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SPECIAL EDUCATION SEMINAR

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"Lessons Learned in 2023 – Case Law and Legal Overview"

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I. Introduction

II. Damages

Perez v. Sturgis Public Schools, 143 S.Ct. 859 (2023).

A student with a hearing impairment had brought claims under the Individuals with Disabilities Education Act ("IDEA") against a school district, claiming that the school district failed to provide the student with free and appropriate public education ("FAPE"). However, after settling the IDEA claims, the student filed a separate claim under the Americans with Disabilities Act ("ADA") seeking money damages which are not permitted by IDEA.

The lower court held that the student could not proceed on their ADA claim because the settlement of the student's IDEA claim meant that the student had not completed IDEA's administrative process. On appeal, the Supreme Court held that IDEA's requirement to exhaust administrative remedies does not apply when a plaintiff files a claim under the ADA for compensatory damages, a remedy that is not available through the IDEA's administrative procedure.

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III. Child Find

A. Child find under the Individuals with Disabilities Education Act ("IDEA") and Section 504 of the Rehabilitation Act of 1973 ("Section 504").

1. The IDEA requires districts to ensure that all children with disabilities residing within their district and who are in need of special education and related services are identified, located, and evaluated. 34 C.F.R. 300.111(a); O.A.C. 3301-51-03(A).

2. Similarly, Section 504 requires districts to "identify and locate every qualified handicapped person" residing in their jurisdiction who are not receiving a public education and to evaluate students who, because of a handicap, need or are believed to need special education services. 34 C.F.R. 104.32(a); 34 C.F.R. 104.35(a).

3. The child find policies and procedures that each school district adopts and implements under Ohio's Operating Standards shall ensure that:

a. All children with disabilities residing in the state, including children with disabilities who are homeless children or are wards of the state, and children with disabilities attending nonpublic schools, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located, and evaluated; and

b. A practical method is developed and implemented to determine which children are currently receiving needed special education and related services. O.A.C. 3301-51-03(B)(1).

4. Child find also must include:

a. Children who are suspected of being a child with a disability under the definition set forth in O.A.C. 3301-51-01(B)(10) and in need of special education, even though they are advancing from grade to grade; and

b. Highly mobile children, including migrant children. O.A.C. 3301-51-03(B)(3).

5. "To establish a violation of the child-find requirement, a plaintiff 'must show that school officials **overlooked clear signs** of disability **and were negligent** in failing to order testing, **or that there was no rational justification** for not deciding to evaluate.'" Dougall v. Copley-Fairlawn City Sch. Dist. Bd. of Educ., No. 5:17CV1664, 2020 WL 435385, at *19

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(N.D. Ohio Jan. 28, 2020) (*quoting* Bd. of Educ. of Fayette Cty. v. L.M., 478 F.3d 307, 313 (6th Cir. 2007) (emphasis added).

6. The question will be: what did the district know, and when did the district know it?

   a. "Clear signs" of a disability.

   b. Excessive absences.

   c. Behavioral issues.

   d. Hospitalizations/other health officials.

B. Case law.

1. Dayton Pub. Schs., 123 LRP 11341 (ODE 2023).

The Ohio Department of Education ("ODE") held that an Ohio district used interventions unnecessarily to delay evaluating a sixth-grade English learner with a Specific Learning Disability ("SLD") when it had reason to suspect a disability. The child received tiered interventions and earned passing grades. In April, the parent requested an evaluation in writing. At that time, the student's assessment scores were in the lowest percentiles. The English Language ("EL") teacher reported the child's reading difficulties were related to English being his second language and not a disability. The intervention team considered an evaluation but agreed there was not enough data to suspect a disability at the time, and the district declined to evaluate. The student eventually was found eligible for special education.

The parent filed a state complaint alleging that the district violated its child find obligation. ODE explained that the IDEA requires districts to ensure that all children with disabilities who need special education services are identified, located, and evaluated. It found that the district violated Ohio law by using interventions to delay unnecessarily a child's eligibility evaluation. Although the child earned passing grades until November, the district had assessment data to show that he consistently scored in the lowest percentiles and failed to make progress despite interventions. ODE determined that based on the information available to the district, the child should have been evaluated prior to the April request.

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2. River Valley Local Schools, 123 LRP 36956 (ODE 2023).

An Ohio district acknowledged that it failed to evaluate a student for special education services and violated its child find duty. The parent alleged that the district failed to meet its child find obligation when it declined to evaluate the student despite a private psychologist's recommendation and ineffective 504 plan accommodations. In addition, the parent asserted that the student's grades dropped in math, reading, and writing, and the student scored below average on Ohio state standardized tests.

1. A private psychologist recommended a "school-based evaluation to determine if [the student] meets criteria for special education services";

2. The student's 504 plan accommodations have been "insufficient" to support the student;

3. For the current school year, the student's grades dropped in math, reading, and writing; and

4. The student scored below average on Ohio State Tests.

Despite these factors, the district declined to conduct a school-based evaluation to determine if the student qualified for special education services.

3. In re: Student with a Disability, 123 LRP 25007 (Ohio 2023).

The ODE determined a district violated its child find duty under the IDEA when it failed to evaluate a student with a potential disability who presented behavioral issues in the classroom. The parent alleged the student has experienced behavioral issues since September 2022, when he was seated away from his peers. Despite interventions put in place by the district, the student continued to struggle behaviorally. The parent further alleged that the student was significantly behind academically despite being involved with a Title I instructor and private tutoring.

While the district's documentation demonstrated the student's teacher attempted to put a behavior chart in place, the student's behavior did not improve enough to move the student to the rest of the class. Additionally, the district did not submit any behavior charts or plans that were utilized after December 2022 to show the student's behaviors improved. For these reasons, the district violated its child find obligation.

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4. <u>Dayton Public Schools</u>, 123 LRP 11341 (Ohio 2023).

In April 2023, the parent requested an evaluation in writing. The intervention team considered an evaluation but agreed there was not sufficient data to suspect a disability at the time and declined to evaluate. The EL teacher reported the child's reading difficulties were related to English being his second language and not a disability. Later, the district suspected a disability, noting the child's academic performance was below grade level. He was found eligible as a student with SLD. State Education Department ("ED") found that the district violated Ohio law that prohibits districts from using interventions to delay unnecessarily a child's eligibility evaluation. Although the child earned passing grades until November, the district had assessment data to show that he consistently scored in the lowest percentiles and failed to make progress despite academic interventions. The first recorded request for an evaluation occurred the following April. Based on the information available to the district, the child should have been evaluated prior to the April request.

Here, the documentation showed the student received Tier I and II supports in reading, math, and English Language Learners ("ELL"). Although the student earned passing grades until November of 2022, the district had assessment data to show the student consistently scored in the lower percentiles despite academic and ELL interventions.

5. <u>JM v. Charlotte-Mecklenburg Schools Board of Education</u>, 123 LRP 12111, 83 IDELR 1 (U.S. Ct.App. 4th Cir. 2023).

A district satisfies its child find obligation when it conducts a comprehensive evaluation and considers the student's need for IDEA services.

A psychologist diagnosed J.M. with autism spectrum disorder. Based in part on that diagnosis, J.M.'s mother asked the school district to evaluate J.M. for an IEP. The school district convened a team to evaluate J.M.'s eligibility in the autism category and requested evaluations in several areas, including adaptive behavior, vision and hearing, educational, speech-language, occupational therapy, and autism rating scales. The team determined J.M. was not eligible for special education under the IDEA because he did not demonstrate at least three of the four impairments required to qualify as a student with autism needing special services as laid out in state policies.

When a school district has convened an IEP team and comprehensively evaluated a student's eligibility for services, and where the state maintains and follows detailed policies to evaluate children needing such services,

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the child find obligation has been satisfied. The court rejected Miller's claim that the IEP team acted wrongfully in failing to follow the recommendations of private evaluators in determining J.M.'s eligibility for an IEP. The IDEA does not require school districts to defer to the opinions of private evaluations procured by a parent. To the contrary, the IDEA instructs school districts to rely on diverse tools and information sources in making an eligibility assessment. 20 U.S.C. § 1414(b)(2)(A).

6. Ja.B., Student v. Wilson County Board of Education, 123 LRP 8526, 82 IDELR 191 (U.S. Ct.App. 6th Cir. 2023).

   The noncompliant, disrespectful, and disruptive behaviors that an eighth grader experienced at school after moving from Illinois to Tennessee did not require his new district to evaluate him for IDEA services.

   When the section 504 process began, WCS teachers did not suspect that Ja.B.'s behaviors were a result of a disability that required special education services. If "the LEA does not suspect that the child has a disability," it is permitted to deny a request for an evaluation.

   Ja.B. had no history of receiving special education services, attended WCS for a very brief time, and had recently moved across state lines. His parents acknowledged the move likely contributed to his behavior. Expert witnesses testified that based on their review of the records, they did not believe a special education referral was necessary yet. WCS moved forward with the Section 504 process following Ja.B.'s discharge from Vanderbilt and did not foreclose the possibility of a special education referral should the Section 504 plan prove unsuccessful. The court concluded only that on these facts, especially given Ja.B.'s general education background and recent move, the school district did not violate its statutory child-find responsibility.

7. Brooklyn S.-M., through her parent, Gabrielle M. v. Upper Darby School District, 123 LRP 8165, 82 IDELR 197 (PA Dist. 2023).

   A parent failed to establish that a Pennsylvania district violated its child find obligations by finding her daughter with SLD ineligible under the IDEA. While a private school psychologist hired by the parents concluded the child had SLD, the court observed, that individual merely reviewed records and briefly met with the child. The district's school psychologist reached the opposite conclusion. In addition, the child's experienced teachers, who knew the student well and observed her in class on a daily basis, stated there was no reason to believe she needed special education. Her teachers reported that the student's behavior was age typical. Finally, the court pointed to the student's academic progress as further evidence that the student had no need for special education services.

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IV. Individualized Education Programs ("IEP")

A. An IEP should be able to pass the "stranger test." A stranger should be able to read an IEP, understand the IEP, and be able to implement the IEP. Mason City Community School District, 46 IDELR 148 (Iowa SEA 2006).

B. Implement all components of the IEP.

1. Each school district shall adopt and implement written policies and procedures approved by the Department of Education and Workforce ("DEW") that ensure an IEP is developed and implemented for each child with a disability. O.A.C. 3301-51-07(A).

2. Each school district must ensure that the child's IEP is accessible to each regular education teacher, special education teacher, related services provider, and any other service provider who is responsible for its implementation, and each teacher and provider above is informed of:

a. The teacher's and provider's specific responsibilities related to implementing the child's IEP; and

b. The specific accommodations, modifications, and supports that must be provided for the child in accordance with the IEP. O.A.C. 330-51-07(K)(4).

3. The IEP is a commitment of resources on the part of the school district. The special education and related services identified in the student's IEP must be provided.

4. The failure to implement the IEP as written, including any behavior intervention plan ("BIP"), or to provide all of the services and accommodations set forth in the IEP, may deny the student FAPE.

5. The child's school district of residence is responsible for ensuring the requirements of O.A.C. 3301-51-07 are met regardless of which school district, county board of DD, or other educational agency implements the child's IEP. This includes responsibility for initiating and conducting meetings for the purpose of developing, reviewing, and revising the IEP of a child with a disability. O.A.C. 3301-51-07(B).

6. Review and revise IEPs as appropriate.

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C. An IEP is developed by a team comprised of the following persons (O.A.C. 3301-51-07(I)):

1. The parents of a child with a disability.

2. Not less than one regular education teacher of the child (if the child is, or may be, participating in the regular education environment).

3. Not less than one special education teacher, or where appropriate, not less than one special education provider for the child.

4. A representative of the district who:

   a. Is qualified to provide, or supervise the provision of specifically designed instruction to meet the unique needs of children with disabilities;

   b. Is knowledgeable about the general education curriculum; and

   c. Is knowledgeable about the availability of resources of the school district.

5. An individual who can interpret the instructional implications of evaluation results who may be a member of the team as described above.

6. At the discretion of the parent or school district, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate.

7. Whenever appropriate, the child with a disability.

8. If the child has been or will be placed by the public school district in a nonpublic school or facility, the district must ensure that a representative of the nonpublic school or facility attends the meeting. If the representative cannot attend, the district must use other methods to ensure participation by the nonpublic school or facility, including individual or conference telephone calls. O.A.C. 3301-51-07(M)(1)(b).

D. Case law.

1. Amanda-Clearcreek Local Schools, 123 LRP 36902 (ODE 2023). (IEP progress reports.)

   An Ohio district that adopted a nine-week progress reporting schedule for all students with IEPs will have to update its policies. The Ohio ED found that the across-the-board policy, which failed to account for the needs of

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individual students, violated the IDEA and the state's education code. The complaint stemmed from the district's failure to provide progress reports to one student's parents every 4.5 weeks as required by the student's IEP. Although the district informed the parents about the new policy, the state ED observed, it did not convene an IEP meeting or modify the student's program. Nor did the district send prior written notice ("PWN") indicating that it would only send progress reports every nine weeks. The state ED pointed out that both the IDEA and Ohio law require IEP teams to decide on a progress reporting schedule that meets the student's unique needs. As such, the state ED determined that the district's policy violated the IDEA and Ohio law. The state ED ordered the district to convene an IEP team meeting to determine an appropriate reporting schedule for the student. It also ordered the district to rescind the nine-week reporting policy, write and circulate a memorandum notifying all relevant staff about that rescission, and have staff members sign an acknowledgment that they read the memo.

2. Akron Public Schools, 123 LRP 3397 (Ohio 2022). (IEP to be available to all staff members responsible for implementation.)

   An Ohio district violated the IDEA when it failed to ensure that the IEP of an eleventh grader with an Other Health Impairment ("OHI") was accessible to all staff members responsible for implementing it. The parent alleged that the district failed to distribute the document to relevant staff, resulting in the student escalating in the cafeteria and being suspended. A district must ensure a student's IEP is available to all staff responsible for implementing any portion of the document. Additionally, those staff members must be informed of their specific responsibilities for implementing the IEP. Here, the principal acknowledged not knowing the student had an IEP. The administrator, the state ED noted, reportedly told the parent, "ma'am we have 900 students, this is the 2nd day of school, we haven't thoroughly read every IEP." The state ED pointed out that the special education director ordered the coordinator to go to the student's school and ensure staff implement the IEP, including its requirement to redirect the student. The state ED ordered no further corrective action.

3. Southwest Licking Local, 123 LRP 16795 (ODE 2023). (Parent participation in IEP.)

   An Ohio district failed to include the divorced father of a preschooler with OHI in the IEP process and thus had to reconvene the IEP team. A 2022 divorce decree provided that the mother was the child's legal guardian, but both parents were entitled to access school records and attend student activities. The father alleged that the district denied him meaningful participation in the IEP process. He asserted he did not receive notice of any IEP meetings and was not invited to participate. Despite requests to

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be included, he alleged that he never heard from staff until the following January. The district asserted it assumed the mother was the main contact, being that she had been the one to communicate throughout the evaluation and IEP process. It defended that its failure to include the father was "not intentional." The state ED noted that the father first contacted the district in September, and he made 20 requests for a copy of the child's IEP. The district had court documentation demonstrating that the father's educational rights were not terminated, it observed. Therefore, he had equal access to the child's educational information and the right to attend IEP team meetings, the state ED explained.

4. Scott D. Pitta v. Dina Medeiros as Administrator of Special Education for the Bridgewater Raynham Regional School District, 2024 WL 47664 (Jan. 4, 2024).

Scott D. Pitta appeals from the decision of the Massachusetts U.S. District Court granting the motion to dismiss his First Amendment claim against Bridgewater-Raynham Regional School District ("the District") and Dina Medeiros, the District's Administrator for Special Education.

After the district denied his request to video record a private meeting with school district employees to discuss the IEP of his child, Pitta brought suit under 42 U.S.C. § 1983, alleging that he had a constitutional First Amendment right, which the appellees had denied, to video record what was said by each individual at his child's IEP meeting. Pitta does not allege that he had a right to record an IEP team meeting under any federal or state statute or regulation.

The complaint alleges that "[d]espite lengthy discussions" regarding the IEP and changes to it, the statements "were not included in the [appellees'] official meeting minutes that were emailed to [him] on March 10, 2022." When Pitta alerted appellees to these "omissions and inaccuracies," he "objected to the [appellees'] minutes as an official record of the meetings and requested that the minutes be amended to include the omitted portions," but appellees "refused to amend the meeting minutes."

Months later, on September 20, 2022, Pitta attended another IEP team meeting, conducted virtually through "Google Meet," to discuss his child's IEP. Pitta requested that the appellees video record the meeting using the Google Meet record function. He did so, he alleges, because of appellees' previous "failure to produce accurate minutes of prior meetings and refusal to correct those errors despite obligations to maintain accurate records under 603 CMR 23.03." When Pitta refused to stop the video recording, Medeiros terminated this meeting. Pitta filed this suit on

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September 28, 2022, within days of the failed meeting, seeking declaratory and injunctive relief.

The district court held that the complaint failed to state a claim under the First Amendment because First Amendment protections for "filming government officials engaged in their duties in a public place," as recognized by the First Circuit in Glik v. Cunniffe, 655 F3d 78 (1st Cir. 2011), did not extend to video recording an IEP team meeting. A student's IEP team meeting, whether virtual or in person, is ordinarily not conducted in a "public space." We hold, as did the district court, that Pitta possesses no First Amendment right to video record IEP team meetings and do so for a variety of reasons.

To start, an IEP team meeting does not ordinarily occur in a space open to the public. In addition, the IEP Team Meetings not only take place in non-public spaces and are closed to the public, but by their nature involve discussions of personal, highly sensitive information about a student. Next, the IEP team members were not performing their duties in public, but rather at a virtual meeting with no public access. There is yet another reason Pitta's claim fails. Our cases have repeatedly framed the right to record public information as linked to the right of the public to receive this information. Finally, we add that even if Pitta had a First Amendment right to video record his child's IEP team meeting, which he does not, his claim would fail. "Even protected speech is not equally permissible in all places and at all times."

5. A+ Arts Acad., 123 LRP 14123 (ODE 2023). (Timely evaluation for IEP.)

An Ohio district responded three days late to a parent's request to evaluate her child and was required to take corrective action. In this case, a parent texted the second grader's general education teacher, informing the teacher that the student had received an autism diagnosis. The parent requested a meeting and requested an evaluation for an IEP. The parent asked for an update on her request three weeks later in a parent-teacher conference. After 30 days with no response, the parent filed a complaint with the ODE. The district then sent a PWN acknowledging receipt of the parent's request for evaluation. In a subsequent PWN, the district indicated that both the private evaluation report and the parent stated there were no academic concerns. Therefore, the district did not evaluate the student.

While the district eventually moved forward to evaluate the child, by that time, the parent withdrew the child from the district prior to the eligibility team meeting. The IDEA requires that districts identify, locate, and evaluate all children with disabilities who need special education services.

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Thus, when a parent requests an evaluation, the district must evaluate within 30 days or provide a PWN explaining why it does not suspect a disability and will not evaluate. Here, the district took 33 days to acknowledge the parent's request for an evaluation. Further, the school's principal indicated that the district experienced communication issues and lacked "clarity" around evaluation procedures. While the district self-corrected its error via a team meeting, the ODE found that the district had violated its duties under state law.

The ODE also found that the district failed to provide appropriate PWN. Of the three PWNs the school subsequently issued, one failed to include a description of the refusal of an IEP. The other stated the private evaluation was insufficient, but failed to state whether the district suspected a disability or planned to evaluate.

6. E.W.-G., et al. v. District of Columbia, 123 LRP 10733, 83 IDELR 25 (DC Dist. 2023).

   A seventh grader's parents may have objected to their daughter's proposed placement in a public middle school, but they could not show that the District of Columbia denied their daughter FAPE. The District Court upheld an administrative decision that denied reimbursement for the student's unilateral placement in a nonpublic day school. U.S. District Judge Colleen Kollar-Kotelly observed that the district had no obligation to maximize the student's potential or to provide the parents' preferred program. So long as the proposed IEP was reasonably calculated to provide an appropriate educational benefit, the judge explained, the district had satisfied its obligation to provide FAPE. Judge Kollar-Kotelly pointed out that the parent agreed with the proposed IEP, which called for the student to spend all but 12 hours each week in the general education setting. The judge further noted that the amount and type of services offered was more than adequate to address the student's SLDs in reading, writing, and math. Moreover, the judge observed, the IEP included behavioral supports to address the student's social and emotional issues. The judge acknowledged that the parents preferred the nonpublic school, which had a smaller campus, served fewer students, and offered smaller class sizes. However, the judge agreed with the Impartial Hearing Officer ("IHO") that the proposed IEP was reasonably calculated to provide FAPE. The court thus upheld the IHO's decision in the district's favor.

7. R.S. and R.S., Individually and on Behalf of J.S., a minor v. Lower Merion School District, 123 LRP 7328, 82 IDELR 202 (PA Dist. 2023). (IEP needs monitored.)

   Because medication and consistent psychiatric treatment stabilized the mental health of a high schooler with bipolar disorder, a District Court

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ruled that the student's current out-of-district therapeutic placement was most likely too restrictive. It issued a preliminary injunction requiring a Pennsylvania district to return the student to his neighborhood school while the parents' IDEA claim was pending. To obtain a preliminary injunction during an ongoing educational dispute, the parents had to show, among other criteria, that they were substantially likely to succeed on the merits of their FAPE claim. The court concluded that the parents satisfied this requirement, noting that they were likely to succeed in establishing that the student's local high school was an appropriate placement. Because the student required intensive emotional, behavioral, and social supports while his private psychiatrist adjusted his medication, the court concluded that it was appropriate for the district to recommend an out-of-district therapeutic placement at the time. However, once the psychiatrist determined the correct dosage of medication and the student's moods stabilized, the student's needs changed and the district should have conducted a reevaluation, the court opined. Now that his bipolar disorder was under control, the court noted, the student achieved good grades, maintained a high GPA, and obtained a high score on the PSAT. Moreover, the court determined that the student's continued therapeutic placement – which would prevent him from participating in his school's extracurricular activities and graduating with his peers – would cause him irreparable harm.

8. B.S. v. Waxahachie Independent School District, 123 LRP 10558, 83 IDELR 2 (U.S. Ct.App. 5th Cir. 2023). (District responsive to changing behavior and IEP.)

Because a third grader's teachers managed his behaviors successfully for months using the strategies in his IEP, a Texas district had no reason to develop a BIP at the start of the school year. The 5th Circuit upheld a District Court's ruling at 80 IDELR 248 that the district provided the student FAPE. The three-judge panel explained that an IEP is appropriate if it is based on the student's unique needs, administered in the least restrictive environment, implemented in a collaborative manner, and allows for academic and nonacademic progress. The panel pointed out that the student's special education teacher, who was well aware of the student's noncompliant, disruptive, and sometimes violent behaviors, recommended new behavioral goals for the student. In connection with those goals, the IEP team developed behavior-management strategies that included frequent breaks. The panel acknowledged that the student's behavior deteriorated in February 2017, around the same time he was adjusting to a medication change and dealing with family-related issues. However, the panel observed that the district took steps to address the student's increasingly aggressive and violent behaviors. In addition to seeking consent to conduct a functional behavioral assessment ("FBA") and scheduling an IEP meeting, the district moved the student to a

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classroom that imposed fewer academic demands. The panel further noted that the student received services in the least restrictive environment ("LRE") and made appropriate progress.

9. Yvonne Davis, individually and as grandparent and natural guardian of O.C. v. David C. Banks, 1 in his official capacity as Chancellor of the New York City Department of Education, and the New York City Department of Education, 123 LRP 29915 (NY Dist. 2023). (Guardian attendance at IEP meeting.)

Because a nine-year old student's elderly guardian was willing to attend a scheduled IEP meeting, a New York district violated the IDEA when it developed the student's IEP in her absence. Holding that the district denied the student FAPE by developing the IEP without the guardian's participation, the District Court ordered it to reimburse the guardian for the student's private placement. Judge Chen determined that the district's actions in this case effectively excluded the guardian from the IEP process. The judge acknowledged that the district invited the guardian, her advocate, and representatives from the student's private school to an on-site meeting. However, the judge noted that the guardian boarded the wrong subway train on her way to the meeting and ended up traveling far out of her way. Although the district argued that the guardian made an "active choice" to skip the meeting when she did not accept an offer to participate by phone, the judge disagreed. "Aside from the technological impossibility of doing so, it clearly would have been inappropriate to require [the guardian] to participate remotely in the meeting while traveling underground in a subway car," the judge wrote. The guardian would not have access to any documents discussed by other team members if she participated by phone. The judge held that the district's refusal to reschedule was unreasonable.

10. Fayette County School Corporation, 123 LRP 20953 (IN SEA 2023). (Follow agreements outside of IEP document.)

A district violated the IDEA when school administrators did not implement an IEP provision prohibiting staff from questioning a student with cognitive deficits without the teacher or parent present. A district and a student's family properly amended an IEP outside of an IEP meeting to include a provision governing how school staff could question the student. The problem came, the Indiana ED found, when the district did not promptly update the IEP and ensure school administrators implemented the new provision when they questioned the student about vaping. Here, the state ED observed, the district acknowledged its error. The state ED pointed out that the district agreed with the parent to add the provision to the IEP and did so outside of an IEP team meeting in February. The state ED remarked that the district then notified staff,

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including the principal and vice principal, of the change, via email. However, the state ED observed, the special education director inadvertently failed to formally add the provision to the IEP until April. Prior to updating the IEP, the principal and assistant principal questioned the student about whether the student had a vape pen, the state ED noted.

V. Manifestation Determination Reviews ("MDR") and Interim Alternative Educational Setting ("IAES")

A. What is an MDR?

1. Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the school district, the parent, and relevant members of the IEP team shall review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine:

a. If the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or

b. If the conduct in question was the direct result of the school district's failure to implement the IEP.

34 C.F.R. 300.530(e)(1).

2. The conduct must be determined to be a manifestation of the child's disability if the school district, the parent, and the relevant members of the child's IEP team determine either of these conditions was met. 34 C.F.R. 300.530(e)(2).

3. If the school district, the parent, and relevant members of the child's IEP team determine the conduct was the direct result of the school district's failure to implement the IEP, then the school district must take immediate steps to remedy those deficiencies. 34 C.F.R. 300.530(f).

B. When is an MDR required?

1. Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the school district, the parent, and relevant members of the IEP team shall conduct an MDR.

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a. The local educational agency, parent, and relevant members of the child's IEP team must conduct a manifestation determination. 20 U.S.C. 1415(k)(1)(E); 34 C.F.R. 300.530(e).

b. On the date on which a decision is made to make the removal that constitutes a change of placement, the local educational agency must notify the parents of the decision and provide the procedural safeguards notice. 34 C.F.R. 300.530(h).

2. What constitutes a change of placement?

a. The removal is for more than 10 consecutive school days; or

b. The child has been subjected to a series of removals that constitute a pattern:

(1) Because the series of removals total more than 10 school days in a school year;

(2) Because the child's behavior resulting in the removal is substantially similar to the behavior in the previous incidents that resulted in the series of removals; and

(3) Because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another.

c. School day is defined as any day, including a partial day, that children are in attendance at school for instructional purposes. 34 C.F.R. 300.11(c)(1).

(1) Days that are counted are days that the child is removed from "the current placement."

(2) Portions of a school day that a child has been suspended would be included in the count.

(3) In-school suspension would not be considered a part of the days of suspension so long as the child is afforded the opportunity to continue to appropriately participate in the general curriculum, continue to receive the services specified on his or her IEP, and continue to participate with nondisabled children to the extent the child would have in his/her current placement. IDEIA Regulations Discussion, Federal Register (Aug. 14, 2006, p. 46715).

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d. Whether a pattern of removals constitutes a change of placement will be determined on a case-by-case basis by the public agency and may be subject to review through due process and judicial proceedings.

C. Unilateral removal to an IAES.

1. In "unique circumstances," a school district can remove a student to an IAES for up to 45 school days regardless of whether the conduct is related to his/her disability. Unique circumstances include:

a. "Carrying or possessing a weapon to or at" school.

(1) A weapon is a device, instrument, material, or substance (animate or inanimate)

(2) That is used for or is readily capable of causing death or serious bodily injury,

(3) Except a weapon does not include a pocketknife with a blade of less than 2 ½ inches in length.

b. "Knowingly possessing or using illegal drugs or selling/soliciting the sale of a controlled substance" at school.

(1) An "illegal drug" is a controlled substance but excludes any controlled substance that is legally possessed or used under the supervision of a licensed health care professional. 34 C.F.R. 300 530; OAC 3301-51-05(K)(20)(i)(b).

(2) An illegal drug does not include alcohol.

(3) What does it mean to be at school? While at school, on school premises, or at a school function under the district's jurisdiction.

(4) Drugs / controlled substances:

"[S]ell[ing] or solicit[ing] the sale of a controlled substance" at school. A "controlled substance" means a drug or other substance identified under schedules I, II, III, IV, or V in Section 202(c) of the Controlled Substances Act (12 USC 812(c)). O.A.C. 3301-51-05(K)(20(i)(a).

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c. "Inflicting serious bodily injury upon another" at school.

Definition of "serious bodily injury."[1] A "bodily injury"[2] that involves one or more of the following:

(1) Substantial risk of death;

(2) Extreme physical pain;

(3) Protracted and obvious disfigurement; or

(4) Protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

2. Under O.A.C. 3301(I)(d)(i), a student in an IAES must continue to receive educational services, as provided in rule 3301-51-02 of the Administrative Code, so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP.

D. Case law.

1. East Academy, 123 LRP 25011 (Ohio 2023). (No MDR following long-term removal.)

An eighth grade student with an SLD may have seriously injured a classmate during a physical altercation, but that did not strip him of his right to an MDR. In March 2023, the student was involved in a physical altercation in which a classmate sustained a concussion. Based on these events, the school removed the student from school and provided him virtual services at home for the remainder of the year. However, the student's removal to an IAES did not absolve the school of its duty to conduct an MDR, the state ED highlighted. Because the school never held an MDR, "[it] was not able to determine the Student's FBA or BIP needed to be reviewed and revised," the state ED wrote. Because the charter school failed to timely hold an MDR after removing the student to an IAES, the Ohio ED concluded that the school denied the student FAPE.

[1] The Ohio definition incorporates the meaning under federal law. O.A.C. 3301-51-05(K)(20)(i)(c). Serious bodily injury: "has the meaning given the term "serious bodily injury" under paragraph (3) of subsection (h) of section 1365 of Title 18, United States Code (December 2, 2002)." O.A.C. 3301-51-05(B)(20)(c).
[2] Bodily injury is defined as a cut, abrasion, bruise, burn or disfigurement; physical pain; illness; impairment of the function of a bodily member, organ, or mental faculty; or any other injury to the body, no matter how temporary.

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2. Redmond School District 2J, 123 LRP 16827 (OR SEA 2023). (Over 10 days.)

A principal's statement that the school does not always count informal student removals as suspensions helped convince the Oregon ED that the district violated the IDEA. The district both formally and informally removed a 10-year old with autism and emotional disturbance on multiple occasions that exceeded 10 school days. The school principal failed to count the student's informal removals for his behavior as disciplinary removals, such as when the school called the parents to pick up the student early. "Informal removals are not a behavioral intervention. They are a discipline incident," the state ED wrote. In addition, the state ED remarked, the student's attendance records did not always reflect the disciplinary nature of the 10-year old's removals, including some of the student's suspensions. As a result, the district failed to convene an MDR team to determine whether the student's conduct was related to a disability or the result of an IEP implementation failure in violation of the IDEA, the state ED found.

3. G.D. and R.D. v. Utica Community Schools, Defendant, Utica Community Schools, Plaintiff, 123 LRP 11355, 83 IDELR 12 (MI Dist. 2023). (Definition of dangerous weapons.)

A kindergartner with an undisclosed disability did not possess "dangerous weapons" that could cause harm to staff. As a result, a Michigan district should not have removed him to an IAES. The five-year old assaulted staff members by throwing supplies, books, pieces of a broken thermometer, and the base of a phone, at them. The MDR team determined that the child's behavior was a manifestation of his disability. It removed him to an IAES due to his alleged use of a weapon. Once there is a determination that a child's behavior was a manifestation of his disability, he must be returned to the placement from which he was removed under the IDEA, the court explained. However, the district may remove him to an IAES for up to 45 school days without regard to the manifestation determination if he possesses a weapon at school. The court noted that the manner of an object's use may be relevant to whether it is a "dangerous weapon" and has the capacity to endanger life or inflict serious physical harm. It held that because the child did not possess dangerous weapons, he should not have been placed in an IAES. The court agreed that "it is difficult to imagine any instance where a kindergarten student could cause death to anyone by throwing any of the objects …. Plastic phone receivers and thermostats, no matter how broken and jagged, are not readily capable of causing a substantial risk of death." It granted the parents' motion for summary judgment.

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4. Sarasota County School Board, 123 LRP 16699 (FL SEA 2023).

A student's attack on another student after school and off campus was not caused by the student's SLD or language impairment or the failure to implement adult transition services. The student's IEP provided for adult assistance with transition. On one occasion, the student joined a group of students who attacked another student outside the school gate after school. The MDR team found the conduct was not a behavior related to the student's disabilities or caused by a failure to implement the student's IEP. The district placed the student in an IAES. The school's obligation to provide adult transition assistance started when the school day began and ended when the school day was over and the student exited school property. The attack occurred off campus and after school when the school's obligation to provide adult supervision had ended. Thus, the student's misconduct was not caused by the failure to implement the IEP. Additionally, the Administrative Law Judge ("ALJ") agreed that the student's conduct was not a manifestation of disability. Although the student had a history of hitting or shoving other students and teachers, those incidents were impulsive, as described in the student's BIP, he noted. The group attack was a premeditated, coordinated attack unlike any other physical aggression the student exhibited at school, and could not have reasonably been foreseen, the ALJ reasoned. The ALJ upheld the IAES placement.

5. Canon-McMillan School District, 123 LRP 15168 (PA SEA 2023).

Pennsylvania district was not required to conduct an MDR prior to disciplining a teen not eligible as a student with a disability prior to engaging in the conduct resulting in discipline. The parents had informed the district of the teen's anxiety and depression and that counseling and medication had been very beneficial. The district did not conduct an MDR before disciplining the student. The parents filed for due process under both the IDEA and Section 504, asserting that the district violated its child find obligation, failed to suspect the teen had a disability, and therefore was entitled to disciplinary protection as a student "thought to have a disability." A student not yet identified as eligible for special education qualifies for the same protections under the IDEA as a student with a disability if the district had knowledge of a disability before the behavior that led to the discipline, the IHO explained. As a result, the requirement to conduct an MDR before a disciplinary change in placement applies to a student the district has reason to suspect has a disability, even without prior identification, the IHO noted. The IHO observed that teachers reported that the teen did not manifest anxious or other concerning behavior at school, and the parents did not report any further concerns. The IHO found that the district did not have reason to suspect

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the teen had a disability and required special education. Thus, the teen was not entitled to any disciplinary protections.

6. Sarasota County School Board, 123 LRP 16097 (FL SEA 2023).

Finding that a Florida district conducted an appropriate MDR, an ALJ determined it could place a student with SLD and a language impairment in an IAES for pushing a teacher. A teacher reported that the student pushed her out of the way while entering the classroom. As a result, the student was issued a four-day out-of-school suspension for "simple battery." The district conducted an MDR and placed the student in an IAES. The parent disagreed and filed for due process.

The ALJ found that the MDR team considered and documented the student's behavior and disciplinary history, the parent's statements, teacher observations, current educational placement, and behavioral concerns. Moreover, the AP and behavior specialist testified that the student's aggression toward the teacher was an "outlier," unusual, not typical, and not consistent with the student's disabilities. The team agreed that the student's IEP was implemented with fidelity. Thus, the ALJ concluded that the MDR was appropriate.

7. W.G. v. Aristoi Classical Academy, et al., 123 LRP 13352, 83 IDELR 43 (TX Dist. 2023). (Student disciplined for consuming alcohol.)

A provision in Section 504 allowing local education agencies ("LEA") to discipline students with disabilities for drug and alcohol offenses was the only shield a Texas charter school needed to fend off a disability discrimination lawsuit. Finding that the student's parents failed to state a claim for relief under Section 504 or the ADA, the District Court granted the school's motion to dismiss the parents' complaint. The case stemmed from the charter school's expulsion of the student, who admitted to drinking a mixture of whiskey and soda from his water bottle throughout the school day. The judge observed that he could not consider the case even if the parents had exhausted their administrative remedies under the IDEA. Section 504 expressly permits LEAs to discipline a student with a disability who is "currently engaging in the illegal use of drugs or in the use of alcohol" to the same extent it disciplines nondisabled students. Because the parents' complaint alleged that the school suspended the student solely for consuming alcohol on school grounds – an action Section 504 allowed it to take – the court held that the parents failed to plead disability discrimination.

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8. D.N. v. School Board of Bay County, Florida, 123 LRP 16937, 83 IDELR 86 (FL Dist. 2023).

   Although a Florida district was aware of a ninth grader's long history of fighting, defiance, and other disciplinary issues, there was no evidence that it knew the student had an IDEA-eligible disability. The parent of a student requested an evaluation of her child following his involvement in a riot. The student, who was allegedly a member in a gang, received approximately 52 disciplinary referrals between 2013 and 2021. He had a history of fighting, drug use and possession, defiance, physical assaults, theft, class disruption, and other inappropriate behaviors. The mother never requested an evaluation for a suspected disability before the student's involvement in the school riot, the court highlighted. A student who has not yet been found eligible for IDEA services is entitled to an MDR if the district has knowledge of a disability before the behavioral incident occurred. A district has knowledge of a student's disability if: 1) the parent requests an IDEA evaluation or special education services; or 2) school personnel express concerns that the student's behaviors are caused by a disability. Although school officials knew of the student's disciplinary history, there was no evidence that staffers believe the student's behaviors were related to a disability.

VI. Prior Written Notice ("PWN")

A. PR-01 is notice that is given to the parents of a child with a disability a reasonable time before the district:

   1. Proposes to initiate or change the identification, evaluation, or educational placement of the child, or to provisions of FAPE to the child; or

   2. Refuses to initiate or change the identification, evaluation, or educational placement of the child, or the provision of FAPE to the child.

   34 C.F.R. 300.503(a); O.A.C. 3301-51-05(H)(1).

B. The purpose of a PR-01 is to:

   1. Ensure the district obtains informed parental consent;

   2. Provide parents with the opportunity to voice their concerns before the district takes action;

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3. Help the parent decide the basis for any disagreement with a proposed or refused action and whether to seek resolution of a dispute through due process or other procedures.

Letter to Boswell, 49 IDELR 196 (OSEP 2007).

C. A PR-01 is a powerful tool the district can use to defend against (or perhaps even prevent) due process complaints and litigation.

A well-drafted PR-01:

1. Becomes evidence of actions requested, taken, and refused.

2. Limits the scope of a parent's grievances and forces the parent to decide quickly whether to challenge the course of action.

3. Helps to disprove claims of predetermination, cost bias, failure to individualize, and failure to provide FAPE.

D. The PR-01 must include:

1. A description of the action proposed or refused by the educational agency;

2. An explanation of why the educational agency proposes or refuses to take the action;

3. A description of each evaluation procedure, assessment, record, or report the educational agency used as a basis for the proposed or refused action;

4. A statement that the parents of a child with a disability have protection under the procedural safeguards of the law and, if the notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;

5. Sources for parents to contact to obtain assistance in understanding the provisions of the law;

6. A description of other options that the IEP team considered and the reasons why those options were rejected; and

7. A description of other factors that are relevant to the educational agency's proposal or refusal.

34 C.F.R. 300.503(b); O.A.C. 3301-51-05(H)(2).

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E. Case law.

1. Upper Scioto Valley Local School District, 123 LRP 36936 (Ohio 2023). (No PWN / no initial evaluation.)

An Ohio district violated the IDEA by failing to provide a PWN or seek parental consent following a parent's requests for an initial evaluation. The district conducted an initial evaluation on the student on April 12, 2021, and found the student ineligible for special education and related services. The basis for determination stated the student struggled with grade-level work, and norm-referenced assessments placed the student's skills in the average to low-average range. At the time of the initial evaluation, the student exhibited "significant" attention difficulty and impulse control but was not diagnosed with an attention disorder, and the team determined the evaluation was not consistent with an SLD or other health impairment. Subsequently, during the 2022-23 school year, the parent requested the district to conduct another evaluation of the student for a disability under IDEA. The parent states the student has anxiety and Attention Deficit Hyperactivity Disorder ("ADHD"). Even though the parent provided a doctor's diagnosis to support the evaluation, the district did not evaluate the student.

The student's third grade teacher noted in an August 26, 2022 email that the parent said the student was supposed to be tested at the beginning of the school year, and the district noted in the student's 504 plan that the request occurred in the "Fall of 2022." The district submitted a PWN dated December 19, 2022 declining to evaluate the student, but there was no PWN or request for consent regarding the request made prior to the August 26, 2022 email. Additionally, there was no PWN or request to obtain consent submitted within 30 days following the request the parent stated occurred on or around March 17, 2023, or after the private evaluation diagnosis was provided to the district on April 25, 2023. Therefore, the district is in violation of O.A.C. 3301-51-06(b)(3) which requires a PWN within 30 days of receipt of a request for evaluation.

2. Westfall Local Schools, 123 LRP 14125 (Ohio 2023).

Parents of a ninth grader with SLD alleged that the district failed to incorporate accommodations, items, and requests in the teen's IEP that were discussed and agreed to during the meeting. As a result, they asserted the proposed IEP did not meet the teen's needs, and they did not agree to it. The state ED determined that the team documented that it considered the teen's strengths and weaknesses when determining the accommodations he needed to access the curriculum. The team also considered the teen's needs and the parents' input, responding to their email requests after the meeting by requesting a meeting and mediation.

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However, the state ED found the PWN was deficient. Although the PWN contained the required elements, both the parents and a district staff member agreed that it did not accurately reflect the team meeting. Staff stated that accommodation determinations were not made at the meeting. Yet, PWN stated the team agreed the teen did not require his prior accommodations, and it did not document all of the parents' requests and disagreements.

3. Brunswick City Schools, 123 LRP 253 (ODE 2023).

The Ohio Office for Exceptional Children found that a district denied the parent of a kindergartner with SLD the opportunity to meaningfully participate in a virtual evaluation team meeting by failing to provide timely notice of the meeting in violation of the IDEA. It found that the district otherwise appropriately provided the parent an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement and the provision of FAPE to the child.

The parent alleges that during a March 8, 2023 virtual meeting, the parent was unable to meaningfully participate in a review of the student's evaluation team report ("ETR"). The parent alleges the conversation moved "too quickly," and they were unable to follow the conversation. The parent also alleges that multiple evaluation team members held conversations for up to 15 minutes while muted, preventing parent participation. The district did not provide a PR-02, which is a required form, for the March 8, 2023 ETR meeting. However, the parent did attend the meeting. Even though the parent was in attendance, the district is in violation of this section.

VII. Restraint and Seclusion OAC 3301-35-15.

A. "Physical restraint" means the use of physical contact in a way that immobilizes or reduces the ability of an individual to move the individual's arms, legs, body, or head freely. Such term does not include a physical escort, mechanical restraint, or chemical restraint. Physical restraint does not include brief physical contact for the following or similar purposes: (1) to break up a fight; (2) to knock a weapon away from a student's possession; (3) to calm or comfort; (4) to assist a student in completing a task/response if the student does not resist the contact; or (5) to prevent imminent risk of injury to the student or others.

B. Physical restraint may be used only:

1. If a student's behavior poses an immediate risk of physical harm to the student or others, and no other safe or effective method of intervention is available;

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2. If the physical restraint does not obstruct the student's ability to breathe;

3. If the physical restraint does not interfere with the student's ability to communicate in the student's primary language or mode of communication; and

4. By student personnel who are trained in safe restraint techniques, except in the case of rare and unavoidable emergency situations when trained personnel are not immediately available.

C. Physical restraint may not be used for punishment or discipline or as a substitute for other less restrictive means of assisting a student in regaining control.

D. "Seclusion" means the involuntary isolation of a student in a room, enclosure, or space from which the student is prevented from leaving by physical restraint or by closed door or other physical barrier.

E. Seclusion may be used only:

1. If a student's behavior poses an immediate risk of physical harm to the student or others, and no other safe or effective method of intervention is available;

2. As a last resort to provide an opportunity for the student to regain control of his or her actions;

3. For the minimum amount of time necessary for the purpose of protecting the student and others from physical harm;

4. In a room or area that:

a. Is not locked;

b. Does not prevent the student from exiting the area should staff become incapacitated or leave the area;

c. Provides adequate space, lighting, ventilation, and the ability to observe the student; and

d. If under constant supervision by staff who are trained to be able to detect indications of physical or mental distress that require removal and/or immediate medical assistance and who document their observations of the student.

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F. Seclusion may not be used:

1. For punishment or discipline;

2. For the convenience of staff;

3. As a substitute for an educational program;

4. As a substitute for inadequate staffing;

5. As a substitute for staff training in positive behavior intervention and supports framework and crisis management;

6. As a means to coerce, retaliate, or in a manner that endangers a student; or

7. As a substitute for other less restrictive means of assisting a student in regaining control, such that it is reflective of the cognitive, social, and emotional level of the student.

G. Case law.

1. In re: Student with a Disability, 123 LRP 17937 (WA SEA 2023).

Washington district teachers improperly used restraint on a third grader with OHI requiring the district to take corrective action. When the child began hitting his head against the wall, a paraprofessional ran to another classroom to request assistance. Two teachers restrained the child and dragged him down school hallways, causing scratches and bruising. The parent filed a state complaint. The district acknowledged that protocol was not followed when the aide went to get help rather than using the "wall call" system to get a person familiar with the child to assist. Staff felt the child was in danger of hurting himself and removed him to a safe location. One of the teachers who restrained the child had not been trained or certified on restraint, and neither were familiar with the child's plan for de-escalation, the state ED noted. But, due to the child's size, the distance traveled, and his past history of trauma, the restraint was inappropriate, it concluded. Video showed that the restraint may have been appropriate initially, to prevent the child from hitting his head, but while he may not have been totally de-escalated and ready to follow instructions, it did not appear that he was engaging in activity that would pose a likelihood of serious physical harm, the state ED reasoned.

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2. Williamson County Schools, 123 LRP 24125 (TN SEA 2023). (Restraint on a school bus.)

A Tennessee district bus aide did not fail to implement a child's BIP on the school bus when she attempted to block a student's movement. The ALJ named the district the prevailing party. The parents of the child with autism and their attorney participated in nine IEP meetings during the school year. The district conducted an FBA, developed a BIP, provided direct Applied Behavior Analysis ("ABA") services by a Board Certified Behavior Analyst ("BCBA"), and hired an independent BCBA to complete monthly fidelity checks to ensure staff properly implemented the child's BIP. Staff recorded behaviors daily in 15-minute increments. The district provided the BCBA's reports and weekly behavior data sheets to the parents. It also conducted at least five student specific training sessions with staff who worked with the child throughout the year, including with transportation staff, on de-escalation strategies and implementation of the BIP. After a behavioral episode on the school bus where an aide used her arm to redirect the student, the parents filed for due process alleging they were not notified of the use of a restraint, among other claims.

Tennessee law requires a district to report to parents if personnel impose an isolation or a "physical holding restraint" on a child the same day it occurs. Video depicted the bus aide implementing aspects of the BIP, such as time outs, in addition to making statements not contemplated by the BIP. The ALJ found the bus aide, by attempting to block the child's path to the rear of the bus, did not use a "physical holding restraint." And, since there was no restraint, the district was not required to notify the parents, the ALJ found.

VIII. Service Animals

A. "Service animal," as defined by 28 C.F.R. 35.104:

1. Service animal means any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. Other species of animals, whether wild or domestic, trained or untrained, are not service animals for the purposes of this definition. The work or tasks performed by a service animal must be directly related to the handler's disability.

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2. Miniature horses may be service animals for the purposes of the ADA if the miniature horse has been individually trained to do work or perform tasks for the benefit of the individual with a disability. (28 C.F.R. 35.136(i)(1)).

B. Questions.

1. School officials shall not require documentation, such as proof that the animal has been certified, trained, or licensed as a service animal. (28 C.F.R. 35.136(f)).

2. School officials shall not ask about the nature or extent of a person's disability. Inquire as to the need for a service animal through an interactive and individualized investigation as required for the determination of reasonable modification by making two inquiries to determine whether an animal qualifies as a service animal:

a. Is the animal required because of a disability? (No need to ask if the disability is obvious.)

b. What work or task has the animal been trained to perform? Examples of work or tasks include, but are not limited to, assisting individuals who are blind or have low vision with navigation and other tasks, alerting individuals who are deaf or hard of hearing to the presence of people or sounds, providing non-violent protection or rescue work, pulling a wheelchair, assisting an individual during a seizure, alerting individuals to the presence of allergens, retrieving items such as medicine or the telephone, providing physical support and assistance with balance and stability to individuals with mobility disabilities, and helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors. The crime deterrent effects of an animal's presence and the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks for the purposes of this definition. (28 C.F.R. 35.104).

C. What is a companion/emotional support animal?

1. An animal that provides comfort, affection, or companionship. Such animals are not specifically trained to perform particular tasks to ameliorate a disability; rather, they require only as much training as an ordinary pet requires to live among humans so as not to be a nuisance, threat, or danger to others.

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2. Emotional support animals are not service animals by definition, but such an animal may be required if needed for a student to receive a FAPE.

D. Case law.

1. Hillsborough County (FL) Public Schools, 123 LRP 32351 (OCR 2023).

On May 4, 2022, the student's mother submitted a written request asking the school to allow the student to bring her service dog to school. She also told the principal that the service dog was trained to assist the student's anxiety by applying deep pressure and interrupting self-destructive/repetitive behaviors. Additionally, the mother provided the school copies of the service dog's rabies certificate and American Kennel Club training certification. The district failed to respond to the parents' numerous emails and communications until August 9.

On August 9, 2022, the Counsel replied to the Safety Director's May 4 email and stated that he believed that the AKC certificate did not constitute sufficient documentation of service animal training under applicable law. He opined that the work or tasks performed by the animal are not directly related to the student's disability. As a result, the Florida OCR determined the district improperly prohibited a high school student with general anxiety disorder from bringing a service animal to school.

2. In re: Student with a Disability, 123 LRP 21857 (MN SEA 2023).

The Minnesota Department of Education found that the student required a dog handler, and the district was required to pay for the handler. By focusing on the district's policy of not providing or underwriting handlers for students' service dogs, the district developed an IEP that failed to offer the student FAPE. The parent filed a state complaint alleging that the student's IEP was inappropriate because it did not provide for a dog handler at public expense. The school principal and special education teacher acknowledged that, in response to the parent's request for a handler, the district did not consider whether the handler was a necessary component of FAPE for the student. Instead, educators stated that the district did not grant the parent's request for a staff member to serve as a handler because district policy prohibited staff from doing so. When a student with a disability with a service animal is not capable of serving as the animal's handler, Policy requires that the animal be under the supervision of a third-party handler while on school grounds. The Policy states that the "[s]chool district personnel are not responsible for the care, supervision, or handling responsibilities of a service animal."

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However, the evidence showed the student required a handler because the student was incapable of handling the dog, and the dog was essential if the student were to stay focused on work and to respond to redirection. Without the dog and the handler, the student could not access the curriculum and obtain educational benefits.

IX. Predetermination

A. A predetermination of placement or other educational decisions without parental input outside of the IEP team process may lead to a finding of a denial of FAPE by depriving the parent of the right to participate in the IEP development process. (20 USC § 1415(F)(3)(E)(ii)).

1. It can also occur when an MDR team determines the outcome of the MDR prior to the MDR meeting.

2. The IEP team members must enter an IEP meeting with an open mind and must meaningfully consider the parent's input.

B. Case law.

1. E.V.E. v. Grossmont Union High School District, 123 LRP 27633 (CA Dist. 2023). (District did not predetermine placement.)

Plaintiff's IEP team agreed on an IEP to attend Helix Charter ("Helix"), a school that offered some, but not all, special education services requested by parent.

Documenting all potential placement options the IEP team has considered and the reasons why those options were appropriate or inappropriate may help the district fend off claims of predetermination. A district did not predetermine the full-time therapeutic placement of a high schooler with severe anxiety. Also, the district did not improperly excuse a general education teacher from the IEP meeting or provide an unclear written placement offer. Records indicated that this district attempted to address a teen's severe anxiety at her neighborhood school for two years and considered several placements, including a virtual academy. The court noted that the district and the mother, over the last two years, had frequently discussed the student's absenteeism, poor grades, and lack of educational progress at her local school. Records also showed that the district – before deciding to place the student in the therapeutic program – discussed "the continuum of placement options" with the mother.

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"A school district violates the IDEA if it predetermines placement for a student before the IEP is developed or steers the IEP to the predetermined placement." In other words, "there must be evidence the state has an open mind and might possibly be swayed by the parents' opinions and support for the IEP provisions they believe are necessary for their child." However, a parent's "right to provide meaningful input is simply not the right to dictate an outcome."

2. I.S. v. Fulton County School District, 123 LRP 33063 (GA Dist. 2023).

The parents alleged that the district predetermined the placement of their son, a high schooler with autism, severe anxiety, and social skills deficits. The court stated that a district engages in predetermination if it comes to an IEP meeting with a closed mind, having already decided material aspects of the IEP without parental input. Here, they observed, the IEP team repeatedly provided the parents opportunity to express their input, and the parents did so. The district, the court pointed out, agreed with the parents' concerns, and in response, developed a strategy to address them. [The] parents may have felt that they were not truly listened to, but there is no evidence that [the district] ignored their input, prevented them from expressing their viewpoints, or failed to approach the meetings with an open mind."

X. Reevaluation

A. Groveport Madison Local School District, 123 LRP 32357 (OCR 2023).

The parent requested an evaluation. The district decided to reopen the student's evaluation report and then changed his placement. Districts should evaluate or reevaluate before taking any action with respect to initial placement and before any subsequent significant change in placement. OCR considers transferring a student from one type of program to another, or terminating or significantly reducing related services, a significant change in placement. Here, meeting notes reflected that the district agreed to begin interventions so that staff could determine appropriate supports for the student based on concern about progress and his lack of instructional time. Yet, the district maintained that staff did not think an evaluation was necessary or would be useful.

OCR found cause for concern that the district did not timely reevaluate the student and noted it provided no information or data to support how it reached the conclusion that an evaluation was unnecessary. OCR was also concerned that the district changed the student's placement without following appropriate procedural requirements. Specifically, the student's IEP identified his placement, but it made a change or placement without having completed an evaluation to support it, OCR explained.

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B. Southwest Local Schools, 123 LRP 36954 (ODE 2023).

An Ohio district comprehensively reevaluated a pre-kindergarten student prior to exiting the child from services. The parent subsequently shared an independent evaluation report that included an autism diagnosis. The school psychologist indicated that the evaluation reflected information the district had at the time of writing the report, and she could not modify it. The parent filed a state complaint alleging the district predetermined its ineligibility decision and inappropriately reevaluated the child. The district demonstrated that it used a variety of assessment tools and strategies to complete the reevaluation, the state ED found. The IEP team reviewed the child's education records, obtained the parent and general education teacher's input, and conducted multiple standardized and informal measures, including observations, to assess whether the child continued to need services. The evaluation team also met to discuss the child's eligibility. The parent did not demonstrate that the district predetermined its decision to exit the child from services prior to the meeting, the state ED observed. The team was not provided the parent's outside report at the time of the evaluation, so it could not be considered, the state ED explained.

XI. Bullying

A. N.P., et al. v. Kenton County Public Schools, et al., 123 LRP 5053, 82 IDELR 148 (KY Dist. 2023). (Student peer and teacher bullying.)

Parents who claimed that teachers viewed their 16-year old son's involuntary muscle tics as willful disrespect could not show that a Kentucky district discriminated against the student for having Tourette syndrome. The District Court granted judgment for the district on the parents' Section 504 and ADA claims. U.S. District Judge David L. Bunning explained that the student's status as an individual with a disability did not in itself make the teachers' conduct unlawful. To establish a claim for disability discrimination, the parents needed to show that district employees discriminated against the student because of his disability. The judge pointed out that many of the student's behaviors had no connection to his disability. Those behaviors included licking another student's ear in the bathroom, spitting on other students on the school bus, and urinating on the football field. "In other words, the behavioral incidents … show that the actions taken by [district] teachers with respect to [the student] were motivated by [the student's] own behavior independent from his disability," the judge wrote. Judge Bunning also cited the parents' failure to show that the teen was treated differently from nondisabled peers who engaged in similar misconduct. Because the parents could not show that teachers criticized, reprimanded, or disciplined the student for disability-related tics, the court explained, they could not prove discrimination on the basis of disability.

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B. C.S. and G.K., o/b/o minor plaintiff, S.K. v. Bridgewater-Raritan Regional School District Board of Education, 123 LRP 4975, 82 IDELR 165 (NJ App.Ct. 2023). (Teacher on student bullying.)

A New Jersey district took immediate steps to end alleged bullying of a seventh grader with anxiety and depression by the school guidance counselor. The parent and student met with the guidance counselor and explained that the student had disabilities, including generalized anxiety disorder and depression. On the first day of school, the student attempted suicide. She was subsequently hospitalized for psychiatric treatment. The parent requested a meeting with the principal to discuss his concerns about the counselor's alleged discriminatory statements, conduct, and discrimination based on the student's disability. He believed that the counselor did not view the student as having a disability. The principal removed the guidance counselor the same day, made the superintendent aware of the allegations, and conducted an investigation. The parents filed suit alleging disability discrimination, a hostile education environment, and bullying. To prevail, the parents must show discriminatory conduct based on disability that is severe or pervasive enough to create an intimidating, hostile, or offensive school environment that the district failed to reasonably address, it added. The court assumed there was discriminatory conduct based on disability but held that the district reasonably responded and accommodated any disability. From the moment it was brought to the district's attention, the student was immediately given a new counselor, and there was an immediate end to the conduct. The court held that because there was no further bullying or harassment, the district showed that its prompt remedial actions upon first learning of the conduct were reasonably calculated to end it.

C. B.D. and K.D., individually and on behalf of R.D. v. Eldred Central School District, 123 LRP 13527, 83 IDELR 31 (NY Dist. 2023). (Peer bullying.)

A New York district did not deny FAPE to an eighth grader with autism and ADHD when it developed a safety plan that required certain action on his part to reduce peer bullying. Rejecting the notion that the district made the student entirely responsible for his own safety, the District Court upheld a State Review Officer's ("SRO") decision for the district on the parents' IDEA claim. The court found that the district convened a meeting to address the parents' concerns about bullying and develop a safety plan for the student. Given the district's efforts to address peer bullying, the judge explained, the parents could not show the district was deliberately indifferent. Although the plan contemplated some action by the student, such as leaving class early and reporting bullying incidents when they occurred, the judge noted that the plan imposed 11 obligations on school personnel Those obligations included separating the student from offenders when problems arose, monitoring common areas, and educating other students about bullying. To establish an IDEA violation, however, the parents needed to show that the district was deliberately indifferent to bullying or failed to take reasonable steps to prevent it.

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D. A.R. v. Cape Henlopen School District, 123 LRP 13350, 83 IDELR 32 (DE Dist. 2023). (Peer on peer harassment.)

A Delaware district did not fail to appropriately accommodate a fourth grader with ADHD after he was bullied at school. The parents filed suit under the ADA Title II and Section 504 alleging that the district discriminated based on disability. The court noted five incidents of minor bullying spread over two school years. The teacher and assistant principal responded with a plan to prevent the incidents from recurring, including utilizing recess monitors and disciplining the bully. When the child experienced severe bullying in fourth grade, the district issued a suspension to the bully, removed him from the child's class, and created a safety plan to keep him separate. The district also added new anti-bullying accommodations to the student's 504 plan, including bringing friends to lunch. The court held that the district responded appropriately to serious bullying by separating the harasser, disciplining him, and providing counseling.

E. Abigail and Berta Jordan v. Chatham County Board of Education, 123 LRP 30861 (NC Dist. 2023). (Disability peer harassment.)

Allegations that a school principal failed to address his own daughter's harassment of a student with autism were sufficient to support disability discrimination claims against a North Carolina district. The District Court denied the district's motion to dismiss the parent's Section 504 and ADA claims. To hold the district responsible, the judge explained the parent needed to show that the district's response to reported incidents of peer harassment was clearly unreasonable. According to the complaint, the principal's daughter teamed up with another schoolmate to prevent the student from using school bathrooms. The parent's repeated trips to the school each week to bring the student a change of clothes established the impact of the harassment. According to the court, "[The parent's] allegations that [the student's] bullies prevented her from using the restroom at school to the point where she regularly soiled her clothing is certainly harassment that is sufficiently 'severe, pervasive, and objectively offensive' such that [the student] was deprived of educational opportunities and benefits at school." The judge explained that the parent's allegations, if true, could support a finding that the district's response to disability-based peer harassment was clearly unreasonable.

F. E.C., by next friends Mario C. and Kim C. v. Community School Corporation of Eastern Hancock County, Community School Corporation of Southern Hancock County, Samson T. Livingston, 123 LRP 29647 (IN Dist. 2023). (Peer sexual harassment.)

An Indiana district's response when it learned that a high school senior had sex with a freshman with cognitive disabilities at school was not clearly unreasonable. The District Court granted judgment to the district on the parent's Title IX claim,

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noting the district took steps to prevent further sexual harassment, including developing a safety plan. The court pointed out that to establish a Title IX violation based on peer sexual harassment, a parent must show the district knew of the discrimination and responded in a way that was clearly unreasonable. The court noted that when the parent expressed concern about the student's relationship with one male peer, the district monitored the students, separated them in class, and reported back to the parent. Later, after an older male student allegedly had sexual relations with the freshman in a restroom, the district took several steps to prevent the conduct from recurring, the court observed. The district immediately contacted both student's parents, children's services, and the sheriff's department. The district also placed the male student on remote instruction and worked with the freshman's parents in developing a safety plan. The court remarked that this was not a case where the district did nothing. "Instead, upon discovering problematic behavior, it engaged in proactive steps to try to stop it from happening again," U.S. District Judge James Patrick Hanlon wrote.

XII. Placement

A. District of Columbia Public Schools, 123 LRP 13715 (DC SEA 2023). (Residential placement.)

An IHO dismissed a due process complaint filed by the mother of a student with multiple disabilities who sought an order requiring the District of Columbia to place her son in a residential program. In denying the parent relief, the IHO stated that the parent failed to show that the student required a residential placement to receive FAPE.

The IHO found there were other options for addressing the student's school refusal, including through providing the student a combination of remote and in-person learning. The IHO explained that when analyzing a residential placement request, a court or hearing officer must determine whether such a placement is necessary for educational purposes. The IHO observed that the parent expressed fear about triggering the student's violence by taking away his games and trying to get him to go to school. The parent also claimed the student's non-attendance stemmed from her son's fear of riding the bus. The district had not yet considered alternative transportation methods or alternative methods of delivering instruction to the student, the IHO stated. Until those things were attempted, the IHO found, it was not clear that a residential program was educationally necessary.

B. N.N., et al. v. Mountain View-Los Altos Union High School District, 123 LRP 11361 (CA Dist. 2023). (Residential placement.)

Parents contend that the district failed to identify N.N. as a student eligible for special education services in her sophomore year in high school, leading to her

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enrollment in a private residential program in Montana, where she attended a local public high school for her junior and senior years.

Under the IDEA, the court explained, the parent of a student with a disability is entitled to reimbursement only if: 1) the district's proposed public placement violated the IDEA; and 2) the private school placement is necessary for educational purposes. In the first program the student was enrolled in, the court noted, the student received "experiential opportunities of a wilderness setting with a clinically focused intervention." In the second program, the student attended weekly two-hour group therapy sessions and individual therapy sessions that included family therapy and therapeutic phone calls with the parents. The court found no evidence that she received individualized educational services from special education teachers at either program. Because neither residential program included an "educational component," the court held that they did not qualify as appropriate placements eligible for reimbursement.

C. Central Bucks School District, 123 LRP 22451 (PA SEA 2023). (Reimburse tuition at unilateral placement.)

An IHO denied the claims of the parents of a teen with Prader-Willi syndrome and declined to require a Pennsylvania district to reimburse private school tuition for the 2022-23 school year. The IHO found that the district's proposed IEP was appropriate under the IDEA and offered the teen FAPE. And the parents' limitation on the district's access to relevant information about the teen was a sufficient impediment to justify denial of reimbursement, the IHO determined.

This district showed that its proposed IEP was appropriate based on the information it had, and included transition planning and access to nondisabled peers that the private school's IEP did not. Moreover, it pointed out that the parents would not freely share information or cooperate, refused to release medical records, did not volunteer information, and conditioned current information about the teen on whether it asked the right questions, effectively barring their claim for tuition reimbursement.

The IHO explained that parents who believe a district is not offering FAPE may unilaterally place their child in a private school and seek reimbursement under the IDEA. But the parents must first give the district an opportunity to meet its obligations. The IHO found that the district appropriately addressed the teen's food security needs.

XIII. Conclusion

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