

NORTHWESTERN OHIO EDUCATIONAL RESEARCH COUNCIL

Findlay, Ohio

March 13, 2002 "Special Education Legal Update"

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I. Introduction

II. Current Special Education Issues/Recent Cases

A. Evaluation Issues: Student Fails to Qualify for Special Education Services; No Showing of Special Education Need.

1. West Chester Sch. Dist., 35 IDELR 235 (SEA PA 2001).

Reversing an impartial hearing officer's determination, a state appeals panel concluded that a 14-year-old student did not demonstrate a need for special education and, therefore, was ineligible for services under the IDEA. Because of that finding, the panel said it did not have to resolve the question of whether the student met the eligibility requirements of OHI and SLD classifications.

To qualify for special education and related services under the IDEA, a student must satisfy both parts of a two-part test. First, the student must meet one or more of the categories of disabilities set out in 34 C.F.R. '300.7(b)-(c). Second, the student must be shown to be in need of special education and related services as a result of his or her disability or disabilities.

Student must reflect a need for special education to be eligible for services under IDEA. There are some students who are not legally disabled under IDEA, even though they have a medical diagnosis.

2. Costello v. Mitchell Pub. Sch. Dist., 266 F.3d 916 (8th Cir. 2001). A student is not eligible for special education services or eligible under Section 504 simply because grades dropped.

3. Austin Indep. Sch. Dist. v. Robert M., 168 F.Supp.2d 635 (W.D. Tex. 2001). Even if it is assumed that a student with ADD is OHI or Emotionally Disturbed in the first place, the Court concluded that the student did not need special education. AWhat Robert needed was to commit to doing homework and regularly attending classes. . . ." In addition, Awhat Robert definitely did need was an understanding that the responsibility for Robert's actions lies with Robert and the knowledge that good choices usually open good doors and bad choices usually open, and often compel entry through bad doors." Hearing officer's determination that student was eligible under IDEA is vacated by the Court which placed the responsibility for the student's difficulties in school with the student and the parents. This case has been appealed by the parent to the Fifth Circuit Court of Appeals.

B. IEP Issues

1. Student Makes Educational Progress Despite IEP Errors

Board of Educ. of the Hyde Park Cent. Sch. Dist., 35 IDELR 237 (SEA NY 2001).

Notwithstanding IEP deficiencies and certain other omissions, a state review officer found no basis for requiring the district to place a 16-year-old student with LD in an out-of-state residential school, as

requested by his parents. The SRO found that the student made meaningful educational progress in the district's program.

While IEP procedural violations, alone, may constitute a failure to provide FAPE in certain circumstances, each case must be reviewed in context with the facts presented. An IEP will not be set aside absent "some rational basis to believe that procedural inadequacies compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process, or caused a deprivation of educational benefits." *Roland M. v. Concord Sch. Comm.*, 16 IDELR 1129 (1st Cir. 1990).

2. Procedural violation resulted in a denial of a free appropriate public education based upon denial of parent participation in educational decision making.

Amanda J. v. Clark County Sch. Dist., 267 F.3d 877 (9th Cir. 2001). Because of the district's procedural violations, parents of student with autism are entitled to reimbursement for independent assessments and the cost of an in-home program funded by them between April 1 and July 1, 1996.

Where the district failed to timely disclose student's records to her parents, including records which indicated that student possibly suffered from autism, parents were not provided sufficient notice of condition and, therefore, were denied meaningful participation in the IEP process.

There is no need to address whether the IEPs proposed by the district were reasonably calculated to enable the student to receive educational benefit because the procedural violations themselves were a denial of FAPE.

3. District representative did not attend IEP meeting resulting in a denial of FAPE.

Pitchford v. Salem-Keizer Sch. Dist. No. 24J, 155 F.Supp.2d 1213 (D. Ore. 2001).

IEPs for the 1996-97, 1998-99 and 1999-2000 school years were reasonably calculated to confer educational benefit to child with autism.

However, 1997-98 IEP was sufficiently flawed to find a denial of FAPE because no district representative attended the meeting who was "qualified to provide or supervise the provision of special education" services. The absence of the district representative forced the student's parents to accept whatever information was given to them by the student's teacher. In addition, the parents had no other individual there who could address any concerns they might have had involving their child's program, including the teacher's style of teaching and his areas of emphasis or lack thereof, or the availability of other resources or programs within the district. In addition, the student "was likely denied educational opportunity that could have resulted from a full consideration of available resources in relation to M's skills in the development of her second grade IEP."

4. *Justin G. v. Board of Educ. of Montgomery County*, 148 F.Supp.2d 576 (D. Md. 2001). Where no IEP is developed prior to the beginning of the school year, even where the school district contends it was parents' fault, such a violation goes to the heart of the district's ability to provide FAPE and, therefore, resulted in a denial of FAPE.

5. *W.A. v. Pascarella*, 153 F.Supp.2d 144 (D. Conn. 2001). Where all IEP Team members agreed that it would be "best" to add a special education teacher to W.A.'s fifth grade classroom to "co-teach" the

class, the failure to revise the written IEP to reflect this consensus does not constitute a procedural violation where the addition of the teacher was not necessary for FAPE. In addition, parental participation requirements of IDEA do not equate to a mandate for the provision of services recommended by them, if the services that are otherwise being provided constitute FAPE.

6. *School Bd. of Collier County v. K.C.*, 34 IDELR 89 (M.D. Fla. 2001). Although the IEPs contained procedural defects, including a failure to set forth the criteria for mastering certain goals and objectives, the deficiencies did not affect the student's right to FAPE, where the school's "best efforts" led to educational benefit for the student.

7. Despite behavioral difficulties at home, a student did not require residential placement to make educational progress. *Gonzalez v. Puerto Rico Dept. of Educ.*, 34 IDELR 291 (1st Cir. 2001). The Court upheld the proposed IEP for a public school placement with a modification that parent training be provided to help them address and control the student's behavior at home.

C. Discipline

1. Dual System of Discipline

Randy M. v. Texas City ISD, 32 IDELR 168 (S.D. Texas 2000); Court decision for the school district.

A 13-year-old boy with a learning disability and a friend allegedly tore off the breakaway pants of a female student. The school district convened an IEP meeting, and the IEP team determined that the action was not a manifestation of the boy's disability. The team recommended that the student be suspended and sent to the alternative school. The parents initiated a due process hearing seeking an injunction to stop the suspensions. The hearing officer ruled in favor of the school district, and the parents appealed to federal court.

The federal court affirmed the hearing officer's decision, finding that the school district acted appropriately and was "justified in taking stern and aggressive remedial action." In addition, the district had offered several opportunities for the parents to provide evidence that the student's actions were caused by a disability.

2. *Farrin v. Maine Sch. Admin. Dist. No. 59*, 165 F.Supp.2d 37 (D. Maine 2001). An "expulsion IEP" was upheld where it afforded opportunity for student to continue to "progress" in the general curriculum. The fact that art, computer and physical education were not included did not foreclose student's ability to obtain the credits or skills needed to graduate later. In addition, these were not courses that student needed to advance to the 9th grade.

3. Student's misconduct does not mean eligible for 504. *Dekalb County (GA) Sch. Dist.*, 36 IDELR 14 (OCR 2001).

OCR determined a parent's contention that his son was entitled to special education services was without merit. Although the student experienced various disciplinary problems at school, nothing in his record indicated he was a student with disability.

Under Section 504, a student is considered as with a disability if he or she has a record of having (or is regarded as having) a physical or mental impairment that significantly interferes with one of life's major activities. Major life activities are functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working. 34 C.F.R. '104.3(j).

D. Participation on Athletic Team as Requirement to Provide a Free Appropriate Public Education

1. Right of Disabled Student to Participate in Interscholastic Athletic Competitions. *Kling v. Mentor Public School District Board of Education*, Case Nos. 1:01-CV204, 1:01-CV3130 (N.Dist. Ohio, 2001) (34 IDELR 148, April 13, 2001).

Parents of an 11th grade special education student challenged the school district's unwillingness to include participation on the high school cross country team on the student's IEP.

Parents requested that their 19-year-old son be allowed to play high school competitive sports when their son was beyond the age allowed by the Ohio High School Athletic Association (OHSAA) rules. The student had been informed that he would be ineligible to participate on the cross country and track teams during his junior year based upon the OHSAA by-law prohibiting participation in interscholastic athletics once the student attains the age of 19. The parents argued that the student's participation on the team was necessary for the school district to provide a free appropriate public education to the student. In particular, the parents claimed that his participation had improved his academic performance and self esteem.

Normally, a challenge to the OHSAA age restriction is made on the basis the rule discriminates against a student with disabilities. Instead of challenging on the basis that the student's rights are violated under Section 504, the parent argued that the student would suffer irreparable harm if he would not be allowed to play competitive sports. The parents used the standard for preliminary injunction to claim that the student could not obtain meaningful educational benefit.

The Court ruled for the student, ordering the school district to revise the IEP to include interscholastic athletics in the IEP and to place him on the track team as a part of his IEP. The Court found that the student's participation resulted in notable improvements in his academic work and self esteem.

The Court found that the purpose of the OHSAA rule was to prevent unfair advantage of older students. The Court noted that the student came in last place at the track meets and that it was not likely that his participation would create an unfair advantage to the school district's team.

The Court further issued a permanent injunction against the OHSAA to keep the OHSAA from sanctioning the school district for allowing the student to participate in track.

This case was appealed by OHSAA to the Sixth Circuit Court of Appeals on the issue of granting the preliminary injunction but was subsequently settled.

2. The Ohio High School Athletic Association amended its By-Laws effective November 1, 2001, to provide a waiver procedure to the 19-year-old age limitation for special education students.

Effective November 1, 2001, the Ohio High School Athletic Association amended by-law 4-2-1, its 19 year old age limitation rule, by adding the following exception:

If the student is a "child with a disability" as that term is defined at 42 U.S.C. Section 12102 (ADA) and the Regulations promulgated thereunder, that student may be declared eligible by the Commissioner if, in the Commissioner's sole discretion, the Commissioner determines that:

- a) the student does not pose a safety risk to himself/herself or others; and
- b) the student does not enjoy any advantages in terms of physical maturity, mental maturity or athletic maturity over other student-athletes; and
- c) the student's participation does not affect the principles of competitive equity; and
- d) the student's participation does not displace another student athlete; and
- e) there is no evidence of "red-shirting" or other indicia of academic dishonesty.

Also, by-law 4-3-4, which pertains to the limitation of eligibility of a student for a period not to exceed eight semesters, was also amended to provide an exception for disabled students. (These revisions will be printed in the 2002-2003 OHSAA handbook.)

3. State athletic association is ordered to develop a waiver process so a 19-year-old student can participate on high school sports teams. *Cruz by Cruz v. Pennsylvania Interscholastic Athletic Assoc.*, 34 IDELR 290 (E.D. Pa. 2001).

Applying the tests established by the U.S. Supreme Court in the controversial *PGA Tour, Inc. v. Casey Martin* decision, the U.S. District Court in Pennsylvania ordered the state athletic association to develop a waiver process allowing a 19-year-old student with disabilities the opportunity to return to his high school athletic teams.

The IEP for the student, who was diagnosed as LD, indicated his need to take part in extracurricular activities, including sports. The student was a member of the varsity football, wrestling, and track teams. However, the state athletic association's rule prohibited students from participating in interscholastic competition when they attained age 19.

The parent and district asked the athletic association to grant the student a waiver or exception to its rules so that the student could continue playing on the team. When the association refused, the parent and district sued under the IDEA and ADA. However, the IDEA claim was dismissed for failure to exhaust administrative remedies.

The Court ruled that the student must be given an opportunity to present his case to the athletic association, which must evaluate a requested waiver of its age-based athletic participation rule for students with disabilities on a case-by-case basis.

The student could be eligible to return to his teams upon a showing that the requested modification to the age rule was reasonable, necessary, and did not fundamentally alter the nature of the competition. The Court enjoined the association from enforcing its age and eligibility rule until it entertained the student's application for a waiver under ADA guidelines established by *Martin*.

The athletic association argued that it would be nearly impossible for it to determine in each individual case whether allowing participation of an over-age student would alter the nature of the competition. However, the Court pointed out that the association had a waiver process for other rules, including student transfers. In granting the injunction, the Court determined the establishment of an age-waiver rule would not place an undue burden on the athletic association.

4. Student has no right under IDEA to play football; no pass -- no play rule upheld. *Moody v. Westerville City School District Board of Education* (August 31, 2001), S.D. Ohio No. C-2-01-00823, unreported.

A student with learning disabilities and alleged depression was barred from playing high school football because of his grades made him ineligible under the board's minimum grade point policy. The board refused to waive the policy due to the student's disabilities.

The student's parents sought a temporary restraining order and preliminary injunction against the board under 20 U.S.C. 1412(a)(2)(A), which requires public schools to provide a free appropriate public education to disabled students. The parents claimed that the student's poor grades were caused by the district's failure to identify his alleged disabilities. The parents also claimed that the IDEA required the district to waive its policy because the student's depression would be remedied by playing football.

The court denied the temporary restraining order, concluding that the record failed to show that the student's poor grades were caused by his disabilities. The court also rejected the parents' claims because they recently had refused to let the district evaluate the student for additional disabilities. Finally, the court held that the IDEA did not require the district to allow the student to play football as a remedy for depression because other treatments were available and being used.

5. Local academic eligibility requirement. *Smelko v. Revere Local School District*, Summit Case No. CV00083627 (August 23, 2000). Disabled high school senior prohibited from participating on the high school football team based upon failure to meet the school district's academic eligibility requirement during the previous school year. Parents argued that the participation was mandated by the IEP which referenced in the transition plan "football, wrestling, and track at Revere High School" under the Community Participation Outcome(s): Community Awareness section.

The Court denied the parents' request for an injunction, finding the student's IEP did not mandate his participation on the football team. The Court said that the activities identified in the transition plan were selected based upon the interest of the student and had no relationship to the student's specific disability.

6. A district did not intend to make participation in interscholastic athletics a mandatory part of a high school student's placement in the IEP. *St. Joseph Pub. Schs.*, 34 IDELR 282 (SEA MI 2001).

The parents had claimed that a student's removal from the varsity baseball team constituted an improper change of placement. The student's IEP provided for one hour per day of special education support. Otherwise, the IEP stated that he would "participate with nondisabled students in all other classes and extracurricular activities."

The student was suspended from the varsity baseball team for a conduct violation. The parents filed for due process claiming that the wording of the son's IEP made after-school interscholastic athletics a mandatory part of his placement.

The hearing officer found the wording of the student's IEP "less than clear" but concluded that participation in extracurricular activities was not intended to include interscholastic sports. The hearing officer determined the student was properly removed from the baseball team for a conduct violation and that such removal did not constitute a placement change. The hearing officer said that because athletics were not discussed in the IEP, the IEP did not obligate the district to keep the student on the team despite his conduct infraction.

7. *Long v. Board of Educ.*, 167 F.Supp.2d 988 (N.D. Ill. 2001). Restraining Order denied to student with unspecified disability under ADA and Section 504 seeking order to allow him to resume participation in lacrosse at the high school after committing a violation of the code of conduct. Court noted that a "TRO would send the message to other students and parents that an ADA challenge in federal court might thwart the enforcement of codes of conduct at Libertyville and other high schools." (Student argued that successful athletic competition was part of his rehabilitation.)

E. Student Records Issues

1. A school district's practice of allowing students to grade each other's tests and call out their own grades in class does not violate the Family Educational Rights and Privacy Act. *Owasso Indep. Sch. Dist. v. Falvo*, ____ U.S. ____ (2002 WL 232853 (U.S.) (February 19, 2002)).

a. A parent of three middle school students, one of whom was a special education student, learned that some of her children's teachers would have their students grade each other's work assignments and tests ("peer grading"), and would then have the students call out their own grade to the teacher.

The parent complained about this grading practice to school officials, claiming that it severely embarrassed her children by allowing other students to learn their grades. The school district refused to disallow the practice.

The parent sued the district and several school administrators. She alleged FERPA and 14th Amendment privacy rights prohibited public disclosure of student grades. A U.S. District Court granted summary judgment to the school district and administrators on both claims and the parent appealed.

b. The Tenth Circuit Court of Appeals had ruled that the grading practice did not violate the IDEA or 14th Amendment, but it did violate FERPA. The Court said that FERPA prohibits schools from permitting the release of a student's education records to anyone other than statutorily designated authorities without parental consent. The students' grades in this case were "educational records" within the meaning of FERPA. The grades contained "information directly related to a student" and were "maintained by a person acting for an educational agency."

(The court did rule that qualified immunity protected the individual administrators from a monetary judgment because the FERPA right violated was not clearly established at the time the officials permitted the grading practice.)

c. The U.S. Supreme Court reversed the Tenth Circuit Court of Appeals. The Supreme Court held that at the point of "peer grading", the papers are not yet "maintained" within the meaning of FERPA. The Court dismissed the notion that student graders were "maintaining" records in the way that the school registrar "maintains" records. Further, the Court held that a student grader is not one who is "acting for" the educational institution. The Court said that the grading of papers allowed review and reinforcement of the taught material. Even under the assumption that the teacher's grade book is an educational record, the students papers are not covered under FERPA until they are collected and recorded into the grade book. The Court held that "peer grading" is not a violation of FERPA.

2. Parent cannot compel removal of meeting notes from student's file. Letter re Spring Branch Indep. School District, (FPCO 7/12/00). Unless opinions expressed at a meeting contain inaccurate information or were incorrectly recorded, FERPA does not afford parents the right to demand the records be removed even in circumstances under which the validity of the meeting is in question.

The parent's complaint to Family Policy Compliance Office (FPCO) stated that district officials held a meeting regarding her son's psychological status without her knowledge or permission. She requested that the district remove any notes regarding that meeting from her son's files, together with any similar documentation regarding other "informal parent-staff or parent-staff-psychologist informal consultations or meetings. . . ."

Decision: FPCO stated that FERPA gives parents the right to seek amendment of education records they believe contain information that is inaccurate or misleading. However, that right cannot be used to challenge a grade or an individual's opinion (unless an opinion has been inaccurately recorded) or to contest the district's decision to create or maintain particular education records. FPCO said that the documents the parent sought to have removed reflected the notes, opinions, and comments of those individuals who attended the meeting.

However, because it appeared that the disputed meeting was held after the parent denied the district's request for psychological testing of her son, FPCO noted it was possible that protections under the IDEA were available to the parent.

3. Special Education Advocate Lacks Standing to Bring FERPA Claim, Letter to Drumheiser, 35 IDELR 219 (FPCO 2001).

An advocate for students with disabilities did not have standing to bring a complaint charging that the district improperly disclosed information to a local newspaper concerning a student's special education requirements. Letter to Advocate for Children with Disabilities, (FPCO 2001). The Family Policy Compliance Office (FPCO) stated that the advocate had not "suffered an alleged violation" of FERPA.

In a complaint received by FPCO, the district was charged with violating FERPA when it allegedly included information regarding a specific student's special education needs in a disclosure to a newspaper without prior written parental consent. The complaint was filed by an advocate for children with disabilities.

Parents have enforcement rights. FPCO explained that FERPA rights to nondisclosure are vested in the parents of a minor student. The statute does not extend those rights to a third party who has not suffered an alleged violation. FPCO explained that it requires that a parent to have standing (i.e. have suffered an alleged violation) in order to file a complaint under FERPA.

Because the special education advocate did not have standing with respect to the allegation of the disclosure of information from the student's records. FPCO refused to investigate the complaint. It advised the advocate that if the complaint was being filed on the parent's behalf, written parental authorization is required before an investigation could commence.

However, FPCO used the opportunity to explain FERPA's prohibition on nonconsensual disclosure of "personally identifiable information" from a student's records. It noted the term includes any information that would make the student's identity "easily traceable." Before making a disclosure, a district must consider whether the party who seeks access to the records has prior knowledge as to the names of the students to whom the records relate and whether any subsequent parties to whom the information may be further disclosed could ascertain the identities of the students.

In this case, FPCO stated that if any reasonable individual in the school community could discover the identify of the student by reading the article containing the reference to the student's special education records, FERPA would bar the disclosure.

4. Principal's handwritten notes concerning disciplinary action against the high school student are "sole possession" records and not educational records which had to be made available to the parent. Letter to Morgan County School District, (FPCO 2001).

A principal was not required to disclose his handwritten notes to a parent of a suspended high school student.

The evidence indicated that the notes were designed to assist the principal's memory of the incident and were not "education records" under the Family Educational Rights and Privacy Act. The Family Policy Compliance Office (FPCO) concludes the notes were sole possession records and, as such, are excluded from FERPA's definition of educational records.

FERPA exempts from the parental access rules "those records which are kept in the sole possession of the maker . . . and are not accessible or revealed to any other person except a temporary substitute for the maker of the records."

In this case, the principal made "memory jogger" notes listing names of students to whom he had spoken. They were solely in the principal's handwriting and contained very brief entries to help his memory of what students gave him what information." FPCO concluded that the school district was not required to provide the parent access to the principal's notes.

F. Tuition Reimbursement for Private School Placements.

1. A draft of an IEP must be provided to parents even though a child who resides in the school district attends a private school. *Redding Elem. Sch. Dist. v. Goynes*, 34 IDELR 118 (E.D. Calif. 2001).

2. Parents are not required to provide notice to the school district of unilateral placement in a private school if the school district has not offered a free appropriate public education (IEP) to student. *Sandler v. Hickey*, 34 IDELR 88 (4th Cir. 2001).

3. *Pollowitz v. Weast*, 34 IDELR 171 (4th Cir. 2001). The Court ruled that the parents had failed to give to the school district the required statutory notice of unilateral placement of their child in a private school when the parents were not satisfied with the proposed educational program of the school district.

The 1997 IDEA amendments state that parents who remove a child from school, with the intention of securing a private placement at public expense, are required to provide the school district advance notice. The parents' failure to give notice results in either the denial of reimbursement or a reduction of a reimbursement.

Facts: The parents attended an IEP meeting in March 1998 to develop an IEP for the 1998-1999 school year. The parents agreed to the IEP and signed it before they left the meeting.

At the same time, the parents had applied for their child's admission to a private school and was accepted in May 1998. In June, the parents signed a contract for attendance during the 1998-1999 school year and paid a \$10,000 deposit. In June 1998, the parents sent a letter to the school district's principal informing him that the parents had explored other placement options and had enrolled the child in the private school for the 1998-1999 school year. The letter also requested that the school district pay for the private placement.

In response to the letter, the school district scheduled a meeting with the parents in August 1998 to review new evaluations that the parents had obtained. The meeting was continued until September 1998 at the parents' request. The school district continued to recommend the public school placement. The parents disagreed and filed for due process.

The hearing officer dismissed the case on the grounds that the parents had failed to give notice of the

private school placement. This decision was appealed to the federal court which affirmed the hearing officer's decision.

Decision: This case is the parents' appeal to the federal court of appeals which also affirmed the hearing officer's decision. The IDEA requires that the parents either provide oral or written notice prior to the placement at the most recent IEP meeting. The Court said that the parents' action at the March 1998 IEP meeting did not constitute oral notice. Despite the fact that the parents verbally expressed reservations about the IEP, they did agree to the IEP and signed it. The Court also found that the parents did not provide written notice.

The Court found that the parents' letter did not constitute notice of their rejection of the public placement because the letter informed the school district that they had obtained placement at the private school. It did not say anything about the district's proposed IEP or the parents' belief that the IEP was unsuitable. The letter merely said that the parents had decided to place their child in a private school. The Court found that the letter did not provide notice because it was sent after the child was already enrolled at the private school for the 1998-1999 school year.

This case illustrates that parents have to give school districts a fair opportunity to prepare an educational program for a child. Parents cannot go ahead and make arrangements at a private school and not tell the school district about it.

4. Failure to hold IEP conference warrants residential placement reimbursement. *Knable v. Knable v. Bexley City Sch. Dist.*, 34 IDELR 1 (6th Cir. 2001). Although the district met with the parents on several occasions to review possible placement options for the student, such meetings were not the "equivalent of providing the parents a meaningful role in the process of formulating an IEP." Because the district did not formally offer an IEP/placement prior to placement in a residential program by the parents, parents are entitled to reimbursement. The parents' refusal to agree with the district's placement recommendation did not excuse the district's failure to conduct an IEP conference.

5. OSEP's response to questions on private school placements. 34 IDELR 263 (OSEP 2000).

G. School counselors may be school district representatives on an IEP team. Letter to Cormany, 34 IDELR 9 (OSEP 2000).

IDEA requires that the IEP team must include a school district representative qualified to provide, or supervise the provision of, specifically designed instruction; is knowledgeable about the general curriculum; and is knowledgeable about the availability of resources of the school district.

The school district has the authority and discretion to determine the individual who should serve as its representative providing that the criteria of the regulations are satisfied. The regulations do not specify which individuals may or may not serve as a representative of the school district. Therefore, so long as the regulations are met, the federal statute imposes no restrictions on a school district from appointing a school counselor as the school district representative on the IEP team.

H. Compensatory Education Claim Will Survive a Student's Graduation

The Office of Special Education Programs, U.S. Department of Education has given an opinion that a student's graduation does not automatically relieve a district of its responsibility to provide compensatory education-related services previously awarded to the student for a denial of FAPE. Letter to Riffel, 34 IDELR 292 (OSEP 2000).

The purposes of a compensatory education award is to remedy the failure to provide services a student should have received in high school when he or she was entitled to FAPE. Compensatory services are often appropriate as a remedy even after the period when the student is otherwise entitled to FAPE because, like FAPE, compensatory education can assist the student in the broader educational purposes of the IDEA including obtaining a job or living independently. OSEP said though that a district is not required to provide compensatory services to a graduated student once the student enters college or junior college, unless such a level of education is considered "elementary and secondary education" under state law.

I. The Americans with Disabilities Act does not require a school district to take any action that it can demonstrate would result in a fundamental alteration in the nature of the program or cause undue financial and administrative burdens. *Horry County (SC) Sch. Dist.*, 35 IDELR 39 (OCR 2001).

OCR dismissed a complaint from a parent of a student with a hearing impairment, concluding the record did not support her charge that the district violated Section 504 and the ADA by not providing her son with an effective means of communication. Additionally, OCR found that the student's disability was not a factor in his failure to enroll in a technology magnet program.

The ADA requires districts to furnish appropriate aids and services where necessary to afford students with disabilities an equal opportunity to participate in, and enjoy the benefits of, a service, program or activity. However, a district is not required to take any action that it can demonstrate would result in a fundamental alteration in the nature of the program or cause undue financial and administrative burdens.

J. Parents are not entitled to attend preparatory meetings.

In the *Matter of D.*, 32 IDELR 103 (SEA CT, 2000). As part of a due process hearing, parents contended that the district violated IDEA when it did not invite the parents to two preparatory meetings prior to an IEP meeting. The hearing officer held there was no IDEA violation since the meetings were solely to develop proposals that the staff would be able to discuss later at the IEP meeting.

This is one of the first rulings regarding "meetings" under the new IDEA regulations at 34 CFR 300.501(b). The holding is consistent with one of the types of meetings that under the regulations a parent has no right to participate in (the other type being informal/unscheduled conversations regarding issues not addressed in an IEP, e.g., methodology, lesson plans, or coordination of services.)

K. Parent's Threat of Violence Supports District's Exclusion from Property.

The Office of Civil Rights found that a school district did not deny a parent's request for a special education due process hearing. Also, the district legitimately banned the parent from district property due to her threats directed at personnel and properly referred suspected abuse of the child to Children Services. *Wooster, Ohio City Schools*, 33 IDELR 253 (OCR 2000).

Facts: The parent of a disabled student filed a complaint with the Office of Civil Rights alleging that the school district failed to grant the parent a due process hearing to challenge the district's placement of a student in a severely behaviorally disabled program. She also claimed that the district retaliated against her by denying her access to school facilities and by filing false charges against her with the county Children Services Department.

Decision: OCR held that the evidence did not support the parent's claims. There was insufficient evidence of retaliation to the parent's filing of a due process claim. The parent's request for due process was protected activity. The district did inform the parent that she was not permitted to enter district property or attend district events, but OCR determined that the district's actions were legitimate and nondiscriminatory because the parent threatened school personnel on two occasions.

Also, the evidence did not support the claims that the district filed false referrals against the parent with the county Children Services Department. The referrals were legitimate because on two occasions school staff members noticed injuries that led them to suspect physical abuse of the student in the home. OCR noted that state law required the district to make such referrals when they suspect abuse of students.

L. Student's Failure in Gifted Program Isn't District's Fault

The U.S. District Court, Western District of Texas, refused to reimburse the parent of a high school student for costs of courses in a gifted program. *Austin Indep. Sch. Dist. v. Robert M.*, 35 IDELR 182 (W.D. Tex. 2001).

The court stated the student chose to squander the opportunity offered by the gifted placement "by skipping class, failing to do homework, smoking dope, neglecting to take his ADD medication, etc."

The Individuals with Disabilities Education Act regulations at 34 C.F.R. '300.350(a) make it clear a child's educational program is not a contract guaranteeing the student will achieve a certain amount of academic proficiency. All that is required of a district is that it make a good faith effort to assist the child in achieving goals.

The district's gifted curriculum made a free appropriate public education available to the student, offering a program reasonably calculated to confer an educational benefit. The court concluded the responsibility for the student's lack of success in the program could not be attributed to the district, commenting "schools are not required to force or motivate students to take advantage of the education they offer; this is the parents' role."

It added the case represented an example of a circumstance in which blame for failures is placed on the most convenient, rather than the most deserving, party. The court vacated an impartial hearing officer's reimbursement award, stating it could not fathom how the independent hearing officer's finding of fact supported her conclusions of law.

M. Liability Issues

1. Board Not Liable for Injuries Incurred by Teacher Struck by Special Education Student
Engleman v. Cincinnati Board of Education, 34 IDELR 288 (2001). (Court of Appeals for Hamilton County.)

A student with a history of violent behavior struck the teacher, who sustained a concussion and other continuing injuries. The teacher sued the Board, claiming it knew of the student's propensity for violence, but failed to take reasonable and obvious measures to prevent the foreseeable injuries the student caused. The teacher alleged that the Board acted intentionally and maliciously by not providing her with protection.

Held for the Board. The Court determined that there were no exceptions to the statutory immunity granted to a Board of Education. While the law contains an immunity exception for the negligent acts of employees, the teacher also accused the Board of an intentional tort, not employee negligence.

2. *Thelma Harris, Mother and Next Friend of Ricky Alan Harris v. Vicki Robinson and Independent School District No. 49 of Leflore County, Oklahoma*, 2001 WL 1558781 (10th Circuit, 2001).

A teacher forced a student to clean out a toilet by hand, with no gloves or tools. The incident stemmed from a conversation where the student admitted to stopping up a toilet. The teacher believed that the student stopped up the toilet intentionally, but the student had used the bathroom and used too much toilet paper to clean himself, thus clogging the toilet. The teacher made sure that the student washed his hands with soap, and the entire incident lasted approximately five minutes.

The student brought suit under 42 U.S.C. 21983 alleging a violation of his civil rights. The United States District Court granted summary judgment in favor of the teacher and the District. In affirming summary judgment, the Tenth Circuit relied on the fact that the teacher's actions were not so cruel as to rise to the level of a substantive violation of the student's Fourteenth Amendment Due Process rights. The court acknowledged that the teacher used poor judgment in not verifying why the toilet was clogged, but was not acting out of malice or sadism. The teacher was issued a formal, written reprimand for the incident, and the court found this sufficient.

3. *Kendall v. West Haven Dept. of Educ.*, 33 IDELR 270 (Conn. Super. Ct. 2000). Court awarded more than \$67,000 to a special education student who was attacked by another special education student, based upon evidence that the assistant principal had reason to know of the potential harm to the victim. The student told the AP of the other student's actions, which included racial epithets, spitting and pushing. The AP stated that she would take care of it, but took no actions; nor did she inform other school officials of the prior incident and left the premises for the day shortly after meeting with the student. Given the egregious nature of the AP's inaction, she was not shielded by the doctrine of governmental immunity.

4. *Willhauk v. Town of Mansfield, Town of Mansfield School Committee, and all of their members*, 35 IDELR 155, U.S. District Court, Massachusetts, (2001).

A student was attacked by another student in a restrictive program designed for students with serious behavioral disorders. The program name was SPRINT, and required 100% supervision of students at all times. The terms of the program however, did not expressly require supervision during after-school activities. The student attacker, Linney, had allegedly threatened a student at his old school with a knife. This was considered by the District and did not bar his admission into SPRINT.

After school one day Linney and a friend attacked another student, Willhauk, in a field behind the school. Linney beat Willhauk so severely that his frontal sinus wall was severely fractured. Willhauk was forced to undergo surgery where metal plates and screws were put into his head. After the attack, Linney was adjudicated delinquent by the juvenile court, but was never disciplined by the District.

Willhauk sued the District because they placed Linney in the SPRINT program and then failed to supervise him. The District argued that the incident took place after school when the 100% supervision rules did not apply. In finding for the District, the court noted that the attack on Willhauk was tragic but, the District did not violate Willhauk's constitutional rights in any way. The Court found that the admission of Linney into the SPRINT program constituted a permissible exercise of discretion for which immunity is

granted to the school officials who made the decision.

N. Question of Whether Non-Custodial Parent Can Bring Special Education Challenges

1. *Navin v. Park Ridge Sch. Dist. 64*, 270 F.3d 1147 (7th Cir. 2001). Where divorce decree did not "wipe out" all of non-custodial father's rights and gave him the opportunity to be informed about and to remain involved in the education of his son, father has standing to challenge tutoring services under IDEA. However, on remand, district court must determine whether custodial mother's view on tutoring (which controls as to the parental view under the divorce decree) is the same as father's to determine whether mother's view "trumps" the father's and ends the case.

III. Miscellaneous

A. Issues Relating to Transition of Disabled Students from Preschool to Kindergarten

Obtain adequate information about disability including behavioral issues.

B. Child Find Issues

1. The Sixth Circuit Court of Appeals has issued a decision in the case of *Metropolitan School District v. Doe*, 34 IDELR 256 (6th Cir., August, 2001), which is a good review of a school district's obligations for child find under IDEA.

2. Requirement of Child Find/Graduation/Compensatory Remedy.

Department of Education, State of Hawaii v. Cari Rae S., 35 IDELR 90, U.S. District Court, Hawaii, (2001).

The student had 79 absences and numerous behavioral referrals during her ninth grade year, but was not identified as eligible for special education until spring of her eleventh grade year. The federal court found that the Department of Education should have identified the child earlier than her eleventh grade year in that the Department was on notice of a problem as early as her ninth grade year.

The precipitating event that led to this litigation was that after the child's mother confronted the child about possible drug abuse per a school counselor's recommendation, the child locked herself in the bathroom and threatened to kill her mother. Her parents sought payment for the hospitalization costs for the child based on the fact that the Department violated the "child find" provisions of the IDEA and the child should have been identified earlier.

The Department contended that because the child graduated, she had not been denied FAPE and therefore, the award of hospital costs was improper. The court disagreed and determined that the child indeed should have been evaluated earlier and the award of hospital costs was an appropriate remedy because the costs were medical services for diagnostic and evaluation purposes as is allowed under the IDEA. The court concluded that, "it is a logical extension of existing authority to find pre-placement medical costs limited to diagnosis and evaluation to be recoverable where the child is subsequently found to qualify for IDEA services."

C. Tape Recording of IEP Meetings

1. Parents may tape record IEP meeting without consent of district, but district may tape record meeting only if parents agree. See, *Inquiry by Diane K. Doerr*, 13 EHLR 127 (OSEP, Apr. 15, 1988).

2. While tape recording is not addressed in IDEA or regulations, the school district must take all necessary steps to ensure that parents understand the proceedings, and tape recording of IEP meetings must be permitted if necessary to enable the parents to effectively participate. Parents' right to meaningful participation outweighs teacher's concern for privacy. *E.H. v. Tirozzi*, 735 F. Supp. 53 (D. Conn. 1990).

3. Under the IDEA, a parent's right to effectively participate in child's IEP necessarily encompasses right to tape record. *V.W. v. Favolise*, 16 EHLR 1070 (D. Conn. 1990).

4. Any recording of IEP meeting maintained by school district is an education record within meaning of Family Educational Rights and Privacy Act (FERPA).

5. Appendix A to the 1999 Regulations states that a school district has the option to require, prohibit, limit, or otherwise regulate the use of recording devices at IEP meetings. A Board policy could be adopted to address these issues. Appendix A, answer to question 21.

D. Requirement of Alternative Assessments for Students on a 504 Plan and ESL Students As Well As IDEA Students. Implementation of Senate Bill 1 and Title 1 requirements.

E. IEP team decisions are not "majority" decisions. *Shasta Union High Sch. Dist.*, 30 IDELR 733 (1999).

F. Home-schooled Children's Right to IDELR Procedures.

Forstrom ex rel. Forstrom v. Byrne, 34 IDELR 260 (New Jersey Superior Court, Appellate Division, August 2001). Because of an equal protection argument, home-schooled children may have the right to access special education procedures.

Issue of whether home school is a private school or a separate and third category in addition to public schools and private schools. It is necessary to identify state law on this issue.

G. Discipline for Alcohol Violation Nondiscriminatory. *El Paso (TX) Indep. Sch. Dist.*, 35 IDELR 22 (OCR 2001).

The Office of Civil Rights found insufficient evidence to support charges that the district discriminated against a student with ADHD by disciplining him for being under the influence of alcohol at a football game. Students without disabilities, who committed the same offense, were disciplined in the same manner, OCR noted.

The disciplinary safeguards provided in the Section 504 regulations do not protect students with disabilities when the discipline imposed does not constitute a change in placement. Instead, review in situations is limited to whether the district acted in a nondiscriminatory manner in disciplining the student.

H. Safety Concerns, Ability Level Justify Student's Exclusion from Choir Activities

Grosse Pointe (MI) Pub. Schs., 35 IDELR 225 (OCR 2001).

Finding the district offered nondiscriminatory reasons for excluding a high school student with a visual impairment from school choir's dance activities, OCR ruled the exclusion did not violate Section 504 or the ADA.

Participation in extracurricular activities and nonacademic services is not a FAPE issue under Section 504, but is instead an issue of accessibility and equal opportunity for participation. However, a new item in the IEP-content requirement of the IDEA requires inclusion of a statement of supplementary aids and services necessary for participation in extracurricular activities. 34 C.F.R. '300.347.

I. Student Is Not Entitled to Transportation Following Intradistrict Transfer

Prince George's County Pub. Schs., 35 IDELR 233 (SEA MD 2001).

A student who was transferred to another district school at the parents' request was not entitled to transportation to and from that school at public expense. The student could have obtained FAPE at the school closest to her home and the district acted in good faith by allowing the transfer to the other school, an administrative law judge ruled.

In Timothy H. and Brenda H. v. Cedar Rapids Community Sch. District, 30 IDELR 535 (8th Cir. 1999), the 8th Circuit ruled that a district had no obligation to provide transportation to a special education student who attended a school that was located within the district's jurisdiction, but was not the student's regularly assigned school. As in this case, the parent in Timothy H. did not dispute that the regularly assigned school offered FAPE.

J. Exhaustion of Administrative Procedures of IDEA Required Before Filing of Lawsuit in Court.

Yaw by Yaw v. Van Buren Intermediate Sch. Dist., 35 IDELR 119, U.S. District Court, Western District of Michigan, 2001.

A special education student had an IEP in which one of the objectives related to personal hygiene and physical education. An incident occurred when a gym teacher ordered the student to shower and he refused. The teacher directed the student to the shower and eventually, the teacher turned the shower on and sprayed the student.

The mother of the student claimed that the teacher's actions violated her son's civil rights. She filed suit against the District in the U.S. District Court in the Western District of Michigan. The District claimed that the student had failed to exhaust his remedies under the IDEA and therefore, could not proceed directly to court. The student claimed that his civil rights which were violated were independent of any rights under the IDEA and administrative exhaustion was unnecessary.

The Court agreed with the District that the claim had a sufficient nexus to the IDEA because the student was a special education student, with an IEP, and the incident arose over an objective in that student's IEP. Therefore, the Court found it was proper that all IDEA administrative proceedings should be exhausted before filing suit in court.

K. DeLeon Independent School District v. Seth B. by Tamera B., 35 IDELR 92, U.S. District Court, Texas, (2001).

DeLeon Independent School District filed a complaint for declaratory and injunctive relief against the mother of a student who was receiving special education services. The District alleged that the mother was abusing the administrative process set out under the IDEA by filing repeated requests for due process hearings, and then canceling or refusing to attend. The District incurred \$154,000 dollars in legal fees. The District sought an injunction restraining the mother from filing subsequent due process

requests on the same matter. The District also sought a declaration from the court that it did not violate IDEA procedures, and that the child's IEP was appropriate.

The court concluded that the District was not a "party aggrieved" as is required under the jurisdictional statute 20 U.S.C. '1415(i)(2). The court reasoned that to be an aggrieved party, there must be an adverse finding or decision against the District. The court concluded that there was no adverse decision against the District, and the litigious conduct of the mother had no judicial remedy under the IDEA.

L. Great Falls Public Schools v. Lee Johnson, o/b/o Amanda Johnson, and the Montana Human Rights Commission, 34 IDELR 286, Montana Supreme Court, (2001).

The father of a high school student with a disability filed a claim against the school district with the Montana Human Rights Commission claiming that the district failed to provide adequate physical access at his daughter's school.

The student was in a wheelchair, and prior to her arrival at the school, her parents brought the issue of accessibility to the attention of the administration. There was no elevator to provide access to the second floor of the school. Thus, the student could not participate in science labs, could not use the library, and had only restricted access to the gym. Also, there were numerous other accessibility issues the student faced, from snow-covered sidewalks, to doors that she could not open.

The District attempted to accommodate the student, but was unable to put an elevator in the school. Although the District made minor adjustments and implemented an IEP to address the concerns, these actions were not effective. The Montana Human Rights Commission found for the parents.

On appeal, the District argued that the administrative remedies under the IDEA were not exhausted, and therefore the claim was improperly before the Human Rights Commission. The district court agreed with this contention and reversed the order of the Human Rights Commission.

In reversing the decision of the district court, the Montana Supreme Court noted that the student was not claiming a deprivation of FAPE, she was seeking relief from physical accessibility problems. The Court found that there was no legal basis for determining that the IDEA was intended to limit applicable state human rights laws pertaining to discrimination claims. The student prevailed.

M. Attorney's Fees/Damages

1. Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and Human Services, 35 IDELR 160, United States Supreme Court (2001).

Buckhannon Board and Care home operated assisted living facilities that failed an inspection by the West Virginia fire marshal's office because some of the residents were incapable of "self-preservation" as defined by West Virginia state law. Plaintiffs were residents of the nursing home who alleged that the self-preservation requirement violated the Fair Housing Amendments Act of 1988 (FHAA) and the Americans With Disabilities Act (ADA). The West Virginia legislature eliminated the "self-preservation" requirement and the case was dismissed as moot.

Plaintiffs then requested attorney's fees as the "prevailing party" under the FHAA and ADA. The attorneys cited the "catalyst theory" which opines that a plaintiff is a "prevailing party" if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct. (p. 679.) The request was denied and the attorneys appealed to the U.S. Supreme Court.

In denying attorney's fees the U.S. Supreme Court held that in order for attorney's fees to be awarded there must be a "prevailing party." "Prevailing party" is one who has been awarded some relief by a court. The Court held that a voluntary change on the part of one party does not make the other the "prevailing party" and thus entitled to attorney's fees under statute. Therefore, no attorney fees will be awarded in such cases.

2. Jose Luis R., et al.v. Joliet Township H.S. District 204, 35 IDELR 151, U.S. District Court, Northern District of Illinois, (2001).

The student and the District entered into mediation to resolve a dispute about the student's educational placement. As a result of the mediation, the dispute was settled and the student received services that he was previously denied.

The student argued that he was entitled to attorney's fees, and the District argued that under *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and Human Services*, 35 IDELR 160, United States Supreme Court (2001) (See above), the student was not entitled to attorney's fees.

The Court found that the Mediation Agreement qualified the student as a "prevailing party" and therefore entitled to attorney's fees under the IDEA. The Court found that when the Mediation Agreement was read into the record, it constituted a change in the legal relationship of the parties, which is a necessary element for one to be a "prevailing party." The Court rejected the District's contention that the agreement was a private settlement and therefore no attorney's fees were warranted. This was because the Mediation Agreement was read into the record before a hearing officer and therefore was public, with Court involvement.

N. United States Supreme Court rules that employee with impairments that prevent performance of limited manual tasks is not disabled under the ADA.

Toyota Motor Manufacturing, Kentucky, Inc. v. Williams (Jan. 8, 2002), ___ U.S. ___, 122 S.Ct. 681, ___ L.Ed.2d ___, 70 U.S.L.W. 4050.

An employee with carpal tunnel syndrome sued her employer, claiming that it failed to provide her with a reasonable accommodation, as required by the ADA. The federal district court granted summary judgment in favor of the employer, holding that the employee's impairments did not substantially limit any major life activity. The Sixth Circuit U.S. Court of Appeals reversed, concluding that the impairments limited the employee in the major life activity of performing manual tasks. The employer appealed, and the U.S. Supreme Court reversed the judgment of the Sixth Circuit. In support of its decision, the Supreme Court concluded that an impairment must prevent or restrict a person from performing tasks that are of central importance to most peoples daily lives in order to qualify as a disability. The Court found that evidence of the employee's inability to perform a narrow class of manual tasks related to her specific job was not sufficient to show that she was disabled under the ADA.

O. Punitive Damages may be available to remedy violations of Section 504 and Title II of the ADA. *Gorman v. Easley*, 34 IDELR 289 (8th Cir. 2001).