LSPA 2017

HOT TOPICS IN SPECIAL EDUCATION LAW

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(1) *Endrew F. ex rel. Joseph F. v. Douglas County Sch. Dist. RE-1*, — U.S. —, 137 S. Ct. 988 (2017)

In a case out of Colorado, the parents believed their child was denied a free appropriate public education (FAPE). The parents lost at the administrative level (i.e., IDEA due process hearing), at the federal district court level, and at the U.S. Tenth Circuit Court of Appeals. The parents sought review from the U.S. Supreme Court. In major part, the parents challenged the Tenth's Circuit's FAPE standard of "merely more than *de minimus*". The larger question, of concern to a national audience, was whether the *Rowley* standard for FAPE should change.

The U.S. Supreme Court rejected the Tenth Circuit's standard, characterizing it as too low. Although the Supreme Court did not agree with the standard proposed by the parents and did not set a bright line FAPE standard, it reiterated in substantial portions the landmark *Rowley* decision from 1982. The Court's primary conclusions:

(1) "[The child's] educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives."

(2) With regard to the substantive factor of the *Rowley* standard, the child's IEP must be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."

Take Aways

- This decision reiterates the need for individualized determinations of student needs.
- Students of any disability must be appropriately challenged to develop academic and functional skills.
- *Endrew F*. does not change the FAPE standard in Louisiana. *See C.G. ex rel. K.G. and L.G. v. Waller Indep. Sch. Dist.*, No. 16-20439, — F. App'x —, 2017 WL 2713431 (5th Cir. June 22, 2017) (unpub.) (implicitly acknowledging that the *Michael F*. factors comply with *Endrew F*.'s standard).

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(2) *Fry v. Napoleon Cmty. Schs.*, — U.S. —, 137 S. Ct. 743 (2017)

Parents of a child with a disability filed suit in federal district court in Michigan claiming that the school district had violated Section 504 and Title II of ADA by denying the child's service dog entry into school to work with the child. The district court and Sixth Circuit Court of Appeals dismissed the parents' claims on the basis of a failure to exhaust administrative remedies under IDEA. Accordingly, the main issue was whether exhaustion of administrative remedies (i.e., IDEA due process hearing) applies to claims and relief requested under Section 504 and ADA, regardless of intersection with IDEA-based claims (esp. claim for monetary damages).

The U.S. Supreme Court held that a parent's "[compliant] requires exhaustion when the gravamen of a complaint seeks redress for a school's failure to provide a FAPE, even if not phrased or framed in precisely that way." The "gravamen" is basically the primary or central underlying focus of the complaint.

To assist lower courts in determining the "gravamen" issue, the Court offered two questions:

(1) "First, could the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was *not* a school—say, a public theater or library?"

(2) "And second, could an *adult* at the school—say, an employee or visitor—have pressed essentially the same grievance?"

The Court further explained:

> When the answer to those questions is yes, a complaint that does not expressly allege the denial of a FAPE is also unlikely to be truly about that subject; after all, in those other situations there is no FAPE obligation and yet the same basic suit could go forward. But when the answer is no, then the complaint probably does concern a FAPE, even if it does not explicitly say so; for the FAPE requirement is all that explains why only a child in the school setting (not an adult in that setting or a child in some other) has a viable claim.

Take Aways

- Denial of a legitimate service dog access request can lead to very expensive litigation.
- The fact that a student is in special education does not necessarily mean that a service dog issue is a FAPE issue under IDEA.

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(3) *S.D. ex rel. A.D. & R.D. v. Haddon Heights Bd. of Educ.*, 833 F.3d 389 (3d Cir. 2016), *vacated and remanded*, — S. Ct. —, 2017 WL 846191 (May 15, 2017)

Parents of a student with a disability under Section 504 claimed that their son's New Jersey school district's attendance policy illegally discriminated against their child. Their son had a medical disability which lead to many absences. The district court and Third Circuit Court of Appeals dismissed the parents' claims citing a failure to exhaust administrative remedies. The parents sought

review by the U.S. Supreme Court. The Supreme Court granted review, and, in light of its recent *Fry* decision, vacated (i.e., wiped-out) the Sixth Circuit's decision and remanded (i.e., sent it back) to the Third Circuit to review the case under the *Fry* framework for exhaustion analysis.

While the actual outcome of the case is pending, a key part of the Third Circuit's initial review of the factual background is important:

> [Parents] allege that [the school district] "made a deliberate choice to enact the Policy," despite [the school district]'s knowledge that it was "substantially likely" that the new attendance policy would harm S.D.'s ability to advance in school, in order to "target" students like S.D. who had frequent excused absences. [Parents] assert that, because the new attendance policy allowed students with unexcused absences to make up credits and progress to the next grade through the Saturday Credit Reinstatement Program, but offered no such mechanism for students with absences excused by, for example, a disability, to make up credits, the policy had an impermissible discriminatory effect.

Take Aways

- Policies without an impermissible discriminatory intent CAN have an impermissible discriminatory impact/effect.
- Students with disabilities must be afforded an equal opportunity to access a school district's programs and services.

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(4) *Seth B. v. Orleans Parish Sch. Bd.*, 810 F.3d 961 (5th Cir. 2016)

Parents of a student with a disability under sought and were granted an independent educational evaluation (IEE) at public expense. The parents disagreed with the re-evaluation the district had performed. The parents believed that, in addition to their son's disability of autism, he also had a specific learning disability. The parents obtained an IEE from a private evaluator of their choice and submitted the private evaluation for the district's review. The district's review of the IEE

under Bulletin 1508 documented 31 separate non-compliance issues. In addition to the district's review, the IEE was extensively analyzed during an IDEA due process hearing that the parents had brought concerning a separate issue of FAPE. The district declined to pay for the evaluation.

The parents filed for an IDEA due process hearing to force the district to pay for the non-compliant evaluation. The administrative law judge ruled in favor of the district. The parents appealed to federal district court. The court affirmed the ALJ's decision and deemed the IEE non-compliant with agency criteria (i.e., Bulletin 1508). The parents appealed to the U.S. Fifth Circuit Court of Appeals.

In a case of "first impression", the Fifth Circuit made the following findings and conclusions:

(1) Under IDEA, in Louisiana the "agency criteria" for purposes of IEE compliance is Louisiana Bulletin 1508, and the IEE must follow Bulletin 1508 procedures.

(2) Initial or "new" (i.e., added or alternative) exceptionality evaluations MUST follow *initial* eligibility criteria under Bulletin 1508.

(3) Evaluations must be "substantially compliant" with Bulletin 1508 criteria. In other words, trivial issues of non-compliance (albeit undefined) would not necessarily prevent an IEE from being "substantially compliant".

(4) The Fifth Circuit reiterated the U.S. Department of Education' long-standing policy that school districts may set reasonable cost containment criteria on publicly funded IEEs

In a 2-1 decision, the Fifth Circuit remanded (i.e., sent back) the case to the district court to review the IEE under the new "substantial compliance" standard. The dissenting judge at the Fifth Circuit disagreed with the new standard. Regardless of what the new rule actually means, he

indicated that the IEE at issue would be non-compliant with the new standard.

Take Aways

- It is critical to give appropriate and timely responsive notice under IDEA to a parent's IEE request.
- The agency criteria under which an IEE is reviewed is Bulletin 1508.
- Seek the parent's consent to contract directly with the (private) IEE evaluator to avoid conflicts with the parents over payment/reimbursement.

The Rest of the Story: Subsequently, the parties settled the matter via a confidential agreement.

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(5) *Chadham v. Palo Alto Unified Sch. Dist.*, 666 F. App'x 615 (9th Cir. 2016) (unpublished)

Based on an unconfirmed suspicion that child had cystic fibrosis, the school district banned the student from his neighborhood school. The district had no physician's diagnosis of the disorder. The parent filed suit in federal district court. The district court dismissed the parent's claims under Section 504 and ADA, concluding that the student posed a "direct threat" to the health or safety of others based on the opinion of doctors who had never met or treated the child.

On appeal, the Ninth Circuit Court of Appeals reversed the district court's ruling. Citing the ADA regulations, the Court stated that the school district failed to appropriately apply the direct threat process. The relevant regulation (28 C.F.R. § 35.139) states, "[i]n determining whether an individual poses a direct threat to the health or safety of others, a public entity must make an *individualized assessment*, based on reasonable judgment that relies on current medical knowledge or on the *best available objective evidence*." (Emphasis added). Specifically, the Court stated that

the district failed to make an "individualized determination" but instead relied on opinions of doctors who had no direct knowledge of the child and more importantly that the child did not actually have cystic fibrosis.

Take Aways

- Ensure that the appropriate process is used to make determinations regarding children.
- Knowledge of the child is imperative, and generic opinions of "experts" may be unhelpful.

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(6) *Arapahoe County Sch. Dist.*, 117 LRP 816 (Colo. SEA 2016)

A student with significant medical needs received homebound instruction for over two years. Every nine weeks, the district approved the student's application for (medical) homebound. However, over this same period of time, the district's IEP reflected school-based services. The parent filed a state complaint alleging denial of FAPE.

Among many findings against the district, the Colorado Department of Education observed,

> [W]hat is more concerning is School District's apparent misunderstanding of the law with respect to the important distinction between instruction in the home, which is an IDEA placement option, see 34 C.R.F. § 300.115(b)(1), and homebound instruction, which is a temporary excusal from school due, generally, to a temporary illness or injury and available to all students as a general education accommodation.

The CDOE further observed, "[R]ather than change Student's placement to reflect the reality of Student's situation and develop an IEP that could meet Student's unique needs in the family's home, instead School District continued to develop Student's IEP and make an offer of FAPE to be provided at School."

Take Aways

- ▶ Make sure staff know the difference between medical homebound and homebound as an IEP-based (educational) placement.
- ▶ Although sometimes necessary medically, is there a stop-gap in your homebound procedures to determine if homebound is actually necessary and appropriate for a child?

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(7) *Beckwith v. Dist. of Columbia*, 208 F. Supp. 3d 34 (D.D.C. 2016)

Over a two-month period the school district physically restrained a student with a disability at least five times. The district did not follow its own procedures for documenting the events and providing appropriate notice to the parent. This was one of several claims the parent leveled against the district.

On appeal from a hearing officer's decision in favor of the district, with reference to the restraint issue and its impact on FAPE, the federal court reversed the hearing officer and concluded, "[The school district] significantly impeded Ms. Beckwith's opportunity to participate in the decision-making process concerning L.B.'s FAPE. After a student is physically restrained, district guidelines require a school to notify parents within [a specific timeframe], send a written report to parents within [a specific timeframe], and convene an [IEP] meeting ... within [a specific timeframe]." The Court further concluded, "Although a single violation of [district] guidelines would certainly not have "significantly impeded" Ms. Beckwith's rights, [the district]'s repeated violations of its own restraint policy throughout the 2014–15 school year did."

Take Aways

- ▶ You are obligated to follow La. R.S. 17:416.21 and ALL of its procedural requirements EVERY TIME physical restraint occurs.
- ▶ Failure to provide relevant information to the parent CAN be the basis for a parent to claim a violation of the "golden IDEA rule": Parent's opportunity for meaningful participation the child's education. That rule includes *timely* sharing of relevant information about the child.
- ▶ The "five-minute rule" is GONE. "Momentary" is the standard timeframe now.

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(8) *Sequoia Union High Sch. Dist.,* No. 2017020648 (Cal SEA Mar. 20, 2017)

A student with Moyamoya disease (who qualified for IDEA services) assaulted another student the day after the presidential election in November 2016. Moyamoya disease (a rare neuro-vascular disorder) can result in seizure activity. The student took prescription anti-convulsive medication for the possible seizures. The student was recommended for expulsion and the district convened a MDR.

The MDR concluded that the student's disability or the medication was not the cause of the physical assault of the other student. After a careful review of medical, behavioral, and other information, the MDR team determined that the student had planned/contemplated the assault (after an exchange on social media with the target student), the behavior was not impulsive, the behavior was not a side effect of the medication, she had no history of assaultive behavior, and therefore the behavior was not a manifestation of her disability.

The mother filed a complaint with the California Department of Education claiming the MDR was flawed and that the anti-convulsive medication was the cause of the behavior. After an

thorough review of the record, the DOE determined that the "Student's conduct on November 9, 2016, was planned over a period of more than three hours and was motivated by political, racial, and social tensions on the campus on the day after the presidential election, not by the effect of her medication." The DOE dismissed the complaint.

Take Aways

- It is critical to review behavior in the context of the student's unique circumstances.
- Not every behavior is a side-effect of medication or springs from a diagnosis.
- If a medical condition is the crux of the MDR, ensure that school staff engage medical professionals (e.g., school nurse, consulting physician) in the review process.

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(9) *K.S. v. Northwest Indep. Sch. Dist.*, No. 16-40093, 689 F. App'x 780, 2017 WL 1683093 (5th Cir. May 2, 2017)

This is not a special education or Section 504 case, but it addresses student-on-student sexual harassment under Title IX. Title IX prohibits discrimination based on sex by public entities like public school district. The shorthand legal standard to find a school district liable for discrimination is "deliberate indifference". In order to meet this high standard, the Court clarified that the district's actions must be clearly unreasonable (not just the fact that they may have been ineffective) in light of the circumstances.

Contrary to the plaintiff's claims, the U.S. Fifth Circuit found that the district had taken steps to address the sexually based harassment. The Court noted that, even if the district's investigations of the alleged harassment were not perfect and the actions in response ineffective, these facts did not rise to the level of deliberate indifference.

Take Aways

- There's a high legal bar for monetary liability under federal law (e.g., Title IX).
- HOWEVER, student-on-student sexual harassment may be bullying, which must be addressed via appropriate legal processes and standards as set out in Louisiana law. See La. R.S. 17:416.13.
- The effects of sexually based behavior on the student may implicate FAPE issues, regardless of the outcome of investigations.

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(10) *Joe R. ex rel. C.R. & J.R. v. Novi Cmty. Sch. Dist.*, No. 14-14531, 2017 WL 528264, Slip op. (E.D. Mich. Feb. 9, 2017), *as amended*, 2017 WL 914251, Slip op. (E.D. Mich. Mar. 8, 2017)

A school district failed to obtain dismissal of the parents' claims that a failure to train staff on sexual harassment lead to the sexual harassment of their son. In support of his ruling, the judge concluded, "Peer-on-peer sexual harassment is clearly a foreseeable consequence of failing to provide teachers training on sexual harassment. Consequently, the inadequacy of [the district's] training could be said to be the result of the district's deliberate indifference."

Take Aways

- Train staff. You can't expect staff to know what to look for and do, if they don't know what to look for and what to do.
- If you don't have time or money to train, you will need to make time for litigation and find money for payment of plaintiffs' damages, attorneys' fees, and court costs.

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(11) *Reyes v. Manor Indep. Sch. Dist.*, 850 F.3d 251 (5th Cir. 2017)

A Texas school district avoided a due process hearing based on a void in Texas law regarding transfer of rights at age of majority for students with disabilities – disabilities which would otherwise impair the student's capacity to make informed decisions in his/her interest. Note: There is no such void in Louisiana law (more specifically, Louisiana regulations).

Take Aways

- ☐ Become familiar with Bulletin 1706, Section 520 and share with your IEP Teams.
- ☐ Ensure that your IEP Teams document what's required under Section 520(B)(3).

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(12) *Bellflower Unified Sch. Dist.*, No. 2016090310, 69 IDELR 196 (Cal. SEA Jan. 26, 2017)

In a due process hearing decision, a hearing officer ruled on the parents' claim that the school district failed to appropriately address their son's functional community based skills. This young man had been classified with autism with a secondary disability of intellectual impairment. Despite his challenges, he was on target to obtain a regular high school diploma in May 2017. He had qualified as having an intellectual disability based on assessment of adaptive functioning. His transition planning focused on education and employment but not community based behaviors.

The hearing officer (IHO) found against the school district. The IHO found that the district was well aware of the student's adaptive deficits but did not adequately address community based behavior. The IHO concluded, "Student needs community based instruction. A preponderance of the evidence demonstrated that Student does not possess the adaptive skills that would enable him to function in the community so he could pursue his post-secondary goals." The IHO ordered as relief (1) an "independent educational evaluation of Student's adaptive and functional skills in the

community"; and (2) 36 hours of community based instruction by a private provider.

Take Aways

- Ensure that all areas of need are addressed in IEPs, including transition planning for older students.
- Do not assume that earning a high school diploma is a guarantee of an appropriate spectrum of functional and adaptive behaviors.

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(13) *Paris Sch. Dist. v. A.H. ex rel. Harter*, 2017 WL 1234151 (W.D. Ark. 2017)

A student with autism had various behavioral challenges. Despite her issues with communication and changes in routine, the district's BIP merely referenced non-compliant behavior. Further, the BIP did not provide information to staff as to how to effectively address the student's behavior. At one point, the IEP Team discontinued (without prior re-evaluation) the student's PT services, claiming that the student was a danger to the PT (when in fact the PT's own notes effectively contradicted the district's claims). The parent prevailed at the administrative level and the district court agreed that the district denied the student FAPE.

Take Aways

- "Non-compliance" does not cut it as a functional basis for behavior. Show me the real FBA.
- BIPs (and possibly the instructional plan pages of the IEP) should have strategies and procedures to address inappropriate behaviors and to develop appropriate replacement behaviors. What's the "P" in BIP?
- Discontinuation of a related services should be via a re-evaluative process and determined through the IEP Team.

(14) Letter to State Directors of Special Education, Preschool/619 Coordinators, No. 17-05 (OSEP May 22, 2017)

This memo addresses OSEP's concerns that States have or may have overly restrictive definitions of "visual impairment" (VI) or procedures for determining IDEA eligibility. While acknowledging States' discretion in fashioning degrees of impairment for certain disabilities as aligned with IDEA's definitions (e.g., intellectual disability: "significantly subaverage general intellectual functioning"; orthopedic impairment: "severe"), OSEP cautioned that IDEA's definition of VI does not contain a modifier denoting a degree of significance or severity. OSEP emphasized that "any impairment in vision, regardless of significance or severity, must be included in a State's definition, provided that such impairment, even with correction, adversely affects a child educational performance."

With regard to the evaluation process, OSEP states that a State may require medical diagnosis for purposes of disability determination, including visual impairment. As with any assessment/evaluation which the State or LEA requires for IDEA eligibility, OSEP reminds States and LEAs that the assessment/evaluation must be at no cost to the parent and not be the sole criterion by which the LEA determines IDEA eligibility. The Letter includes some examples of resources to access, including its DCL on Braille from 2013. See Letter in Appendix A.

Take Aways

- Follow Bulletin 1508 for VI to the extent it is consistent with IDEA.
- Louisiana may need to revisit its VI eligibility criteria.

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(15) *T.M. v. Quakertown Cmty. Sch. Dist.*, — F. Supp. 3d —, 2017 WL 1406581 (E.D. Pa. 2017)

Dissatisfied with their child's progress in special education, the parents filed for due process alleging multiple violations of FAPE. The due process hearing officer ruled in favor of the school district. The parents appealed.

One of the parents' claims involved the district's (non-)implementation of the parents' preferred program (i.e., ABA), including how data should be collected on their child's behavior. The district court framed the issues:

> Reduced to its essence, the dispute is whether the district must provide T.M. a strict ABA program or one based on ABA principles. The parents argue that the district failed to implement an educational program consistent with established ABA requirements. They contend that the failure to implement their evaluator's recommendations for data collection and one-on-one instruction deprived T.M. of a free appropriate public education.
>
> The hearing officer agreed with the district that its implementation of ABA–based educational programming, not strict adherence to ABA, was appropriate. After comparing the qualifications of the witnesses and making a credibility determination based on the testimony, he found the district's staff members more credible than the parents' evaluator.
>
> The parents' evaluator, Amy McGinnis, is an occupational therapist and board-certified behavioral analyst. She has no four-year college degree. She has no regular or special education teaching degree or experience. Given McGinnis's certification as a behavior analyst, the hearing officer found her an expert in ABA programming. But, in light of her lack of experience in public school teaching and her unfamiliarity with T.M.'s reading and math curriculum, he determined that "her recommendations about reading, math, speech and language were beyond her specialty areas."
>
> The district's special education staff members, on the other hand, are well qualified and experienced in all areas. The district's board-certified behavioral analyst, who has worked in public schools for more than ten years, holds a bachelor's degree in psychology, a master's degree in ABA, and a doctorate degree in educational leadership. The district's psychologist has worked for more than a decade assessing children with disabilities in a school setting, including children with autism and apraxia. The former Supervisor of Special Education and member of the IEP team has bachelor's and master's degrees in speech therapy, master's degrees in educational administration and in pupil personnel services, and a doctorate degree

> in educational leadership. The then-current Supervisor of Special Education has a bachelor's degree in special education, a master's degree in early childhood education, and a supervisory certificate in special education. The program coordinator and educational curriculum consultant, a member of the IEP team, has been with the Bucks County Intermediate Unit since 2004. She has bachelor's and master's degrees in education with a bachelor's certificate in special education and a master's certificate in education technology.
>
> The hearing officer compared not only the relative qualifications, but also the time the staff members spent observing T.M. in the school setting. He noted that the district's staff saw T.M. for 1,440 hours over the two-year period they worked with him. McGinnis observed him on two separate days for a total of sixteen hours.
>
> The hearing officer discounted McGinnis's critique of the IEP's academic, behavioral, and speech goals because she is not a certified teacher, psychologist, or speech therapist. As a behavioral analyst and occupational therapist, McGinnis does not possess the requisite educational background to opine on those topics.

For these reasons, the hearing officer found the school district's witnesses more credible with regard to the child's education and progress. The district court found no reason to deviate from the hearing officer's conclusions.

The district court also addressed the parents' claims that the district used inappropriate data collection. The court noted:

> The district's special education staff credibly explained their decision to rely on the five-minute interval data collection method instead of McGinnis's recommended "gold standard" [of five to ten seconds]. The board-certified behavior analyst testified that smaller intervals may overstate rather than understate targeted behavior. She also explained that interval data collection is widely used in her field and research supports expressing the frequency of problematic behavior in percentages. Switching to McGinnis's recommended method would have required an additional staff member dedicated solely to data collection for one student because measurements are meant to be recorded contemporaneously. According to the district's witnesses, employing a staff member dedicated exclusively to data collection is done only in a clinical setting, not a public school setting.

The district court also analyzed the parents' claim that their son required 20 hours of one-on-one ABA programming weekly. The court stated:

> Incorporating twenty hours of isolated ABA programming into T.M.'s weekly academic schedule could be accomplished in one of two ways. Either the ABA programming would replace other elements of his already established daytime curriculum, or the one-on-one lessons would take place after school in a community or home setting.
>
> The district's decision not to adopt her recommendation in either a daytime or after-school setting was appropriate. If the one-on-one programming were implemented during school hours, T.M.'s specially designed instruction would require significant changes. T.M.'s school day lasts 6.5 hours, including lunch, recess and study periods. McGinnis recommended that at least four of those 6.5 hours—sixty percent of T.M.'s school day or more—should be devoted to one-on-one ABA instruction. She testified that part of T.M.'s established curriculum already included opportunities for one-on-one instruction, but conceded that her recommendation would require changes to teaching procedures, IEP goals and data collection methodologies. She did not suggest which areas of T.M.'s school-day programming would be changed or eliminated to accommodate the ABA programming.

The district court noted that T.M. had many opportunities for socialization and was making progress in that area. The court also stated that the school district did not foreclose a one-on-one; instead, it said it would reconsider based on the student's progress in socialization.

The district court concluded:

> The record supports the conclusion that T.M.'s ABA–based programming was appropriately implemented. Given the qualifications of the district's staff and the amount of time they spent with T.M., the hearing officer properly accorded more weight to their testimony than that of the parents' evaluator. The district's chosen data collection techniques produced reliable records and provided a comprehensive picture of T.M.'s progress. The IEP programming was implemented and supervised to ensure objectivity and uniformity.

<u>Take Aways</u>

- YOU AND YOUR STAFF ARE *EDUCATIONAL EXPERTS*. Show it. Be proud of it. Stand firm on what is educationally appropriate for the child. See *D.L. ex rel. J.L. & A.L. v. Clear Creek Indep. Sch. Dist.*, No. 16-20673, — F. App'x —, 2017 WL 2417010 (5th Cir. June 2, 2017) (per curium) (unpublished) (explicitly valuing opinions and observations of school staff who have more experience with child and stating, "[T]here is no presumption

in favor of outside evaluators.").

- ▶ Have behavioral experts (in-house) who can assist in and back up what you do in the classroom and in other educational environments. BCBAs and school psychologists with ABA expertise can be invaluable assets.
- ▶ "ABA" is not a thing. It's not an all-or-none proposition. Find out what it is and is not (e.g., a panacea).
- ▶ Document services. Document accommodations. Document progress. Document communications. Document ...
- ▶ Plan, implement, document, review, revise, repeat ...

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(16) *Provo City (UT) Sch. Dist.*, No. 08-16-1359 (OCR Dec. 6, 2016)

The teacher of a self-contained special education class took medical leave, which became extended. The school district assigned the class's para-educator as the substitute teacher. The parents filed an OCR complaint alleging that the school district denied their child FAPE based on the fact that he did not have a certified/licensed instructor over several months during the 2015-16 school year.

After review of documents and interviews of staff, OCR

> [found] that from the period of December 2015 to March 2016 the Student was being solely taught by [the paraeducator], who is not a fully licensed teacher, does not have a special education certification, and is not concurrently enrolled in a special education licensure program. Accordingly from December 2015 to March 2016 the District failed to provide the Student with FAPE by failing to provide the Student with qualified teachers, in violation of Section 504 and Title II.

Take Aways

- ▶ You need more than warm bodies to provide FAPE. E.g., what about ISS?

(17) *Warren Hills Reg'l High Bd. of Educ.*, 70 IDELR 57 (NJ SEA 2017)

A student with significant medical issues (i.e., Marfan Syndrome) had frequent surgical procedures and required extensive recuperation time and precluded school attendance on any regular basis. The child felt isolated and frustrated that he could not engage with his peers at school. The parents suggested a robot which would allow for "seeing" and "interacting" with peers and teachers at school. The school district did not consider services beyond the offered (and provided) homebound necessary for the child. The parents filed a complaint with the New Jersey Department of Education (NJDOE).

The NJDOE found that the school district did not carefully consider the parents' request for assistive technology and LRE issues, and therefore the district denied the student FAPE. More specifically, the State faulted the district for its failure to explore the requested AT and whether such devices had been successfully deployed in other districts.

Take Aways

- Do not dismiss out-of-hand parents' requests for AT or other supplementary aides and services.
- Carefully consider such requests via assessment, research, consultation, and other means to explore what may appear facially strange requests. It's about process, not necessarily result.

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(18) *Crocker R-II Sch. Dist.*, 70 IDELR 28 (MO SEA 2017)

After a parent verbally aggressed and pointed a finger at the principal in the school office, the district had a plan for the next IEP Team meeting. Without notice to the parent, the district invited the superintendent and SRO to the meeting. The staff seated the SRO next to the parent. The

parent had multiple issues with her child's education program. The parent filed a due process complaint.

Among findings against the district, the hearing officer held that the district failed to provide the parent appropriate notice that the superintendent and SRO were going to attend the IEP Team meeting. Also, the fact that the SRO sat next to the parent had a chilling effect on meaningful parental participation in the IEP meeting. The hearing officer concluded,

> The District overutilized the school resource officer to the detriment of Student when it invited the officer to the January 17, 2017 IEP meeting without notice to Ms. [ ] or Student. It was reasonable for Ms. [ ] to question the presence of the officer and have concerns that Student's confidential information would be discussed in the officer's presence without her consent to release information as stated in the notification of meeting. The presence of the officer and superintendent significantly impeded Ms. [ ]'s opportunity to participate in the decision making process, and it required her to cancel the meeting even with the fact that she wanted to record the meeting. This resulted in Student's IEP not being revised on January 17, 2017, wherein he would have had a right to participate.

Take Aways

- It is imperative for the LEA to provide the parent prior written notice of whom the LEA intends on participating in an IEP Team meeting. Without such notice, the parent has a legitimate gripe about the mere presence of an "unnoticed" district participant.
- The district may have valid safety concerns about the behavior of the parent(s).

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(19) *J.M. v. Dep't of Educ., State of Hawai'i*, 224 F. Supp. 3d 1071 (D. Haw. 2016)

Parent removed her child from public school based on being bullied repeatedly. After the first due process hearing, the hearing officer determined that the district had denied the student FAPE and ordered reimbursement for the student's private placement. Subsequent to the decision, the district held an another IEP Team meeting. In addition to specialized instruction, counseling services, and a 1-to-1 aide, the district's IEP offer included:

> He would receive daily: 1) role playing of situations that may cause anxiety; 2) seating near positive peer role models; 3) modified lunch and recess, as needed until Student felt comfortable with peers; 4) opportunities to interact with same-age peers; 5) opportunities to practice self-calming strategies; 6) social stories to help with his anxiety and peer interaction; 7) Behavior Support Plan ("BSP"); and 8) Crisis Plan.

The mother rejected the proposed IEP at the meeting. Within two weeks, the district followed-up with a written notice of proposed action, reflecting the proposed IEP. The mother filed for due process (again). She reiterated her concerns about the bullying which had occurred at his previous public school. The district made repeated attempts to gain the parent's cooperation in implementing the new IEP. She maintained that his private placement was appropriate.

After the second due process hearing, the hearing officer concluded that the district's IEP offer constituted an offer of FAPE (e.g., 1-on-1 aide, transition planning, counseling, crisis plan). The parent appealed. The district court reviewed multiple issues. Of particular relevance regarding bullying and FAPE is the following:

> This Court is troubled by the fact that the 11/24/14 IEP appears to both minimize the seriousness of the prior bullying incidents and ignore the DOE's responsibility for the incidents. This Court also agrees with Plaintiffs that Student's IEP needs to alert school staff to the fact that bullying is a greater concern with Student than it is with others, and underscores this point here to emphasize its importance as well as to suggest firmly that including such information would be the better and wiser practice.

> Although it failed to present a complete picture of the prior bullying that Student suffered, the minimal discussion of prior bullying in the 11/24/14 IEP and the fact that the IEP incorporated a Crisis Plan did alert school staff to the heightened concern about Student being bullied. There are no magic words that were required to be included in the 11/24/14 IEP to constitute a sufficient discussion of the prior bullying incidents.

The parent also claimed that the district denied her child FAPE by failing to follow the resolution steps listed in the OCR *Dear Colleague Letter* of October 21, 2014 entitled "Responding to Bullying of Students with Disabilities". The Court concluded that the DCLs are merely "aspirational" and are not requirements that districts must follow. Accordingly, the Court held that the district did not deny the child FAPE for not following the *DCL*.

Also, the parent wanted the IEP to have a guarantee that her child would not be bullied again. The Court stated, "[I]t appears from the record that Mother was seeking a guarantee that Student would not be subjected to any bullying if he returned to the Home School. Although, ideally, no student would ever be subjected to bullying at school, that type of guarantee is not required to provide a FAPE."

<u>Take Aways</u>

- ☐ Carefully consider bullying-related issues at IEP Team meetings.
- ☐ If necessary, modify and amend the IEP to address effects of bullying, plans in response to bullying, and other supports to reduce the probability of further bullying.
- ☐ It is aspirational to seek to eliminate bullying, but make no promises for zero incidents. You will have to break your promises sooner or later.

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(20) *Tamalpais Union High Sch. Dist. v. D.W.*, No. 16-4350, 117 LRP 41035 (N.D. Cal. 2017)

An IEP Team listed speech and language services on student's IEP as a related service. The Team checked off that student would receive both "individual" and "group" therapy. The IEP included no additional detail regarding the scope, duration, or frequency of group services. The parents complained that the absence of such detail denied them meaningful participation in the IEP process and thus denied their child FAPE. The administrative law judge agreed that such vague descriptions were a serious procedural violation. The school district appealed. The district court agreed that the vague related services description was a procedural violation which rose to the level of denial of FAPE. The judge rejected the school district's argument that the IEP Team's discussions informed the parents of how the district intended to provide the speech and language services. The parents were entitled to recover the full cost of the student's unilateral private placement for a whole school year and recover transportation expenses.

Take Aways

- Ensure that proposed services are presented in the IEP document in sufficient detailed to inform parents, service providers, and administrators of what a student will receive, including duration, frequency, and other parameters appropriate to the service (e.g., related service).
- IEP development is only part of the story; implementation is critical as well.

