

SPECIAL EDUCATION LAW UPDATE:
Top Eight Current Legal Issues



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Julie J. Weatherly
Resolutions in Special Education, Inc.
6420 Tokeneak Trail
Mobile, AL 36695
(251) 607-7377
JJWesq@aol.com

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TOP EIGHT CURRENT LEGAL ISSUES OF 2009-10 (SO FAR, AT LEAST!)

What a terribly litigious time it is in the area of special education! There were a number of extremely relevant cases issued in 2009 and still more to come in 2010. For different reasons, the following are what I believe are this year's top ten current legal issues.

Top Legal Issue #1: SECLUSION AND RESTRAINT

I. INTRODUCTION AND REVIEW OF LEGISLATION

One of the "hottest" current legal issues in the field of education law is the use of seclusion/restraint (also called "aversive techniques" in some circles) in schools, particularly with students with disabilities. Recently, it has become a significant issue for Congress, for the federal government and for states generally.

A. Federal Action Status

The use of restraint/seclusion in schools rose to the level of being a national/federal concern in 2008. As we discussed last summer at the CASE Conference, as of January of 2009, Congressman George Miller (D-CA) had asked the U.S. Government Accountability Office (GAO) to investigate allegations of deadly and abusive seclusion and restraint in schools. At that time, The Stop Child Abuse in Residential Programs for Teens Act of 2009 was already in the works and was ultimately passed by the House on February 23, 2009 (HR 911).

On May 19, 2009, the Government Accountability Office (GAO) issued the requested study of its examination of the use of seclusion and restraint in schools and a hearing was held by the House Education & Labor Committee, chaired by Congressman Miller. At the hearing, the testimony of the author of the GAO report was heard, along with testimony from several parents whose children were injured or died from the use of restraints in school.

The GAO report indicated that hundreds of cases of alleged abuse and death existed based upon the use of seclusion and restraint in schools, but that there was no federal legislation to prevent these deaths and abuses from happening. At the hearing, there was apparent consensus among the Committee members that uniform standards were needed across the country with respect to how and when to use seclusion/restraint, if ever. Still others countered that additional federal laws may not be necessary, since states already have laws in place addressing the use of seclusion/restraint in schools.

On May 20, 2009, Education Secretary Arne Duncan reportedly told the House Education and Labor Committee that he would be asking states to submit plans by the fall of 2009 for ensuring that children are not necessarily restrained or secluded. That seemed to indicate that current state plans, laws, procedures, etc. would be reviewed before any federal or further Congressional action would be taken.

Notwithstanding the fact that it appeared that Congress was going to hold off on federal legislation, Congressman Miller introduced H.R. 4247 in the House known as the “Preventing Harmful Restraint and Seclusion in Schools Act” on December 7, 2009. It is expected that this bill will go through numerous revisions before it is a final federal statute but it appears to be moving fairly quickly, as it was approved by Congressman Miller’s Committee on February 4, 2010. On the Senate side, however, many are uncertain that the bill will be passed there, based upon the complete lack of GOP support for a similar measure that was introduced, Senate Bill 2860.

On February 24, 2010, Secretary Duncan released his long-awaited review of state policies on restraint and seclusion, which notes the different approaches that states have taken on this issue. According to LRP Publications, Congressman Miller reportedly commented that “[t]he report shows us that while some states have made progress, overall state policies still vary wildly,” and that “[a] divergent patchwork of state and local rules is not adequate when it comes to protecting our kids from abusive uses of restraint and seclusion. It is clear we need to pass H.R. 4247 to ensure every child, in every state, is safe and protected while at school.”

The proposed federal legislation has drawn numerous comments from interested stakeholders, including National CASE and the American Association of School Administrators (AASA).

B. Alabama State Action

According to the federal GAO Report, only six states collected data on the use of restraint and seclusion. In a report issued by the Alabama Disabilities Advocacy Program (ADAP) on June 9, 2009, ADAP noted that Alabama is one of nineteen states that did not have any laws regulating the use of seclusion and restraint in schools. ADAP’s report also cited a dozen reported “chilling incidents” that ADAP had investigated. The alleged incidents are described in the report with quite a bit of detail and clearly set forth scenarios of inappropriate use of restraints/seclusion.

In response to the federal activity on this issue, the Alabama State Board of Education had promulgated proposed amendments to the Alabama Administrative Code (AAC) to address the issue of restraint/seclusion in the Fall of 2009. However, when Congressman Miller introduced the federal legislation on December 7, 2009, the Alabama State Board of Education decided to withdraw its proposal to amend the AAC in order to await federal action.

II. THE LEGAL CLAIMS/CASES INVOLVED WITH THE USE OF SECLUSION AND RESTRAINTS

Even though there are no specific federal laws in place yet concerning the use of seclusion/restraint in public schools, there have been arguments made and cases brought alleging that the use of certain procedures is a violation of a student’s constitutional rights. In addition, an argument could be made in appropriate circumstances that some uses of seclusion/restraint violate a child’s overall right to a free appropriate public education (FAPE) under the IDEA. Even in the absence of any actual federal or state law regulating the use of restraint/seclusion, there are causes of action that may be sustainable based upon federally protected rights.

A. Constitutional Claims/Cases

There have been several reported cases alleging that the use of seclusion or restraint was unconstitutional. Many of these cases are based upon the Fourteenth Amendment's guarantee of due process, the Fifth Amendment's liberty interest and the Fourth Amendment's prohibition against unreasonable seizures. Still others have been brought under the theory that the use of such techniques is "cruel and unusual punishment" in violation of the Eighth Amendment. In all of the cases, money damages (i.e., damages for "pain and suffering," "emotional distress," "wrongful death," punitive damages) are sought via 42 U.S.C. § 1983 and, typically, violations of state personal injury laws.

1. Fourteenth/Fifth Amendment cases

With respect to the use of seclusion/restraint in schools, liberty interest and due process challenges are typically rejected if their use is deemed "reasonable" under the circumstances. In addition, where individual educators have been sued, they may be entitled to the defense of qualified immunity in appropriate cases.

- a. Youngberg v. Romeo, 457 U.S. 307, 102 S.Ct. 2452 (1982). An individual has a constitutionally protected liberty interest in reasonably safe conditions of confinement and freedom from unreasonable bodily restraint. In determining what is "reasonable," the Court will defer to the judgment of qualified professionals. [Note: Case involved restraint of an intellectually impaired adult confined to a state hospital].
- b. Honig v. Doe, 108 S.Ct. 592, 484 U.S. 305 (1988). With respect to students with disabilities who are considered dangerous or disruptive, they may be disciplined with the use of study carrels, timeouts, detention or the restriction of privileges, as well as suspension for up to ten days. The Court also noted that these procedures allow school administrators to protect the safety of other students and provide for a "cooling down" period during which school officials can initiate an IEP review and seek to persuade parents to agree to a change in placement.
- c. Jefferson v. Ysleta Indep. Sch. Dist., 817 F.2d 303 (5th Cir. 1987). Teacher and principal do not have qualified immunity in a case where a second grade student was tied to a chair for the entire school day and for a substantial portion of the second day as an "educational exercise," with no suggested justification such as punishment or discipline. The student was denied access to the bathroom and no other student received such treatment. If these facts are proved, this would implicate the student's Fifth and Fourteenth Amendment rights to substantive due process, specifically the right to be free from bodily restraint. "We are persuaded that in January 1985, a competent teacher knew or should have known that to tie a second grade student to a chair for an entire school day...was constitutionally impermissible."
- d. Metzger v. Osbeck, 841 F.2d 518 (3d Cir. 1988). A decision to discipline a student, if accomplished through excessive force and appreciable physical pain, may constitute an invasion of the child's Fifth Amendment liberty interest in his personal security and a

violation of the substantive due process prohibited by the Fourteenth Amendment. Where it is alleged that the coach put his arm around the neck and shoulders of the student while verbally admonishing him over the use of foul language (and the student lost consciousness and fell to the floor), a reasonable jury could find that the restraints employed exceeded the degree of force needed to correct the behavior and that the injuries served no legitimate disciplinary purpose.

- e. Heidemann v. Rother, 24 IDELR 167, 84 F.3d 1021 (8th Cir. 1996). The use of a ~~blanket wrapping~~ technique with a 9-year-old student with severe mental and physical disabilities was not an unreasonable bodily restraint which violated the student's constitutional rights to due process. Since the school employees were following the recommendations of a licensed professional therapist in the implementation of the technique, the school professionals are entitled to qualified immunity.

- f. Brown v. Ramsey, 33 IDELR 216, 121 F.Supp.2d 911 (E.D. Va. 2000). Case is decided in favor of teachers who used ~~basket hold~~ on a 6-year-old student with Asperger Syndrome. The hold was performed "by clasping the (student) at his wrists, crossing his arms in front of his body, and pushing his head into his chest." The parent claimed that the teachers used the hold approximately 40 times and that its use suffocated the student, but the teachers stated that they performed the hold only when the student posed a danger to himself or others. At times, the student threw items around the classroom, jumped onto desks and tables, and scratched or struck other students. Clearly, the student did not suffer the requisite severe injury and the parent never took the student to a doctor for treatment of any injuries caused by the alleged abuse. The parent also failed to show that the use of the 'basket hold' was not appropriate to address the student's actions. It "was not administered arbitrarily but instead only occurred in connection with his being placed in time-out." Further, the student's IEP contained a behavior management plan that allowed for restraint in some instances. Finally, the court determined that the teachers' use of the hold was not "so inspired by malice or sadism" that it was "literally shocking to the conscience."

- g. M.H. v. Bristol Bd. of Educ., 169 F.Supp.2d 21 (D. Conn. 2001). In denying the school district's motion for summary judgment in a case alleging inappropriate use of physical and mechanical restraints, the court found that it was without facts concerning the circumstances of when restraint was necessary for the safety of the student or others; whether each of the individual school defendants followed the prescribed rules for using restraints, and whether they received adequate training to use such restraints in an appropriate manner. In addition, the school defendants have not provided the court with sufficient information about their level of expertise and experience for the court to conclude that they were each ~~competent~~, "whether by education, training, or experience, to make the particular decision [regarding the use of restraint with M.H.]."

- h. Doe v. State of Nevada, 46 IDELR 124 (D. Nev. 2006). Case alleging negligence on the part of a teacher and an aide will not be dismissed where parents alleged that both assaulted a 3 year-old student with autism. The parents alleged a violation of due process rights when school staff, among other things, allegedly twisted the child's arm behind his

back, lifted him up and threw him toward a wall and grabbed his wrists. When viewed in the light most favorable to the parents, the allegations supported the parents' negligence claim and, therefore, would not be dismissed. However, the claims against the school district under Section 504, the ADA and Section 1983 were dismissed because there was no evidence that the district acted with deliberate indifference; rather, the evidence showed that teachers and staff were trained by the district in behavior management and education of students with autism.

- i. Colon v. Colonial Intermed. Unit 20, 46 IDELR 75, 443 F.Supp.2d 659 (M.D. Pa. 2006). Where complaint alleged that teacher used physical restraints; placement in a "time out" room for an entire day; and deprivation of benefits generally available to students in the program, such as hot lunches, bathroom privileges and regular breaks, cause of action against teacher may proceed under Section 1983 for alleged IDEA violations. The evidence was inconclusive as to whether the teacher used these strategies for safety reasons or for punishment for behavior that was a manifestation of the student's disability. Punitive damages may also be sought by the parent because of the possibility that the teacher acted with reckless or callous disregard of, or indifference to, the student's rights.
- j. W.E.T. v. Mitchell, 49 IDELR 130 (M.D. N.C. 2008). Although educators can use reasonable force to restrain or correct students and maintain order, 10-year-old student with severe asthma, partial blindness and CP has sufficiently plead a cause of action under Section 1983 for extensive mental and emotional damages. Student's special education teacher is not entitled to qualified immunity where it is alleged that she sharply rebuked the student for talking to a classmate, taped his mouth shut with masking tape and ripped it off when he tried to speak to her through the tape. A reasonable educator would have known that forcefully taping the mouth of a child with asthma amounted to a constitutional violation.
- k. O.H. v. Volusia County Sch. Bd., 50 IDELR 255 (M.D. Fla. 2008). Allegations that an autistic student was confined to a dark bathroom as punishment for off-task behaviors were sufficient to support a Section 1983 claim against a special education teacher. The teacher's alleged actions of strapping the student into a classmate's wheelchair and confining him to the dark bathroom may have been out of proportion to his conduct and could support a claim that excessive force was used.
- l. King v. Pioneer Regional Educational Service Agency, 109 LRP 4988 (Ga. Sup'r Ct. 2009). Lawsuit filed under Section 1983 is dismissed where student's death was not the result of a constitutional violation and no "special relationship" existed and, therefore, no affirmative duty was owed to the student. While the decision of certain employees to allow the student to keep a makeshift rope used as a belt when he was locked in a timeout room may have amounted to negligence, the parents have pointed to no policy, procedure or custom on the part of the school agency that violated a privilege under Section 1983.

2. Fourth Amendment cases

- a. Rasmus v. Arizona, 24 IDELR 824, 939 F. Supp. 709 (D. Ariz. 1996). Where an eighth grade student with attention deficit disorder and an emotional disability was assigned to a "time out room" by a teacher's aide for about ten minutes, this was sufficient to constitute a "seizure" under the Fourth Amendment, since the student was required to enter the time out room. In addition, the claims may proceed to trial as to whether the district's time out practices were reasonable, where the room was a small, lighted, unfurnished, converted closet which could be locked from the exterior and was used for disciplinary purposes. Reviewing recommendations from state agencies regarding time out rooms that suggested that the school develop a written behavior management plan as part of the IEP that governs the use of time out, that schools use time out only with the written consent of the parents and never use locked time out rooms, the court denied the district's motion for summary judgment.
- b. Doe v. State of Hawaii Dept. of Educ., 334 F.3d 906 (9th Cir. 2003). Vice principal is not entitled to defense of qualified immunity where he taped the student's head to a tree for disciplinary purposes and the student's only offense had been "horsing around" and refusing to stand still. Taping his head to a tree for 5 minutes was so intrusive that even a 5th grader observed that it was inappropriate. There was no indication that the student was fighting or imposed a danger to others and there is sufficient evidence for a fact finder to conclude that the vice principal's behavior was objectively unreasonable in violation of the Fourth Amendment.
- c. A.C. v. Indep. Sch. Dist. No. 152, 46 IDELR 242 (D. Minn. 2006). Claims for general and punitive damages for the types of injuries alleged by student are not available under the IDEA. Therefore, IDEA cannot serve as a basis for a § 1983 claim for such damages. However, student's Fourth Amendment claims based upon confinement against his will may proceed relative to the alleged inappropriate use of a 70 square-foot, window-less "storage closet" as the student's classroom.
- d. Couture v. Board of Educ. of the Albuquerque Pub. Schs., 535 F.3d 1243 (10th Cir. 2008). The repeated use of a timeout room as punishment for the student's behavior did not violate the Fourth Amendment, as the timeout room was justified at its inception, the length in timeouts were reasonably related to the school's objective of behavior modification, and placement in the timeout room did not implicate procedural due process requirements. Assuming that the use of time-out is a "seizure" under the Constitution, the use of time-out in this case was not unreasonable. Based upon the student's behavior, which included repeatedly swearing at teacher and classmates, physically attacking them and threatening bodily harm, "temporarily removing [the child] given the threat he often posed to the emotional, psychological and physical safety of the students and teachers, was eminently reasonable" and did not rise to the level of a constitutional violation. In addition, timeouts were expressly prescribed by his IEP as a mechanism to teach him behavioral control. Thus, the Section 1983 claims against the teacher should be dismissed.
- e. C.N. v. Willmar Pub. Schs., 50 IDELR 274 (D. Minn. 2008), aff'd, 110 LRP 1305 (8th Cir. 2010). Where it was alleged that a teacher overzealously applied the seclusion and

restraint provisions of a third-grader's BIP, this was not enough to sustain a Section 1983 claim for Fourth Amendment violations. Because the teacher's conduct was reasonable, the court held she was entitled to qualified immunity. The qualified immunity defense turns on the reasonableness of an official's conduct at the time of the alleged offense. If a teacher's treatment of a student with a disability does not substantially depart from accepted professional judgment, practice or standards, her actions are reasonable. In this case, the standard for accepted practice was set by the student's IEP. Because the IEP expressly permitted the teacher to use seclusion and restraint as behavior management techniques, the teacher did not depart from accepted professional judgment when she used those techniques with the student. "Indeed, [the teacher] was required to follow the IEP and use these techniques to help manage [the student's] behavior." [It is important to note that a state investigation did find ~~mal~~treatment" of the student when she denied access to the bathroom].

3. Eighth Amendment cases

- a. Hayes v. Unified Sch. Dist., 559 IDELR 249, 669 F. Supp. 1519 (D. Kan. 1987). Parents can not use the Eighth Amendment to challenge the school's imposition of time-out.

B. FAPE claims/cases

While the IDEA does not address the use of restraint/seclusion specifically, there could be claims brought that the use of such violates the IDEA and its requirement to provide FAPE.

1. OSEP guidance

- a. Letter to Trader, 48 IDELR 47 (OSEP 2006). New York's state regulations allowing for the use of aversive behavioral techniques do not conflict with the IDEA. While the IDEA requires a student's IEP team to consider the use of positive behavioral intervention supports and strategies, neither the IDEA nor its regulations contain a ~~flat~~ prohibition on the use of aversive behavioral interventions. Whether to allow IEP Teams to consider the use of aversive behavioral interventions is a decision left to each State."
- b. Letter to Anonymous, 50 IDELR 228 (OSEP 2008). If Alaska law would permit the use of mechanical restraints or other aversive behavioral techniques for children with disabilities, the critical inquiry is whether their use can be implemented consistent with the child's IEP and the requirement that IEP Teams consider the use of positive behavioral interventions and supports when the child's behavior impedes the child's learning or that of others.

2. OCR guidance

- a. Portland (ME) Sch. Dist., 352 IDELR 492 (OCR 1987). Although OCR rarely intervenes in individual cases, this was justified by ~~extraordinary~~ conduct, where a teacher who unilaterally decided to strap a profoundly disabled student into a chair without disciplinary action or an IEP meeting. This violated the student's right to FAPE.

- b. Oakland (CA) Unif. Sch. Dist., 20 IDELR 1338 (OCR 1990). Since evaluations and assessments had determined that the student’s behavior was related to his disability, taping shut the mouth of an 18-year-old student with mental retardation for excessive talking was a violation of Section 504 and the ADA.

3. Court cases

- a. CJN v. Minneapolis Pub. Schs., 38 IDELR 208, 323 F.3d 630 (8th Cir. 2003). While the Court expressed regret that CJN was subjected to an increased amount of restraint in his third-grade year, that fact alone did not make his education inappropriate within the meaning of the IDEA. “Because the appropriate use of restraint may help prevent bad behavior from escalating to a level where a suspension is required, we refuse to create a rule prohibiting its use, even if its frequency is increasing.”
- b. Melissa S. v. School Dist. of Pittsburgh, 45 IDELR 271 (3d Cir. 2006), unpublished disposition. Where the student “sat on the floor kicking and screaming, struck other students, spit at and grabbed the breast of a teacher, refused to go to class, and once had to be chased by her aide after running out of the school building,” the school’s use of a time out area in an unused office where her aide and others would give her work did not violate IDEA. This did not constitute a change in placement and was within normal procedures for dealing with children endangering themselves or others.
- c. P.T. v. Jefferson County Bd. of Educ., 46 IDELR 3 (11th Cir. 2006), unpublished disposition. An Alabama district appropriately considered the safety of the students on the school bus when it used a safety harness with an 11-year-old nonverbal student with autism. The district did not deny FAPE to the student by using a harness to restrain her on the bus because her behavioral outbursts were a safety concern that posed a serious risk of bodily injury to all of the passengers.
- d. Mallory v. Knox County Sch. Dist., 46 IDELR 276 (E.D. Tenn. 2006). Action for compensatory and punitive damages under 42 U.S.C. § 1983 are dismissed for failure to exhaust administrative remedies. Action brought concerning use of physical restraint clearly includes claims addressing the student’s IEP, the treatment of the student as a special education student, and the district’s alleged failures in dealing with the educational environment of the student—all of which should be addressed first in a due process hearing. The fact that the parents are seeking damages does not take this case out of the IDEA nor does it excuse the exhaustion of remedies requirement. Further, the contention that the use of the restraint system was abusive does not take this case out of the IDEA’s purview.
- e. Payne v. Peninsula Sch. Dist., 47 IDELR 35 (W.D. Wash. 2007). Parent’s suit for money damages and injunctive relief over student’s being allegedly locked in a 63-inch by 68-inch “safe room” on a regular basis is dismissed. A parent can not avoid the IDEA’s exhaustion requirement simply by limiting the prayer for relief to money or services that are not available under the IDEA. The parent must seek a due process hearing and remedies under IDEA before filing in federal court.

- f. Waukeew Community Sch. Dist. v. Douglas and Eva L., 51 IDELR 15 (S.D. Iowa 2008). The fact that the parents agreed to the use of time-outs and hand-over hand interventions to manage their daughter's problem behaviors did not excuse a district's over-reliance on those techniques, where the behavior interventions were excessive and inappropriate. While the district made "considerable effort" to address the child's behavioral needs, the interventions applied were not reasonably calculated to manage the student's behavioral problems. The student's noncompliant behaviors were escapist in nature, while her aggression against peers was an effort to seek attention. "Both parties' experts...testified that the use of break time activity in response to non-compliance--an escape-based behavior--and the use of hand-over-hand intervention in response to peer aggression--an attention seeking behavior- would serve to reinforce the problem behavior and was contraindicated by the research." In addition, the interventions were excessive and inappropriate as applied. Although the district indicated that it would apply "age-appropriate" time-outs, lasting one minute for each year of the student's age, the evidence showed that the student sometimes spent several hours in isolation. The parents were also unaware that district staffers regularly used restraint when applying hand-over hand interventions and the district was required to provide prior written notice of its use. By failing to develop and implement appropriate behavioral interventions, the district denied the student FAPE.
- g. Robert H. v. Nixa R-2 Sch. Dist., 26 IDELR 564 (W.D. Mo. 1997). Placement of SED child in a time-out room was allowed as stated in the IEP, to which the parents consented. District's refusal to allow child to attend field trip did not violate IDEA, since participation was conditioned on completion of homework, which the child did not do. In addition, 504 and ADA claims were precluded where there was no violation of IDEA.
- h. Rasmus v. State of Arizona, 24 IDELR 824 (D. Ariz. 1996). Section 1983 case for damages resulting from student's incarceration in locked time-out room for ten minutes. Action allowed to continue on the issue of whether the "seizure" was reasonable under a Fourth Amendment analysis.
- i. Hayes v. Unified Sch. Dist., 669 F. Supp. 1519 (D. Kan. 1987), rev'd on other grounds, 877 F.2d 809 (10th Cir. 1989). School system used 3 x 5 "time out" room to temporarily isolate disruptive children to allow them to calm down and to minimize disruption to the rest of the class. Students were never placed in "time-out" without good cause. Court found no violation of students' constitutional rights in use of the "time out" room.

Top Legal Issue #2: PROTECTION AND ADVOCACY INVESTIGATIONS IN SCHOOLS

There is now a new investigatory authority in town: The Alabama Disabilities Advocacy Program (ADAP).

- A. Disability Law Ctr. of Alaska, Inc. v. Anchorage Sch. Dist., 53 IDELR 2, 581 F.3d 936 (9th Cir. 2009). FERPA and the provisions of the IDEA regarding confidentiality do not bar a Protection and Advocacy agency from obtaining from school officials contact

information for the parents/guardians of disabled students when the P&A agency has probable cause to believe the students are being abused or neglected. Although FERPA prevents the release of personally identifiable information without parental consent or a court order, the U.S. DOE and the U.S. Department of Health and Human Services have interpreted the Developmental Disabilities Act as creating a limited exception to FERPA. –The agencies stated that if a school or other facility could refuse to provide the name and contact information, it could interfere substantially with [a protection and advocacy agency’s] investigation of abuse or neglect, thereby thwarting Congress’ intent that [protection and advocacy agencies] act to protect vulnerable populations from abuse or neglect.” In addition, P&A agencies are required to maintain the confidentiality of any student records they receive.

- B. Disability Law Center v. Discovery Academy, 53 IDELR 282 (D. Utah 2010). Protection and advocacy agency is not entitled to access student records at a therapeutic boarding school by claiming it had ~~probable cause~~” to believe that abuse and neglect occurred. Where the agency did not produce any factual evidence that the school used improper seclusion or restraint techniques, the case is dismissed. –The [agency] fails to provide any factual support for what the allegations were, who made the allegations, what the substance of the complaint was, or the name of the supposed victims of the abuse.” In addition, agency’s argument that it has sole authority under the Protection and Advocacy for Individuals with Mental Illness Act (PAMI) to decide whether there is probable cause to investigate abuse and neglect is rejected. Otherwise, the agency would be able to conduct what was effectively a ~~warrantless search and seizure~~” of the school’s records—a practice that would raise serious constitutional concerns. Because the agency produced no evidence of current abuse or neglect at the school, it was not entitled to access student records or interview the students about seclusion and restraint.

Top Legal Issue #3: SERVICE ANIMALS IN SCHOOLS

The issue of trained service animals in schools portends to be the hottest topic in special education over the next several years. There is little case authority so far on the issue but enough reported litigation is ~~in the works,~~” such that school districts need to be prepared for addressing requests by parents for service dogs and other animals to attend school with their children.

A. Alabama Law

As an initial matter, the issue of whether a student with a disability is entitled to bring a service animal to school is a state law matter. In Alabama, the law provides only for totally or partially blind and hearing impaired individuals the right to be accompanied by guide dogs, but only those dogs that are especially trained for that purpose, in order that they may have access to places of public accommodation. The law does not address the use of service animals in schools.

1. Cases decided under other State laws

- a. Kalbfleisch v. Columbia Community Unit Sch. Dist. Unit No. 4, 53 IDELR 266 (Ill. App. Ct. 2009). Lower court decision is affirmed allowing a 5-year-old student with autism to

attend school with his service dog, since Illinois law provides that districts must permit service animals to accompany students with disabilities to all school functions, whether inside or outside of the classroom.

- b. K.D. v. Villa Grove Community Unif. Sch. Dist., 53 IDELR 300 (Ill. Cir. Ct. 2009). Illinois District could not prohibit first-grader with autism from bringing his service dog to school, because the dog qualified as a “service animal” under state law and the child had a right to be accompanied by the dog at all school functions under that law. “[The child’s] service dog...is a service animal as defined by Section 14-6.02 of the Illinois School Code, in that he is individually trained to perform tasks for [the child’s] benefit.”

B. Guidance under Federal Law

There is no federal law governing the use of service animals in schools. However, not allowing a service animal to accompany a student to school could be a form of discrimination under Section 504 or the Americans with Disabilities Act (ADA) or even an alleged denial of FAPE under the IDEA.

1. Regulatory guidance under the ADA

Importantly, there is a definition of “service animal” under Title III of the ADA regulations at 28 C.F.R. 36.104. Currently, the definition of "service animal" includes “any guide dog, signal dog, or other animal individually trained to do work or perform tasks for the benefit of an individual with a disability, including, but not limited to, guiding individuals with impaired vision, alerting individuals with impaired hearing to intruders or sounds, providing minimal protection or rescue work, pulling a wheelchair, or fetching dropped items.”

In 2008, the Justice Department proposed to add a modified definition to Title II of the ADA regulations that would have modified the above definition from Title III and included any dog or “other common domestic animal” and added the following to the list of work and task examples: Assisting an individual during a seizure, retrieving medicine or the telephone, providing physical support to assist with balance and stability to individuals with mobility disabilities, and assisting individuals, including those with cognitive disabilities, with navigation.

The proposed regulations would have also added that “service animal” includes individually trained animals that do work or perform tasks for the benefit of individuals with disabilities, including psychiatric, cognitive, or mental disabilities but that a “service animal” would not include wild animals (including nonhuman primates born in captivity), reptiles, rabbits, farm animals (including any breed of horse, pony, miniature horse, pig, and goat), ferrets, amphibians, and rodents. Finally, the proposed regulations added that animals whose sole function is to provide emotional support, comfort, therapy, companionship, therapeutic benefits, or promote emotional well-being are not service animals.

The 2008 proposed Title II regulations were placed, along with a number of other regulations that had not been published in the Federal Register, on “indefinite hold” as part of the Obama’s administration and were withdrawn from the OMB review process.

2. Case law guidance

To date, there has been at least one reported federal court case, one due process hearing decision and at least one OCR Letter of Finding that provide some useful guidance to school districts in the development of their procedures for addressing requests to bring service (or other) animals to school.

- a. Cave v. East Meadow Union Free Sch. Dist., 47 IDELR 162, 480 F. Supp. 2d 610 (E.D.N.Y. 2007), aff'd, 49 IDELR 92, 514 F.3d 240 (2d Cir. 2008). Despite claiming that their son's request to bring his service dog to school had nothing to do with his IEP, the parents of a high schooler with a hearing impairment could not pursue Section 504 and ADA claims against the District. The parents' failure to exhaust their administrative remedies under the IDEA barred their discrimination suit under the ADA, where the dispute boiled down to a request for an IEP modification. Although the parents maintained that the District unlawfully prevented the student from accessing a public facility, the District would need to make changes to the student's IEP to accommodate the dog's presence. "It is hard to imagine, for example, how [the student] could still attend the physical education class while at the same time attending to the dog's needs, or how he could bring [the dog] to another class where another student with a certified allergic reaction to dogs would be present." While the IDEA did not permit the parents to recover the \$150 million in compensatory and punitive damages that they sought, it did offer a remedy: the parents could request a due process hearing and seek to have the service dog identified as an accommodation in the student's IEP. As such, the parents had to exhaust their administrative remedies before filing suit. Thus, the case is remanded with instructions to dismiss the case for lack of jurisdiction.
- b. Collier County Sch. Dist., 110 LRP 7471 (SEA Fla. 2006). Among other things, the ALJ found no need to include a service dog in the child's IEP. Noting that the dog's purpose was to comfort the child in the event of a seizure--a service that could be performed by his one-to-one aide--the District was entitled to use any methodology that would provide the child FAPE.
- c. Bakersfield City (CA) Sch. Dist., 50 IDELR 169 (OCR 2008). Without deciding whether a student's dog qualified as a "service animal," OCR found that a California district violated Title II and Section 504 by excluding the dog from school, because the District did not follow proper procedures for reviewing the dog's training, function, or impact on the student's education. For instance, the District did not conduct a specific inquiry as to whether the dog was an appropriately trained service animal or whether its function addressed the student's disability-related needs. Instead, the District unilaterally determined that the dog posed a health and safety risk to students and staff. In addition, the District failed to conduct a hearing about the dog's status as a service animal. "[T]his denial of a reasonable modification to the student's disability...should have been internally grievable under a Section 504/ADA Title II grievance procedure." Even if the dog did not qualify as a service animal, the District should have considered whether the dog's presence was necessary for the student to receive FAPE. Of note was the fact that the student's behavior improved significantly when he brought his dog to class.

Moreover, there was no evidence that staff or other students complained about the dog's presence. By failing to consider whether the dog was a necessary aid or service under the IDEA, the District deprived the student of his procedural safeguards.

- d. Bakersfield City Sch. Dist., 51 IDELR 142 (SEA Cal. 2008). The fact that a seventh-grader's parents produced studies on the benefits of service dogs did not require the District to identify the student's dog as a related service in his IEP, because the dog's presence was unnecessary and overly restrictive. While the parents' experts testified that students with autism and developmental disorders make great strides when they work with service dogs, only one of the experts was knowledgeable about autism. Further, the studies on which the experts relied were anecdotal in nature. "[The dog expert] does not know if [the use of service dogs for educational purposes] has been endorsed by autism experts, nor is he aware of peer-reviewed studies endorsing the use of dogs for [children with autism]." The ALJ also pointed out that the student did not need a service dog to receive FAPE, where the District had offered to provide a one-to-one aide, which the parents rejected as overly restrictive. Indeed, the dog's presence would be more restrictive than that of the aide, because unlike the aide, who could "fade out" and allow the student to redirect his behavior on his own, the dog would be constantly at the student's side. Thus, the District did not err in denying the student's request to have the service dog in class.

Top Legal Issue #4: PRIVATE SCHOOL/RESIDENTIAL PLACEMENT

As established initially in 1984 by the Supreme Court in the Burlington case, parents can seek to obtain reimbursement or prospective funding for private/residential placement tuition if they can show that their placement at the private placement is appropriate and that the school district did not make FAPE available to the student. This past year, there were a number of interesting residential placement cases that seem to start an interesting trend of looking to the "primary purpose" of the unilateral private placement and whether or not that purpose was for educational reasons.

- A. Shaw v. Weast, 53 IDELR 313 (4th Cir. 2010). Where 20-year old student with emotional disturbance and PTSD was progressing in her private day school program, she did not need residential placement in order to receive educational benefit. Residential placement is required only if residential care is essential for the child to make any educational progress. Here, the placement was necessitated by medical, social or emotional problems that were segregable from the learning process and where the student needed around-the-clock assistance with basic self-help and social skills. Although her progress in the district's special day school slowed during psychiatric episodes, she made educational progress when those stabilized. Thus, the ALJ's decision denying tuition reimbursement to the parents is affirmed.
- B. Forest Grove Sch. Dist. v. T.A., 53 IDELR 213 (D. Ore. 2009). The equities in the case prevent the parents from recovering the cost of residential placement, as they did not provide the district of notice of the student's residential placement until "well after" the student's enrollment. In addition, the parents placed the student in the first facility

recommended by their physician without considering whether other, more suitable placements were available. More importantly, on the enrollment form for the placement, student's father indicated that the placement stemmed from the student's drug abuse and problem behaviors and nothing ~~about~~ the one ADHD symptom for which the district could be liable—[the student's] trouble with his school work." Private placement was unrelated to the student's difficulties focusing in school.

- C. Ashland Sch. Dist. v. Parents of Student R.J., 53 IDELR 176 (9th Cir. 2009). Parents of high schooler with ADHD are not entitled to reimbursement for private placement because the placement was not educationally necessary. The student did not engage in disruptive behavior in class, was well-regarded by her teachers, and was able to learn in the general education environment. ~~Although~~ [the student's] teachers reported that she had difficulty turning in assignments on time, the record shows that she earned good grades when she managed to complete her work." Clearly, the parents enrolled her in a residential facility because of her ~~risky~~" and ~~defiant~~" behaviors at home, including sneaking out of the house at night to see friends and having a relationship with a school custodian. Residential placement is not necessary for FAPE.
- D. Ashland Sch. Dist. v. Parents of Student E.H., 53 IDELR 177 (9th Cir. 2009). Evidence supported the district court's conclusion that the student's placement in a residential placement was medical in nature rather than educational in nature. ~~For~~ example, [the student's] case manager testified that [the parents] told him that they were searching for a residential placement because of problems at home, not at school," and evidence of the student's psychiatric hospitalizations further support the view that the residential placement was unrelated to the student's education.
- E. Mary Courtney T. v. School Dist. of Philadelphia, 52 IDELR 211, (3d Cir. 2009). Although emotionally disturbed teenager is entitled to services under the IDEA, her parents are not entitled to funding for placement in a psychiatric residential facility. ~~Only~~ those residential facilities that provide special education...qualify for reimbursement under *Kruelle* and IDEA." Although the court acknowledged that some services received at the facility may have provided educational benefit, they are not ~~the~~ sort of educational services that are cognizable under *Kruelle*." At the facility, the child ~~received~~ services that are not unlike programs that teach diabetic children how to manage their blood sugar levels and diets—both sorts of programs teach children to manage their conditions so that they can improve their own health and well being. However, because both programs are an outgrowth of a student's medical needs and necessarily teach the student how to regulate his or her condition, they are neither intended nor designed to be responsive to the child's distinct learning needs.'" Clearly, the residential program is designed to address medical, rather than educational, conditions and the child's admission there was necessitated, not by a need for special education, but by a need to address her acute medical condition. The residential placement here is also not a ~~related~~ service;" rather, it is an excluded medical service. ~~While~~ the Supreme Court stated that physician services other than those provided for diagnostic purposes are excluded, it also specifically excluded hospital services." Note: The court also held that the school district acted promptly to propose services to the child (and provide her with tutoring) when notified of

her hospitalization and her ability to be evaluated by the school district. On that basis, compensatory education was also denied.

- F. Richardson Indep. Sch. Dist. v. Michael Z., 52 IDELR 277 (5th Cir. 2009). The following test is applicable in determining whether residential placement is required: ~~In~~ order for a residential placement to be appropriate under the IDEA, the placement must be 1) essential in order for the disabled child to receive a meaningful educational benefit; and 2) primarily oriented toward enabling the child to obtain an education.” Unlike *Kruelle*, ~~this~~ test does not make the reimbursement determination contingent on a court’s ability to conduct the arguably impossible task of segregating a child’s medical, social, emotional, and educational problems.” ~~IDEA~~, though broad in scope, does not require school districts to bear the costs of private residential services that are primarily aimed at treating a child’s medical difficulties or enabling the child to participate in non-educational activities....This is made clear in IDEA’s definition of related services,‘ which limit reimbursable medical services to those for diagnostic and evaluation purposes only.” While the district court did make the factual finding that residential placement was necessary for this student to receive a meaningful educational benefit and that she could achieve no educational progress short of residential placement, the case is remanded for the district court to make factual findings as to whether treatment at the particular residential facility was primarily designed for, and directed to, enabling her to receive a meaningful educational benefit.

Top Legal Issue #5: RETALIATION

Retaliation is considered a form of discrimination if a school district retaliates against someone on the basis of his/her advocacy on behalf of an individual with a disability. This continues to be a hot topic in special education litigation.

- A. Wilbourne v. Forsyth County Sch. Dist., 38 NDLR 89, 36 F. App’x 473 (11th Cir. 2009). Dismissal of case is affirmed where teacher argued that district retaliated against her by issuing a ~~letter of directive~~” to be placed in her personnel file and filing a complaint against her with the Professional Standards Commission for ~~unprofessional conduct~~” after she filed a complaint with PSC regarding an incident involving a teacher abusing her disabled son and confronted an administrator at her son’s school about the school’s projected discipline of her son. To establish a case of ADA retaliation, a plaintiff must show: (1) that she engaged in statutorily protected activity; (2) that she suffered an adverse employment action; and (3) a causal link between the protected activity and the adverse action. Once a plaintiff has established a case of retaliation, the employer has an opportunity to articulate a legitimate, non-retaliatory reason for the challenged employment action. If this is accomplished, the plaintiff then bears the burden of showing that the reason provided by the employer is a pretext for prohibited, retaliatory conduct. Here, the teacher presented insufficient evidence to establish that the district’s reasons for taking adverse action against her were pretext for discrimination.
- B. Stengle v. Office of Dispute Resolution, Stengle v. Office of Dispute Resolution, 109 LRP 24455 (M.D. Pa. 2009). Case alleging violations of the First Amendment and retaliation under Section 504/ADA is decided on summary judgment in favor of all the ODR and State Department of Education defendants. Defendants clearly articulated non-

discriminatory reasons for non-renewing plaintiff's contract as a due process hearing officer. She was not non-renewed because of the mere fact that she maintained a blog or because she criticized or "bashed" ODR on that blog. Rather, defendants have shown that she was non-renewed because the content of the blog caused members of the public, some of whom were parties in cases she heard as a hearing officer, to question her impartiality, which ultimately inhibited the effective administration of the hearing officer system. "Simply put, Plaintiff has failed to adduce any evidence that calls into question the legitimacy of ODR Defendants' first non-retaliatory reason, the perceived compromise of her impartiality occasioned by her blog."

- C. Rodriguez v. Clinton, 109 LRP 8413 (N.D. N.Y. 2009). School district did not retaliate against a parent of a student with a disability who spoke against the district at a board meeting and wrote a letter to the editor on institutional racism in school elections when it filed an "educational neglect" report against him. Prior to the student's withdrawal from school, he was found eligible for special education and the special education coordinator attempted to work with his parents to arrange for home tutoring or residential placement. The student's psychiatrist had recommended a residential placement for the student because he was at risk for self harm and drug use. When the coordinator had not heard from the parents for almost a month, she recommended to the child study team that a CPS report be filed and this had nothing to do with the parent's speech activities.
- D. Pinellas County (FL) Sch. Dist., 52 IDELR 23 (OCR 2009). Where district's meeting minutes showed that staff discussed not placing the student in a German class because there was a pending OCR Complaint, this is sufficient to reflect retaliation.

TOP LEGAL ISSUE #6: DISABILITY HARASSMENT

Educators must be sure to follow good policies and procedures to not only prevent disability harassment but to also address it properly when it occurs. Otherwise, the district could be found liable for student-on-student disability harassment.

- A. Patterson v. Hudson Area Schs., 109 LRP 351, 551 F.3d 438 (6th Cir. 2009). This case will not be dismissed where a jury must decide whether the school district was deliberately indifferent to the harassment of the ED student. At some point, the response of the district, which knew that its verbal reprimands were not affective against the mistreatment, clearly became unreasonable. "We cannot say that a school district is shielded from liability if that school district knows that its methods of response to harassment, though effective against an individual harasser, are ineffective against persistent harassment against a single student." The student claimed that throughout his middle and high school year classmates called him names referencing his sexual orientation and pushed him in the hallways. While a staff member would verbally reprimand individual perpetrators and the student would stop the conduct, the maltreatment by the student body as a whole continued. In addition, the district placed him in a resource room in middle school but the high school principal would not allow him to continue there and the harassment intensified, culminating in a sexual assault. A district may be liable for student-on-student sexual harassment if 1) the harassment was

so severe, pervasive and offensive as to deprive the victim of educational benefits; 2) the district knew about the harassment; and 3) the district was deliberately indifferent to the harassment (i.e., if its response is clearly unreasonable in light of known circumstances).

Top Legal Issue #7: CHILD-FIND/IDENTIFICATION

Allegations that a school district did not properly or timely refer a student for an evaluation continue to be seen frequently in the court cases.

- A. Regional Sch. Dist. No. 9 Bd. of Educ. v. Mr. and Mrs. M., 53 IDELR 8 (D. Conn. 2009). Where district violated its child find obligation, it must reimburse the parents for the student's therapeutic placements. Although the student's hospitalization did not in itself qualify her as a child with an emotional disturbance, "[t]he standard for triggering the child find duty is suspicion of a disability rather than factual knowledge of a qualifying disability." The parent completed a health assessment form just one week before the student's hospitalization, when she enrolled the student in her local high school. The form stated that the student had been diagnosed with depression the previous year and was taking an antidepressant. Those statements, combined with the student's subsequent hospitalization, should have raised a suspicion that the student suffered from an emotional disturbance over a long period of time. Based upon private evaluations, the student is eligible for IDEA services and her parents are entitled to reimbursement.
- B. Pohorecki v. Anthony Wayne Local Sch. Dist., 53 IDELR 22 (N.D. Ohio 2009). The IDEA does not require children be classified by their disability. Rather, it requires that a child who needs special education and related services be regarded as a child with a disability and receive an appropriate education. The label assigned merely assists in developing the appropriate education provided. In addition, there was ample evidence that the student met the IDEA's definition of ED and that classification was a reasonable one.
- C. Richard S. v. Wissahickon Sch. Dist., 52 IDELR 245 (3d Cir. 2009). District court's ruling that district did not fail to timely identify student as disabled prior to the eighth grade is affirmed. The district court did not focus solely upon the ability/achievement analysis to determine that there was no evidence of LD at the relevant time, the district court also considered the testimony of the student's teachers that the student was not one who had problems with attention, impulsivity, or hyperactivity during the relevant period. Indeed, the district court pointed to extensive evidence that, in the seventh and eighth grades, the student was perceived by professional educators to be an average student who was making meaningful progress, but whose increasing difficulty in school was attributable to low motivation, frequent absences and failure to complete homework.
- D. Jamie S. v. Milwaukee Pub. Schs., 52 IDELR 257 (E.D. Wis. 2009). Where district has made only minimal efforts to remedy its systemic child find violations, additional interventions are necessary, including the appointment of a special education professional to monitor the district's review of each student's compensatory education needs. The independent monitor will establish guidelines for deciding which individuals qualify as

class members, evaluating each class member's eligibility for compensatory services and determining the amount, type and duration of the services. In addition, a "hybrid IEP team" will apply those guidelines in assessing each student's right to compensatory education. The hybrid IEP team will include at least four permanent members, selected from district personnel, and "rotating" members who are knowledgeable about each student's unique needs. In addition, the district must notify potential class members of the remedial scheme and students whose evaluations were delayed during the relevant time period are to receive individualized notice of the class action, and for all other potential class members, the district can provide a general notice on its Web site.

Top Legal Issue # 8: PROCEDURAL SAFEGUARDS/VIOLATIONS

- A. Drobnicki v. Poway Unif. Sch. Dist., 109 LRP 73255 (9th Cir. 2009) (unpublished). Where the district scheduled an IEP meeting without asking the parents about their availability and did not contact them to arrange an alternative date when the parents informed the district that they were unavailable on the scheduled date, the district denied FAPE. Though the district offered to let the parents participate by speakerphone, the offer did not fulfill the district's affirmative duty to schedule the IEP meeting at a mutually agreed upon time and place. "The use of [a phone conference] to ensure parent participation is available only if neither parent can attend an IEP meeting." Further, the fact that the student's mother asked the district to reschedule the meeting undermined claims that the parents affirmatively refused to participate--a circumstance that would allow the district to proceed in the parents' absence. Although the mother attended two other IEP meetings that year, the student's IEP was developed in the parents' absence. As such, the district's procedural violation deprived the parents of the opportunity to participate in the IEP process and, therefore, denied the student FAPE.
- B. T.Y. v. New York City Dept. of Educ., 53 IDELR 69 (2d Cir. 2009). A provision in the IDEA that requires IEPs to include the anticipated location of a child's services does not refer to the specific school site. Therefore, the IEP developed for a preschooler with autism was appropriate where it stated that the child would attend a 6:1+1 class in a school for students with disabilities. Although the parents argued that the IDEA required the IEP to identify a specific school, the term "educational placement," as used in the IDEA regulations, refers to the type of program a student will attend, rather than a specific school. This interpretation is supported not only by the official comments to the 1999 Part B regulations, but also by the Senate commentary on the IDEA. "Because there is no requirement in the IDEA that the IEP name a specific school location, [the preschooler's] IEP was not procedurally deficient for that reason."
- C. T.P. v. Mamaroneck Union Free Sch. Dist., 51 IDELR 176, 554 F.3d 247 (2d Cir. 2009). There was insufficient evidence of a "predetermination of placement" where the parents failed to show that the school district did not have an open mind as to the content of the autistic student's IEP. There was no premeeting agreement to adopt the recommendations of the consultant to the school district and there was evidence that the parents meaningfully participated in the IEP meeting, where the Committee adopted some of the recommendations of the parents.

- D. A.G. v. Placentia-Yorba Linda Unif. Sch. Dist., 52 IDELR 63, 320 F. App'x 519 (9th Cir. 2009) (unpublished). An IEP team meeting is procedurally valid as long as it includes a special education teacher or provider ~~who~~ has actually taught the student." It is not required that the student's current teacher or provider be present.
- E. G.N. v. Board of Educ. of the Township of Livingston, 52 IDELR 2, 309 F. App'x 542 (3d Cir. 2009). Pursuant to the IDEA, a procedural violation committed during the formulation of a child's IEP is actionable only if that violation: 1) impedes the child's right to a free appropriate public education; 2) significantly impedes the parents' opportunity to participate in the decisionmaking process; or 3) causes a deprivation of benefits. After carefully reviewing the administrative record, the district court determined that the January 2004 IEP was the product of a collaborative effort between school personnel and the parents and was designed to address the student's needs. The parents' ~~frustration~~ with the end-product of that collaboration does not diminish the fact that the IEP – had [the parents] agreed to its implementation – would have conferred a meaningful educational benefit. Therefore, the district court was correct in denying private tuition and other declaratory relief.
- F. School Bd. of Manatee County v. L.H., 53 IDELR 149 (M.D. Fla. 2009). District was required to allow a private psychologist to conduct an in-school observation of a student with Asperger's syndrome. The district violated the IDEA when it imposed restrictions on the independent evaluation.
- G. Horen v. Board of Educ. of City of Toledo Pub. Sch. Dist., 53 IDELR 79 (N.D. Ohio 2009). Parents' claim that they were entitled to tape record their daughter's IEP sessions is rejected. As OSEP has indicated, if a public agency has a policy that prohibits or limits the use of recording devices at IEP meetings, that policy must provide for exceptions only if they are necessary to ensure that the parent understands the IEP or the IEP process or to ensure other parental rights under the IDEA. Where these parents have not contended that they fall within an exception to the district's no-recording rule, the district did not violate IDEA when it refused to proceed with an IEP meeting unless the parents agreed not to record the discussions.
- H. Caitlin W. v. Rose Tree Media Sch. Dist., 52 IDELR 223 (E.D. Pa. 2009). Private school funding is not warranted where IEP was determined to be appropriate, notwithstanding the fact that the school district committed a procedural violation when the parents requested a due process hearing in September 2001 and the district did not respond. Where the parents requested a hearing the second time in November 2002 and a hearing was ultimately held in February 2003, the hearing officer did not err in finding that the procedural violation did not result in a denial of educational benefit to Caitlin because she had already been enrolled in a parentally-chosen unilateral placement that her parents deemed appropriate when the first hearing was requested and the due process hearing would have resulted in a finding that the district's IEP was appropriate anyway.

- I. Omidian v. Board of Educ. of the New Hartford Cent. Sch. Dist., 52 IDELR 95 (N.D. N.Y. 2009). The absence of a regular education teacher at the IEP Team meeting did not render the IEP inadequate because at least one parent and their attorney were present at every meeting and the evidence is clear that the only IEP proposal the parents would have accepted was placement at a private residential school.
- J. Anderson v. District of Columbia, 52 IDELR 100, 606 F.Supp.2d 86 (D. D.C. 2009). While it is true that the student's regular and special education teachers did not participate in IEP sessions, the last IEP meeting did include a placement specialist who had observed the student in the classroom, a speech pathologist and a special education teacher at the CARE Center. In addition, the Team had written reports from the student's special education teacher, indicating that the student was not making progress, which supported the proposed change in placement. Given the information provided to the Team, ~~the~~ Court does not see how the teachers' absence directly resulted in an IEP that was inappropriate, and therefore a loss of educational opportunity."
- K. Mahoney v. Carlsbad Unif. Sch. Dist., 52 IDELR 131 (S.D. Cal. 2009). Following the 2004 IDEA Amendments, the 9th Circuit has held that the IDEA no longer requires the presence of a student's current regular or special education teacher on the IEP Team. Rather, it is sufficient for a teacher to be one who is, or will be, responsible for implementing the IEP to attend.
- L. Laddie C. v. Dept. of Educ., 52 IDELR 102 (D. Haw. 2009). The mere existence of a difference in opinion between a parent and the rest of the IEP team is not sufficient to show that the parent was denied full participation in the process, nor that the DOE's determination that the student should return to a public school placement was incorrect. However, the court remands to the hearing officer the issue of at which meeting the placement decision was actually made, who was involved in that decision, and whether those persons were sufficiently knowledgeable of the student's needs to make the decision. In addition, the hearing officer is asked to examine whether the DOE violated the IDEA in making the placement decision and, if so, whether this violation resulted in a denial of FAPE.
- M. Anello v. Indian River Sch. Dist., 52 IDELR 11 (D. Del. 2009). Where parental consent was implicit in the parental request for an evaluation, which was made on February 3, 2004, the district had until April 7, 2004 to evaluate the student and hold an eligibility meeting under the state's 45-day timeline. Where the district did not hold the eligibility meeting until June 14, 2004, the district is responsible for private services the parents obtained during the time between April 7 and June 14. (Court interpreted Delaware law to require parental consent only when the IST refers a student for an initial evaluation but not where a parent initiates the referral).