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## SPECIAL EDUCATION YEAR IN REVIEW: WHAT'S NEW LEGALLY AND SO WHAT FOR US?

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### I. INTRODUCTION

The purpose of this Article is to present and discuss various rulings regarding special education published over the last year. These are not necessarily rulings that would be in the headlines of a newspaper or in professional publications. Rather, these are rulings that have practical significance or include a valuable lesson. Instead of a more scholarly approach, this Article will examine what the cases mean for us as lawyers for parents, lawyers for school districts, lawyers for administrators, or in our role as hearing officers.

### II. ELIGIBILITY/EVALUATIONS

#### A. Observation by Independent Evaluator

*School Board of Manatee County v. L.H. ex rel. D.H.*<sup>1</sup> involved a school district that had an unwritten policy of preventing the parents' psychologist from observing in the classroom as part of an evaluation, in which the parents were contending that a psychologist was necessary for them "to effectively participate in the development of" their child's Individualized Education Program ("IEP") and exercise their right to an Independent Education Evaluation ("IEE").<sup>2</sup>

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<sup>1</sup> No. 8:08-cv-1435-T-33MAP, 2009 WL 3231914 (M.D. Fla. Sept. 30, 2009).

<sup>2</sup> *Id.* at \*1 & n.1.

The administrative law judge (“ALJ”) agreed and the court affirmed, relying in part upon *Letter to Mamas*<sup>3</sup> from the Office of Special Education Programs (“OSEP”) which acknowledged the need for a parent to sometimes be able to enter the classroom and bring his or her expert along with them.<sup>4</sup> The court rejected the school district’s argument that *Letter to Mamas* applied only to IEEs at the public’s expense.<sup>5</sup>

So what does that mean? First, school districts should take a look at their district-wide or building policies, either written or unwritten, with regard to visitation. School districts should also be careful with regard to how they treat that parent or expert. They should treat him or her as if there were no hearing or potential dispute. It is clear from *Manatee County*, as well as *Letter to Mamas*, that there are going to be occasions where a parent is going to have the right to observe in order to effectively exercise his or her right to an independent evaluation, the right to information about or participation in the IEP, or most significantly, the right to present meaningful well-founded testimony at a hearing.<sup>6</sup>

However, when you bring an expert into the schoolhouse and classroom, there are a potential host of problems that school districts must consider. For example, how long is the observation going to last? How many times is the expert going to come and observe? Is there going to be any interaction with staff during the course of observation? Can the observation be made without disruption?<sup>7</sup>

With regard to the ABA cases—the Applied Behavior Analysis—there are a lot of situations where school districts are being asked to reimburse parents for home-based programs or to fund those programs.<sup>8</sup> If a school district is being asked to fund or reimburse these types of programs, it ought to be able to go into the home.<sup>9</sup>

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<sup>3</sup> *Id.* at \*3; *Letter to Mamas*, 42 IDELR 10, 48 (OSEP May 26, 2004).

<sup>4</sup> *Manatee County*, 2009 WL 3231914, at \*3.

<sup>5</sup> *Id.* (holding that the court was not persuaded “that it should differentiate between the public and private expensed IEEs when determining access to classroom observation”).

<sup>6</sup> *See id.*

<sup>7</sup> Some of these factors are discussed in *In re Student with a Disability*, 43 IDELR 214 (Nev. State Educational Agency June 21, 2005).

<sup>8</sup> *See Deal v. Hamilton Cnty. Bd. of Educ.*, 392 F.3d 840, 846 (6th Cir. 2004) (“The [plaintiffs] . . . requested that the School System fund a 40-hour per week home based ABA program for the summer, as well as provide for year-round speech therapy.”).

<sup>9</sup> *See, e.g., id.*

However, the same types of conditions need to be applied in this situation as are applied with regard to disruption in the classroom.<sup>10</sup>

This effectively amounts to pseudo-discovery, which most hearing officers would generally not allow.<sup>11</sup> But with regard to this fundamental observation, which is so critical to both sides in certain circumstances, the parties should go to the hearing officer if any problems cannot be worked out. In addition, the school districts sometimes get concerned about the Family Educational Rights and Privacy Act (“FERPA”)<sup>12</sup> implications. However, if the parents’ counsel asks the hearing officer for a protective order, it would more than satisfy an illegitimate concern of the school districts in terms of the FERPA order.<sup>13</sup>

### B. Adverse Affect

Adverse affect is a condition for eligibility under the Individuals with Disabilities Education Act (“IDEA”).<sup>14</sup> However, there is no definition of the term in the IDEA, and as *Marshall Joint School District No. 2 v. C.D. ex rel. Brian & Traci D.*<sup>15</sup> points out, one must look to state law for the definition of “adverse affect.”<sup>16</sup> Thus, adverse affect can be critical in terms of the eligibility determination.<sup>17</sup>

### C. Socially Maladjusted

*Eschenasy ex rel. A.E. v. New York City Department of Education*<sup>18</sup> points out a big mistake made by too many school districts.<sup>19</sup>

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<sup>10</sup> See, e.g., *Dorian G. ex rel. Cristina S. v. Sobel*, No. 93 CV 0687, 1994 WL 876707, at \*1 (E.D.N.Y. Jan. 28, 1994) (requesting reimbursement for tuition expenses for enrolling child in a private school for emotionally disturbed children).

<sup>11</sup> See, e.g., *C.B. & R.B. ex rel. W.B. v. N.Y.C. Dep’t of Educ.*, No. 02 CV 4620(CLP), 2005 WL1388964, \*9 (E.D.N.Y. June 10, 2005).

<sup>12</sup> Family Education Rights and Privacy Act of 1974, 20 U.S.C.A. § 1232g (West 2010).

<sup>13</sup> See, e.g., *Ragusa v. Malverne Union Free Sch. Dist.*, 549 F. Supp. 2d 288, 294 (E.D.N.Y. 2008).

<sup>14</sup> *Mr. I ex rel. L.I. v. Maine Sch. Admin. Dist. No. 55*, 480 F.3d 1, 14 (1st Cir. 2007).

<sup>15</sup> 592 F. Supp. 2d 1059 (W.D. Wis. 2009), *rev’d*, 616 F.3d 632 (7th Cir. 2010).

<sup>16</sup> *Id.* at 1078 (“Neither the [IDEA] nor the regulations define ‘adversely affects,’ leaving the states to give meaning to this term.”).

<sup>17</sup> See generally *id.*

<sup>18</sup> 604 F. Supp. 2d 639 (S.D.N.Y. 2009).

<sup>19</sup> See *id.* at 643 (find that student should have been “classified as a student with emotional disturbance” and parents were entitled to reimbursement).

The teenager in this case engaged in a host of problematic behaviors, many of which manifested outside of the school setting.<sup>20</sup> The school district took the position that the student was socially maladjusted, and therefore not emotionally disturbed.<sup>21</sup>

As this case points out, the two classifications—one being socially maladjusted, and the other being emotionally disturbed—are not mutually exclusive.<sup>22</sup> A child can be socially maladjusted and still meet the characteristics to be identified as emotionally disturbed.<sup>23</sup> Given the serious nature of the student's needs, classifying the child as socially maladjusted, but not as emotionally disturbed when he was eligible, was an extremely expensive mistake on the part of the school district.<sup>24</sup>

### III. IEPs/IEPT MEETINGS

#### A. Right to Appeal Old/Agreed Upon IEPs

One of the biggest responsibilities a hearing officer has is to make sense of the Individuals with Disabilities Education Act (“IDEA”).<sup>25</sup> In this regard, *Letter to Lipsitt*<sup>26</sup> has significant potential ramifications for both parents and school districts in terms of destabilizing the entire process.<sup>27</sup> The letter states that even though a school district has given a parent all the protections required under the IDEA, if a parent agrees with the IEP and it goes into effect, within the two-year statute of limitations period the parent can still appeal the IEP.<sup>28</sup>

Looking at the scheme of the IDEA in terms of the protections offered to the parent with regard to notice of procedural safeguards, organizations to assist in understanding IDEA rights, and in-

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<sup>20</sup> *Id.* at 643-44 (“She stole, broke school rules, obtained a tattoo and body piercings, made inappropriate friends on the internet, began using drugs, and ran away from home.”).

<sup>21</sup> *Id.* at 643, 645-46.

<sup>22</sup> *Id.* at 647 (citing 20 U.S.C.A. § 1401(3)(A) (West 2010)).

<sup>23</sup> *See Eschenasy*, 604 F. Supp. 2d at 647 (citing 20 U.S.C.A. § 1401(3)(A)).

<sup>24</sup> *Id.* at 654.

<sup>25</sup> Individuals with Disabilities Education Act, 20 U.S.C.A. §§ 1400-1482 (West 2010).

<sup>26</sup> 52 IDELR 47, 227 (OSEP Dec. 11, 2008).

<sup>27</sup> *See generally id.* (discussing that a parent may request a due process hearing regarding an IEP that they previously accepted).

<sup>28</sup> *See id.*

terpreter services, is there any equitable relief that might be possible if a school district does everything required, yet the parent's action or inaction leads to the implementation of the IEP?<sup>29</sup> Technically yes, but practically, *Lipsitt* is proliferating litigation.<sup>30</sup> The OSEP's argument is that the law does not require the parent to agree to the IEP; parents can appeal, thereby placing the burden on hearing officers to sort out the issues.<sup>31</sup> This is not a responsible interpretation of the IDEA, given that the scheme of the Act is to foster the goal of good faith cooperation.<sup>32</sup>

OSEP letters are entitled to deference absent a cogent reason

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<sup>29</sup> *See id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Lipsitt*, 52 IDELR at 227.

<sup>32</sup> The IDEA establishes procedural safeguards intended for use by the parents to protect the rights of the child to be utilized prior to filing a due process complaint or civil action. This "exhaustion" requirement is intended to limit formal litigation. *Compare* N.B. v. Hellgate Elem. Sch. Dist. *ex rel.* Bd. of Dir., Missoula Cnty., Mont., 541 F.3d 1202, 1208-09 (9th Cir. 2008) (holding that the school district "did not fulfill its [procedural] statutory obligations" to the parents of an autistic child without ensuring that the proper assessments were conducted; it was not sufficient that the district referred the parents to a testing center, as it was the district's responsibility to see that the testing in fact occurred), *with* 20 U.S.C.A. § 1415(l) (West 2010)

[B]efore the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) [impartial due process hearing] and (g) [appeals] shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

*See also* Centennial Sch. Dist. v. Phil L. *ex rel.* Matthew L., 559 F. Supp. 2d 634, 643 (E.D. Pa. 2008) ("Thus, to the extent that any claim seeks relief that is 'available' under the IDEA, the IDEA's administrative remedies must be exhausted before such an action is brought."), *amended by* No. 08-982, 2008 WL 3539886, at \*5-\*6 (E.D. Pa. Aug. 8, 2008); *see also* Ellenberg v. N.M. Military Inst., 478 F.3d 1262, 1275 (10th Cir. 2007)

[The] claims ultimately fail because the [plaintiffs] did not exhaust the IDEA's administrative procedures before filing a lawsuit against [the defendants] . . . "Congress required that parents turn first to the statute's administrative framework to resolve any conflicts they had with the school's educational services." We have interpreted the IDEA's exhaustion requirements broadly, noting Congress' clear intention to allow those with experience in educating the nation's disabled children "at least the first crack at formulating a plan to overcome the consequences of educational shortfalls."

(internal citations omitted); *see also* Hayes *ex rel.* Hayes v. Unified Sch. Dist. No. 377, 877 F.2d 809, 814 (10th Cir. 1989) (noting the "philosophy of the [IDEA] is that plaintiffs are required to utilize the elaborate administrative scheme established by the Act before resorting to the courts to challenge the actions of the local school authorities").

not to adhere to them, e.g. violating the IDEA.<sup>33</sup> Accordingly, a hearing officer ought to be very careful when not following this type of letter.<sup>34</sup>

### B. Obligation to Generalize Skills

*Thompson R2-J School District v. Luke P. ex rel. Jeff P.*<sup>35</sup> is a Tenth Circuit decision following earlier decisions coming from the First and Eleventh Circuits.<sup>36</sup> In this case, the parents of a fourteen-year-old student with autism contended that his IEP was inappropriate because it “failed to address adequately his inability to generalize functional behavior learned at school to the home and other environments.”<sup>37</sup> The parents insisted that “[t]he ability to generalize . . . is ‘fundamental’ and without it ‘learning does not exist.’”<sup>38</sup> “Absent the ability to generalize skills learned at school, particularly basic self help and social skills, [the parents argued their son’s] education [was]

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<sup>33</sup> See, e.g., *Pardini ex rel. Pardini v. Allegheny Intermediate Unit*, 420 F.3d 181, 191-92 (3d Cir. 2005) (“[T]he level of deference to be accorded to such interpretive rules depends upon their persuasiveness.” In evaluating persuasiveness we consider such factors as the thoroughness, reasoning, and consistency with other agency pronouncements.” (internal citations omitted). The *Pardini* court ultimately reversed the district court’s decision, which relied in part on a letter from the OSEP, because “the OSEP never explained how it reached [its] conclusion” in the letter. *Id.* at 192. See *Orange Cnty. Dep’t of Educ. v. A.S.*, 567 F. Supp. 2d 1165, 1170 (C.D. Ca. 2008) (the court gave significant authoritative weight to OSEP letters using them to support its holding, as the letters were consistent with case law and statutory regulations). See also *Ringwood Bd. of Educ. v. K.H.J. ex rel. K.F.J.*, 469 F. Supp. 2d 267, 270-71 (D.N.J. 2006) (citing *Steven C. ex rel. Michael C. v. Radnor Twp. Sch. Dist.*, 202 F.3d 642, 649 (3d Cir. 2000)); *Chester Cnty. Intermediate Unit v. Pa. Blue Shield*, 896 F.2d 808, 815 (3d Cir. 1990). See generally Perry Zirkel, *Do OSEP Policy Letters Have Legal Weight?*, 171 WEST EDUC. L. REP. 391 (2003).

<sup>34</sup> See, e.g., *D.P. ex rel. E.P. v. Sch. Bd. of Broward Cnty.*, 483 F.3d 725, 729, 731 (11th Cir. 2007) (rejecting parents’ reliance on *Pardini* because the plain language of the relevant statute was unambiguous and thus the court did not need to rule on whether the agency’s interpretation was reasonable). The court also stated that “[w]e think [*Pardini*] was incorrectly decided . . . . We do note, however, that our interpretation of the statute is consistent with that of the Department of Education.” *Id.* at 730. See also *R.C. & S.C. ex rel. R.J.C. v. Carmel Cent. Sch. Dist.*, No. 06 Civ. 5495(CLB), 2007 WL 1732429, at \*2-3, \*5 (S.D.N.Y. June 14, 2007) (affirming decision of SRO, which distinguished *Pardini* and thus relied in part on the OSEP letter that *Pardini* had rejected).

<sup>35</sup> 540 F.3d 1143 (10th Cir. 2008).

<sup>36</sup> *Id.* at 1150 n.7 (citing *Devine v. Indian River Cnty. Sch. Bd.*, 249 F.3d 1289 (11th Cir. 2001); *Gonzalez v. Puerto Rico Dep’t of Educ.*, 254 F.3d 350, 351-52 (1st Cir. 2001); *JSK ex rel. JK & PGK v. Hendry Cnty. Sch. Bd.*, 941 F.2d 1563 (11th Cir. 1991)).

<sup>37</sup> *Id.* at 1145, 1150.

<sup>38</sup> *Id.* at 1150.

effectively worthless.”<sup>39</sup>

The school district replied that “as a matter of law, generalization across settings [was] not required by [the] IDEA so long as [a student was] making *some* progress in school.”<sup>40</sup> The court found for the school district, holding that Congress did not, in the IDEA, guarantee self-sufficiency.<sup>41</sup> The court did acknowledge another court’s suggestion “that in some instances difficulty generalizing skills may be so severe that it prevents a student from receiving *any* educational benefit.”<sup>42</sup> In that case, the IEP would need to address it in some fashion, albeit maybe not in a residential placement.<sup>43</sup> But the court reversed the conclusions of the hearing officer and state review officer below that such progress “was meaningless if there was no strategy to [e]nsure that those skills would be transferred outside the school environment.”<sup>44</sup>

It is difficult to square this court’s ruling that generalization is not required when taking into account the purposes and policies underlying the transition aspect of an IEP.<sup>45</sup> The court also failed to

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<sup>39</sup> *Id.*

<sup>40</sup> *Thompson R2-J Sch. Dist.*, 540 F.3d at 1150.

<sup>41</sup> *Id.* at 1150-51 (“We are constrained to agree with the school district and our sister courts. Though one can well argue that generalization is a critical skill for self-sufficiency and independence, we cannot agree with [the parents] that [the] IDEA always attaches essential importance to it.”).

<sup>42</sup> *Id.* at 1152 (citing *Gonzalez*, 254 F.3d at 353).

<sup>43</sup> *Id.* (“In such situations, our sister court held, an IEP ‘must address such problems in some fashion, even if they do not warrant residential placement.’ ” (quoting *Gonzalez*, 254 F.3d at 353)).

<sup>44</sup> *Id.* at 1154.

<sup>45</sup> Compare *Thompson R2-J Sch. Dist.*, 540 F.3d 1143, with *K.C. ex rel. M.C. v. Mansfield Indep. Sch. Dist.*, 618 F. Supp. 2d 568 (N.D. Tex. 2009).

[T]he IDEA defines “transition services” as a coordinated set of activities within a results-oriented process focused on improving the academic and functional achievement of the child to facilitate movement to post-school activities based on the individual child’s needs, strengths, preferences, and interests and “includes instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation.”

*Id.* at 574 (quoting 20 U.S.C.A. § 1401(34)(C) (West 2010); see *New Milford Bd. of Educ. v. C.R. ex rel. T.R.*, Civ. A. No. 09-328 (JLL), 2010 WL 2571343, at \*3 (D.N.J. June 22, 2010) (“The education provided under the IDEA must be constructed so as to meet a disabled child’s unique needs and provide ‘significant learning,’ including a meaningful educational benefit in the least restrictive environment.” (citing *D.S. v. Bayonne Bd. of Educ.*, 602 F.3d 553, 556 (3d Cir. 2010))).

consider community-based instruction in its decision.<sup>46</sup> Additionally, the court ignored the fundamental behavioral principle that it is necessary to generalize behavior in order to be successful.<sup>47</sup> Thus, in advocating and participating in the development of IEPs, particularly with regard to transition, it is important to include provisions ensuring that students are able to generalize.

### C. Uncooperative Parents

In *Sytsema ex rel. Sytsema v. Academy School District No. 20*,<sup>48</sup> the parents of a three-year-old boy came into an Individualized Education Planning Team (“IEPT”) meeting seeking reimbursement for the cost of a home-based autism program.<sup>49</sup> The school district presented the parents with a draft IEP and, as a result of initial discussions, made verbal offers to increase services.<sup>50</sup> Once the parents learned the school district intended to deliver the services in an integrated preschool setting, they refused to participate.<sup>51</sup> The Tenth Circuit held that a parent’s refusal to participate in the IEP process effectively excused any procedural defects in the IEP’s formation.<sup>52</sup> In particular, the court found the parents’ conduct excused the school district’s failure to provide the parents with a final IEP.<sup>53</sup>

These cases show that parents will be held to the same “good

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<sup>46</sup> Compare *Thompson R2-J Sch. Dist.*, 540 F.3d 1143, with *Rosinsky ex rel. Rosinsky v. Green Bay Area Sch. Dist.*, 667 F. Supp. 2d 985, 985-86 (E.D. Wis. 2009) (stating that, although the goals of the student’s IEP, which included a goal of “increasing independence in the community,” may not have been as extensive as the parents would like, “they were measurable and were formulated to provide [the student] a basic floor of opportunity”) (internal quotation marks omitted).

<sup>47</sup> Compare *Thompson R2-J Sch. Dist.*, 540 F.3d 1143, with *Doe ex rel. Doe v. Hampden-Wilbraham Reg’l Sch. Dist.*, Civ. A. No. 08cv12094-NG, 2010 WL 2132799, at \*9, \*10 (D. Mass. May 25, 2010) (The IEP in question stated, “[The student] needs to be taught to mastery before going on. Mastered items need to be reinforced to ensure continued mastery and generalization to all settings. [The student] needs 1:1 teaching of skills, generalizing them to all settings.”).

<sup>48</sup> 538 F.3d 1306 (10th Cir. 2008).

<sup>49</sup> *Id.* at 1310.

<sup>50</sup> *Id.* at 1309-10.

<sup>51</sup> *Id.* at 1310.

<sup>52</sup> *Id.* at 1315 (“The hearing officer’s findings of fact indicate that the Sytsemas unilaterally terminated the IEP development process . . . [T]hat decision precluded them from meaningfully participating in the complete IEP development process. Thus, we conclude that the lack of a final IEP did not substantively harm Nicholas [Sytsema].”).

<sup>53</sup> *Sytsema*, 538 F.3d at 1314-15.

faith” or “open mind” standard as school districts with respect to their obligation to cooperatively participate in the IEP development process.<sup>54</sup> It is now a two-way street and parents must cooperate and act in good faith.<sup>55</sup> The Sixth Circuit has also stated that the IDEA rules apply both to parents and school districts,<sup>56</sup> and has often discussed partnership in the IEP development process.<sup>57</sup> These cases suggest that parents need to understand that although they have extremely strong feelings with regard to what is best for their child, such does not mean they have the right to dictate the result of the IEP process.<sup>58</sup> Instead, the parents must go into these meetings with an open mind and good faith.<sup>59</sup>

#### D. Predetermination

In *T.P. & S.P. ex rel. S.P. v. Mamaroneck Union Free School District*,<sup>60</sup> the parents sought reimbursement for their in-home ABA services.<sup>61</sup> Prior to the IEP, the school district staff had discussed the child’s services and came to the meeting with a chart outlining the

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<sup>54</sup> See *id.*; *Thompson R2-J Sch. Dist.*, 540 F.3d at 1154-55 (referencing exhaustion requirements and parents’ obligation to exercise procedural safeguards).

<sup>55</sup> *Sytsema*, 538 F.3d at 1314-15 (relying on *MM ex rel. DM & EM v. Sch. Dist. of Greenville Cnty.*, 303 F.3d 523, 535 (4th Cir. 2002)); see *Hjortness ex rel. Hjortness v. Neenah Joint Sch. Dist.*, 507 F.3d 1060, 1066 (7th Cir. 2007); see also *Thompson R2-J Sch. Dist.*, 540 F.3d at 1154-55.

<sup>56</sup> See, e.g., *Cordrey v. Euckert*, 917 F.2d 1460 (6th Cir. 1990).

A school district must heed these requirements, particularly those “giving parents and guardians a large measure of participation at every stage in the administrative process,” including the formulation of an IEP. We emphasize today that the parents likewise are obligated to operate within the Act’s procedural framework.

*Id.* at 1466 (internal citation omitted).

<sup>57</sup> See, e.g., *Doe ex rel. Doe v. Defendant I*, 898 F.2d 1186, 1190-91 (6th Cir. 1990) (“[B]ecause [the] parents were allowed to participate fully in the development of [their child’s] . . . IEP, the procedural requirements of the [Act] were met even though two items were omitted from the document.”); see also *Berger v. Medina City Sch. Dist.*, 348 F.3d 513, 520 & n.4 (6th Cir. 2003) (holding that the district court should not have found that the procedural deficiencies in question denied the student a FAPE because “[t]he evidence . . . showed that [parents] participated in the IEP meetings, had regular communication with the teachers and special education staff, and were engaged in [the student’s] schooling on a daily basis”).

<sup>58</sup> See cases cited *supra* notes 55 & 57.

<sup>59</sup> *Id.*

<sup>60</sup> 554 F.3d 247 (2d Cir. 2009).

<sup>61</sup> *Id.* at 249-51.

recommendations of its behavioral consultant comparing them with the recommendations of the parents' independent evaluator.<sup>62</sup> Since the school district listened, offered various ideas, and even accepted many of the parents' recommendations, the district was found to have had an open mind and had not predetermined the child's IEP.<sup>63</sup>

Conversely, in *H.B. ex rel. Penny B. v. Las Virgenes Unified School District*,<sup>64</sup> at the IEPT meeting the school district's superintendent stated that the IEPT would be discussing how the student would transition from the current private school placement to a public school.<sup>65</sup> The court found that the superintendent's statement showed predetermination in that the district was unwilling to consider the possibility of continuing the student's private school placement.<sup>66</sup> Thus, the school district failed to have an open mind to at least give meaningful consideration to the parents' concerns and proposals.<sup>67</sup>

In *L.M.P. ex rel. E.P. v. School Board of Broward County*,<sup>68</sup> the parent claimed that the Local Educational Agency ("LEA") had a policy of denying a request for one-to-one ABA services, and sought records concerning the IDEA services the LEA provided to other autistic students.<sup>69</sup> The school district refused, stating that it could not do so without the other parents' consent.<sup>70</sup> However, the court noted that both FERPA and state law permitted such disclosure without consent upon court order.<sup>71</sup> The court granted the parents' request, explaining that the information about the services provided to other autistic students was "crucial" to the litigation.<sup>72</sup> The court also noted that the parents sought an order to protect the confidentiality of the disclosed information that would protect the privacy of other students.<sup>73</sup>

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<sup>62</sup> *Id.* at 249-50.

<sup>63</sup> *Id.* at 253 ("S.P.'s parents have failed to show that Mamaroneck did not have an open mind as to the content of S.P.'s IEP. Both Young and the Committee chairperson testified that there was no premeeting agreement to adopt Young's recommendations.").

<sup>64</sup> 52 IDELR 163, 829 (C.D. Cal. Mar. 26, 2008).

<sup>65</sup> *Id.* at 830.

<sup>66</sup> *Id.* 830-31.

<sup>67</sup> *Id.*

<sup>68</sup> 53 IDELR 49, 251 (S.D. Fla. Aug. 18, 2009).

<sup>69</sup> *Id.* 252-53.

<sup>70</sup> *Id.* 253.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *L.M.P.*, 53 IDELR at 253.

In terms of predetermination, *Solana Beach School District*<sup>74</sup> poses a host of questions that a hearing officer might consider in determining a claim of predetermination.<sup>75</sup> Predetermination cases with regard to controversial methodologies are increasing.<sup>76</sup> Therefore, school districts need to pay close attention to these cases with regard to not only what administrators are saying, but also what administrators are actually doing in response to some of these approaches—for example, methodologies that parents are suggesting as appropriate and necessary.

### E. Self-Sufficiency, Not Just Accommodation

In *A.C. ex rel. M.C. v. Board of Education of the Chappaqua Central School District*,<sup>77</sup> the parents put their child in a private school and sought reimbursement contending the school district promoted “learned helplessness” by assigning their son his own aide to redirect him when he lost focus or became disruptive.<sup>78</sup> The Second Circuit found for the school district and struck down the claim because the child’s IEP provided for the aide to decrease the level of prompting and redirection when the child improved his ability to focus and stay on task.<sup>79</sup>

In *Kingsport City School System v. J.R. ex rel. Rentz*,<sup>80</sup> a child with poor interaction skills had a bad behavior intervention plan that was supposed to improve his skills in this regard.<sup>81</sup> But rather than provide counseling or social skills training, the plan required the student to refrain from name calling or making inappropriate comments that provoked violent reactions from his peers.<sup>82</sup> After the student withdrew from school after a series of fights, the school district pro-

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<sup>74</sup> 49 IDELR 237, 1055 (Cal. State Educ. Agency Jan. 7, 2008).

<sup>75</sup> See *id.* at 1071.

<sup>76</sup> See, e.g., *L.M.P.*, 53 IDELR 49; *T.P.*, 554 F.3d 247; *Penny B.*, 52 IDELR 163 (C.D. of Cal. Mar. 26, 2008); *Solana Beach*, 49 IDELR 1055.

<sup>77</sup> 553 F.3d 165 (2d Cir. 2009).

<sup>78</sup> *Id.* at 170.

<sup>79</sup> *Id.* at 173 (“We therefore defer to the SRO’s finding that the IEP adequately addressed the need for M.C. to develop independence, and thus was not substantively deficient under the IDEA.” (citing *Karl ex rel. Karl v. Bd. of Educ. of Geneseo Cent. Sch. Dist.*, 736 F.2d 873, 877 (2d Cir. 1984))).

<sup>80</sup> No. 2:06-CV-234, 2008 WL 4138109 (E.D. Tenn. Sept. 4, 2008).

<sup>81</sup> *Id.* at \*2.

<sup>82</sup> *Id.*

posed the use of a shadow escort to accompany the student at all times.<sup>83</sup> The court upheld the ALJ's finding that the plans provision of an escort prevented the student from developing appropriate social skills, a point which the school district's expert had supported.<sup>84</sup>

This line of cases started with *J.L. v. Mercer Island School District*,<sup>85</sup> which was a 2006 case from Washington.<sup>86</sup> In this case, the court emphasized the goals of providing independence and self-sufficiency, criticizing that the school district's use of an aide resulted in "learned helplessness."<sup>87</sup> These cases point out that school districts should be cautious when providing aides, as it is more important to teach the child skills to the fullest extent possible, rather than having the aide simply complete tasks for the child. To prevent any problems, school districts should include in an IEP that if an aide will be provided, the child will be weaned off the aide as the appropriate skills are developed.

#### F. Flexible Scheduling of IEPT Meetings

In *Letter to Thomas*,<sup>88</sup> OSEP was asked whether the IDEA allowed school districts to unilaterally limit the times for conducting IEPT meetings to normal school hours, based in part on school districts' work hours as provided in union contracts.<sup>89</sup> OSEP said it was not unreasonable for school districts to schedule meetings during regular school or business hours because it is likely those times would be most suitable for its staff to attend meetings.<sup>90</sup> In those circumstances where a parent could not attend a meeting scheduled during the day because his or her employment restricted his or her availability, OSEP stated that school districts should be flexible to accommodate reasonable requests.<sup>91</sup> If school districts and parents cannot schedule meetings accommodating their respective needs,

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<sup>83</sup> *Id.* at \*4.

<sup>84</sup> *Id.* at \*4-5.

<sup>85</sup> No. C06-494P, 2006 WL 3628033 (W.D. Wash. Dec. 6, 2006), *rev'd*, 592 F.3d 938 (9th Cir. 2010).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at \*6.

<sup>88</sup> 51 IDELR 224, 1189 (OSEP June 3, 2008).

<sup>89</sup> *Id.* at 1190.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

then school districts must take other steps to ensure parental participation.<sup>92</sup>

Too often, IEP meetings are getting longer and more people are being invited—which in turn impacts scheduling and gives rise to a host of legal challenges.<sup>93</sup> IEP meetings need to be simpler, shorter, and involve less people while maintaining a cooperative effort to develop an IEP. To improve this situation, parents and school districts should identify a school district staff member to do some preplanning for the IEP meeting. This person could draft an IEP developed with the parents and determine with the parents who actually needs to be present at the IEP meeting, which will effectively make the meetings shorter and less involved.

### G. Methodology and Peer-Reviewed Research

In *Joshua A. ex rel. Jorge A. v. Rocklin Unified School District*,<sup>94</sup> the parents of an autistic child alleged that the school district “failed to provide . . . a Free and Appropriate Public Education (“FAPE”).”<sup>95</sup> The parents contended that the school district’s eclectic approach used various models that had not been peer-reviewed and that an applied behavioral analysis program was the only one supported by research as being effective.<sup>96</sup> The school district maintained that it retained the discretion to determine methodology and that the primary component of its program had support in peer-reviewed research.<sup>97</sup> Further, the school district claimed the reason the other components had not been peer-reviewed was because some of them were new.<sup>98</sup>

The ALJ first noted that the IDEA does not mandate the use of a particular methodology and that the most important issue was whether the proposed instructional method met the student’s needs

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<sup>92</sup> *See id.*

<sup>93</sup> *See, e.g., Doe*, 2010 WL 2132799, at \*7; *see also* LAWRENCE M. SIEGEL, THE COMPLETE IEP GUIDE: HOW TO ADVOCATE FOR YOUR SPECIAL ED CHILD 123 (Betsy Simmons ed., Nolo 5th ed. 2007).

<sup>94</sup> 319 F. App’x 692 (9th Cir. 2009).

<sup>95</sup> *Id.* at 694.

<sup>96</sup> *Id.* at 695.

<sup>97</sup> *Id.* at 694.

<sup>98</sup> *Id.* at 695.

and allowed the student to make adequate educational progress.<sup>99</sup> The ALJ then set forth OSEP's comments to its recent regulations at some length regarding the peer-reviewed research requirement.<sup>100</sup> The ALJ found that the school district's program did provide a fair and appropriate education under this standard given its demonstrated success by meeting the student's individual needs.<sup>101</sup> Both the district court and the Ninth Circuit affirmed the ALJ's decision.<sup>102</sup> This case is probably the most definitive case dealing with what was thought to be extremely problematic language with regard to peer-reviewed research.

### H. Recording Meetings

Although the law does not say anything about tape recording meetings, OSEP has ruled that a school district must allow meetings to be tape-recorded if necessary (1) to ensure that the parents understand the IEP; (2) for parents to implement other guaranteed parental rights; or (3) if the parents have a disability.<sup>103</sup> In *Horen v. Board of Education of the City of Toledo Public School District*,<sup>104</sup> the LEA refused to proceed with an IEPT meeting when the parents demanded they be allowed to record it.<sup>105</sup> As a result, the child had no IEP and the LEA sought a hearing requesting, among other things, that the parents be directed to participate in IEPT meetings without making audio or video recordings absent prior agreement of the LEA.<sup>106</sup> The court affirmed the hearing officer's decision that the parent had no such right under these circumstances.<sup>107</sup> While aware of the district's policy, the parents' lawyer failed to come up with a reason that fit within one of the three exceptions.<sup>108</sup>

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<sup>99</sup> *Joshua*, 319 F. App'x at 695.

<sup>100</sup> *Id.* (“[A]n eclectic approach similar to the one proposed by [the school district meets] the IDEA's substantive requirements.”).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> See *V.W. v. Favolise*, 131 F.R.D. 654, 657 (D. Conn. 1990) (allowing the recording of a meeting where a parent had a disabling injury to her hand which prevented her from taking notes, and in turn prevented her from effectively evaluating her child's IEP).

<sup>104</sup> 655 F. Supp. 2d 794 (N.D. Ohio 2009).

<sup>105</sup> *Id.* at 798.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 804.

In too many problematic situations parents want to record meetings and, too often, school districts react negatively to such requests.<sup>109</sup> School districts and their counsel should strongly consider allowing meetings to be recorded because these recordings can provide confirmation of what the staff members have said at the meetings. When meetings are recorded, the people being recorded—for example, the teacher or the psychologist—often choose their words more carefully, are more professional, and have a better basis for their opinions. Thus, recording meetings can have a lot of positive benefits for both parents and school districts.

#### IV. PROGRAMS AND RELATED SERVICES

##### A. Audio-Video Surveillance as a Related Service

*J.T. ex rel. Harvell v. Missouri State Board of Education*<sup>110</sup> involved a seventeen-year-old student who was severely disabled.<sup>111</sup> It was alleged that the student's skills had regressed in many areas over the last few years due to the failure of the school district staff to implement his IEPs.<sup>112</sup> As a result of not receiving occupational and physical therapy, the student was forced to spend most of his day in a wheelchair.<sup>113</sup> The parents requested that the school "install a [twenty-four] hour audio and video surveillance, or some other independent monitoring scheme, in all classrooms and hallways" for the purpose of allowing the student's parents to independently view the activities at the school relating to implementation of the student's IEP, including his safety.<sup>114</sup> The court denied the state's motion to dismiss, stating that the definition of related services was not exhaustive, and, therefore, the audio-visual surveillance could be considered a related service.<sup>115</sup>

One problem with this decision is that the court was anticipat-

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<sup>109</sup> See, e.g., *Horen*, 655 F. Supp. 2d 794.

<sup>110</sup> No. 4:08CV1431RWS, 2009 WL 262094 (E.D. Mo. Feb. 4, 2009).

<sup>111</sup> *Id.* at \*1.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* (stating that J.T. was forced to sit in the wheelchair for so long that his "body conformed to the shape of his sitting position in the wheelchair").

<sup>114</sup> *Id.* at \*6.

<sup>115</sup> *Id.* at \*7, \*11 (citing *Cedar Rapids Cmty. Sch. Dist. v. Garret F. ex rel. Charlene F.*, 526 U.S. 66, 73 (1999)).

ing a potential violation of the IEP, which the court does not have the jurisdiction to consider. Although this may not have been a well thought out or well founded decision, it does show how far some courts might be willing to go in terms of defining “related services.”

### B. Staff Shortages/Substitutes

In *Washington County Public Schools*,<sup>116</sup> an LEA faced a sudden unexpected shortage of physical therapists and acknowledged it failed to implement one child’s Individualized Family Service Plan (“IFSP”) for two months.<sup>117</sup> Given it had resumed providing services as soon as it could and offered makeup sessions, no corrective action was taken.<sup>118</sup> However, the LEA was ordered to “provide make-up services to any other children who missed physical therapy sessions.”<sup>119</sup>

In *Richland Springs Independent School District*,<sup>120</sup> a one-on-one aide in a physical education class had to take over for the teacher on frequent occasion when she was absent.<sup>121</sup> Not only did the student fail to receive what his IEP required, but given the student’s heart condition, the lack of the aide’s “extra set of eyes” posed a safety risk for the student.<sup>122</sup> The school district was found to have denied the student FAPE.<sup>123</sup>

In *Westview School Corp. & The Northeast Indiana Special Education Cooperative*,<sup>124</sup> the least restrictive environment (“LRE”) section of the student’s IEP required that the school district provide a sign language interpreter.<sup>125</sup> The school district was directed to adjust the IEP to address this shortcoming and provide compensatory educational services for the days the student was without an interpreter.<sup>126</sup>

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<sup>116</sup> 53 IDELR 105, 503 (Md. State Educ. Agency Apr. 27, 2009).

<sup>117</sup> *Id.* at 503-04.

<sup>118</sup> *Id.* at 504.

<sup>119</sup> *Id.* at 503.

<sup>120</sup> 51 IDELR 144, 748 (Tex. State Educ. Agency June 2, 2008).

<sup>121</sup> *Id.* at 749.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 750.

<sup>124</sup> 51 IDELR 27, 148 (Ind. State Educ. Agency July 31, 2008).

<sup>125</sup> *Id.* at 149-50.

<sup>126</sup> *Id.* at 150.

Lastly, in *North Lyon County (KS) Unified School District*,<sup>127</sup> a parent complained that the school district had failed to implement her daughter's 504 plan because a substitute teacher did not give her the opportunity to correct assignments according to the IEP.<sup>128</sup> As a result, the student was failing.<sup>129</sup> The school district settled in this case.<sup>130</sup>

All of these cases point out a big problem: staff shortages foster too much litigation and hurt children in a situation where a simple solution could be reached. School districts need to be more up-front and communicate to parents that they are making the effort to get the best qualified persons they can in the classroom and have some kind of backup plan for substitute teachers.

### C. Advising Regarding Specific Responsibilities

The IDEA has gone overboard from a prescriptive standpoint, dictating what to do in special education and how to do it.<sup>131</sup> A couple of re-authorizations ago, in response to the fact that about seventy-five percent of all complaints were due to school districts allegedly not adhering to the IEP, Congress finally stated that school districts must communicate to the providers of service what their responsibilities entail.<sup>132</sup> The providers must be told what accommodations and modifications they are supposed to make on behalf of the student if he or she is in the provider's classroom.<sup>133</sup>

Too often, school districts do not communicate these necessary accommodations to providers. It seems that in situations where there are alleged violations of IEPs, school districts do not follow this commonsense approach that is dictated by law. The law does not dictate a specific form; it simply requires that the providers of service be told what their responsibilities entail.<sup>134</sup> A commonsense solution such as a form, however, could eliminate a lot of the problems and

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<sup>127</sup> 51 IDELR 109, 572 (Office for Civil Rights, Midwestern Div., Kan. City Aug. 20, 2008).

<sup>128</sup> *Id.* at 573-74.

<sup>129</sup> *Id.* at 575.

<sup>130</sup> *Id.* at 576-77.

<sup>131</sup> See generally IDEA, 20 U.S.C.A. § 1400.

<sup>132</sup> 34 C.F.R. 300.323(d) (2010).

<sup>133</sup> See, e.g., *N. Lyon Cnty.*, 41 IDELR at 573-74.

<sup>134</sup> See generally 34 C.F.R. 300.323.

litigation in this area with regard to specific responsibilities.

#### D. Service Dogs

In *Bakersfield City School District*,<sup>135</sup> the parents of a seventh grade autistic student sought to have the student's dog identified as a related service in the IEP.<sup>136</sup> The parents' experts testified that students with autism make great progress when they work with service dogs.<sup>137</sup> The ALJ noted that the studies relied upon by the experts were merely anecdotal in nature.<sup>138</sup> Additionally, the ALJ stated that the parents' experts did not know whether the use of service dogs for educational purposes had been endorsed by autism experts or whether there were any peer-reviewed studies endorsing the use of dogs for such purpose.<sup>139</sup> Although not presented in this case, there are studies regarding the use of service dogs in educational settings, in which educational experts endorse their use in certain situations.<sup>140</sup>

The parents' request to have the service dog included as a related service was rejected on two grounds.<sup>141</sup> One reason was that under the definition of "related services," a service dog is not required in order to assist the child for the benefit of special education.<sup>142</sup> The other reason noted by the ALJ was that the school district's offer of a one-on-one aide was not as restrictive an option as the use of a service dog since the aide could be faded out.<sup>143</sup>

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<sup>135</sup> 51 IDELR 142, 733 (Cal. State Educ. Agency Oct. 22, 2008).

<sup>136</sup> *Id.* at 734.

<sup>137</sup> *Id.* at 739-40.

<sup>138</sup> *Id.* at 740.

<sup>139</sup> *Id.*

<sup>140</sup> See generally, Merope Pavlides, *Autism Service Dogs*, MONTGOMERY CNTY. HUMANE SOC'Y, <http://www.mchumane.org/DogsAutism.shtml> (last visited Aug. 13, 2010).

<sup>141</sup> *Bakersfield*, 51 IDELR at 743.

<sup>142</sup> *Id.* at 744. In his opinion, ALJ Gregory P. Cleveland looked to the definitions of "related services" under the IDEA and section 56363 (a) of the California Education Code, finding no reference to service dogs. *Id.* at 742. Accordingly, the service dog's presence in school was not a necessary program or service for the student with special needs to receive FAPE. *Id.*

<sup>143</sup> The opinion explains why a one-on-one aide is a less restrictive means than the use of the service dog:

An aide can back off from Student according to circumstances, whereas Thor would be constantly at Student's side throughout the day. Similarly, a human aide can gauge the extent of re-direction Student needs much more so than Thor can . . . Student's aide started out working close by Student and would move away and come back as needed. The

### E. Misbehavior on the Bus

In *Prince Georges County Public School*,<sup>144</sup> a student's misconduct on a bus caused him to be disciplined twelve times and miss four days of school.<sup>145</sup> Although the IEP team met, they did not address the conduct.<sup>146</sup> In response, the parent filed a complaint.<sup>147</sup> The State Education Agency ("SEA") noted that when a student's "behavior impedes his learning or that of others, the [IEPT] must consider appropriate strategies" or interventions to address the behavior.<sup>148</sup> Indeed, the fundamental obligations under the IDEA with regard to the LRE—addressing behaviors, and informing providers of their responsibilities under an IEP or behavior intervention plan ("BIP")—all apply to transportation just as they do in the classroom.<sup>149</sup>

### F. Legal Standard for Related Services

In *Marion County (NC) School District #7*,<sup>150</sup> the parent of a student with cerebral palsy wanted the LEA to provide additional physical therapy to make him physically stronger.<sup>151</sup> His current IEP provided for physical therapy given that he was unable to use his mo-

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aide tried to allow Student to work as independently as possible. Additionally, Student's own evidence does not support use of Thor instead of an aide. Dr. McAmis testified Student's aide should be faded out as Student learned to utilize proper replacement behaviors, but if that were true, Student would be more restricted by Thor's presence, than by an aide that fades over time.

*Id.* at 740-41.

<sup>144</sup> *Id.* at 1387.

<sup>145</sup> *Prince Georges Cnty. Pub. Sch.*, 52 IDELR at 1388.

<sup>146</sup> *Id.* In reviewing the file, the Superintendent found no documentation showing that the IEPT addressed or discussed the student's behavioral problems while riding the school bus. *Id.*

<sup>147</sup> *Id.* The parents of the 14-year-old student "withdrew [their] consent for the student to receive special education and related services and requested that the student begin to attend" a general education high school. *Prince Georges Cnty. Pub. Sch.*, 52 IDELR at 1388. Less than a month later, the student's mother filed a complaint with Maryland State Department of Education alleging that (1) PGCPS failed to consistently provide the student with special needs with transportation services, and that (2) it failed to address the student's misbehavior on the bus for almost a year. *Id.* at 1387.

<sup>148</sup> *Id.* at 1389.

<sup>149</sup> *Id.* at 1388.

<sup>150</sup> 52 IDELR 298, 1525 (Office for Civil Rights S. Div., D.C. Apr. 7, 2009).

<sup>151</sup> *Id.* at 1526.

tor skills and his range of motion was limited in all joints.<sup>152</sup> The LEA refused and the Office for Civil Rights (“OCR”) found no violation.<sup>153</sup> The OCR noted that developing an IEP consistent with the IDEA requirements was one way to meet Section 504’s obligation to provide related services to persons with disabilities “as adequately as the needs of non-disabled persons are met.”<sup>154</sup> Under the IDEA, related services are “required to assist a child with a disability to benefit from special education,” whereas here the physician’s prescription was for medical purposes.<sup>155</sup>

This case reflects some practical problems that all too often prompt disputes in litigation. First, professionals coming from clinical settings are often unaware that an LEA’s obligation under the IDEA to provide related services is limited to those services required to assist a child to benefit from special education.<sup>156</sup> The IDEA standard differs from the “best interests of the child” standard used in the medical field in that it is a far broader standard.<sup>157</sup> Once apprised of the IDEA standard, the clinical professional will often tell the parent that the standard they have is higher and revise his or her recommendation.<sup>158</sup>

Additional problems in this regard sometimes arise because clinicians are often unfamiliar with a delivery model other than direct pull out services, such as the consultive model, and the educational advantages it may provide to certain students.<sup>159</sup> Explaining the advantages and disadvantages of the differing service delivery models to the clinicians may lead to resolution of the differing professional recommendations.

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<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 1526-27.

<sup>154</sup> *Id.* at 1525.

<sup>155</sup> 20 U.S.C.A. § 1401(26)(A).

<sup>156</sup> *But see Marion County*, 52 IDELR at 1527 (indicating that the parties knew that medical physical therapy goes beyond the IEP goals, while educational physical therapy only supports the educational goals in the student’s IEP).

<sup>157</sup> *See generally* 20 U.S.C.A. § 1401(26)(A); Loretta M. Kopelman, *Children and Bioethics: Uses and Abuses of the Best-Interests Standard*, 22 J. MED. AND PHIL. 213, 213 (1997).

<sup>158</sup> *See Marion County*, 52 IDELR at 1527 (stating that the physical therapist explained to the parent that medical physical therapy goes beyond the IEP goals, while educational physical therapy only supports the educational goals in the student’s IEP).

<sup>159</sup> *See N.S. ex rel. Stein v. District of Columbia*, No. 09-621(CKK), 2010 WL 1767214, at \*2-\*3 (D.D.C. May 4, 2010) (stating that the plaintiffs’ doctor “recommended [that] the maximum amount of special education” pull-out services be implemented).

### G. Meaning of Location

In *T.Y. ex rel. T.Y. v. New York City Department of Education, Region 4*,<sup>160</sup> a Second Circuit case, the student's IEP stated that the child would go to school in District 75, which is "a group of schools that specialize in providing education for [students] with disabilities."<sup>161</sup> The IEP did not name the specific school the student would attend.<sup>162</sup> About "a month after the IEP was formalized, the parents received a notice in the mail that recommended a specific school placement."<sup>163</sup> The parents found both this school and a second school offered by the LEA to be unacceptable and instead enrolled the student in a private school.<sup>164</sup> In requesting a hearing, the parents contended that the IEP had to include a specific school placement.<sup>165</sup> The hearing officer "rejected the parents' argument that the IEP was procedurally defective because it failed to name a specific school placement."<sup>166</sup>

The parents appealed, contending that the LEA's policy of not "specifying a particular school in the IEP deprived them of their right to meaningful[ly] participat[e] in . . . [its] development."<sup>167</sup> The court rejected the parents' arguments, stating that the term "educational

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<sup>160</sup> 584 F.3d 412 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 3277 (2010).

<sup>161</sup> *Id.* at 416.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* After enrolling the child in a specialized private school for children with autism, T.Y.'s parents "notified the [New York City Department of Education] of their intent to seek reimbursement." *T.Y.*, 584 F.3d at 416.

<sup>165</sup> *Id.* The parents argued that the Department of Education's failure to include a specific placement in the IEP constituted a major procedural deficiency. *Id.*

<sup>166</sup> *Id.* at 416-17, 419. The hearing officer explained that T.Y.'s Committee on Special Education ("CSE") properly identified and suggested a type of program and subsequently provided the parents with the names of offered schools and an opportunity to visit the sites. *Id.* at 416. Accordingly, CSE's failure to identify the specific school at the CSE meeting was harmless and did not render IEP procedurally deficient. *T.Y.*, 584 F.3d at 416-17. In fact, during the hearing, a New York City Department of Education representative testified that "in New York a specific school placement is never offered at the IEP meeting, and that the child's placement is rather determined by 'a citywide placement officer who looks at which school would be the most appropriate.'" *Id.* at 419. Additionally, Hon. Barrington D. Parker referred to the United States Department of Education commentary to the 1997 amendment to IDEA, which interpreted the requirement that an IEP specify the location as merely stating a general setting or environment that is appropriate for providing the necessary service to the child with special needs, rather than the particular facility where the services will be provided. *Id.* at 419-20.

<sup>167</sup> *Id.* at 419.

placement” “ ‘refer[red] only to the general type[s] of educational program[s] in which the child is placed.’ ”<sup>168</sup> Furthermore, the court noted that “the requirement that an IEP specify the ‘location’ does not mean that the IEP must specify a specific school site.”<sup>169</sup> In support of its decision, the Second Circuit quoted OSEP’s comments to the 1997 regulations: “[t]he location of services in the context of an IEP generally refers to the type of environment that is the appropriate place for provision of the service.”<sup>170</sup> When moving a student, too many school districts fail to consider the potential LRE implications. Overlooking these implications when determining which school to send the student to is potentially a big problem for school districts.

## V. BEHAVIOR INTERVENTION PLANS (“BIP”) AND DISCIPLINE

### A. Questions and Answers on Discipline Procedures

The Office of Special Education and Rehabilitative Services (“OSERS”) addressed a host of questions in an attempt to clarify the IDEA’s discipline procedures.<sup>171</sup> With regard to whether a school district may offer “home instruction” as the sole interim alternative education setting (“IAES”) option, OSERS’s answer is no.<sup>172</sup> The IAES must be determined by the IEPT and meet the IDEA’s requirements with regard to an interim alternative educational setting, enabling the child to continue in the general education curriculum and meet his or her IEP goals and objectives.<sup>173</sup>

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<sup>168</sup> *Id.* (quoting *Concerned Parents & Citizens for the Continuing Ed. at Malcolm X (PS 79) v. N.Y.C. Bd. of Educ.*, 629 F.2d 751, 756 (2d Cir. 1980)).

<sup>169</sup> *T.Y.*, 584 F.3d at 419.

<sup>170</sup> *Id.* at 420 (quoting Assistance to States for the Education of Children With Disabilities and the Early Intervention Program for Infants and Toddlers With Disabilities, 64 Fed. Reg. 12406, 12594 (Mar. 12, 1999) (to be codified at 34 C.F.R. § 300, 303)) (internal quotation marks omitted).

<sup>171</sup> *Questions and Answers on Discipline Procedures*, 52 IDELR 231, 1150 (OSERS June 1, 2009).

<sup>172</sup> *Id.* at 1152-53.

<sup>173</sup> *Id.*

Whether a child’s home would be an appropriate interim alternative educational setting under § 300.530 would depend on the particular circumstances of an individual case such as the length of the removal, the extent to which the child previously has been removed from his or her regular placement, and the child’s individual needs and educational goals. In general, though, because removals under §§ 300.530(g) and 300.532 will

Too often, school districts provide services in the home as an interim alternative educational setting. This effectively creates a crisis for families where both parents are working because the child is being sent home unattended. If the school district is able to find a location other than the home to provide services to the child on an interim basis, school districts will find the parents responding in a more favorable manner.

## VI. COMPLAINTS, HEARINGS, AND REMEDIES

### A. Settlement Offer's Impact on Parent and District Attorney's Fees

Although the decisions in this area are split, all of these cases begin with the parents filing due process complaints.<sup>174</sup> The school districts often agree that they erred, but refuse to pay attorneys' fees as a part of their settlement offers.<sup>175</sup> The question becomes: When the settlement offer either does not offer attorneys' fees or offers only a nominal, is the parent justified in rejecting that settlement offer and going ahead with a hearing to recover his or her attorneys' fees?<sup>176</sup> It

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be for periods of time up to 45 days, care must be taken to ensure that if home instruction is provided for a child removed under § 300.530, the services that are provided will satisfy the requirements for services for a removal under § 300.530(d) and section 615(k)(1)(D) of the Act.

*Id.* at 1153.

<sup>174</sup> 34 C.F.R. § 300.507 (2006). The IDEA allows the filing of a due process complaint on matters such as identification, evaluation or educational placement of a child with disabilities, or the provision of FAPE to the child. *Id.* However, such complaint has to be very specific, and many such complaints get dismissed for failure to suffice the necessary pleading requirements. See *M.S.-G. ex rel. K.S.-G v. Lenape Reg'l High Sch. Dist. Bd. Of Educ.*, 306 F. App'x 772, 775 (3d Cir. 2009).

The complaint must provide notice to the opposing party, "including (III) a description of the nature of the problem of the child relating to such proposed initiation or change, including facts relating to such problem; and (IV) a proposed resolution of the problem to the extent known and available to the party at the time."

*Id.* (citing 20 U.S.C.A. § 1415(b)(7)(A)(ii)(III)-(IV)).

<sup>175</sup> See, e.g., *El Paso Indep. Sch. Dist. v. Richard R. ex rel. R.R.*, 591 F.3d 417, 420 (5th Cir. 2009) (explaining the "prevailing party" standard that allows the prevailing party to recover attorney's fees); *District of Columbia v. Ijeabonwu*, 631 F. Supp. 2d 101, 103 (D.D.C. 2009); *Ruben A. ex rel. R.A. v. El Paso Indep. Sch. Dist.*, 657 F. Supp. 2d 778, 788-89 (W.D. Tex. 2009); *Y.B. ex rel. A.B. v. Williamson Cnty. Bd. of Educ.*, No. 3:08-0999, 2009 WL 4061311, at \*2 (M.D. Tenn. Nov. 20, 2009).

<sup>176</sup> See 20 U.S.C.A. § 1415(i)(3)(E) (allowing a complaining parent to reject the settle-

appears that the majority of the cases hold that the parent is justified in rejecting the settlement offer and going ahead with the hearing to recover attorneys' fees.<sup>177</sup>

The courts say that the parents are justified in rejecting the settlement offers because the rulings under the IDEA are more favorable than the settlement offers.<sup>178</sup> Accepting the settlement offers would have deprived the parents of obtaining attorneys' fees or made it impossible, given the waiver of provisions in the settlement offers.<sup>179</sup> Under the IDEA's scheme, either a hearing officer or a court has the authority to make a ruling on whether a decision is more favorable than a settlement offer.<sup>180</sup>

Given these decisions, even though it technically does not make sense under the IDEA, school districts need to give serious consideration in their settlement offers in terms of making a reasonable offer on attorneys' fees. Likewise, counsel for the parent must give serious consideration to how reasonable that offer is because under these decisions, both parties are risking something if the parents reject the settlement offer.

### B. Emails of Educational Records

In *S.A. ex rel. L.A. & M.A. v. Tulare County Office of Education*,<sup>181</sup> the parents requested copies of all emails concerning or personally identifying their ten-year-old son in native file format rather

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ment offer and recover attorney's fees and costs, if the parent prevails on his claim, and rejection of the settlement offer is "substantially justified").

<sup>177</sup> See *J.P. ex rel. Peterson v. Cnty. Sch. Bd. of Hanover Cnty., Va.*, 641 F. Supp. 2d 499, 525 (E.D. Va. 2009) (awarding over \$300,000 in attorney fees and litigation expenses); *Y.B.*, 2009 WL 4061311, at \*9 (allowing the plaintiff to recover limited attorney fees, excluding the time spent by the counsel at the resolution session); *B.L. ex rel. Lax v. District of Columbia*, 517 F. Supp. 2d 57, 61 (D.D.C. 2007); *R.N. ex rel. Mr. and Mrs. D. v. Suffield Bd. of Educ.*, 194 F.R.D. 49, 53 (D. Conn. 2000) (finding appropriate the recovery of attorney's fees and supplemental fees in connection with the summary judgment motion). *But see El Paso*, 591 F.3d at 428-29 (finding that parents' rejection of the settlement offer made by the school district which would include attorney's fees was not substantially justified; parents' decision not to accept a reasonable offer of settlement was viewed by the court as conduct that " 'unreasonably protracted the final resolution of the controversy' " (quoting 20 U.S.C.A. 1415(i)(3)(F)(i))).

<sup>178</sup> See *e.g., Y.B.*, 2009 WL 4061311, at \*23.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *S.A. ex rel. L.A. & M.A. v. Tulare Cnty. Office of Educ.*, No. CV F 08-1215 LJO GSA, 2009 WL 4048656 (E.D. Cal. Nov. 20, 2009).

than printed pages.<sup>182</sup> The LEA responded by sending the parents hard copies of the emails that had been placed in the student's permanent file.<sup>183</sup> The parents filed a complaint with the SEA contending that all emails, whether printed or in electronic format, were educational records.<sup>184</sup> The SEA upheld the LEA's interpretation.<sup>185</sup> The parents appealed, arguing that all emails were "maintained" in the LEA's electronic mail system and could be located even if deleted.<sup>186</sup>

The court agreed with the SEA and noted that the definition of an educational record does not direct an LEA to maintain a record that identifies a student.<sup>187</sup> Additionally, the court found nothing in the record to support the position that the school district failed to maintain electronic records in a central location.<sup>188</sup> Therefore, under the IDEA's scheme, only emails that are copied and put in hardcopy records are educational records that have to be provided to the parents.<sup>189</sup> Since many school districts maintain emails through a central maintenance system, this decision may not be entirely accurate in terms of the way most school districts function and maintain their records under FERPA.

## VII. CONCLUSION

This may not have been the typical legal review with regard to special education. However, hopefully it has been one which has

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<sup>182</sup> *Id.* at \*1.

<sup>183</sup> *Id.* (explaining that Tulare County Office of Education ("TCOE") did not store emails in native file format and, therefore, could not produce them in any other format than printed emails from the student's file).

<sup>184</sup> *Id.* (stating that the parents contended, *inter alia*, that TCOE unlawfully destroyed the student's records "without parental notification or consent . . . when it unilaterally 'purged' original electronic files").

<sup>185</sup> *Id.* (finding "that e-mails are not 'education records' to be maintained by the educational agency and that TCOE was in compliance").

<sup>186</sup> *S.A.*, 2009 WL 4048656, at \*1 (relying on the definition of "maintained" set forth in 34 C.F.R. § 99.3).

<sup>187</sup> *Id.* at \*2.

<sup>188</sup> *Id.* (holding that after considering "the parties arguments, the administrative record, the declarations, and the judicially noticeable facts, this [c]ourt issued a September 24, 2009 Order on Cross-Motion for Summary Judgment . . . against Student on the predominant issues of the action").

<sup>189</sup> *Id.* (holding that "plain language of the statute and regulation that define 'education records' is consistent with California DOE's interpretation that only those emails that both are maintained by the educational institution and personally identify Student are education records") (internal quotation marks omitted).

brought home some of the practical implications of these cases for parents, school districts, administrators, lawyers in this field, and hearing officers.