to provide

them. But the school district must still conduct an evaluation before making that determination. Further, that student will still be considered to be a student with a disability because the student has an impairment that substantially limits a major life activity. As a result, the student is protected by Section 504's general nondiscrimination prohibitions (e.g. no retaliation, harassment, unlawful different treatment, etc.). Students with ADHD and Section 504: A Resource Guide 68 IDELR 52 (United States Department of Education, Office for Civil Rights (2016)).

C. The Office for Civil Rights announced that settlements had been reached with 11 educational entities in 7 states involving website accessibility to individuals with disabilities under the ADA's effective communication regulations.

OCR investigations found that on all 11 websites important images were missing text descriptions that describe the images to blind and low-vision users who use special software. Common problems affecting many of the websites included:

- Some important content of the website could only be accessed by people who can use a computer mouse, which meant that content was not available to those who are blind, many who have low-vision, and those with disabilities affecting fine motor control;
- Parts of the website used color combinations that made text difficult or impossible for people with low vision to see; and
- Videos were not accurately captioned, so they were inaccessible to people who are deaf.

The 11 education groups voluntarily committed to make their websites accessible through a range of actions, which require OCR review and approval at key stages, including:

- Affirming their commitment to ensuring that people with disabilities have opportunities equal to those of others to enjoy the recipients' programs, services, and activities, including those delivered online;
- Selecting an auditor who has the requisite knowledge and experience to audit content and functionality and identify barriers to access on the existing website for people with disabilities;

- Conducting a thorough audit of existing online content and functionality;
- Adopting policies and procedures to ensure that all new, newly added or modified online content and functionality will be accessible to people with disabilities;
- Making all new website content and functionality accessible to people with disabilities;
- Developing a corrective action plan to prioritize the removal of online barriers;
- Posting a notice to persons with disabilities about how to request access to online information or functionality that is currently inaccessible; and
- Providing website accessibility training to all appropriate personnel.

Source: OCR Press Release (June 29, 2016).

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.