

Special Education Law Update
Hawaii Department of Education

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Legislative Issues

I. Rosa’s Law (S. 2781 H.R. 4544)

The bill, signed into law on October 5, 2010 changes all references in Federal law from “mental retardation” to “intellectual disability”.

II. Recognizing the work of Special Education Teachers (H. Congressional Resolution 284)

The resolution, passed 415-0 in the House of Representatives and by voice vote in the Senate, recognizes the amount of work required to be a special education teacher and commends the 370,000 special education teachers for their sacrifice and dedication to individuals with special needs.

III. State Compliance Determinations with Part B of the IDEA

The United States Department of Education informed Hawaii, based on the data submitted in the State Performance Plan and the Annual Performance Report, that the State meets the requirements of Part B of the IDEA. Letter to Superintendent Matayoshi (United States Department of Education, Office of Special Education Programs (June 3, 2010))

IDEA Case Law Up-Date

I. Evaluation Issues

- A. The Court found that the school district violated its responsibility under the child find provision of the IDEA when it did not conduct a special education evaluation of a student. The 10th grade student was referred by the school to a mental health

counselor since the student failed every subject and the teachers reported that her work was “gibberish and incomprehensible”, she played with dolls in class and urinated on herself in class.

Although the mental health counselor recommended a special education evaluation, the school district did not refer her for an evaluation and instead promoted her to the 11th grade. The school did finally conduct an evaluation when the parent made a referral. Compton Unified School District v. Addison 598 F.3d 1181,54 IDELR 71 (United States Court of Appeals, 9th Circuit (2010)).

- B. The Court affirmed the District Court’s conclusion supporting the use of a general education intervention team as part of the regular pre-referral process before a student would be evaluated for special education services. The Court noted that the use of alternative programs is not inconsistent with the IDEA for it is sensible policy for a school to explore options in the regular education environment before designating a child as a special education student. The process did not act as a “roadblock” to prevent the parents from requesting an evaluation at any time. In this case, the parents had never submitted a request to have their child evaluated.

Lastly, the Court concluded that the IDEA’s procedural safeguards do not apply to general education interventions and therefore the parents do not have a legal right to be part of such team. The mere discussion of a possible special education referral by the team does not become a special education referral triggering the IDEA’s procedural protections. A.P. v. Woodstock Board of Education 370 F.Appx. 202, 55 IDELR 61 (United States Court of Appeals, 2nd Circuit (2010)). Note: This is an unpublished decision.

- C. The Court held that the school district denied the student a FAPE by violating its responsibility under child find when it failed to evaluate a student who was placed in a psychiatric hospital and subsequently placed in a therapeutic placement in another state. The school district argued that the fact that the student was admitted to a psychiatric hospital does not necessarily mean that she would qualify for special education. However, the standard for triggering the child find duty is suspicion of a disability rather than factual knowledge of a qualifying disability. Here, the district had been informed of the student’s prior diagnosis of depression, her use of medication, and her psychiatric hospitalization that prevented her from commencing classes at the public school. This information is sufficient to raise a suspicion that the student may have suffered from an emotional disturbance over a long period of time.

In addition, the school failed to provide the parents with their special education procedural safeguards, and the parents remained unaware of special education processes for evaluation, referral and program development.

The Court concluded that this “gross procedural violation” denied the student a FAPE and ordered reimbursement of the student’s therapeutic placements and award of compensatory education. Regional School District No.9 v. Mr. and Mrs. M. 53 IDELR 8 (United States District Court, Connecticut (2009)).

- D. The parents sued the school under Section 504 for punitive and compensatory damages based on a hearing officer's determination that the school did not timely refer the student for an IDEA evaluation. The Court held the use of pre-referral interventions were well intended and did not support the Section 504 liability standard of bad faith or gross departure from acceptable professional standards. Therefore, the 504 claims were dismissed. D.A. v. Houston Independent School District 110 LRP 75453 (United States Court of Appeals, 5th Circuit (2010)).
- E. The Court held that the school district could not proceed with an initial special education evaluation when one parent provided written consent for the evaluation and the other parent provided a written refusal to consent to the evaluation. Both parents had equal legal rights in this matter. The parents are free, however, to litigate any dispute regarding their relative educational decision making rights in the family court. In the Matter of J.H. v. Northfield Public School District 52 IDELR 165 (Minnesota Court of Appeals (2009)). Note: This is an unpublished decision.
- F. The Court held that by imposing numerous conditions on the reevaluation (including the requirement that the parents meet with the evaluators prior to and after the evaluations prior to the submission to the Team, that all evaluations be conducted in the presence of the parent and the evaluation shall not be submitted to anyone without parent consent) the parents in effect refused to consent. The Court ordered the parent to consent to the reevaluation and held that the parents were not entitled to an Independent Educational Evaluation at public expense. G.J. v. Muscogee County School District 54 IDELR 76 (United States District Court, Middle District, Georgia (2010)).
- G. There is no requirement under the IDEA that a school district conduct a reevaluation of a child with a disability or additional testing solely to satisfy the eligibility criteria established by the College Board or other testing programs to secure testing accommodations on the SAT/ACT. However, there is nothing in the IDEA that prevents a student from submitting to the College Board or other testing organization the results of testing done as part of a reevaluation. Moreover, there is nothing in the IDEA that bars a District from conducting testing to satisfy the eligibility criteria established by the College Board or other testing programs but such testing generally would not be covered by Part B of the IDEA and would have to be paid for out of an alternate funding source. Letter to Moffit 54 IDELR 130 (United States Department of Education, Office of Special Education Programs (2009))

II. Eligibility Issues

- A. A student with an “other health impairment” was determined by the Team to be no longer eligible for special education since he was demonstrating “age expected success” in the regular education curriculum with modifications and accommodations provided by the regular education staff. The Court, in overturning the hearing officer and district court, concluded that there was no adverse affect on the student’s educational performance requiring special education. The Court clarified that the appropriate question is not whether the disability may affect educational performance but whether in reality it does. Here, the student’s needs could be met through a health plan implemented in the regular class. In addition, the Court noted that the hearing officer and lower court relied in great part on the testimony of the student’s physician. Although a physician’s diagnosis and input is important and bears on the team’s decision a “physician cannot simply prescribe special education” since they are not a trained educational professional with knowledge of the subtle distinctions that affect IDEA classifications. Marshall Joint School District No.2 v. C.D. 54 IDELR 307 (United States Court of Appeals, 7th Circuit (2010)).
- B. Although a student was diagnosed with Asperger’s syndrome and an attention deficit disorder, the Court upheld the determination that the student was not eligible for special education because his disability did not affect his educational performance since the student was performing at average to above-average levels in the classroom and progressing academically. The Court noted that the term “educational performance” is not defined by the IDEA. Basing its decision on other case law, the Court concluded that “educational performance” must be assessed by reference to academic performance “which appears to be the principal, if not only, guiding factor”. The student’s difficulties with his disorder, which presumably include emotional and behavioral problems, are not the proper measure of educational performance. A.J. v. Board of Education, East Islip Union Free School District, (United States District Court, Eastern District, New York (2010) See also Maus v. Wappingers Central School District (United States District Court, Southern District, New York (2010)).
- C. The Court upheld the Team’s decision that a student, who was deemed to be a student with a disability under Section 504 was not eligible for IEP services as a student with a specific learning disability. Although the student was diagnosed as dyslexic, the Court found that the Team’s determination that there was not a “severe discrepancy” between the student’s achievement and ability was supported by the evidence. The State has the right to establish eligibility standards requiring that a student have a severe discrepancy as part of the eligibility determination. Michael P. v. Hawaii Department of Education Civil No. 08-00146 (United States District Court, Hawaii (2009))

- D. The school district found the student was no longer eligible as a student with a specific learning disability since there was no severe discrepancy based on the statistical formula used in a computer program that factors in a regression analysis. The Court, in overturning the decision, held that the IDEA prohibits reliance on any one test or formula for determining eligibility. M.B. v. South Orange-Maplewood Board of Education 55 IDELR 18 (United States District Court, New Jersey (2010)).
- E. The Court affirmed the hearing officer's decision that a student who turned 20 was no longer eligible for special education. The evidence supported the conclusion that the student had achieved the IEP goal for competitive employment and had "plateaued" in his academic and functional performance. C.B. v. Hawaii Department of Education 110 LRP 75231 (United States District Court, Hawaii (2010))
- F. The Court affirmed the public school's decision that a student with a disability who was attending a private school under an IEP was properly granted a high school diploma terminating her eligibility for continued special education services. The Court held the parents did not carry their burden of proof showing the public school's reliance on the transcript from the private school was misplaced. R.Y. v. Hawaii Department of Education 54 IDELR 4 (United States District Court, Hawaii (2010))
- G. A student who was diagnosed as having a central auditory processing disorder and ADHD was not eligible for IEP services since her disabilities did not adversely affect her educational performance placing her in need of special education based on data from multiple sources. The Court found that "if a student can materially benefit from a properly considered placement in a regular curriculum with accommodations, then the student does not need special education and related services. The term adversely affects has a similar meaning". C.M. v. Hawaii Department of Education (Civ. No. 09-00205), (United States District Court, Hawaii (2010)). Motion for reconsideration denied by the Court.

III. IEP/FAPE

- A. The U.S. Supreme Court in Board of Education of the Hendrick Hudson Central School District, et al. v. Rowley, et al. (102 S. Ct. 3034, IDELR 553:656 (1982)) held that an inquiry in determining whether a FAPE is provided is twofold:
1. Have the procedures set forth in the IDEA been adequately complied with?
 2. Is the IEP reasonably calculated to enable the child to receive educational benefits?

B. Procedural Issues

1. The Court held that a school district did not violate either the IDEA or Section 504 when it refused to convene the IEP Team meeting in the evening as requested by the parents. The Court noted that the IDEA regulations clearly provide that IEP meetings are to be scheduled at a "*mutually* agreed on time and place." 34 C.F.R. § 300.322(a)(2) (emphasis added). Therefore, the hearing officer correctly found that the concept of mutual agreement does not encompass one party's unilateral insistence that an IEP meeting be held at a particular time, especially when that time is after school hours. B.H. v. Joliet School District 54 IDELR 121 (United States District Court, Northern District, Illinois (2010)).

Note: The United States Department of Education has issued guidance that the IDEA requires public agencies to ensure that IEP meetings are scheduled at a "mutually agreed on time and place". Public agencies should be flexible in scheduling IEP Team meetings to accommodate the reasonable requests from parents. However, the IDEA does not require the public agency to schedule the IEP meeting outside of regular school hours or regular business hours to accommodate the parents or their experts. If the parent and the public agency cannot schedule a meeting to accommodate their respective scheduling needs, the public agency must take other steps to ensure parent participation by offering other means of participation (such as individual or conference telephone calls or videoconferencing) Letter to Thomas 51 IDELR 224 (United States Department of Education, Office of Special Education Programs (2008)).

2. A school district was found to have denied a student a FAPE since it did not properly involve the parents in the IEP Team process. The school notified the parents of the date and time of the IEP Team meeting. The parents informed the school that they were not sure that they could attend the meeting on that date. Thereafter, the school made no attempts such as telephone calls, correspondence, etc. to reach a mutually agreed upon date and time for the meeting. Although they offered to have the parent participate by speakerphone, the Court held that the offer was of no consequence since such alternative methods are available only if neither parent can attend the IEP meeting. The Court held that a school must include the parents in an IEP meeting "unless they affirmatively refuse to attend". Drobnicki v. Poway Unified School District 52 IDELR 210 (United States Court of Appeals, 9th Circuit (2009)). Note: This is an unpublished decision.
3. The Court noted that the IDEA requires that when a student on an IEP transfers to a new school district, the new district must provide

“comparable services” to the student after consulting with the parents. The Court held that the IEP that was last implemented is the one which applies to the “comparable services” analysis not the IEP that was last developed. In addition, the Court held that the IEP ultimately developed by the district was appropriate and provided a placement in the LRE when it placed the student in a special education class. A.M. v. Monrovia Unified School District 110 LRP 73218 (United States Court of Appeals, 9th Circuit (2010))

4. The 2008 IDEA regulations gives parents the right to revoke, in writing, consent for the continued provision of IEP services to an otherwise eligible child. In such case, the school district must provide the parents with written notice that all IEP services will be terminated. Such revocation is not subject to challenge in a due process hearing. In the case of parents who have equal legal authority to make educational decisions and one parent provides consent for IEP services and the other parent submits a written revocation, the LEA must provide written notice to both parents that IEP services will be terminated. The IDEA further provides that either parent, after services are ceased due to the revocation of consent, has the right to request an initial evaluation to determine if the child is IEP eligible. Letter to Cox (United States Department of Education, Office of Special Education Programs (August 2009)). In a subsequent letter, OSEP stated “we appreciate that public agencies may have difficulty with this interpretation when both parents with legal authority to make educational decisions on behalf of their child disagree on the revocation of consent.” Nevertheless, OSEP declined the request to modify their interpretation. Letter to Ward (United States Department of Education, Office of Special Education Programs (August 2010))
5. The Court found no procedural violation of the IDEA based on the fact that a regular education teacher was not present at all IEP Team meetings. The absence of a regular education teacher at any given IEP meeting is not a per se procedural violation since the IDEA states that a regular education teacher “shall to the extent appropriate, participate in the review and revision of the IEP”. The Court also noted that there was no evidence to support the parents’ argument that the presence of the regular education teacher would have changed the Team’s decision. K.L.A. v. Windham Southeast Supervisory Union 54 IDELR 112 (United States Court of Appeals, 2nd Circuit (2010)). Note: This is an unpublished decision.
6. The IEP Team meeting serves as a communication vehicle between parents and school personnel and enables them, as equal participants, to make joint informed decisions regarding the services that are necessary to meet the unique needs of the child. The IEP team should work towards a

general agreement, but the public agency is ultimately responsible for ensuring the IEP includes the services that the child needs in order to receive a free appropriate public education (FAPE). It is not appropriate to make IEP decisions based on a majority "vote." If the team cannot reach agreement, the public agency must determine the appropriate services and provide the parents with prior written notice of the agency's determinations regarding the child's educational program and of the parents' right to seek resolution of any disagreements by initiating an impartial due process hearing or filing a State complaint. Letter to Richards 55 IDELR 107 (United States Department of Education, Office of Special Education Programs (2010)).

7. The Court concluded that the absence of the student's special education teacher did not impede the child's right to a free appropriate education, limit the parents' ability to participate in the decision making process, or result in the denial of educational benefits. A certified special education teacher who taught and served as an IEP coordinator at the student's school did attend. Further, the Court concluded that the record did not support the parents' claims that the IEP Team (1) did not consider sufficient evaluative data, (2) ignored the independent evaluation, (3) failed adequately to discuss the IEP's goals and recommendations with J.H.'s parents, and (4) arbitrarily adjusted the IEP to assign the student to a different class. A.H. v. Department of Education of the City of New York 55 IDELR 36 (United States Court of Appeals, 2nd Circuit (2010)). Note: This is an unpublished decision.
8. Although the IEP for a student with a non-verbal learning disability was not fully implemented since the student did not have a classroom aide as provided for in the IEP, the Court concluded that this was not a material failure. The evidence demonstrated that the student made improvements throughout his sixth-grade year despite that fact. His report card reflected As, Bs, and Cs, and showed some improvement in language arts, math, and science. In addition, the student's statewide test scores indicated that he was performing at goal in math and reading, and was proficient in writing. A.P. v. Woodstock Board of Education 370 F.Appx. 202, 55 IDELR 61 (United States Court of Appeals, 2nd Circuit (2010)). Note: This is an unpublished decision.
9. The IDEA does not require a school district to assign staff members the parents desire. Thus, the IEP provided FAPE even though the aide previously working at home with the student was not assigned to be his aide in the classroom. Gellerman v. Calaveras Unified School District, 37 IDELR 125. (United States Court of Appeals, 9th Circuit (2002)). Note: This is an unpublished decision. See also Blanchard v. Morton School District 54 IDELR 277 (United States Court of Appeals, 9th Circuit

(2010)) Note: This is an unpublished decision.

C. Substantive Issues

1. The Court of Appeals overturned the District Court's decision that the FAPE standard, as established by the United States Supreme Court in Rowley, had been superseded by the 1997 Amendments to the IDEA. The Court noted that there was no plausible way to conclude that the addition of post-secondary transition services in the IDEA supported a Congressional intent to change the FAPE standard. Had the Congress intended to change the Rowley standard it would have expressed a clear intent to do so.
The Court also upheld the IEP even though it didn't specify the minutes of each service or accommodation to be provided. The IEP specified a lump sum of minutes for special education services. The Court held while a lump sum may not be appropriate in other IEPs, it was appropriate here. The allocation of a specific number of minutes to each service or accommodation would make no sense in this case since they were access based accommodations and it is not reasonable to expect the school to predict the amount of time the student will actually use the accommodations they have access to. In addition, the parents failed to show how the student was prejudiced by the failure to specify the amount of each IEP service she was to receive. J.L. v. Mercer Island School District, 575 F.3d 1025 , 52 IDELR 241 (United States Court of Appeals, 9th Circuit (2009)) The decision was amended by the Court at 53 IDELR 280 (United States Court of Appeals, 9th Circuit (2010)).
2. The 77 page IEP for a student with multiple disabilities was found to be appropriate by the Court. The teachers' testimony and other evidence supported the conclusion that the student was progressing at a level commensurate with her cognitive profile.
The Court also found that the special day school placement in the IEP was less restrictive than the parents proposed home and community based program. Lessard v. Wilton-Lyndeborough Cooperative School District 592 F.3d 267, 53 IDELR 279 (United States Court of Appeals, 1st Circuit (2010)).
3. The parents disputed the discontinuation of 15 hours of after school 1:1 ABA services for their student with autism. The IEP also provided for parent training and communication.
The Court concluded that the IEP without the after school services would provide the student a FAPE since the extensive parent training provided would help the parents meet the student's needs at the end of the school day. The Court noted that the IEP is likely to produce educational progress

rather than regression. C.G. v. New York City Department of Education 55 IDELR 157 (United States District Court, Southern District, New York (2010))

4. The Court, in reversing the lower court's decision, held that student's IEP did not provide a FAPE even though the student's cumulative final grade point average for the school year was 92. The Court noted that the student was not being educated in a regular classroom setting and that under the Rowley standard, grades achieved in a special education class are of "less significance" than grades earned in a regular class. D.S. v. Bayonne Board of Education 54 IDELR 141 (United States Court of Appeals, 3rd Circuit (2010)).
5. A student with multiple disabilities was sexually assaulted by another student in elementary school. The parents alleged that the other student's presence in the middle school denied their student a FAPE. First, the Court denied the parents' request to view the other student's educational records. Second, the Court held that the evidence did not establish that the student cannot receive adequate educational benefits even if he happens to see the other student for a short time one day at school. Also, the school took reasonable measures to keep the students from having any direct contact with each other. The record simply did not support a conclusion that the school's refusal to assign the student perpetrator to a different school upon the parents demand denied the student a FAPE. A.B. v. Clarke County School District 54 IDELR 146 (United States Court of Appeals, 11th Circuit (2010)). Note: This is an unpublished decision.
6. The school district was found to be in violation of the IDEA based on the IEP Team's failure to consider the parents' request to address their daughter's participation in extracurricular activities. The IEP Team had an obligation to consider whether the IEP should include a specific extracurricular activity and, if so, identify the supplementary aids and services necessary. The Court held that the plain language of IDEA regulations establish that the extracurricular and nonacademic activities included in an IEP are not limited to those activities required to educate the disabled child. The IDEA requires a school district to take steps to provide those supplementary aids and services that have been determined appropriate and necessary by the IEP team to afford the disabled student an equal opportunity to participate in extracurricular and nonacademic activities. Independent School District No. 12 v. Minnesota Department of Education 55 IDELR 140 (Minnesota Supreme Court (2010))
7. The Court concluded that a student with Asperger's syndrome was denied a FAPE due to insufficient transition services. The lack of a full transition assessment and resulting transition plan failed to provide measurable goal

related to training, education, employment and independent living skills. Dracut School Committee v. Bureau of Special Education Appeals of the Massachusetts Department of Elementary and Secondary Education 55 IDELR 66 (United States District Court, Massachusetts (2010)).

8. The Court, in reversing the lower Court, held that the IEP for a student with a learning disability provided the student a FAPE. The IEP was revised from an earlier one under which the student regressed. The subsequent IEP corrected for any failings by addressing the student's areas of regression in reading by requiring him to attend a multisensory reading class every day as well as a writing instruction class every other day. Bougades v. Pine Plains Central School District 54 IDELR 181 (United States Court of Appeals, 2nd Circuit (2010)). Note: This is an unpublished decision.
9. A student with multiple disabilities was not afforded a FAPE since the student consistently failed to meet the IEP goals. The Court based its decision on the finding that the IEP included fewer goals than previous IEPs and the remaining goals "were simply new iterations of the previous goals". In addition, the Court found that there was a lack of "reliable objective testing" to measure the student's progress and present level of performance.
As a result the district was order to partially reimburse the parents for the student's private placement. Reimbursement was reduced due to the Court's finding that the parents acted unreasonably. Anchorage School District v. D.K. 54 IDELR 28 (United States District Court, Alaska (2009)).
10. The IEP developed for a student with a hearing impairment and Down's Syndrome changing the educational placement from private school to a public school "Total Communications Program" provided the student a FAPE. The IEP was based on the individual student's needs and would be implemented by a certified deaf education teacher.
In addition, the Court noted that the public school placement would allow interaction with other students whereas the private school placement provided no opportunity to interact with students who are not disabled and little opportunity to learn functional communication.
The Court did find that the DOE did not obtain sufficient data to support the extended school year (ESY) component of the IEP. Therefore, that issue was sent back to the hearing officer to determine what ESY services are appropriate for the student. J.S. v. Hawaii Department of Education 55 IDELR 43 (United States District Court, Hawaii (2010)).

IV. Related Services

- A. The United States Supreme Court Decision – Irving Independent School District v. Tatro, 104 S. Ct. 3371, IDELR 555:511 (1984).
1. The United States Supreme Court established a three-prong test for determining whether a particular service is considered a related service under the IDEA. To be entitled to a related service:
 - a) A child must have a disability so as to require special education under the IDEA;
 - b) The service must be necessary to aid a child with a disability to benefit from special education; and
 - c) The service must be able to be performed by a non-physician.
- B. A school was ordered to provide a student with individual nursing services as a related service in his IEP. The court followed a “bright line” rule in the Tatro case. Since the services were not required to be administered by a doctor and were supportive services necessary for the student to attend school, they were required related services regardless of the cost (Cedar Rapids Community School District v. Garret F., 25 IDELR 139, United States Supreme Court (1999)).
- C. If the IEP Team has made the determination that transportation is a required related service in the student’s IEP, then it should include transportation for required after-school activities, such as community service activities that are required by the school, as well as for activities necessary to afford the child an equal opportunity to participate in extracurricular activities. Questions and Answers on Serving Children With Disabilities Eligible for Transportation (United States Department of Education, Office of Special Education and Rehabilitative Services (2009)).
- D. The parents challenged the appropriateness of their daughter’s IEP specifically the occupational therapy services. The Court, in concluding the IEP did provided FAPE, stated that the case was basically a disagreement over methodology. Once the requirements of the IDEA are met, questions of methodology are not for a Court to decide. Carlson v. San Diego Unified School District 54 IDELR 213 (United States Court of Appeals, 9th Circuit (2010)). Note: This is an unpublished decision.
- E. The Court held that the school’s failure to reimburse the parent for mileage for driving their student to and from school did not deny the student a FAPE. Although transportation was listed as a related service in the student’s IEP, the parent refused to submit the necessary reimbursement forms and failed to maintain or provide proof of no fault insurance as required by state insurance law.

The Court held that the school could not waive state law requirements. Russell v. Hawaii Department of Education 54 IDELR 143 (United States Court of Appeals, 9th Circuit (2010)). Note: This is an unpublished decision.

- F. The IDEA regulations do not specifically require that an IEP include the exact number of minutes to be provided for each session of each related service, although it is anticipated that most IEPs would include that information in order to meet the requirement that the level of the agency's commitment of resources be clear. A lump sum amount of services such as sixteen weekly sessions totaling 600 minutes would be in compliance. This is a specific amount of time and provides all parties with an understanding of the general commitment of resources by the agency in terms of the number of minutes to be provided over the course of a 16 week semester. However, we agree that there may be special circumstances where the amount of time for each session of related services may vary in order to meet the needs of an individual student and there is nothing in the IDEA that would bar such an arrangement in an IEP. Letter to Mathews 55 IDELR 142 (United States Office of Special Education Programs (2010)).
- G. The parents challenged their student's IEP alleging it was inappropriate since it did not provide a speech therapist with specific experience in working with childhood apraxia of speech or PROMPT therapy and did not call for direct occupational and physical therapy. The Court, in upholding the IEP, noted that the decision whether to hire a speech therapist with particular expertise or training is "a question of educational policy that Congress left to the DOE, not the court, to decide". In addition, the parents experts testified that the student would benefit from direct OT and PT services but never testified that direct services were required for him to benefit from special education. Hawaii Department of Education v. Rachel M. Civil No. 09-00421 (United States District Court, Hawaii (2010)).

V. Least Restrictive Environment

- A. The Court remanded the case for a determination whether the IEP Team violated the IDEA's procedural requirements in making a predetermination of placement. In doing so, the Court stated that the standard for determining whether a predetermination of placement occurs is "when an educational agency has made its determination prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives" H.B. v. Las Virgenes Unified School District, 48 IDELR 31 (United States Court of Appeals, 9th Circuit (2007)). This was an unpublished decision. On remand, the Court affirmed the District Court's holding that the school district predetermined the student's placement. The decision to transfer the student from his private placement, made pursuant to a settlement agreement, back to the public school was made before the IEP meeting was held.

The Court found that the District's determination to remove the student from the private placement and place him in a public program did not evidence the sort of "open-mindedness" that is necessary. The Court's conclusion was based on findings including the school district administrator's comments at the beginning of the meeting that "we'll talk about a transition plan" bringing the student back to the public school. The Team never discussed the possibility of keeping the student in the private placement even though the district was fully aware of the parents' wishes. H.B. v. Las Virgenes Unified School District 370 F.Appx. 843, 54 IDELR 73 (United States Court of Appeals, 9th Circuit (2010)). Note: This is an unpublished decision.

- B. The Court affirmed the lower court's decision that a student who is deaf with a cochlear implant was placed in the least restrictive placement when placed in a general education classroom. The student was an oral language learner who built on his communication needs by communicating with students who were not disabled. At the IEP meetings the parents insisted on a regular education placement. Although they are not prohibited from later challenging the placement they initially requested, their position supports the conclusion that the IEP provided a FAPE in the least restrictive environment. J.W. v. Fresno Unified School District 55 IDELR 153 (United States Court of Appeals, 9th Circuit (2010))
- C. The Court held that the IEP for a preschooler provided the student a FAPE, both procedurally and substantively, in the least restrictive environment by placing the student in a part-time public program that included both students with disabilities and students without disabilities. The Court rejected the claim by the parents that a private preschool for students without disabilities was the least restrictive environment since the IDEA "makes removal to a private school placement the exception". R.H. v. Plano Independent School District 54 IDELR 211 (United States Court of Appeals, 5th Circuit (2010)).
- D. The IEP for a pre-school student with autism called for placement in a pre-school "inclusion class" with special education and related services. The Court rejected the argument that the IEP did not sufficiently define the student's placement since it failed to name the school at which the student would receive services. The physical location where a placement will be implemented is an "administrative decision made by the DOE, it is not necessarily included in the IEP". The Court also noted that nothing in the IDEA requires an IEP to specify a minimum amount of time for each method of service such as individual v. small group instruction, etc. N.S. v. Hawaii Department of Education 54 IDELR 250 (United States District Court, Hawaii (2010)).
- E. The Court held that the IEP which called for a self-contained classroom "to be re-integrated into the general education population if he is able" was the least restrictive environment for a student with autism who exhibited aggressive and

inappropriate behaviors toward teachers and peers. The Court found that although the student would benefit from integration with his peers the student was an actual danger to fellow students and himself due to his physical aggressiveness. In addition, the Court concluded that no evidence was presented to show that the student needed special education and related services in an after school program. C.P. v. Hawaii Department of Education 54 IDELR 281 (United States District Court, Hawaii (2010)).

VI. Unilateral Placements

- A. The United States Supreme Court in Burlington, MA v. Department of Education et al., 105 S. Ct. 1996, IDELR 556:389 (United States Supreme Court (1985)), held that parents may be awarded reimbursement of costs associated with a unilateral placement if it is found that:
1. The school district's IEP is not appropriate;
 2. The parent's placement is appropriate; and
 3. Equitable factors may be taken into consideration
- B. Parental placement at a school which is not state approved or does not meet the standards of the state does not itself bar public reimbursement under the Burlington standard (Florence County School District Four et al. v. Carter, 114 S. Ct. 361, 20 IDELR 532 (United States Supreme Court (1993))).
- C. The parents placed a student who was never deemed eligible for special education in a private residential school. The Court held that the fact that the student has never been deemed eligible did not act as a bar to the parents' right to seek a due process hearing for reimbursement. The Court noted that the school district's argument that the IDEA limits reimbursement to students who have previously received public special education services is unpersuasive for several reasons:
1. It is not supported by the IDEA's statutory text, as the 1997 Amendments to the IDEA do not expressly prohibit reimbursement in this situation;
 2. The School District offered no evidence that Congress intended to supersede the *Burlington* and *Carter* decisions;
 3. It is at odds with IDEA's remedial purpose of "ensur[ing] that all children with disabilities have available to them a [FAPE] that emphasizes special education ... designed to meet their unique needs,"; and
 4. It would produce a rule bordering on the irrational by providing a remedy when a school offers a child inadequate special-education services but leaving parents remediless when the school unreasonably denies access to such services

altogether. Forest Grove School District v. T.A., 129 S.Ct. 2484, 52 IDELR 151 (United States Supreme Court (2009)).

On remand, the District Court, in reversing the hearing officer, held that the parents are not entitled to reimbursement for their son's private placement. The Court noted that the decisive factor in this case was that the parents enrolled their son in the private placement not because of any IDEA disability but due to his drug abuse and behavioral problems. Forest Grove School District v. T.A. 675 F.Supp.2d 1063, 53 IDELR 213 (United States District Court, Oregon (2009)).

- D. The Court denied reimbursement for the unilateral placement of a student with emotional disabilities since the placement was primarily for medical not educational reasons. The Court also stated that it did not agree with the parents contention that the cost of the placement should necessarily be irrelevant to the decision of whether to grant or withhold reimbursement. In addition, the parents' failure to provide the school notice of their intent to make a private placement at school expense is not excused since the parents received a copy of their procedural safeguards. The parents' claim that the school should have reminded them of this obligation once they were considering residential placement had no legal basis. Lastly, the parents argued that they should have been entitled to interim relief since the hearing officer's decision was unreasonably delayed beyond the 45 day timeline. The Court found there was not an unreasonable delay since the hearing officer needed to address numerous motions and briefs filed by the parties and a voluminous record. Ashland School District v. E.H. 587 F.3d 1175, 53 IDELR 177 (United States Court of Appeals, 9th Circuit (2009)).
- E. The parents of a student with ADHD placed their daughter unilaterally in a residential private facility and sought reimbursement from the school district. The Court concluded that the school was not responsible for the costs of the placement since it was primarily for non-educational reasons based on "risky behaviors" outside of school. The placement stemmed from issues apart from the learning process which manifested themselves away from school grounds. Ashland School District v. R.J. 588 F.3d 1004, 53 IDELR 176 (United States Court of Appeals, 9th Circuit (2009)).
- F. The Court held that the parents of a student with multiple disabilities, including an emotional disability, were not entitled to be reimbursed for the costs of a private residential school. The Court found that the parents placed the student in the residential facility primarily for the treatment of her mental health and safety issues which were segregable from her educational needs. Shaw v. Weast 364 F.Appx. 47, 53 IDELR 313 (United States Court of Appeals, 4th Circuit (2010)).
- G. The parents challenged the hearing officer's decision reducing the amount to be reimbursed for their private placement based on their

actions which he found were at times obstructive. The IDEA provides that the cost of reimbursement may be reduced or denied upon “a judicial finding of unreasonableness with respect to actions taken by the parents”.

The Court held that either a court or hearing officer is authorized under the IDEA to make “judicial findings” under this provision. To hold otherwise would make little sense in that Congress intended that disputes should be resolved as early in the process as possible. Hogan v. Fairfax County School Board 645 F.Supp.2d 554, 53 IDELR 14 (United States District Court, Eastern District, Virginia (2009))

- H. Parents are only required to provide the school notice one time of their displeasure with their student’s IEP and their intent to place their child privately at public reimbursement. They have no legal obligation to notify the school of their intent to keep the student in the private placement for subsequent years since removal from the public school, not enrollment in the private school establishes the regulatory requirement of notice. The IDEA also provides that a Court or hearing officer may consider equitable factors when making a decision on parental reimbursement. Letter to Miller 110 LRP 73646 (United States Department of Education, Office of Special Education Programs (2010)).
- I. The Court concluded that the IEP calling for a public school placement provided the student who is emotionally disturbed a FAPE. Based on the Court’s finding the parents request for private school reimbursement was denied. In reaching its conclusion, the Court noted that none of the parents’ expert witnesses observed the student in an educational setting or spoke with any of the student’s teachers. The Court gave greater weight to the DOE expert who testified “using varied and comprehensive sources of information, most importantly observing the student in the educational setting and talking to his teachers”. Hawaii Department of Education v. Magali S. Civil No. 08-1-2021-10 (Hawaii Circuit Court, First Circuit (2010)).
- J. The parent placed their student in a private school after rejecting the IEP which called for placement in both general education classes and services in the resource room. Although a final IEP was not in place until the end of September, the Court found that under these particular circumstances (ongoing placement discussions, a re-evaluation, and the parent canceling three scheduled IEP team meetings) there was no denial of FAPE and therefore the parents request for reimbursement for the private placement was denied. The Court noted that the student had received benefit from previous IEPs and the Team considered the student’s individual needs in making its decision. Tracy N. v. Hawaii Department of Education 715 F.Supp.2d, 54 IDELR 216 (United States District Court, Hawaii (2010))

VII. Behavior and Discipline

- A. The student's IEP Team convened four days into the student's suspension for fighting and bringing a pocket knife to school. The Team decided to place the student in an alternative high school. The parent's attempted to challenge the student's placement before the local school board. They were denied the opportunity to appear in front of the board with their request. The Court concluded the student's constitutional due process rights were not violated since once the IEP Team changed the student's placement, the IEP Team, not the local school board, became the decision maker in regards to future placement changes. The parents could have also requested an expedited due process hearing under the IDEA. Doe v. Todd County School District 55 IDELR 185 (United States Court of Appeals, 8th Circuit (2010))
- B. The IEP for a student with autism adequately addressed the student's behavior and provided a FAPE. The Court observed that the IDEA does not require an IEP to have a specific goal with regard to behavior. If behavior impedes the student's ability to learn, the IEP team must only consider strategies, including positive behavioral interventions, and supports to address the behavior. The student's IEP in this case described his disruptive behaviors and included a host of strategies to address them. Lathrop R-II School District v. Gray 611 F.3d 419, 54 IDELR 276 (United States Court of Appeals, 8th Circuit (2010)). Review denied by the United States Supreme Court.
- C. A student with a learning disability and a speech impairment was arrested for stealing beer. As an alternative to a sentence in juvenile jail, the Court approved his placement in a residential facility. The parents requested that the school district pay for the placement alleging that his IEP was inappropriate since it did not include a behavior intervention plan. The Court in upholding the IEP held that his behavioral problems did not rise to the level of severity to trigger a need for a behavior plan. Rodriguez v. San Mateo Union High School District 53 IDELR 178 (United States Court of Appeals, 9th Circuit (2009)) This is an unpublished decision.
- D. A student, who was diagnosed as having an Attention Deficit Disorder, was considered a child "at risk" and receiving general education interventions including one-on-one instruction in class, small group instruction and modifications to reduce distractions. An intervention assistance team was convened when the student exhibited continued behavioral problems and referred the student to an outside mental health agency. The student was suspended and ultimately expelled for threatening behavior. The Court held that the school's failure to convene a manifestation determination review violated the procedural safeguards of the IDEA. When the intervention team referred the student to the outside mental health agency there was sufficient reason to evaluate the student for special education services. The Court ordered compensatory education for the period of time of the student was suspended and

that school records of the suspension be expunged. Jackson v. Northwest Local School District 55 IDELR 71 (United States District Court, Southern District, Ohio (2010)).

VIII. Due Process Issues

A. Due Process Hearing Complaint Requests

1. The Court affirmed the Administrative Law Judge's dismissal of the due process hearing complaint as being insufficient under the IDEA requirements. The ALJ found that the due process complaint did not allege facts related to the problem identified and further failed to satisfactorily propose a resolution to the problem. The Court noted that the purpose of the IDEA to foster cooperation between the parents and the school is served by the development of the factual basis for the dispute prior to the initiation of the adversarial proceeding. M.S.G. v. Lenape Regional High School District Board of Education 51 IDELR 236 (United States Court of Appeals, 3rd Circuit (2009)) This is an unpublished decision.
2. The Court held it did not have jurisdiction to hear an appeal from a hearing officer's decision that the due process hearing complaint was not sufficient. Federal Court jurisdiction is limited to reviewing determinations from a due process hearing. In addition, the Court cited the Senate HELP Committee's Report which states that "there should be no hearing or appeal in regard to the hearing officer's determination" regarding sufficiency. Knight v. Washington School District 54 IDELR 185 (United States District Court, Eastern District, Missouri (2010)).

B. Jurisdiction/Party Status

1. The parents initiated a due process hearing against the school district (the Local Education Agency) and the State Department of Education (the State Education Agency) alleging that their student with autism was denied a FAPE since the IEP never addressed the student's unwillingness to leave his house. The District Court disagreed with both the hearing officer's and the appeals officer's determination that they did not have jurisdiction over the claims against the SEA. The Court of Appeals affirmed the ruling that the SEA was not a proper party to the due process hearing. The SEA had no role in developing the IEP and was not responsible for providing direct services to the student. Under the IDEA (300.227) the SEA is responsible for providing direct services if it determines that the LEA is unable to provide FAPE. Here,

SEA had received an “informal letter” and phone call from the parents about their dispute with the LEA. The Court concluded that “the SEA was not on notice of non-compliance such that it should have attempted to take over education for the LEA” without allowing the due process hearing to run its course. Chavez v. New Mexico Public Education Department 55 IDELR 121 (United States Court of Appeals, 10th Circuit (2010)).

2. The hearing officer granted the school district’s Motion to Dismiss the due process hearing complaint finding that the matter was moot since the school district had offered in full the relief requested. The parent had rejected the offer.

The Court overturned the dismissal finding that a parent’s decision to reject an offer of settlement would be relevant to an award of attorney’s fees under the IDEA but does not deprive the hearing officer of subject matter jurisdiction. A.O. v El Paso Independent School District 54 IDELR 42 (United States Court of Appeals, Fifth Circuit (2010)). Note: This is an unpublished decision.

3. The Court rejected the school district’s argument that the prior written notice procedures (written notice of proposals or refusals to change the student’s identification, evaluation, educational placement or provision of FAPE) limit the jurisdictional scope of the due process hearing to those issues that the school included in written notices to parents.

The Court held that the IDEA allows a party to bring a due process complaint with respect to “any matter” related to the student’s identification, evaluation, educational placement or FAPE. The notice requirements do not further limit this jurisdictional mandate. Compton Unified School District v. Addison 598 F.3d 1181, 54 IDELR 71 (United States Court of Appeals, 9th Circuit (2010)).

4. A lawsuit was brought by several parents challenging the eligibility criteria in the State’s Early Intensive Behavioral Treatment Program. Previous to the lawsuit the parents filed a joint request for a due process hearing which was dismissed by the Office of Administrative Hearings (OAH).

The Court concluded that the OAH was within its authority to dismiss the complaint since the IDEA contemplates only due process hearings involving an individual child. The Court dismissed the lawsuit based on a failure to exhaust administrative remedies holding that each parent must request a due process hearing regarding their child as other parents of impacted students have done. Z.F. v. Ripon Unified School District 54 IDELR 3 (United States Court of Appeals, 9th Circuit (2010)). Note: This is an unpublished decision.

5. The Court held that the due process hearing officer erred when she ruled that she was without jurisdiction to hear the parent's IDEA issues since the student was not currently enrolled in the school district's public schools. Because a school district has an ongoing, affirmative obligation to locate children with disabilities residing in the district and to provide them with a FAPE, a child's school enrollment status has never been a condition precedent to the filing of a due process complaint. To the contrary, the IDEA affords parents the opportunity to file administrative complaints and request due process hearings "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." D.S. v. District of Columbia 54 IDELR 116 (United States District Court, District of Columbia (2010)).

C. Stay Put

1. The Court was asked to address the issue of whether the school's unilateral change of location of learning support services from a resource room to "an inclusion classroom" during the pendency of due process proceedings amounted to a change of placement within the meaning of the "stay put" provision.
The Court held that the issue of what constitutes a change of placement is necessarily fact specific and must include an analysis of whether the modification is likely to affect in some significant way the child's learning experience. In affirming the lower court's decision, the Court concluded that there was no violation of stay put since the same educational services were provided with the same special education teacher but in a different room and therefore it did not amount to a change in educational placement. J.R. v. Mars Area School District 318 F.Appx. 113, 52 IDELR 91 (United States Court of Appeals, 3rd Circuit (2009)).
2. The parent agreed to a change in their son's IEP placement by noting that she "agreed for now" with the IEP. The Court held that the IEP conditionally signed was the "stay put" placement since it is consistent with the purpose of the IDEA which is to maintain a student's status quo until the parent's dispute with the school is over. Farzana K. v. Indiana Department of Education 53 IDELR 180 (United States District Court, Northern District, Indiana (2009)).
3. A due process hearing challenging the student's proposed graduation was filed. As a result, the hearing officer ordered that the current private school placement be maintained as the "stay put" placement. Ultimately, the hearing officer concluded that the student received a FAPE and was properly graduated. The parents appealed. On appeal, the Court

held that “stay put” continued to apply since the challenge is based on the exiting of the student due to graduation not aging out.

In addition, the private school was closing and therefore the “stay put” placement is in a comparable program. The Court found that the parent’s proposed College Internship Program was the proper “stay put” placement. Although the school district argued that a college program exceeded the IDEA’s mandate, the school offered no alternative nor did the school submit evidence that the proposed Internship program was inappropriate for the student. Therefore, the Court concluded it had the equitable authority to order placement in the College Internship Program. Tindell v. Evansville-Vanderburgh School Corporation 54 IDELR 7 (United States District Court, Southern District, Indiana (2010)).

4. The school changed the student’s educational services from one school to another after the parents had requested a due process hearing. The Court held that there was no violation of stay put since the “current educational placement” generally refers to the educational program and not the particular institution or building where the program is implemented. The Court did note, however, that moving the location of the student’s services may in some circumstances be a change in the educational placement but that was not the case here. L.M. v. Pinellas County School Board 54 IDELR 227 (United States District Court, Middle District, Florida (2010)).
5. The Court ruled that when a student requested a due process hearing contesting her upcoming award of a high school diploma, “stay put” applied. The Court remanded the case to the hearing officer to determine the appropriate relief. R.Y. v. Hawaii Department of Education 54 IDELR 4 (United States District Court, Hawaii (2010)).
6. The Court held that the use of “Furlough Fridays” (days all schools were closed due to budget issues) did not violate the “stay put” provision of the IDEA. The Court noted that “stay put” was not intended to cover system wide changes in public schools that impact both students with disabilities and student without disabilities since such changes are not changes in educational placement. N.D. v. State of Hawaii, Department of Education 55 IDELR 220 (United States District Court, Hawaii (2010)).

D. Statute of Limitations

1. The Court affirmed the decision that a student was barred from challenging his placement in a functional skills program due to the misclassification of him as being mentally retarded. His reclassification in

2006 as a student with a speech and language impairment should have put the student on notice of his FAPE claim. Therefore, the two year statute of limitations barred his claim as being untimely. Davis v. Hampton Public School District 53 IDELR 254 (United States Court of Appeals, 4th Circuit (2009)).

2. The Court held that the state's one year statute of limitations did not apply since the school withheld required information from the parents. By failing to invite a special education teacher or representative from the private learning center where the child was receiving services to the IEP Team meeting, the school effectively withheld the availability of important input from the parents. S.H. v. Plano Independent School District 54 IDELR 114 (United States District Court, Eastern District, Texas (2010)).

E. Hearing Officer Authority

1. The Court affirmed the hearing officer's order which included a requirement that the school contract with a specific inclusion expert and establish a \$50,000 compensatory education fund which the IEP Team and parent can draw on for funding services, evaluations and training. In so doing, the Court stated that a hearing officer in fashioning an appropriate remedy has the authority to order the district to retain the services of a particular expert who has observed the student and staff and whose testimony was found credible at the due process hearing. In addition, the Court found that the hearing officer properly considered the parties' conduct and equitable considerations in fashioning the compensatory education award. Matanuska-Sustina Borough School District v. D.Y. 54 IDELR 52 (United States District Court, Alaska (2010)).
2. The hearing officer found that the student was denied a FAPE since the IEP transition services were inappropriate. The hearing officer determined, however, that the student met graduation requirements and should be awarded a diploma. The hearing officer then ordered two years of extended IDEA eligibility and additional compensatory transition services. The Court held that the hearing officer exceeded his authority by extending IDEA eligibility after the student graduated with a diploma. In addition, the Court remanded the award for compensatory education back to the hearing officer since the record is unclear as to the standard that was applied in ordering compensatory relief. Dracut School Committee v. Bureau of Special Education Appeals 55 IDELR 66 (United States District Court, Massachusetts (2010)).

3. The Court, in overturning the lower court, held that a hearing officer had the authority and jurisdiction under the IDEA not only to determine whether the student's conduct was a manifestation of his disability but also to order a reduction in the number of days of disciplinary placement in an alternative setting imposed by the school administrator from 45 days to 11 days. The reduction was ordered after the hearing officer affirmed that the behavior was not a manifestation of the student's disability.
The Court based its conclusion on the fact that hearing officers have the authority to address issues of FAPE and the hearing officer in this case found that the class exclusion would deny the student a FAPE. District of Columbia v. Doe 611 F.3d 888, 54 IDELR 275 (United States Court of Appeals, District of Columbia Circuit (2010))
4. The Court overturned the hearing officer's denial of an award for compensatory education. The hearing officer determined that the parents failed to meet their burden of establishing the type and amount of compensatory services needed to compensate the student for the services that were denied.
The Court held that the parent is not required to have a perfect case to be entitled to compensatory education. A hearing officer may "provide the parties additional time to supplement the record if she believes there is insufficient evidence to support a specific award". The matter was remanded to supplement the record and to determine the appropriate award of compensatory education. Stanton v. District of Columbia 53 IDELR 314 (United States District Court, District of Columbia (2010)). Note: The Court did not address the 45 day timeline for issuing a due process hearing decision or the fact that a hearing officer cannot extend the timeframe on their own.
5. The Court held that the parents' due process complaint for compensatory speech language services was moot. The student did not receive all the speech-language services in his IEP due to a shortage of speech therapists. Subsequently, the student was found no longer eligible for special education which was not contested. Therefore, the Court concluded that the claim for compensatory speech services should be dismissed. M.L. v. El Paso Independent School District 369 F. Appx. 573, 54 IDELR 41 (United States Court of Appeals, 5th Circuit (2010)). Note: This is an unpublished decision.
6. As a result of finding the IEP to be inappropriate, the hearing officer ordered that the school district continue to fund the home based program for a student with autism until such time as the district's proposed program is approved by the private company which was supervising his home program.

The Court concluded that the hearing officer did not have such authority. The IDEA gives the IEP Team the responsibility for developing the IEP not the private company. In addition, the Court noted that the potential conflict created by the order was evident. Anchorage School District v. D.S. 54 IDELR 29 (United States District Court, Alaska (2009))

7. The Court affirmed the hearing officer's decision that despite being denied a FAPE the student was not entitled to compensatory education since the student's subsequent educational program remedied the FAPE violation. In determining an equitable compensatory education award, a hearing officer must engage in a fact-intensive analysis that is qualitative rather than quantitative and take into account individual assessments of the student and focus on the student's individual needs. In this case, the hearing officer conducted just such a fact-intensive analysis and determined that the FAPE violation had already been remedied by the student's subsequent placement. Wheaton v. District of Columbia Public Schools 55 IDELR 12 (United States District Court, District of Columbia (2010)).
8. The parents challenged their student's IEP by requesting a due process hearing in September 2001. The due process hearing request was not processed until November 2002 with a hearing taking place in February 2003. The hearing officer ultimately concluded the IEP provided the student a FAPE denying the parents claim for reimbursement of private school tuition.
Regarding the request for compensatory education, the parents assert that the extended delay between their request for a due process hearing the ultimate resolution of this issue was so egregiously prolonged that the delay offers independent justification for granting an award of compensatory education. The Court held the student also is not eligible for compensatory education. The purpose of compensatory education is not to punish school districts for failing to follow the established procedures for providing a free appropriate public education, but to compensate students with disabilities who have not received an appropriate education. Here, there was no challenge to the hearing officer's decision that the education received by the student was appropriate. Given that she was not denied an appropriate education, the imposition of compensatory education would not further the purposes of IDEA. C.W. v. Rose Tree Media School District 55 IDELR 123 (United States Court of Appeals, 3rd Circuit (2010)). Note: This is an unpublished decision.

F. Attorney's Fees

1. The Court denied the school district's request for attorney's fees since it was not a prevailing party in the due process hearing. The parent's request for a due process hearing regarding an independent educational evaluation was deemed moot and dismissed by the hearing officer when the district agreed to pay for the evaluation while the hearing request was pending. The Court held that the district did not obtain judicial relief since the dismissal did not provide any relief from what the district already agreed to do. Therefore, the district is not deemed a prevailing party and is not entitled to attorney's fees. District of Columbia v. Straus 53 IDELR 250, 590 F.3d. 898 (United States Court of Appeals, District of Columbia (2010)).
2. The parents rejected a proposed settlement offer that included reimbursement of reasonable attorney's fees and all of the educational relief sought. The parents rejected the offer. The Court held that the parents were not entitled to attorney's fees since they were not justified in rejecting the settlement which was made at a resolution session. In overturning the lower court's decision, the Court held that a resolution agreement is enforceable in state or federal court. In addition, the Court did not award attorney's fees incurred before the settlement offer was made since the parents unreasonably protracted the litigation. El Paso Independent School District v. R.R. 591 F.3d 417, 53 IDELR 175 (United States Court of Appeals, 5th Circuit (2010)). Appeal denied by the United States Supreme Court.
3. The Court affirmed an award of \$10,000 in attorney's fees to be paid by the parents' attorney to the school district. The attorney advised his client not to accept the school district's offer of all the relief being sought in the due process hearing. The Court concluded that the continued litigation and stonewalling tactics made the case frivolous, unreasonable and without foundation and an award of attorney's fees was permissible under the IDEA. El Paso Independent School District v. Berry 110 LRP 66132 (United States Court of Appeals, 5th Circuit (2010))
4. The Court refused to consider an offer of settlement made by the school district when it awarded the parents attorney's fees. The offer was made in a mediation session and the IDEA requires that all discussions that occur in a mediation be kept confidential. J.D. v. Kanawha County Board of Education 52 IDELR 182 (United States Court of Appeals, 4th Circuit (2009)) The United States Supreme Court declined the appeal.
5. The hearing officer held that the classification of a student eligible for special education as being mentally retarded was "flawed" because the student should also have been classified as being autistic. However, the

hearing officer concluded that FAPE was not denied since the student received educational benefit from the IEP.

The Court concluded that the parents were entitled to attorney's fees since a student need not be deprived of a FAPE for his parents to be deemed a prevailing party. The change in eligibility category materially altered the relationship between the parties since it entitled the student to be placed in a classroom with a teacher qualified to teach students with the primary disabilities of mental retardation and autism.

In addition, although a parent who is the attorney cannot receive attorney's fees when they represent their own child the Court concluded that the fact that the student's grandmother was the attorney did not limit the award of attorney's fees. Weissburg v. Lancaster School District 53 IDELR 249, 591 F.3d. 1255 (United States Court of Appeals, 9th Circuit (2010)).

6. The parties to a due process hearing drafted a consent decree. The hearing officer noted "so ordered" on the document and sent it back to the parties. As a result of the hearing officer's notation, the Court held that the parent was a prevailing party eligible for attorney's fees under the IDEA. V.G. v. Auburn Enlarged Central School District 53 IDELR 140 (United States Court of Appeals, 2nd Circuit (2009)).
7. The hearing officer conducted a pre-hearing conference to address school district's Motion to Dismiss and the parent's Motion to Clarify the Issues that had not been resolved during private settlement discussions. Based on the discussions held during the pre-hearing conference, the hearing officer issued an Administrative Order dismissing the due process complaint. The Order included the district's offer to provide compensatory education which had not been previously resolved in the private settlement discussion. The Court held that the pre-hearing order was sufficient to make the parent a prevailing party for attorney's fee purposes. C.Z. v. Plainfield Community Unit School District No. 202 53 IDELR 317 (United States District Court, Northern District, Illinois (2010)).
8. Several decisions were issued this year regarding the award of attorneys fees. Fees awarded to parents who prevailed but reduced the fees for hours devoted to participation in the resolution session. Jeremiah B. v. Hawaii Department of Education 54 IDELR 21 (United States District Court, Hawaii (2010)) Fees awarded but reduced based on duplicate billing, work attributed to an unsuccessful motion, and an unreasonably high hourly rate. B.T. v. Hawaii Department of Education 54 IDELR 159 (United States District Court, Hawaii (2010)) See also Hawaii Department of Education v. Zachary B. 54 IDELR 229 (United States District Court, Hawaii (2010)). Fees awarded but reduced for billing for an excessive amount of billable hours and time spent on a motion for reconsideration.

Taylor H. v. Hawaii Department of Education 54 IDELR 54 (United States District Court, Hawaii (2010))

G. Hearing Officer Competencies/Impartiality

1. A state review officer (SRO) was sued for monetary damages alleging that he misused his authority and conspired to rule against parents in reimbursement tuition cases for unilateral placements. The Court held that since all of the claims against the SRO arose from his conduct as an adjudicator, he is "wholly insulated" by the doctrine of absolute immunity from the claims. However, the Court held that the doctrine of absolute immunity does not extend to the claims for declaratory relief based upon alleged continuing violations of federal law. The Court gave the parent an opportunity to amend her complaint to assert a claim that the SRO is committing ongoing allegations of the IDEA. B.D.S.v. Southold Union Free School District 52 IDELR 293 (United States District Court, Eastern District, New York (2009)). See also B.J.S. v. State Education Department (United States District Court, Western District, New York (2010))
2. The parents alleged that the hearing officer's decision and Order was "a statement of personal opinion of the IHO, rather than a fair and impartial adjudication based upon a weighing of the evidence, and it did not fairly and impartially decide the issues presented." The Court found that there was no basis in the record to support their attack on the hearing officer's impartiality and fairness. The Court noted that the right to adjudication by an impartial decision maker is of course a bedrock principle of due process. Demonstrating that a decision maker has violated this principle, however, is a difficult task. Administrative adjudicators, as well as judges, are entitled to "a presumption of honesty and integrity." In order to overcome this presumption and establish bias, "evidence is required that the decision maker 'had it in' for the party for reasons unrelated to the officer's view of the law." Here the parents have not presented the Court with any evidence whatsoever that the hearing officer somehow "had it in" for them. Simple disagreement with the decision, without some evidence that the hearing officer issued her Decision and Order for reasons other than her view of the facts and the law, is insufficient to establish bias. B.H. v. Joliet School District 54 IDELR 121 (United States District Court, Northern District, Illinois (2010)).

H. Mediation/Settlement Agreements

1. The Court overturned the State Review Officer's (SRO) decision to incorporate a settlement agreement reached privately by the parties into a

dismissal order. Although the school district agreed to the terms of the settlement agreement, it objected to having the agreement incorporated into the dismissal order. The Court held that the SRO lacked the authority to enter the settlement agreement into the order stating that it is essentially the functional equivalent of a consent decree. A judgment by consent may not be entered without an actual agreement and consent of the parties. Traverse Bay Area Intermediate School District v. Michigan Department of Education 49 IDELR 156 (United States District Court, Western District, Michigan (2008)).

Based on the SRO's decision, the school district then sued the State Department of Education and the State Office of Administrative Hearings alleging that the State failed to maintain procedural due process procedures in accord with the IDEA.

The Court held that the IDEA does not provide school districts with an express or implied right of action to compel the State to comply with the IDEA's procedural safeguards absent an underlying claim directly involving a student's IEP. Traverse Bay Area Intermediate School District v. Michigan Department of Education 110 LRP 44701 (United States Court of Appeals, 6th Circuit (2010)).

2. The Court, in overturning the District Court, held that a hearing officer does not have the authority to enforce a private settlement agreement reached by the parties. The Court found that the settlement agreement is essentially a contract between the parties and a due process hearing is not the proper vehicle to enforce the contract. H.C. v. Colton-Pierrpont Central School District 341 F. Appx. 687, 52 IDELR 278(United States Court of Appeals, 2nd Circuit (2009)). Note: This is an unpublished decision.
3. The Court dismissed the parents' claim that educational services were not provided consistent with a settlement agreement since they did not exhaust their administrative remedies by first requesting a due process hearing. The Court held that exhaustion would not be futile. Even if the Administrative Law Judge could not provide all the relief the parents were seeking, the ALJ may be able to grant appropriate relief including the revision of the student's educational placement and providing for a more detailed schedule of services. T.L. v. Palm Springs Unified School District 51 IDELR 268 (United States Court of Appeals, 9th Circuit (2009)). Note: This is an unpublished decision.
4. After a due process hearing request was filed, the parties engaged in informal settlement negotiations. The parties dispute whether a binding settlement agreement resulted. The school filed a Motion to Enforce the Settlement Agreement or in the alternative a Motion to Dismiss. The

hearing panel (Missouri uses a hearing panel instead of a hearing officer) denied the motion.

The Court held that the private settlement was enforceable by the hearing panel. The Court noted that if the settlement had been reached through a resolution session or mediation, such agreement would have been directly enforceable in federal or state court. St. Joseph School District v. Missouri Department of Elementary and Secondary Education, 54 IDELR 124 (Missouri Court of Appeals (2010)).

5. As a result of a request for a due process hearing, the parties entered into a settlement agreement resolving the FAPE issue. The agreement specifically stated that “this is a mediated settlement agreement enforceable in federal court”. Subsequently, the parents initiated another due process hearing including a claim that the school district breached the settlement agreement.

The Court, over the objection of the school district, held that the hearing officer has the authority to hear the claim. While the IDEA provides a forum in Court for the claiming a breach of a mediated agreement, Congress intended for hearing officers to have broad authority in resolving matters. Since the breach of the agreement is “inextricably intertwined” with core decisions made by hearing officers, any resolution of the parents’ claim will necessarily involve a review of whether FAPE is being provided. Springfield Local School District Board of Education v. Jeffery B. 55 IDELR 158 (United States District Court, Northern District, Ohio (2010))

I. Discovery/Evidentiary Issues

1. The hearing officer denied the parents request to engage in pre-hearing discovery. The Court affirmed the hearing officer holding that discovery (other than the five day disclosure rule) is not an IDEA due process hearing right.

The Court noted that allowing conventional pre-trial discovery into the special education hearing process would not serve to fulfill the IDEA’s principle of prompt adjudication of disputes. Horen v. Board of Education of the City of Toledo Public School District 655 F.Supp.2d 794, 53 IDELR 79 (United States District Court, Northern District, Ohio (2009)). See also B.H. v. Joliet School District 110 LRP 18364 (United States District Court, Northern District, Illinois (2010)).

J. Hearing Timelines

1. The Administrative Law Judge granted the parents’ attorney request to extend the 45 day hearing period by four and a half months to

accommodate two vacations, two unrelated trials and trial preparations. The school district filed a Motion for a Temporary Restraining Order seeking to prohibit the continuance arguing that such extensions have become the “rule rather than the exception”.

The Court in denying the Motion questioned whether it had the authority to rule on an interlocutory appeal. Even if it did, the Court noted the district’s claim of prejudice was vague and was outweighed by the prejudice in revoking a “good cause” continuance and rescheduling the hearing to a date when the parents’ attorney was unavailable and/or unprepared. Lake Washington School District No. 414 v. Office of the Superintendent of Public Instruction, 51 IDELR 278 (United States District Court, Western District, Washington (2009)). On Appeal.

2. A pro se parent challenged the hearing officer’s denial of his request for an indefinite continuance of the due process hearing due a general allegation that he had health problems. The school district did not object to the continuance.

The hearing officer did grant a 30 day continuance but held he did not have the authority to grant an indefinite extension of the 45 day hearing timeframe. The hearing officer proceeded with the hearing in the parent’s absence and rendered a decision.

The Court held that the hearing officer did not abuse his discretion in denying the request and holding the hearing. The hearing officer had asked the parent to submit information about the exact nature of his medical condition including the names of his doctors which allegedly advised him not to proceed with the due process hearing. The parent did not provide the information. The Court found it was not an abuse of discretion to ask for such information which could have been provided “in camera” to protect the parent’s privacy interest. J.D. v. Kanawha City Board of Education 53 IDELR 225 (United States District Court, Southern District, West Virginia (2009)). School District’s Motion to Dismiss granted since the petitioners have waived appellate review by failing to file objections after receiving proper notice. J.D. v. Kanawha City Board of Education 54 IDELR 184 (United States Court of Appeals, 4th Circuit (2010)0. Note: The decision is unpublished.

K. Miscellaneous Hearing Issues

1. A parent filed a complaint with the Office for Civil Rights (OCR) alleging that the hearing officer discriminated against her on the basis of disability by not providing her with necessary accommodations, such as taking breaks, during the course of the hearing. OCR concluded that there was no evidence either in the transcript of the hearing or from the complainant to show that she requested such breaks as an accommodation. OCR noted that there was extensive evidence in the record and from

OCR's interviews that the hearing officer allowed breaks when the parent became upset or agitated. In addition, the parent was allowed to use a laptop and to eat food throughout the hearing. OCR Complaint #11-10-1121 (United States Department of Education, Office for Civil Rights (2010))

2. An LEA is obliged to schedule and hold a resolution meeting within 15 calendar days of receiving the notice of the parent's due process complaint unless both parties mutually waive the resolution meeting in writing. It would be inconsistent with the IDEA for a state to adopt a regulation that would allow suspension of the 15 day timeline when the due process hearing complaint is received shortly before or during the school's winter break. Letter to Anderson (United States Department of Education, Office of Special Education Programs (2010))

IX. Liability Issues

- A. A student was subjected to teasing and name calling at school and online after other students found out she had HIV. The student ultimately withdrew from school and sued the school district for failing to respond to peer harassment under Section 504.
To hold the district liable for disability-based peer harassment, the student is required to show that: 1) she was an individual with a disability; 2) she was harassed based on her disability; 3) the harassment was so severe or pervasive that it altered the condition of her education; 4) the district knew about the harassment; and 5) the district was deliberately indifferent to it.
The Court dismissed the claims finding that school personnel reacted to each reported incident, met with the alleged harassers, admonished them for their behavior, and informed all interested parents. Therefore, the school was not deliberately indifferent to the incidents of harassment. P.R. v. Metropolitan School District of Washington Township 55 IDELR 199 (United States District Court, Southern District, Indiana (2010))
- B. The parents of a student with autism initiated legal action against the school district and school staff, both in their individual and official capacities, alleging that the use of restraints and seclusion violated the student's constitutional rights. The Court, in affirming the dismissal of the claims, held that the use of such measures was reasonable since the student's IEP authorized their use and therefore the IEP "set the standard of accepted practice". The Court referenced another decision which stated that "we would place educators in a very difficult position if we did not allow them to rely on a plan [the IEP] specifically approved by the student's parents and which they are statutorily required to follow". C.N. v. Willmar Public Schools 591 F.3d 624, 53 IDELR 251 (United States Court of Appeals, 8th Circuit (2010)).

- C. The Court affirmed a finding by the jury that architectural barriers denied a student with cerebral palsy “meaningful access” to the school’s program in violation of Section 504 and the Americans With Disabilities Act. However, the Court vacated the jury award of \$115,000 in damages since the award was arbitrary in light of the evidentiary record. The Court remanded the issue of damages for a new trial. Celeste v. East Meadow Union Free School District 54 IDELR 142 (United States Court of Appeals, 2nd Circuit (2010)). Note: This is an unpublished decision.
- D. An occupational therapist sued the parents and school district for negligence for injuries she received when being hit and kicked by a student with autism. The Court dismissed the lawsuit since the OT admitted that, prior to the incident, she was aware of the student’s tendency to use physical force and had observed such behavior on previous occasions. The Court noted that it is well established that there is no duty to warn an individual about a potentially dangerous condition of which she/he is actually aware or that may be readily observed by a reasonable person. Johnson v. Cantie 54 IDELR 257 (New York Supreme Court, Appellate Division (2010)).
- E. The parents initiated a lawsuit seeking monetary damages against a school district for the alleged improper use of a “safe room” which was included in the student’s IEP to address the student’s behavior. The Court of Appeals dismissed the lawsuit for failure to exhaust administrative remedies. The Court held that the parent cannot avoid the exhaustion requirements by requesting only monetary damages. Payne v. Peninsula School District 598 F.3d 1123, 54 IDELR 72 (United States Court of Appeals, 9th Circuit (2010)). Reconsideration pending.
- F. The availability of relief under the IDEA does not limit the availability of a damage claim under Section 504. Although both the IDEA and Section 504 have overlapping FAPE requirements, there are some distinctions between the two. The most important difference is that unlike FAPE under the IDEA, FAPE under Section 504 requires a comparison between the manner in which the needs of disabled and non-disabled children are met. The Court found that there is an implied right of action under Section 504 for claiming damages for a FAPE violation. A public entity can be held liable for damages under Section 504 if it intentionally or with deliberate indifference fails to provide meaningful access or reasonable accommodations to a disabled person. Mark H. v. Lemahieu, 513 F 3d 922, 49 IDELR 91 (United States Court of Appeals, 9th Circuit (2008)).
- In a subsequent decision, the Court reversed the granting of a summary judgment for the Department of Education (DOE) by the District Court. The Court concluded that the parents raised genuine issues of material fact as to whether the DOE denied the students meaningful access to the benefits of public education by failing to provide them with reasonable accommodations and whether it did so with deliberate indifference. The case was remanded back to the District Court

for a trial on the merits. Mark H. v. Hamamoto 620 F.3d 1090, 55 IDELR 31 (United States Court of Appeals, 9th Circuit (2010)).

X. Miscellaneous Issues

- A. The Court found no violation of the IDEA when the state closed down a charter school due to financial problems. The students on IEPs did not have their rights violated since the closure resulted in a change of location not a change of placement under the IDEA since the new schools would not fundamentally change the IEPs. Comb v. Benji's Special Education Academy Inc. 55 IDELR 162 (United States District Court, Southern District, Texas (2010))
- B. Nine students with disabilities and their parents filed a lawsuit against the Hawaii Department of Education alleging that the closing of all public schools for 17 Fridays in the school year (Furlough Fridays) due to the state's fiscal crisis amounted to a change of educational placement under the IDEA and therefore the "stay put" provision applies. The Court concluded that the use of Furlough Fridays did not constitute a change in educational placement under the IDEA which the Court stated is a movement of a student from one type of program (such as regular class) to another type of program (such as home instruction). When Congress enacted the IDEA, it did not intend for the IDEA to apply to system wide administrative decisions which affects all public school students. N.D. v. State of Hawaii, Department of Education 600 F.3d 1104, 54 IDELR 111 (United States Court of Appeals, 9th Circuit (2010)). In a subsequent decision, the District Court held that the use of Furlough Fridays did not violate the "stay put" provision of the IDEA. The Court noted that "stay put" was not intended to cover system wide changes in public schools that impact both students with disabilities and student without disabilities since such changes are not changes in educational placement. N.D. v. State of Hawaii, Department of Education 55 IDELR 220 (United States District Court, Hawaii (2010)).
- C. The Court issued a Preliminary Injunction allowing a student with autism to bring his service dog to school and school functions. The injury the student would suffer if not allowed to bring his dog to school outweighs any harm potentially incurred by the school district. Kalbfleisch v. Columbia Community School District 53 IDELR 57 (Illinois Circuit Court (2009)) The granting of the Preliminary Injunction was affirmed. . Kalbfleisch v. Columbia Community School District 53 IDELR 266 (Illinois Appellate Court, 5th District (2009)). See also K.D. v. Villa Grove Community School District 55 IDELR 78 (Illinois Appellate Court, 4th District (2010)).
Note: The Department of Justice has issued new ADA, Title II regulations addressing service animals. See: www.ada.gov/regs2010/ADAregs2010.htm

- D. A special education teacher voiced concerns to her supervisor that the school district's special education services were not in compliance with state and federal legal requirements. The teacher, after feeling her concerns were not being addressed, filed a complaint with the Office for Civil Rights (OCR) alleging that the district was denying students with disabilities a free appropriate public education.
- The teacher alleged that after filing her complaint, her supervisors began retaliating against her creating an intolerable work environment. She alleged that she was intimidated, her correspondence was not responded to, she was excluded from meetings and her work assignment was changed to locations further from her home. As a result she filed a further complaint with OCR based on retaliation which found merit to her complaint. She ultimately resigned finding it intolerable to continue working in the district.
- The teacher then filed a lawsuit based on retaliation under Section 504 and the Americans with Disabilities Act (ADA). The Court of Appeals, in reversing the lower court's dismissal of the action, held that any individual---regardless if they are disabled or a parent of a disabled child---may sue under Section 504 and the ADA for retaliation for advocating on behalf of individuals who are disabled. Therefore, the former teacher has legal standing to sue. The case was remanded back to the District Court for trial. Barker v. Riverside County Office of Education 584 F.3d 821 (United States Court of Appeals, 9th Circuit (2009)). See also Reinhardt v. Albuquerque Public Schools 595 F.3d 1126, 110 LRP 9870 (United States Court of Appeals, 10th Circuit (2010)).
- E. A student on an IEP lived with his grandmother who is his guardian. The grandmother's house burned down and the grandmother and student relocated to temporary housing in an adjacent school district. The original school district provided special education services for the remainder of the school year but refused services for the next school year when it learned that the student's mother was living in the adjacent district.
- The Court held that the student was deemed homeless under the McKinney-Vento Act and therefore the original school district must continue to provide the student with an education. Where a homeless child attends school is to be determined based on his or her best interest, which requires "to the extent feasible, keeping a homeless child or youth in the school of origin, except when doing so is contrary to the wishes of the child's or youth's parent or guardian." The Act makes it clear that there is no maximum duration of homelessness. Instead, a school district must accommodate a homeless child for the entire time that they are homeless. Further, it was immaterial that the student's mother lived in another school district since the mother played no role in his education. L.R. v. Steelton-Highspire School District 54 IDELR 155 (United States District Court, Middle District, Pennsylvania (2010)).
- F. The Court invalidated the section of the NCLB Federal regulation that deems teachers who are participating in an alternative route to certification and who

demonstrate satisfactory progress toward full certification as a “highly qualified teacher” since the regulation contradicts the statute. The IDEA incorporates by reference the section of the NCLB regulation that has been invalidated. (See IDEA regulation, Section 300.18(a)). Renee v. Duncan 110 LRP 54658 (United States Court of Appeals, 9th Circuit (2010)). Congress passed legislation in December 2010, effective until 2013, to allow teachers who have enrolled in an alternative route program to be deemed highly qualified.

Note: This outline is intended to provide workshop participants with a summary of selected Federal statutory/regulatory provisions and selected judicial interpretations of the law. The presenter is not, in using this outline, rendering legal advice to the participants. The services of a licensed attorney should be sought in responding to individual student situations.