

Special Education Law: A Year in Review

MAASE

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Presenter: Art Cernosia, Esq. - LLC
Williston, Vermont

E-mail: acernosia@aol.com

I. Introduction

- A. With the proposed changes to and new judicial interpretations of the Individuals With Disabilities Education Improvement Act (IDEA), many policy and practice implications for state and local school officials and parents remain unclear. This presentation will highlight and discuss some of the major challenges resulting from recent IDEA interpretations and review the future legislative and regulatory actions impacting students with disabilities in particular.

II. Proposed IDEA Regulations

- A. The United States Department of Education proposed regulation would reverse its longstanding interpretation and permit parents to withdraw consent for continued IEP services for their child. The parents' right to terminate their child's IEP services would not be subject to challenge in a due process hearing. If a parent subsequently provided consent after such withdrawal, the school district would again have an obligation to make a FAPE available to the child including the development and implementation of an IEP. (Federal Register, Volume 73, No.93, May 13, 2008).

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- B. The United States Department of Education proposed regulation would clarify that a State, in exercising its monitoring responsibilities, must ensure that when it identifies noncompliance with the requirements of Part B by its LEAs, the noncompliance must be corrected as soon as possible, and in no case, later than one year after the State's identification. Correction of noncompliance means that a State requires a public agency to revise any noncompliant policies, procedures and practices, and verifies through a follow up review of documentation or interviews, or both, that the noncompliance issues are corrected. (Federal Register, Volume 73, No.93, May 13, 2008)

- C. The United States Department of Education proposed regulation would give parents the right to be represented by a non-attorney in a due process hearing only if state law allows. (Federal Register Vol.73, No. 93, May 13, 2008)

III. State Performance Plans (SPP)/Annual Performance Reports (APR)

- A. Each State had to develop a State Performance Plan, by December 2005, subject to the approval of the Secretary, which included measurable and rigorous targets in the priority areas. The SEA must also provide annual performance reports to the Secretary.
 - 1. The State Performance Plan must include measurable and rigorous State established targets in the following areas:
 - a) Provision of FAPE in the LRE
 - b) Exercise of effective general supervision (including child find, effective monitoring, use of resolution meetings, mediation, and a system of transition services)
 - c) Disproportionate representation of racial and ethnic groups in special education and related services to the extent the representation is the result of inappropriate identification.

As part of its State Performance Plan, each State must establish measurable and rigorous targets for the indicators established by the U.S. Secretary of Education, including the

provision of FAPE in the LRE. The IDEA does not prescribe the number or percentage of children with disabilities who must be educated in any particular environment. The IDEA's LRE principle expresses a strong preference, not a mandate, for educating every child with a disability in the regular educational environment. The IDEA also requires that each public agency make available a continuum of alternative placements recognizing that the regular educational environment may not be the appropriate placement option for each child. Letter to Whole 50 IDELR 138 (United States Department of Education, Office of Special Education Programs (2008)).

2. The State must collect valid and reliable data to annually report to the Secretary and the public on the State's performance on 20 indicators: percent of youth with IEPs graduating with a regular diploma, percent of youth with IEPs dropping out, participation and performance on statewide assessments, suspension/expulsion rates, percent of students with disabilities (6-21) removed from regular class, percent of preschool students with disabilities (3-5) served in settings with nondisabled peers, percent of preschool children with improved positive social/emotional/behavioral skills, percent of parents of students with disabilities who report schools facilitated parent involvement, percent of districts with disproportionality due to inappropriate identification, percent of districts with racial or ethnic disproportionality in specific disability categories, percent of students who receive special education evaluations within 60 days of consent, percent of children transitioning from Part C with an IEP by their third birthday, percent of youth age 16 and older with IEP transition goals and services, percent of youth who were on IEPs who within one year of leaving school are employed and/or in postsecondary education, whether the SEA's general supervision system identifies and corrects noncompliance within one year, percent of administrative complaints with reports issued within 60 days, percent of due process hearing decisions issued within 45 days, percent of hearings resolved through resolution agreements, percent of mediations resulting in mediation agreements, and whether the state reported data in a timely and accurate manner.

3. The State is responsible for reporting to the public on the performance of each LEA against the SPP targets.
 - a. The State must make a finding of noncompliance against an LEA regardless of the specific level of noncompliance. It must notify the LEA and ensure that the noncompliance is corrected as soon as possible but in no case later than one year after state identification. Frequently Asked Questions Regarding Identification and Correction of Noncompliance and Reporting on Correction in the SPP/APR (OSEP (2008)).
 4. The State must carry out enforcement actions against those LEAs not meeting the requirements.
- B. The Secretary shall determine if the SEA:
1. Meets the requirements of the IDEA;
 2. Needs Assistance;
 3. Needs Intervention; or
 4. Needs Substantial Interventions
- C. Enforcement Options include:
1. Technical Assistance
 2. Imposing special conditions on the IDEA grant
 3. Requiring a corrective action or improvement plan
 4. Requiring a compliance agreement
 5. Withholding IDEA funds
 6. Seeking recovery of funds
 7. Referring matter to the Department of Justice for enforcement

IDEA Case Law Up-Date

I. Evaluation/Eligibility

- A. The Court found that the school district systematically failed to adhere to its child find efforts under the IDEA. The district failed to refer children with suspected disabilities in a timely fashion and improperly extended the initial evaluation process. The Court found

not only that the school district was in violation but that the State Department of Education also violated its legal responsibility under the IDEA to provide general supervision and to monitor local agencies for compliance. (Jamie S. v. Milwaukee Public Schools, ___ F.Supp.2d ___, 48 IDELR 219 (United States District Court, Wisconsin (2007))). The State Department was reported to have settled the case with the Plaintiffs, Disability Rights Wisconsin. The settlement will include a state paid outside authority to monitor the School District and also a new parent trainer position to support the parents in the school district.

- B. The Court found that the school district violated the IDEA and denied a FAPE when it stopped the evaluation process of a student who was placed in an out of state residential school by his parents. Further, the Court stated the child find process under the IDEA does not prevent a parent from initiating a request for the initial evaluation from the LEA of residence in addition to the LEA where the private school is located (District of Columbia v. Abramson, 493 F. Supp. 2d 80, 48 IDELR 96 (United States District Court, D.C. (2007))).
- C. The school, by referring a family to an evaluation center to determine whether the child with a disability was also autistic, violated its obligation under the IDEA to evaluate student in all areas of suspected disability. The Court held that a school cannot abdicate its affirmative duties under the IDEA by simply referring the parents to an evaluation center since it would not ensure that the child is assessed. The Court concluded that such procedural deficiency denied the student a FAPE. N.B. v. Hellgate Elementary School District 108 LRP 51033 (United States Court of Appeals, 9th Circuit (2008)).
- D. The Court held that a student with Asperger's Syndrome is eligible for special education services in spite of the fact that she was doing well academically. The "adverse affect" on her educational performance was the impact of her disability on her social skills and communication skills since the Court found that nothing in the IDEA supports the conclusion that educational performance is limited to academic performance. In addition, the Court found the IDEA term "adverse affect" does not have a qualifier such as substantial or significant. Therefore, any adverse affect meets the standard.

Finally, the Court found that the student was in need of specialized instruction in social skills and therefore met the eligibility requirement of being in need of special education (Mr. and Mrs. I v. Maine School Administrative District 55, 480 F. 3d 1, 47 IDELR 121(United States Court of Appeals, 1st Circuit (2007))).

- E. The Court held that a student diagnosed with ADHD, PTSD, RAD and Intermittent Explosive Disorder was not eligible for special education services and, therefore, her parents were not entitled to reimbursement for their private placement. The Court concluded that the student was not emotionally disturbed since she was able to maintain satisfactory relationships and her inappropriate behavior was not to a marked degree over a long period of time. In addition, there was no adverse impact on her educational performance since her grades, tests, and teachers' reports all indicated she was performing at average or above average levels.

Finally, although the Team that addressed her eligibility was not duly composed since the special educator on the Team never provided services to the student, the Court held it was harmless error since it did not result in a loss of educational opportunity (R.B. v. Napa Valley Unified School District, 496 F.3d. 932, 48 IDELR 60 (United States Court of Appeals, 9th Circuit (2007))).

- F. The Court affirmed the decision that a student with schizophrenia met the definition of a student with an emotional disturbance which adversely impacted her educational performance resulting in a need for special education services. Her frequent absences from school, her hearing voices, zoning out, and wanting to hurt herself were the result of the impact of her schizophrenia on her ability to cope in a public middle school environment (Board of Education of Montgomery, County v. S.G., 230 Fed. Appx. 330, 47 IDELR 285 (United States Court of Appeals, 4th Circuit (2007)). This is an unpublished opinion.
- G. The Court affirmed the Team's conclusion that the student was not eligible for special education under either the Specific Learning Disability or Other Health Impairment categories. Although there was a severe discrepancy between the student's ability and achievement, the student was performing above grade level based on class work and tests. Therefore, the discrepancy could be addressed without the need for special education services (Hood v. Encinitas

Union School District, 486 F.3d 1099, 107 LRP 26108 (United States Court of Appeals, 9th Circuit (2007)).

- H. When a parent requests an Independent Educational Evaluation (IEE) at public expense, the LEA must “without unnecessary delay” either comply with the request or initiate a due process hearing to show its evaluation is appropriate. The Court held that the district failed to file its due process request “without unnecessary delay” when it took almost three months from the parent’s request to the filing of a due process hearing complaint. The unexplained and unnecessary delay in requesting the hearing waived the right of the LEA to contest the IEE (Pajaro Valley Unified School District v. J.S. 47 IDELR 12 (United States District Court, Northern District, California (2007)).

- I. The parents were entitled to payment for an Independent Educational Evaluation (IEE) since the district failed to evaluate the student when there was reason to do so. Even though the parents did not “disagree” with the school’s evaluation, as required by the IDEA, since there was no evaluation to disagree with, the Court held that the parents were entitled to reimbursement based on equitable considerations. Los Angeles Unified School District v. D.L., 49 IDELR 252 (United States District Court, Central District, California (2008)).

- J. A school district limited an independent evaluator’s ability to observe the placement proposed by the IEP Team to 20 minutes per observation. The Court held that although it may be a procedural violation there was no evidence presented that the parents’ ability to meaningfully participate was significantly impacted. The independent evaluator conceded that she was able to provide the parents with an informed and independent opinion which was introduced as evidence in a due process hearing. L.M. v. Capistrano Unified School District, 50 IDELR 181 (United States Court of Appeals, 9th Circuit (2008)).

- K. When a parent requests an Independent Educational Evaluation at public expense, the IDEA requires that the school either pay for it or request a due process hearing to prove that the school’s evaluation is appropriate. Here, the school did not request a due process hearing on the issue but the parents did submit a hearing request. The Court noted that, although the letter of the law was violated since the school did not initiate a due process hearing, the purpose of the

IDEA requirement (having a hearing officer consider the appropriateness of the school's evaluation) was fulfilled. The Court denied reimbursement based on the hearing officer's and state review officer's determination that the school's evaluation was appropriate. P.R. v. Woodmore Local School District 49 IDELR 31 (United States Court of Appeals, 6th Circuit (2007)). Note: This is an unpublished opinion.

- L. FERPA (the Buckley Amendment) requires that a school respond to reasonable requests for explanations and interpretations of education records such as test answer sheets or test protocols not accompanied by the question booklet. Thus, a school should, upon request, provide the parent an opportunity to review the test booklet by either showing the test question booklet, read the questions to the parent or provide an interpretation for the responses in some other manner adequate to inform the parent. Letter to Scott City School District, 107 LRP 39 (United States Department of Education, Family Policy Compliance Office (2007)).

II. 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. Although the school did not fully implement the student's IEP in relation to math instruction, behavior supports and self-contained class work, the student was not entitled to compensatory education. The Court held that they were not material failures to implement the IEP. Minor discrepancies between the services provided and the services called for in the IEP do not give rise to an IDEA violation. A material failure occurs when the services provided fall significantly short of the services in the IEP. The child's educational progress, or lack of it, may be probative of whether there has been a

significant shortfall (Van Duyn v. Baker School District, 502 F.3d 811, 47 IDELR 182 (United States Court of Appeals, 9th Circuit (2007))).

- C. The Court held, as a matter of law, that in a case where the parents express doubt whether a school can satisfactorily provide IEP services, the IEP must identify a particular school in order to have a proper offering of FAPE. The offer of FAPE is limited to the terms of the IEP itself. Expanding the scope of the offer to include comments made during the IEP process would undermine the importance of the formal written offer.

The Court noted that this decision is limited to situations where the parents and school have a dispute about location. The Court's holding should not be read so broadly that a school can never offer a FAPE without identifying a particular location in which IEP services are expected to be provided (A.K. v. Alexandria City School Board, 484 F.3d 672, 47 IDELR 245 (United States Court of Appeals, 4th Circuit (2007))). Petition for rehearing and rehearing en banc denied. Review denied by the United States Supreme Court.

- D. The Court held that the FAPE standard, as established by the United States Supreme Court in Rowley, has been superseded by the 1997 Amendments to the IDEA. The Court remanded the case to the ALJ to determine whether the IEP met the IDEA standard of "equality of opportunity, full participation, independent living and economic self-sufficiency" and whether the programs conferred a "meaningful educational benefit" in light of these criteria.

In addition, the Court found the IEP was in violation of the IDEA due to the "absence of any specification of teaching methodologies and time allotments to various services" (J.L. v. Mercer Island School District, 46 IDELR 273 (United States District Court, Western District, Washington (2006)). On Appeal.

- E. The Court held that neither the 1997 or 2004 amendments to the IDEA have changed the FAPE standard in Rowley. Congress did not explicitly articulate disagreement with the decision or amend the statutory definition of FAPE. The Court stated that "given the ubiquity of Rowley in the context of IDEA proceedings, one would expect Congress to speak clearly if the intent were to supersede it". Mr. and Mrs. C. v. Maine School Administrative District No.6, 49 IDELR 281 (United States District Court, Maine (2008)).

- F. The Court rejected the parents' contention that the No Child Left Behind Act imposed additional obligations to provide the student with educational benefit in order to receive a FAPE. The Court held that the NCLBA does not alter the standard under the IDEA (Kirby v. Cabell County Board of Education, ___ F.Supp. ___, 46 IDELR 156 (United States District Court, Southern District, West Virginia (2006))).
- G. The No Child Left Behind Act contains no specific language which purports to alter the IDEA's FAPE and IEP requirements. The IDEA does not require that FAPE determinations be based on the results of the NCLBA assessments nor does it require that the IEP be designed specifically to enhance the student's scores on the NCLBA tests. However, the NCLBA assessments can be considered as one factor in the broader inquiry as to whether the student's education is meaningful (Leighty v. Laurel School District, 457 F.Supp. 546, 46 IDELR 214 (United States District Court, Western District, Pennsylvania (2006))). See also Fisher v. Stafford Township Board of Education, ___ F.Supp. ___, 47 IDELR 134 (United States District Court, New Jersey (2007)).
- H. Although the school provided a student with multiple disabilities extensive support, the Court found the IEP did not provide FAPE. The indefinite use of a one on one aide throughout the day failed to address the need of the student to increase his independence and added to the pattern of "learned helplessness" (A.C. v. Board of Education of the Chappaqua Central School District, 47 IDELR 294 (United States District Court, Southern District, New York (2007))).
- I. The Court found that the district offered the student a FAPE. The parents alleged that there was no IEP since the district only offered drafts and there was neither a full discussion of the proposals nor consensus by the Team. The Court held that there were multiple IEP meetings with the parents and that there is no requirement in the IDEA that the parties reach consensus on all aspects of the IEP before it is valid (A.E. v. Westport Board of Education, 48 IDELR 270 (United States Court of Appeals, 2nd Circuit (2007))).
- J. The Court held that the parents were not entitled to be reimbursed for their student's residential school placement even though the IEP developed by the public school was incomplete. The Court found the

IEP was not completed due to the parents' lack of cooperation. The Court also stated that it is appropriate to look at the totality of circumstances, including extrinsic evidence not included in the IEP, in determining the appropriateness of the claims. C.G. v. Five Town Community School District, 49 IDELR 93 (United States Court of Appeals, 1st Circuit (2008)).

- K. The Court upheld the appropriateness of an IEP that was finalized after the IEP meeting took place. The Court noted that the parents' sole issue was public payment for their student's private school placement. The parents' refusal to discuss any other issues left the school no choice but to develop the IEP without the parents' meaningful input. Under these circumstances, "the parents' intransigence to block an IEP that yields a result contrary to the one they seek does not amount to a violation of the procedural requirements of the IDEA." Hjortness v. Neenah Joint School District, 48 IDELR 119, 507 F.3d 1060 (United States Court of Appeals, 7th Circuit (2007)). Review denied by the United States Supreme Court.
- L. A student was found to have been denied a FAPE since substantial portions of the student's IEP were not implemented by the teacher. The Court found that the teacher of the of the emotional support classroom had no prior experience teaching a special education class, no degree in education and no teaching certifications which left her to teach on her own "instinct". With no teaching qualifications and little training, the implementation of the IEP suffered. Damian J. v. School District of Philadelphia 49 IDELR 161 (United States District Court, Eastern District, Pennsylvania (2008))
- M. There is no requirement in the IDEA that all IEP documents must be translated into the parents native language. However, the parents are entitled to meaningfully participate in the IEP development process. Therefore, the school district must take whatever action is necessary to ensure that parents understands the proceedings of the IEP Team meeting, including the arranging of an interpreter. Letter to Boswell 49 IDELR 196 (United States Department of Education, Office of Special Education Programs (2007)).
- N. The Court upheld the IEP for a student with autism even though it did not incorporate ABA services as requested by the parents. The Court found that the requirement in the IDEA 2004 Amendments requiring that special education services be based on "peer reviewed

research to the extent practicable” does not require that the service with the greatest body of research be used in order to provide a FAPE. There is nothing in the IDEA to suggest that the failure to provide services based on peer reviewed research would automatically result in a denial of FAPE. Joshua A. v. Rocklin Unified School District, 49 IDELR 249 (United States District Court, Eastern District, California (2008)).

- O. The Court originally found that the school violated the IDEA by having an unwritten policy of not considering home based services for students with autism and remanded the case to determine the amount that the parents should be reimbursed for privately obtaining such services. The Court affirmed that the parents were entitled to only half the cost since the IEPs were substantively appropriate. In doing so, the Court stated that different methodologies may be appropriate for treating autism and provide FAPE as long as the student’s individual needs are considered and the program is reasonably calculated to provide educational benefit. Deal v. Hamilton 258 F. Appx. 863, 49 IDELR 123 (United States Court of Appeals, 6th Circuit (2008)).

- P. The Court held that the failure to have a signed IEP in place by the beginning of the school year did not deny the student a FAPE since the delays were the product of the parent’s “own intransigence”. In addition, the Court held that the IDEA does not require a stand-alone transition plan as part of an IEP. The IDEA requires that IEPs contain statements of transition services but the law does not require that those statements be articulated in a separate component of the IEP. Lessard v. Wilton-Lyndeborough Cooperative School District 518 F.3d 18, 49 IDELR 180 (United States Court of Appeals, 1st Circuit (2008)).

III. Related Services

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

a related service under the IDEA. To be entitled to a related service:

- a) A child must have a disability so as to require special education under the IDEA;
- b) The service must be necessary to aid a child with a disability to benefit from special education; and
- c) The service must be able to be performed by a non-physician.

B. A school was ordered to provide a student with individual nursing services as a related service in his IEP. The court followed a “bright line” rule in the Tatro case. Since the services were not required to be administered by a doctor and were supportive services necessary for the student to attend school, they were required related services regardless of the cost (Cedar Rapids Community Sch. Dist. v. Garret F., 25 IDELR 139, U.S. Supreme Court (1999)).

C. The Court found that the IDEA 2004 statutory amendments are “somewhat ambiguous” whether the definition of related services includes mapping of a cochlear implant. However, the IDEA 2006 regulations (effective on October 16, 2006) clarify that a school is not required to program a cochlear implant as a related service. Therefore, the school is not required to provide mapping services to the preschooler with a hearing impairment (A.U. v. Roane County Board of Education, 501 F.Supp. 2d 1134, 48 IDELR 3 (United States District Court, Eastern District, Tennessee (2007))).

D. The Court affirmed the dismissal of the parent’s due process request challenging the school’s refusal to administer medications to their son who is bipolar and ADHD. The school nurse did initially administer the medications but observed the student was falling asleep, appeared not to be focusing, etc. in response to the medication. The nurse asked the parents for permission to contact the treating psychiatrist which was denied. In response, the school refused to continue to administer the medications. The Court held that although the administration of medication is a related service under the IDEA, the issue in this case relates to the ability of the parents to regulate communications between the school and the child’s doctor which is a medical treatment issue not a special

education issue (John A. v. Board of Education for Howard County, 48 IDELR 133, 929 A.2d 136 (Maryland Court of Appeals (2007))).

- E. The parents of children with cochlear implants initiated a lawsuit under the IDEA and the Administrative Procedures Act alleging that the 2006 IDEA regulation excluding mapping from the definition of related services contravenes the IDEA, exceeds the U.S. Secretary's rulemaking authority and is arbitrary, capricious and an abuse of discretion. The Court dismissed the lawsuit holding that the IDEA 2006 regulation was a permissible interpretation of the IDEA. Petit v. United States Department of Education 108 LRP 55452 (United States District Court, District of Columbia (2008)).

IV. Least Restrictive Environment

- A. The Court remanded the case for a determination whether the IEP Team violated the IDEA's procedural requirements in making a predetermination of placement. In doing so, the Court stated that the standard for determining whether a predetermination of placement occurs is "when an educational agency has made its determination prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives" (H.B. v. Las Virgenes Unified School District, 48 IDELR 31 (United States Court of Appeals, 9th Circuit (2007))). This is an unpublished decision.
- B. The Court upheld the school's proposal to change the placement of a student with Rett Syndrome from a regular class to a special class setting. The student must be receiving more than a minimal educational benefit in the regular class setting in order to prove that the regular class setting is the LRE (Board of Education of Township High School District No. 211 v. Ross 486 F.3d 267, 47 IDELR 241 (United States Court of Appeals, 7th Circuit (2007))).
- C. The Court determined that the IEP properly called for a day private school placement and the parents were not misled in believing that the IEP called for a residential placement. The Court stated that it disagreed with the parents' belief that the IEP Team must consider the student's educational and non-educational needs when developing the IEP. Finally, it was noted that nowhere in the IDEA is there a requirement for the Team to discuss financing. The IEP provides a FAPE and any additional services or treatment provided

is not the responsibility of the school district (Avijan v. Montgomery County Board of Education, 48 IDELR 61 (United States Court of Appeals, 4th Circuit (2007))). This is an unpublished decision.

V. Unilateral Placements

- A. The U.S. Supreme Court in Burlington, MA v. Department of Education et al., 105 S. Ct. 1996, IDELR 556:389 (U.S. 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 (see B.G. v. Cranford Board of Education, 702 F. Supp. 1158, IDELR 441:327 (D NJ 1988)).
- B. Parental placement at a school which is not state approved or does not meet the standards of the state does not itself bar public reimbursement under the Burlington standard (Florence County School District Four et al. v. Carter, 114 S. Ct. 361, 20 IDELR 532 (U.S. 1993)).
- C. The Court, in awarding reimbursement to the parents for their unilateral placement in a private school, held that the IDEA does not require that a student previously received special education services from the public school as a pre-condition for seeking reimbursement (Board of Education of the City School District of the City of New York v. Tom F., 193 Fed. Appx. 26, 106 LRP 48499 (United States Court of Appeals, 2nd Circuit (2006))). The United States Supreme Court issued an equally divided per curiam opinion affirming the judgment (2007)).
- D. In a unilateral placement case, the Court stated that although the IDEA does not require that the parents' private school be a state approved school meeting state education agency standards, the same considerations and criteria that apply in determining the appropriateness of the public school's placement should be considered in determining the appropriateness of the parents' private placement.

The parents need to demonstrate, with “objective evidence”, that the private placement provides specially designed instruction to meet the student’s unique needs to permit the student to receive educational benefit (Frank G. v. Board of Education of Hyde Park, 459 F.3d 356,46 IDELR 33 (United States Court of Appeals, 2nd Circuit (2006)). Review denied by the United States Supreme Court.

- E. The Court denied reimbursement for the parents’ private school placement of their student who is emotionally disturbed. The private school was found to be inappropriate since it did not have staff trained to address the therapeutic needs of the student. The reported success of the student at the private school does not itself demonstrate that it was an appropriate placement. The Court held that it is appropriate only if it provides “education instruction specifically designed to meet the unique needs of a handicapped student” Gagliardo v. Arlington Central School District, 489 F.3d 105, 48 IDELR 1 (United States Court of Appeals, 2nd Circuit (2007)).
- F. The parents placed a student who was never deemed eligible for special education in a private residential school. The Court held that the parents were entitled to seek reimbursement in a special education hearing. In doing so, the Court adopted the reasoning of the Court of Appeals in the Tom F. case that allows parents of students who never received special education from a public agency to seek reimbursement for their unilateral placement. The case was remanded to consider all relevant factors in determining whether to grant reimbursement including whether the parent put the district on notice, the existence of other suitable placements, the cooperation level by the parents and whether the placement was made for reasons related to the student’s disability. Forest Grove School District v. T.A., 523 F.3d 1078, 50 IDELR 1 (United States Court of Appeals, 9th Circuit (2008)). On Appeal to the United States Supreme Court.

VI. Behavior and Discipline

- A. The Court, in upholding the appropriateness of an IEP, held that nothing in the IDEA or state law requires that a behavior intervention plan be in writing. The Court found that the staff responded to the student’s behaviors with set procedures and documented the student’s behavioral incidents and the school’s

responses (School Board of Independent School District #11 v. Renollett, 440 F. 3d 1007, 45 IDELR 117 (United States Court of Appeals, 8th Circuit (2006))).

- B. The Court found that the school district failed to provide an appropriate IEP for the student by not including a behavior plan in the IEP to address her behavior that was interfering with her learning. As a result, the Court ordered compensatory education and tuition reimbursement for the private school placement (Lauren P. v. Wissahickon School District, 48 IDELR 99 (United States District Court, Eastern District, Pennsylvania (2007))).
- C. The behavioral supports called for in the student's IEP were not provided for two weeks due to a change of service providers. The Court held that this brief gap of services did not result in a denial of FAPE since it was not a material failure. A material failure occurs when the services provided fall significantly short of those required by the IEP (Sarah Z. v. Menlo Park City School District, 48 IDELR 37 (United States District Court, Northern District, California (2007))).
- D. The parents of a child with autism challenged the district's IEP since the child's behavior component did not address generalizing his positive behavior over all settings including the home. The Court rejected this argument and held that the parents cited no authority holding that a school district must address a student's inability to generalize across settings in order to provide an educational benefit under the IDEA. A District is required to address behavioral problems extraneous to the academic setting only to the extent they affect the educational progress of the student. In conclusion, the Court stated "the District is not required to ensure that a student takes behavioral skills learned at school into the home". San Rafael Elementary School District v. California Special Education Hearing Office, 482 F. Supp. 2d 1152, 47 IDELR 259 (United States District Court, Northern District, California (2007)).
- E. A student with autism, who exhibited severe behavioral problems at home and in the community, did not require a residential placement for educational purposes. The Court found that the student was making some progress on his IEP goals and his in school behavior was not as severe as in other settings. In such a case, the Court held that generalization of skills across settings is not required by the IDEA so long as the student is making educational progress at

school. Thompson R2-J School District v. Luke P. 50 IDELR 212 (United States Court of Appeals, 10th Circuit (2008))

- F. The parents and student were not deprived of their due process rights by having an in school suspension imposed without first receiving notice or ability to contest the suspension. The in school suspension did not deprive her of educational benefit in the same manner that an out of school suspension would since she was required to complete school work during the in school suspension. Laney v. Farley 501 F.3d 577, 107 LRP 50017 (United States Court of Appeals, 6th Circuit (2007)).

VII. Due Process Issues

A. Stay Put

1. The Court held that the State Department of Education was correct when it determined that an annual IEP meeting was required even though there was a pending due process hearing. Matthew L. v. Hawaii Department of Education, (United States District Court, Hawaii (November 2007)).
2. A school district must convene an IEP Team meeting at least annually to develop a new IEP even if there is a due process hearing pending. If the new IEP developed is different than the IEP which was in place when the due process hearing request was made, the school must ensure that the IEP in place when the request was made is implemented unless the parents and school agree otherwise. Letter to Watson, 48 IDELR 284 (United States Department of Education, Office of Special Education Programs (2007)).
3. The parents initiated a due process hearing challenging the initial IEPs proposed for their triplets who were transitioning from a Part C Early Intervention program where they were receiving services under Individual Family Service Plans (IFSP). The Court held that the “stay put” placement was not continued services under their IFSPs. The “stay put” placement is the public school only if agreed to by the parents and the school district. D.P. v. The School Board of Broward County, 483 F.3d 725, 47 IDELR 181 (United States Court of Appeals, 11th Circuit (2007)). Review denied by the United States Supreme Court.

B. Burden of Proof

1. The Court held that the burden of proof in a due process hearing is on the party challenging the IEP. Note: The Court commented that this decision does not address those states that have a state law which places the burden of proof on the school district in a due process hearing (Weast v. Schaffer, 126 S.Ct. 528, 44 IDELR 150 (United States Supreme Court (2005))).
2. Although the State Supreme Court had previously ruled that a school district has the burden of proof in an IDEA due process hearing, the Court held that the Weast decision is now applicable. Therefore, the burden of proof is on the parents in this case since the appeal in this matter was pending when Weast was issued. The Court also concluded that the Weast holding applies not only to issues of FAPE, but to any challenge to the IEP including LRE issues (L.E. v. Ramsey Board of Education, 44 IDELR 269 (United States Court of Appeals, 3rd Circuit (2006))).
3. Even though there was a state law placing the burden of persuasion on the school district in a due process hearing, the Court held in light of the Weast decision, it was error to place the burden of persuasion on the school district. The burden of persuasion is on the party seeking relief. School Board of of Independent School District No.11 v. Renollett, 440 F.3d 1007, 45 IDELR 117 (United States Court of Appeals, 8th Circuit (2006) and M.M. v. Special School District No.1, 512 F.3d 455, 49 IDELR 61 (United States Court of Appeals, 8th Circuit (2008)). On appeal to the United States Supreme Court.

B. Statute of Limitations

1. The Court held that the school was not required under the IDEA to affirmatively explain to parents the revisions in the procedural safeguard statement pertaining to the statute of limitations requirement. By providing the parents with a written copy of the revised procedural safeguards, the parents received notice as required by the IDEA. Therefore, the Court

affirmed the dismissal of the due process hearing request as being untimely (Natalie M. v. Department of Education, State of Hawaii, 47 IDELR 301 (United States District Court, Hawaii (2007))).

2. The Court remanded the case to the hearing officer to determine whether the 90 day statute of limitations applies and whether the parents received an adequate procedural safeguard notice. The parents alleged that, after receiving the revised procedural rights notice, the school administrator told them that the “laws remain basically the same”. R.M. v. Hawaii Department of Education, 47 IDELR 99 (United States District Court, Hawaii (2007)).
3. The Court held that an exception to the two year statute of limitation period applied since the parent never received written notice of the school’s refusal to evaluate in response to several requests from the parents to evaluate their child. Therefore, the school withheld information from the parent that was required to be provided. In addition, there was a continuing practice of refusing to evaluate within the last two years. D.G. v. Somerset Hills School District 559 F.Supp. 2d 484, 50 IDELR 70 (United States District Court, New Jersey (2008)).

C. Hearing Officer Authority

1. The Court affirmed the Hearing Officer’s conclusion that two of the three IEPs in dispute did not provide the student a FAPE. The Court then affirmed the award of compensatory education which was additional services for the student’s teachers addressing the implementation of the IEP’s self-help goals. In so doing, the Court noted that the award of compensatory education is a form of equitable relief and the IDEA does not require services be awarded directly to the student (Park v. Anaheim Union School District, 444 F.3d 1149, 45 IDELR 178 (United States Court of Appeals, 9th Circuit (2006))).
2. The Court held that a hearing officer may not delegate his/her authority to award specific compensatory education services

to the IEP Team. That is a hearing officer function (Board of Education of Fayette County v. L.M. 478 F.3d 307, 47 IDELR 122 (United States Court of Appeals, 6th Circuit (2007))).

3. The hearing officer's award of compensatory education based on a formula to calculate the amount of the award was overturned by the Court. The Court noted that a compensatory award constructed with the aid of a formula is not per se invalid but it must represent an individually tailored approach to meet the student's unique prospective needs based on a "qualitative fact-intensive inquiry". Friendship Edison Public Charter School Collegiate Campus v. Nesbitt, 532 F. Supp. 2d 121, 49 IDELR 159 (United States District Court, District of Columbia (2008)).

D. Attorney's Fees

1. Parents who prevail in a due process hearing are not entitled to recover the costs of experts or consultants under the IDEA's attorney fees provision. The majority opinion rejected the argument that the legislative history of the IDEA supported such award basing its analysis on what it termed the "unambiguous text of the IDEA" (Arlington Central School District Board of Education v. Murphy, 126 S.Ct. 2455, 45 IDELR 267 (United States Supreme Court (2006))).
2. The Court ordered that the State Department of Education be reimbursed attorney's fees as a result of a lawsuit claiming the State had a practice or custom of denying the due process rights of children with disabilities. The Court found that there was clear existing precedent holding that the State is an improper party in such an instance. Due to the attorney's obvious knowledge of the cases setting precedent and the absence of any authority to justify the claim against the state, the Court found the award of attorney's fees appropriate (R.W. v. Georgia Department of Education, 48 IDELR 279, ___ F.Supp.2d ___ (United States District Court, Northern District, Georgia (2007))).
3. The Court denied the district's request that the district be reimbursed attorney's fees by the parent and their attorney

when it prevailed in the IDEA due process hearing involving a unilateral placement. The parent's failure to give the district notice of their intent to place their child in a private school and seek reimbursement did not result in a finding that the due process request was frivolous, unreasonable, without foundation or presented for an improper purpose (Taylor P. v. Missouri Department of Elementary and Secondary Education et.al. 48 IDELR 242 (United States District Court, Western District, Missouri (2007))).

4. The parents filed a due process hearing request which was settled by the district and parents prior to a hearing. The Court held that the settlement agreement did not make the parents a prevailing party for attorney fee purposes since it was a privately reached agreement between the parties, not judicially sanctioned. Traverse Bay Area Intermediate School District v. Michigan Department of Education 49 IDELR 156 (United States District Court, Western District, Michigan (2008)).

E. Miscellaneous Hearing Issues

1. The United States Supreme Court held that parents of students with disabilities are granted independent enforceable rights under the IDEA. These rights are not limited to certain procedural and reimbursement related matters but also encompass the entitlement to a FAPE for the parent's child and the substantive decisions to be made.

Since parents enjoy rights under the IDEA, they are entitled to prosecute IDEA cases on their own behalf. In light of the Court's holding, the Court found it need not address whether the IDEA entitled parents to litigate their child's claims pro se (Winkelman v. Parma City School District, 127 S.Ct. 1994, 47 IDELR 281 (United States Supreme Court (2007))).

2. The Court overturned the administrative complaint decision of the State Education Agency that held that a school attorney's involvement in finalizing the draft of the resolution agreement, while in the school building where the resolution session took place was not a violation of the IDEA. Although the IDEA prohibits the school attorney from being included in the resolution session when the parent's attorney is not

present, the attorney in this matter was not physically or functionally present (Mr. and Mrs. S. v. Rochester Community Schools, 46 IDELR 187 (United States District Court, Western District, Michigan (2006))).

3. The parent's request for a due process hearing was dismissed since the parent did not have standing to initiate such a request on behalf of her 18 year old student. The Court held that the parent's IDEA rights transferred to the adult student absent a showing of being deemed incompetent (Neville v. Dennis, 48 IDELR 241 (United States District Court, Kansas (2007))).
4. The IDEA does not contain a provision keeping the discussions in the resolution session confidential. Therefore, the Court held that the hearing officer erred as a matter of law when he refused to allow testimonial and documentary evidence from a resolution meeting into evidence during the due process hearing. In so holding, the Court held that the Federal Rules of Evidence are inapplicable to resolution meeting notes as a resolution meeting is not a settlement negotiation. Friendship Edison Public Charter School v. Smith 561 F. Supp. 2d 74, 50 IDELR 192 (United States District Court, District of Columbia (2008)).

VIII. Miscellaneous Issues

- A. The Court held that "for profit" charter schools were not public schools eligible to receive federal funds under either the IDEA or the Elementary and Secondary Education Act. Under both federal statutes, an elementary and secondary school is defined as a "nonprofit" institutional day or residential school, including a public charter school. The Court held that the statutes are plain and unambiguous and therefore are controlling (Arizona State Board for Charter Schools v. United States Department of Education, 464 F.3d 1003, 46 IDELR 153 (United States Court of Appeals, 9th Circuit (2006))).
- B. A student with a disability alleged he was harassed and bullied by his peers and sued the school for based on discrimination under Section 504. The Court held the following elements must be shown before a school can be held liable for peer harassment based on

disability: (1) the student is a student with a disability; (2) the he/she was harassed based on their disability; (3) that the harassment was sufficiently severe or pervasive that it altered his/her education or created an abusive/hostile environment; (4) that the school knew of the harassment; and (5) that the school was deliberately indifferent to the harassment.

In this case, the school investigated the matter, disciplined the students involved, monitored the student with a disability and separated him from his harassers, held mediation sessions, contacted the parents and provided training to the student body. The affirmative steps taken by the school was clear evidence that it was not deliberately indifferent. S.S. v. Eastern Kentucky University 532 F. 3d. 445, 50 IDELR 91 (United States Court of Appeals, 6th Circuit (2008)).

- C. The availability of relief under the IDEA does not limit the availability of a damage claim under Section 504. Although both the IDEA and Section 504 have overlapping FAPE requirements, there are some distinctions between the two. The most important difference is that unlike FAPE under the IDEA, FAPE under Section 504 requires a comparison between the manner in which the needs of disabled and non-disabled children are met. The Court found that there is an implied right of action under Section 504 for claiming damages for a FAPE violation. A public entity can be held liable for damages under Section 504 if it intentionally or with deliberate indifference fails to provide meaningful access or reasonable accommodations to a disabled person. Mark H. v. Lemahieu, 513 F 3d 922, 49 IDELR 91 (United States Court of Appeals, 9th Circuit (2008)).
- D. The Court dismissed an action filed by two school districts and parents claiming that the No Child Left Behind Act conflicts with the IDEA. In doing so, the Court noted should there be a conflict, the earlier enacted statute (IDEA) must give way to the requirements of NCLBA. Board of Education of Ottawa Township High School District 140 v. Spellings, 517 F.3d 922, 49 IDELR 152 (United States Court of Appeals, 7th Circuit (2008)).
- E. The NEA and school districts from three states sued the United States Department of Education alleging that NCLB does not require school districts to comply with its requirements if doing so would require the expenditure of state and local funds to cover the costs of compliance. The Court, in reversing the dismissal of the lawsuit,

held that NCLB could reasonably be read to mean that a state need not comply with its requirements if they are “not paid for under the Act” with federal funds. School District of the City of Pontiac v. Spellings, 512 F.3d 252 (United States Court of Appeals, 6th Circuit (2008)). Rehearing en banc pending.

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