2016 Year in Review Court

Fifth Circuit Creates New Substantial Compliance Standard for Independent Educational Evaluations

In *Seth B. ex rel. Donald B. v. Orleans Sch. Parish Bd*., 810 F.3d 961, 2016 WL 157998 (5th Cir. Jan. 13, 2016), the Fifth Circuit held that independent educational evaluations (IEE) need only be "substantially compliant" with agency criteria in order for parents to be reimbursed for the evaluations. *Seth B.* at *9-10. NDRN* joined by the National Federation of the Blind and the National Association of the Deaf filed an amicus supporting *Seth B*.

Under the Individuals with Disabilities Education Act (IDEA), parents have the right to an IEE at public expense, so long as the IEE meets the same criteria used by the district in the evaluation. *Id*.; 34 C.F.R. § 300.502. The parents of Seth B., a child previously diagnosed with Autism, asked permission from the Orleans Parish School Board to obtain a second independent assessment, and the Board assented, offering reimbursement up to $3,000. *Id.* at *1.

The parents then obtained an independent assessment, and sent the assessment to the school. The Board responded with concerns that the assessment did not meet the criteria of Bulletin 1508, the regulation on point. *Id*. at *1. Several months later, the parents of Seth B. sent the board an invoice totaling $8,066.50. The Board responded two months later denying the request and citing that the IEE was noncompliant with Bulletin 1508. *Id.*

The parents then requested an administrative hearing, in which the ALJ found in favor of the Board, noting noncompliance with Bulletin 1508. *Id*. at *2. Seth B.'s parents next requested a review in federal district court, which also found for the Board, determining that the board had not waived its right to challenge Seth's IEE, and that reimbursement was disallowed because the IEE was noncompliant with Bulletin 1508. *Id.* The parents then appealed to the circuit court to determine whether the board had waived their right to challenge the price, and whether reimbursement was disallowed because the IEE was noncompliant with Bulletin 1508. *Id*.

The Fifth Circuit first found that the Board had not waived its right to challenge reimbursement by failing to respond to the parent's request for two months. *Id*. at *3. Under the IDEA, a school must demonstrate at a hearing that the evaluation obtained by the parent did not met agency criteria within a reasonable period of time. *Id*.; 34 C.F.R § 300.502(b)(2)(ii). Because a hearing had taken place, even though it was at the parent's request and not the school's, and the school had attempted to demonstrate that the IEE did not meet agency criteria, the court found that the school had acted within a reasonable time period. *Id*. Therefore, the school did not waive its right to challenge the refund for the IEE. *Id.*

The court also noted that the purpose of requiring a hearing within a reasonable period of time is to make sure the child's IEP is not months behind. *Id.* at *5. In this case, the school had the IEE and used it for the student's IEP, so the question was one of funding and not delaying a student's education. *Id.* While waiting months to change a child's IEP was unreasonable, waiting

months to figure out whether the parents deserved a reimbursement was not. *Id.* Therefore, the court found that the school had not waived its right to challenge a reimbursement request for the IEE. *Id.*

After determining that the lower courts had not violated any procedural rights of the parents, the court went on to determine whether the IEE failed to meet agency criteria, thus precluding Seth's parents' reimbursement. *Id.* at *7. The court determined that the degree necessary for an IEE to meet agency criteria is not explicitly defined in the IDEA or its corresponding regulations. *Id.* The court noted, however, that in other IDEA contexts, the standard is "substantial compliance." *Id.*

The court defined "substantial compliance" in this context as meaning that "insignificant or trivial deviations from the letter of agency criteria may be acceptable as long as there is substantive compliance with all material provisions of the agency criteria and the IEE provides detailed, rigorously produced and accessibly presented data." *Id*. at *10. The court cited policy considerations for having a less strict standard than meeting exact agency criteria, including wanting to give parents more of an involved role in their child's education. *Id*. at *9. The court also expressed concern that perfect adherence of IEEs to agency criteria, Bulletin 1508, could give schools too much power over parents. *Id.* at *10. The court reasoned that schools may be able to find ambiguities or inconsequential nonconformities in a student's IEE, treating parents' right to an IEE as a privilege to be granted, since the school has the power to determine reimbursement. *Id.*

The court remanded the case to the district court over whether the IEE substantially complied with Bulletin 1508. *Id.* at *11. The court noted, however, that the maximum amount the parents were entitled to was $3,000, because they knew of the Board's cost cap for the evaluation from the beginning and they were given an opportunity to demonstrate the need for an exception but did not do so. *Id.*

Fifth Circuit Rules that a "Stay Put" Order Alone Is Insufficient for IDEA Fee Award

In *Tina M. v. St. Tammany Parish Sch. Bd*., 816 F.3d 57, 2016 WL 723352, (5th Cir. Feb. 23, 2016), *cert. denied* 137 S.Ct. 371 (2016) the Fifth Circuit held that obtaining a stay-put order under the IDEA, without other merits based relief, is insufficient to qualify a litigant as a "prevailing party." As such, the plaintiff parent was unable to obtain a fee award. *Tina M. v St. Tammany Parish Sch. Bd.* at *1.

After a behavioral incident outside of school, the St. Tammany Parish School Board convened an IEP meeting and proposed that S.M. receive at-home tutoring in lieu of school based services. His mother disagreed and refused to consent to the change. Soon thereafter, the family's attorney requested a due process hearing and filed a "stay put" motion, which resulted in a "stay put" order by an ALJ. The result of this order was that S.M. was to remain in school until a decision on the merits of his claim. *Id.* at *1.

The case settled and at Plaintiffs' request the ALJ terminated the matter without reaching the merits of Plaintiffs' claims. Plaintiffs filed suit in federal court seeking attorneys' fees and the

district court held that Plaintiffs were the "prevailing party" for purposes of obtaining attorneys' fees, by analogizing the "stay-put" order to a preliminary injunction. Defendant appealed the district court's ruling on prevailing party status to the Fifth Circuit. *Id.* at *1. However, the Fifth Circuit disagreed with this analogy, finding that the ALJ's "stay-put" order did not involve a ruling on the merits, and that the relief obtained was only an automatic stay that did not permanently alter the legal relationship of the parties. *Id.* at *2.

The court distinguished a stay put order from a preliminary injunction where a party must have "establish[ed] that he is likely to succeed on the merits." In *Davis v. Abbott,* 781 F. 3d 207, 216 (5th Cir. 2015), the Fifth Circuit recently reiterated the importance of a party having achieved relief on the merits for the purposes of determining prevailing party status in the context of interlocutory injunctive relief, holding that "to qualify as a prevailing party in the preliminary-injunction context," the preliminary injunction must have been "based upon an unambiguous indication of probable success on the merits of the plaintiff's claims as opposed to a mere balancing of the equities in favor of the plaintiff." *Id.* at *3.

The circuit court held that Plaintiffs are not the prevailing party by virtue of having invoked the IDEA's stay-put provision, consistent with several other circuit courts that have addressed this issue. *Id* at *3. In Footnote 1, the court distinguished appeal court rulings that found prevailing party status in cases involving a "stay put order" as being different from the facts in this case or no longer good law. *Id.* at *4.

P&A Access to School Affirmed in Case Brought by Disability Rights New York

In the second favorable access case from New York, *Disability Rights New York v. North Colonie Bd. of Ed.*, No. 14-CV-0744, 2016 WL 1122055 (N.D.N.Y, Mar. 22, 2016), the district court granted DRNY partial summary judgment upholding P&A access rights to conduct an investigation and to monitor a school class-room which serves individuals with disabilities.

DRNY received complaints of possible abuse and neglect, including possible physical restraints and seclusion, of fourth through sixth graders taught under the Individuals with Disabilities Education Act (IDEA) in a self-contained classroom at the Blue Creek School in the defendant school district. *Id.* slip. op. at *1 - 2. In June 2014, the school district refused DRNY's request to access the school to investigate, but given the approaching end of the school year, DRNY obtained a temporary restraining order from the court which allowed access. *Id.* at *2. DRNY then sought a permanent injunction and declaratory relief, and both parties moved for summary judgment.

The district court rejected a claim by the school district that a school is not a "facility" or "service provider" under the DD, PAIMI and PAIR Acts. *Id.* at *4 - 5. Notably, the court rejected the school district's argument that the P&A acts only apply to an entire school which serves individuals with disabilities, not to self-contained class rooms. *Id.* at *5. The court stated "[a]s schools play an important role in providing care to children with disabilities, they also raise the possibility of abuse and neglect. As a result . . . the services provided to students in the [self-contained] classroom constitute 'care and treatment' as defined in the PAIMI Act and 'services' as defined in the DD Act and the PAIR Act." *Id.* The court went on to enjoin the school district

from disputing in the future that it is a "service provider" or "facility" under the P&A acts. *Id.* at *9.

The court further rejected both the school district's argument that DRNY lacked probable cause that abuse and neglect may have occurred, and that the individuals served by the school do not meet the definition of disability in the P&A acts. *Id.* at *6 - 7. The court found as "strained," the school district's reading of the P&A acts that abuse and neglect requires actual injury or death, and determined that information from a former employee and five parents/guardians about possible elopement, failure to properly respond to a suicide threat, and potential excessive use of force when using a physical restraint constituted abuse sufficient to trigger the right to access. *Id.* at *7. Further, DRNY met the requirement to show "substantial evidence" that students in the classroom meet the definition of disability for purposes of the DD Act and PAIR, though on its face the court stated it was not clear if the students had a mental disability as defined by the PAIMI Act. *Id.* at *8.

As with the issue regarding whether the school was a service provider, the court enjoined the school from disputing in the future that students served under IDEA are also covered under the P&A acts. *Id.* at *9.

Though DRNY did not rely on the P&A monitoring authority when seeking access in 2014, the court found that it could monitor the school provided DRNY otherwise complies with the requirement of the P&A acts, such as the PAIMI regulatory provision that P&As make an effort to inform parents and guardians of potential monitoring. *Id.* at *8.

The court determined that since DRNY had completed the 2014 investigation, and that the school complied with the request for records, that no relief was necessary for the past investigation. *Id.* at *9. The court stated however, that "[t]o require [DRNY] to always obtain a court order to perform its statutory investigative responsibilities would stifle its mission to provide timely and effective advocacy for those it is charged with protecting." *Id.* Therefore, as mentioned, the court enjoined the school district from claiming that it is not a "facility" or "service provider" or that students served under IDEA are not covered under the P&A acts. *Id.*

Ninth Circuit Clarifies FAPE and Discrimination Standards under IDEA, ADA, and Section 504

In *A.G. v. Paradise Valley Unif. Sch. Dist. No. 69*, 815 F.3d 1195, 2016 WL 828095 (9th Cir. Mar. 3, 2016), the Ninth Circuit reviewed a case brought under the Individuals with Disabilities Education Act (IDEA), Americans with Disabilities Act (ADA), Section 504 of the Rehabilitation Act (Section 504), and Arizona tort law after a student was transferred to a different school and at different times restrained due to behavior issues. *A.G.* at *2. Although plaintiffs had already settled all IDEA claims with the school district, the Circuit Court reviewed the standards for FAPE and for seeking damages under all three acts, as well as the state tort law claims. *Id.* at *3.

A.G. is a student qualified under the IDEA to receive special education and related services. *Id.* at *1. After behavioral issues escalated at her original school, Vista Verde Middle School, her

IEP team, along with her parents, coordinated her transfer to a school primarily designed for children with emotional disturbances, Roadrunner School. *Id.* at *2. A.G.'s behavioral issues continued at Roadrunner. As an example, she refused to enter the school, kicked an officer in the face, and had to be physically escorted to an "Intervention Room." *Id.* During another incident, A.G. allegedly poked an officer in the eye, and then scratched the officer on the face and neck. *Id.*

Plaintiffs filed a claim in Arizona state court against the school district under the IDEA, ADA, Section 504, and state tort law. *Id.* The parties settled the IDEA claims, and the defendant school district subsequently removed the remaining claims to federal district court, which granted summary judgment on all claims in its favor. *Id.* at *3.

Reviewing the case, the court first clarified that there are different standards for free appropriate public education (FAPE) under the IDEA and Section 504. *Id.* at *4. The IDEA requires that special education and related services be provided in conformity with the IDEA IEP regulations, while Section 504 requires that regular or special education and related aids and services be designed to meet the individual needs of people "*as adequately as the needs of non-handicapped persons are met*." *Id.* (emphasis in original). Therefore, the court clarified that showing FAPE was denied under IDEA does not necessarily establish a denial of FAPE under Section 504. *Id.*

The court also clarified that the elements of an ADA Title II claim do not differ in any material sense from a Section 504 claim. *Id.* at *5. To prove either, a plaintiff must show she is a qualified individual with a disability who: (1) was denied meaningful access to the benefits of public services by a federally-funded program; (2) that the program denied her a reasonable accommodation necessary for meaningful access; and (3) if plaintiff is seeking damages, there was intentional discrimination, which includes deliberate indifference. *Id.* The court addressed these three elements separately. *Id.*

On the issue of meaningful access, the court explained that the plaintiff must prove that there was a violation of the 504 regulations and that such violation denied access to a public benefit. *Id.* at *6. Plaintiffs alleged that the school violated the regulations that pertained to providing regular or special education and related aids that are designed to meet the needs of children with disabilities as adequately as the needs of non-handicapped persons, in that the district transferred A.G. to a different more restrictive school, thereby violating the Least Restrictive Environment requirements of Section 504 because A.G. could have remained in the less restrictive school if they had given her appropriate behavioral supports. *Id.*

The court reasoned that A.G.'s parents had consented to her school transfer, but their consent did not bar a claim challenging placement because parents cannot be expected to have specialized expertise as to what services the child needs. *Id.* at *7. Therefore, the Circuit Court reversed the lower court's determination that the parents' consent blocked their right to file a claim, and remanded the meaningful access claim for further consideration. *Id.*

On the issue of reasonable accommodation, the court explained that the plaintiff most show that the defendant failed to make reasonable modifications that would accommodate the plaintiff's disability without fundamentally altering the nature of the program. *Id.* Defendants pointed out that A.G.'s parents never requested modifications, and argued that the claim was therefore baseless. *Id.* at *8. However, the court again found that A.G.'s parents did not have the duty, nor the legal expertise, to determine what accommodations might allow A.G. to remain in her regular educational environment, and determined that there was a triable issue of fact as to whether the services plaintiffs faulted the school district for failing to provide were actually reasonable, necessary, and available, and remanded the case back to the court for determination. *Id.*

Next, looking at whether there was deliberate indifference on behalf of the school district in handling A.G.'s behavioral issues, the court noted that the determination depended on whether the defendant had notice of her need for an accommodation and failed to act. *Id.* The District court dismissed these claims because a medical expert had testified that some of the services plaintiffs claimed were not legally necessary. *Id.* at *9. Here, however, the Circuit Court found that a medical expert witness was not qualified to provide a legal opinion, and that there existed a genuine factual dispute over whether the need for accommodations was obvious. The Court reversed the finding of the District Court and remanded this claim for further consideration. *Id.* at *10.

The court next went on to examine the claims made under state tort law and found that plaintiff's claims for intentional infliction of emotional distress, and negligent infliction of emotional distress, were correctly dismissed by the District Court because there was no genuine issue of material fact whether the defendant's acts were outrageous enough to qualify. *Id.* Nonetheless, the court found that summary judgment was improper on the counts of assault, battery, and false imprisonment, because there was an issue of fact as to whether the school district officials physically escorted and restrained A.G. when she was not a threat to herself or others. *Id.* at *11-12.

Sixth Circuit Holds Teacher's Abusive Practices Do Not "Shock the Conscience"

In *Domingo v. Kowalski*, 810 F.3d 403 (6th Cir. 2016), three students with disabilities and their parents brought suit alleging violations of their substantive due process rights under the Fourteenth Amendment. They alleged that the teacher, among other things, gagged a student with a bandana to keep him from spitting, strapped another to a toilet to keep her from falling off of it, and forced another student to sit with her pants down on a training toilet "in full view of her classmates to assist her with toilet training." *Id.* at 406.

The district court granted summary judgment to the defendants, because the "instructional techniques, while inappropriate and even 'abusive,' did not rise to the conscience-shocking level required of a substantive due process claim." The Sixth Circuit affirmed. *Id.*

In analyzing whether the teacher's actions met the "shocks the conscience" standard, the court used the framework developed by the Third Circuit in *Gottlieb v. Laurel Highlands Sch. Dist.,* 272 F.3d 168 (3d Cir. 2001):

a) Was there a pedagogical justification for the use of force?; b) Was the force utilized excessive to meet the legitimate objective in this situation?; c) Was the force applied in a good-faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm?; and d) Was there a serious injury? *Gottlieb,* 272 F.3d at 173.

Domingo at 411. The court addressed each of these points in turn.

In analyzing whether the teacher's actions served a pedagogical purpose, the court noted that the "test first looks to the ends motivating the teacher's actions and not the means undertaken to achieve those ends." *Id.* at 412. Here, the teacher's actions were much less "offensive" than cases in other circuits where the teacher's conduct was not found to shock the conscience. In this case, the teacher's "complained-of conduct involved attempts, albeit misguided ones, to address her special-education students undisputed educational or disciplinary needs." *Id.*

The court next looked at whether the teacher's conduct was excessive. To meet this test "the conduct must be clearly extreme and disproportionate to the need presented to be excessive in the constitutional sense." *Id.* at 414. Here there was no evidence that the teacher's "educational methods were 'severe in force,' or otherwise constituted a 'brutal and inhumane' abuse of power." *Id.* (quotations in original).

In determining intent, the question is whether the teacher "acted in a good-faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." *Id.* (internal quotations and citation omitted). Here, however, the court found that the facts reveal that the teacher's "purpose, in most instances, was to assist her students in meeting their educational goals, and in the others, to curb disruptive behavior." *Id.* at 415.

The final factor is whether any of the students "suffered a serious injury." *Id.* (internal quotations and citation omitted). The court declined to hold whether or not there must be serious physical injury or whether psychological injury alone would be sufficient, concluding, "We, too, can imagine a case in which evidence of serious psychological injury could support a Fourteenth Amendment substantive due process claim. However, that is not the case here. Appellants have presented no evidence of any serious injury, physical or otherwise." *Id.* at 416.

The court, thereby determined that the teacher's actions "may have been inappropriate, insensitive, and even tortious. This does not, however, render them unconstitutional." *Id.*

Ninth Circuit Holds School District Offered FAPE in the Least Restrictive Environment to Preschool Student

In *A.R. ex rel. Reese v. Santa Monica Malibu Sch. Dist.*, 636 Fed.Appx. 385, 2016 WL 145768 (9th Cir. 2016) (unpublished), the Ninth Circuit affirmed the decisions of an administrative hearing officer and the district court that the school district offered the student a free appropriate public education (FAPE) in the least restrictive environment (LRE). The court also affirmed the decision to deny tuition reimbursement to the parent for the unilateral placement of A.R. in private school. *Id*. at *2.

> The court weighs four factors when considering whether a placement is in the LRE: (1) The educational benefits to the student if placed in general education; (2) the nonacademic benefits to the student if placed in general education; (3) the effect on the teacher and classmates if the student is placed in general education; and (4) costs. *Sacramento City Unif. Sch. Dist. v. Rachel H.,* 14 F.3d 1398, 1400–02 (9th Cir.1994).

A.R. at *1.

In this case, the court upheld findings that the student could not benefit from a general education placement "due to the severe symptoms of his autism." Additionally, the school district had offered a number of potential placements designed to meet his needs, "including programs with non-disabled peers." *Id.*

Ninth Circuit Upholds Significant Reduction in IDEA Fee Award by District Court

In *Beauchamp v. Anaheim Union High Sch. Dist.,* 816 F.3d 1216 (9th Cir. 2016), a mother (Beauchamp) appealed an attorney fee award related to a due process complaint she filed under the IDEA on behalf of her son, J.E. The Ninth Circuit appeal concerns the district court's award of attorney fees to J.E.'s attorney at an amount significantly lower than the petitioned amount. *Id.* at 1218.

First, the Ninth Circuit upheld the district court's conclusion that Beauchamp unreasonably rejected a timely settlement offer, and was thereby justified in the resulting reduction in the fee award. *Id.* In late February 2012, Beauchamp requested that the District evaluate J.E. for special education services; the District performed an evaluation and J.E. was found eligible. *Id.* The parties engaged in settlement discussions which focused on whether the District violated its "child-find" obligations under IDEA by failing to timely evaluate J.E. for special education services. On September 28, 2012, the District made a settlement offer that included the following relief: (1) 80 hours of individual tutoring by a special education teacher; (2) reimbursement of the costs of a private evaluation; (3) 20 hours of compensatory counseling services by a credentialed school psychologist; and (4) reimbursement of reasonable attorney fees and costs. J.E. rejected this offer and a hearing was held. *Id.* at 1219-1220.

The ALJ issued a favorable ruling for J.E. and awarded in total: (1) six hours of individual counseling by a credentialed mental health professional; and (2) reimbursement for the cost of

the examination, an amount of relief substantially less than the settlement offer. *Id* at 1220. The Ninth Circuit agreed that J.E. is a prevailing party entitled to attorney fees, that it is undisputed that the District's offer met the statutory requirements, and that J.E. did not accept the offer within ten days.

Beauchamp argued that she was justified in rejecting the settlement offer because without a ruling from the ALJ on the child-find issue in the first hearing, she risked reversal in a pending expedited-hearing appeal. The Ninth Circuit found this argument to be without merit because the two proceedings were not legally dependent upon one another. *Id* at 1221. As such, there was nothing to be gained by rejecting the settlement offer and obtaining a ruling on the child-find issue. *Id.* at 1222.

Beauchamp then argued that she was justified in rejecting the District's offer because it was vague and ambiguous. The offer stated that the terms would "be incorporated into an industry standard general compromise and release agreement that [would] effectuate the offer outlined and permit the District to provide the offered reimbursements and services." She further argued that she could not have accepted the offer without knowing what those terms were, and particularly whether they included any waiver of rights; it was unclear what rights she waived upon acceptance, and that she should not have been expected to seek clarification of what industry-standard terms the District intended to incorporate. *Id.* at 1223. However, the Ninth Circuit held that the District's September 28, 2012 letter was not ambiguous or vague. It explicitly stated the material terms of the offer, and, as is customary in settlement negotiations, explained that the terms would be incorporated into a final document. *Id.*

Second, the court addressed the fee rate for J.E.'s attorney. In support of her request for fees, J.E.'s lawyer submitted her own declaration, the declarations of other attorneys practicing education law in the Central District of California, and two orders from recent IDEA cases where she was awarded fees. *Id.* at 1224. The court found that evidence the lawyer herself submitted on average supports the $400 rate. Accordingly, it was not an abuse of discretion for the district court to apply that rate without seeking additional rebuttal evidence from the District. *Id.* at 1225. As such, the District Court's findings as to amount of the fee and the rate were upheld by the Ninth Circuit.

Eleventh Circuit Holds Student's Need for Direct Instruction Supports Separate Setting for Part of School Day

In *S.M. v. Gwinnett County Sch. Dist.*, 636 Fed.Appx. 763, 2016 WL 1138336 (11th Cir. March 24, 2016) (unpublished), the Eleventh Circuit held that the school district met the Individuals with Disabilities Education Act (IDEA) requirement that services to students with disabilities are to be in the least restrictive environment (LRE) to the maximum extent possible. The Eleventh Circuit had adopted a two-part test to ensure compliance with the LRE mandate:

> First, we ask whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily.... If it cannot and the school intends to provide special education or to remove the child from regular education, we ask, second, whether the school has mainstreamed the child to the maximum extent appropriate.

*Id.**1 (citations omitted).

The parents argued that the district did not meet the first prong of this test—that it did not consider the full range of supplemental aids and services to successfully educate their child, S.M., in the regular classroom. The Eleventh Circuit disagreed. The court observed that S.M. was to be educated in the regular classroom for all classes except reading, writing and math. The district also provided a range of supplemental aids and services for S.M. in the regular classroom, including co-teaching in science and social studies. *Id.*

In reading, writing and math, the court agreed with the district that S.M.'s needs were such that she could not be educated in the regular classroom even with supplemental aids and services. The court noted that she required "direct, explicit, small group instruction with drill and repetition, which instruction is significantly different from that of a general second grade classroom." *Id.* Therefore, the court could not disagree "with the finding of the district court (and the ALJ) that modification of the regular classroom curriculum in order to accommodate S.M. would not be feasible and would modify the regular curriculum beyond recognition." *Id.*, fn. 1.

Ninth Circuit Holds IEP Did Not Require Services in the Home

In *C.L. ex rel. V.L. v. Lucia Mar Unif. Sch. Dist.*, 646 Fed.Appx. 524, 2016 WL 1169960 (9th Cir. March 25, 2016) (Mem), the Ninth Circuit affirmed a district court decision that C.L.'s Individualized Education Program (IEP) for 2011 was properly implemented and that the IEP for the following year offered C.L. a free appropriate public education (FAPE) pursuant to the Individuals with Disabilities Education Act (IDEA).

Regarding the proper implementation of the 2011 IEP, the Ninth Circuit adopted the reasoning of the district court that there were no major discrepancies between the behavioral services required in C.L.'s IEP and those actually provided by the school district. Additionally, the IEP did not require services to C.L. in the home. *Id.* at *1.

The court next held that the issue of the appropriateness of the 2012 IEP was moot "because C.L.'s mother consented to all parts of that IEP in August 2015," following *Murphy v. Hunt,* 455 U.S. 478, 481, 102 S.Ct. 1181, 71 L.Ed.2d 353 (1982), holding that "a case becomes moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome."

Ninth Circuit Affirms Denial of Attorney's Fees Finding Consultant for Parent's Attorney Operated as an Expert, Not Paralegal

In *Anaheim Union High Sch. Dist. v. J.E.*, 637 Fed.Appx. 380, 2016 WL 695979 (9th Cir. Feb. 22, 2016) (Mem), the Ninth Circuit affirmed the district court's decision that the parents were not entitled to fees for a consultant hired by the parent's attorney. The court began by noting that paralegal fees are generally recoverable by prevailing parties in IDEA actions. However, the costs of experts or consultants are not recoverable. *Id.* at *1. In this case, the facts supported a finding that the expert did not function as a paralegal in the case. She was introduced as an educational consultant at the due process hearing, and the tasks she performed were not those of a paralegal. She reviewed educational assessments and IEP goals. *Id.*

The Ninth Circuit also affirmed a reduction in the attorney's hourly rate. The attorney had billed at $450 per hour at the administrative hearing and $475 per hour in court. The affidavits of other attorneys in the Los Angeles area showed fees between $350-$560 per hour. The district court found $400 per hour for all work performed in line with the attorney's skill and experience in the community, but determined "rates above $400 per hour were on the high end of fees charged in the relevant market, and therefore not 'prevailing' as required by IDEA." *Id.*

Second Circuit Holds that Claims Concerning Home Instruction are Subject to Individuals with Disabilities Education Act Exhaustion Requirements

In *L.K. v. Sewanhaka Cent. High Sch. Dist.*, 641 Fed. Appx. 56, 2016 WL 853433 (2d Cir. March 4, 2016) (unreported), the Second Circuit held that the parents' claims under the Americans with Disabilities Act (ADA), Section 504 of the Rehabilitation Act of 1973 (Section 504), and several other civil rights laws concerning the school district's failure to allow for home instruction, were subject to the exhaustion of administrative remedies pursuant to the Individuals with Disabilities Education Act (IDEA). The IDEA requires that plaintiffs exhaust IDEA's administrative remedies "whenever they assert claims for relief *available* under the IDEA, regardless of the statutory basis of their complaint." *Id.* at *1 (emphasis in original; internal quotations and citations omitted). Therefore, IDEA exhaustion is required "if the 'theory' behind a claim relates to the education of" a child with a disability, unless exhaustion could be excused. *Id.* (internal quotations and citation omitted).

In *L.K.*, the parents argued that exhaustion was not required because the theory of their dispute goes beyond the elements of an individualized education program (IEP). Rather, the issue is the school district's improper denial of their request for home schooling following their children's diagnosis of chronic fatigue syndrome, which resulted in them not being able to graduate before they turned 21. *Id.* at *1-*2. The court, however, found that the IDEA would provide relief for this type of grievance. IDEA itself applies to questions of instruction in the home because of a student's disability. In *Weixel v. Bd. of Educ. of City of N.Y.,* 287 F.3d 138, 150 (2d Cir.2002), the court concluded "that plaintiff who suffered from chronic fatigue syndrome and fibromyalgia adequately stated [an] IDEA claim based on failure to provide home instruction." *L.K.* at *2. Additionally, the administrative process would have been helpful to address their

claim that when they did receive IEPs, the IEPs failed to provide guidance about how the curriculum could be modified to ensure the student graduated by age 21.

Plaintiffs also failed to demonstrate that their failure to exhaust should be excused. The record belied their claim that the district had misled them about their procedural remedies. It showed that the district had informed them of their rights under Section 504, including the right to request a due process hearing, and had provided them with a notice of their rights under the IDEA. *Id.*

The Second Circuit also affirmed the district court's dismissal of their conspiracy claims under 42 U.S.C. §§ 1985 and 1986 because parents "failed to plead facts supporting their conclusory assertion that defendants had an 'express understanding or tacit agreement'." *Id*. at *3 (citation omitted). Finally, their First Amendment retaliation claim, based on the school district reporting the parents to Child Protective Services, was barred by the applicable three-year statute of limitations. *Id.*

Second Circuit Holds Failure of School District to Conduct Functional Behavioral Assessment or Develop Behavior Intervention Plan Did Not Deny Student Free Appropriate Public Education

In *J.C. v. New York City Dept. of Educ.*, 643 Fed.Appx. 31, 2016 WL 1040160 (2d Cir. March 16, 2016) (Mem), the Second Circuit denied tuition reimbursement for a private unilateral placement, holding that the school district provided the student with a free appropriate public education (FAPE) under the Individuals with Disabilities Education Act (IDEA).

The primary issue raised by the parents was that the school district's failure to conduct a functional behavioral assessment (FBA) or to develop a behavioral intervention plan (BIP) denied the student a FAPE. The court began its analysis by noting:

> The failure to conduct an adequate FBA is a serious procedural violation because it may prevent the [IEP Team] from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all. … Such a failure also seriously impairs substantive review of the IEP because courts cannot determine exactly what information an FBA would have yielded and whether that information would be consistent with the student's IEP.

Id. at *2 (citation and internal quotations omitted).

Nevertheless, the court stated the failure to conduct an FBA will not always result in the denial of a FAPE, "so long as the IEP adequately identifies a student's behavioral impediments and implements strategies to address that behavior." *Id.* (internal quotations and citation omitted). The court then deferred to the conclusion of the State Review Officer that the failure to conduct an FBA or develop a BIP did not deny the student a FAPE. *Id.*

The court also rejected the parents' argument that the classroom their child would have been placed in did not contain an appropriate grouping of students as required by the IDEA or New York law. Under Second Circuit precedent, the court's evaluation of the IEP "must focus on the written plan offered to the parents." Speculation "that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement." *Id.* (internal quotations and citation omitted). However, parents may challenge "the assigned school's actual, and non-speculative inability to comply with the IEP without first enrolling the student in the school." *Id.* Here, "grouping evidence is not the kind of non-speculative retrospective evidence that is permissible" under Second Circuit precedent. *Id.*

Sixth Circuit Holds School District Not Deliberately Indifferent to Rights of Student with Diabetes by Assigning Him to a School with a Full-Time Nurse

At the age of four R.K. was diagnosed with Type-1 diabetes, which required that he receive periodic insulin injections and monitor his sugar intake throughout the day. His parents sought to enroll him in his neighborhood school for kindergarten, but the school district disagreed and enrolled him in a school with a full-time nurse. Notably, his doctor indicated that he would need a nurse to help with insulin injections. *R.K. ex rel. J.K. v. Bd. of Educ. of Scott County, Ky.*, 637 Fed.Appx. 922, 923 (6th Cir. 2016) (unreported).

During kindergarten he transitioned from a pen needle to inject his insulin to an insulin pump, which delivered it automatically throughout the day. His physician indicated that he "must be supervised by an adult with dose administration via pump." *Id.* The parents then asked that R.K. be moved to his neighborhood school for the remainder of kindergarten, but again the school refused. The school district's nurses did not recommend assigning the monitoring of the insulin pump to someone other than a nurse. *Id.* at 924.

For first grade, R.K.'s physician noted that he was independent in manipulating his pump and only needed help counting carbohydrates, which could be performed by any trained lay person and did not require a nurse. Nevertheless, the school district still insisted that R.K. attend a school with a full time nurse. For second grade, R.K. was finally fully independent with his insulin pump so the school district enrolled him in his neighborhood school. However, the parents moved two months into the school year. *Id.*

The parents then sued the school district for violations of the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act of 1973 (Section 504). The district court granted summary judgment to the school district and the Sixth Circuit affirmed. *Id.*

The parents sought "to enjoin the school board from denying him an 'educational opportunity' or 'singling him out for disparate treatment' because of his diabetes." *Id.* However, Kentucky amended its laws to require a school district to allow a student to attend the school the student would have attended if he or she did not have disabilities. As this statute forbids the action which the family sought to enjoin, their request for injunctive relief was deemed moot. *Id.* at 925.

The parents also sought money damages, which requires a showing of "deliberate indifference" towards the student's "federally-protected rights." *Id.* In this case, the family pointed to "no evidence that the school board knew that it would likely violate his rights when it assigned him to a school with a full-time nurse." *Id.* The court stressed that this "is not a case where a school board ignored a student's request for help. Rather, the student's parents simply disagreed with the school as to whether a nurse was necessary to provide it." *Id.* Therefore, the court concluded that he was not entitled to damages as a matter of law. *Id.*

Judge Karen Nelson Moore dissented from the majority's holding on the damages claim because:

> [A] jury finding that R.K. requested an accommodation and that the School Board knew that the accommodation was needed and could be provided is all that is needed to establish the knowledge necessary for a finding of deliberate indifference, I dissent from the majority's conclusion that R.K. is not entitled to compensatory damages as a matter of law.

Id. at 927.

Third Circuit Affirms Full Attorneys' Fees Award Following Successful Administrative Decision

In *E.C. v. Philadelphia Sch. Dist.*, 644 Fed.Appx. 154, 2016 WL 1085498 (3d Cir. Mar. 21, 2016) (unreported), the Third Circuit fully affirmed a $81,849 award for attorneys' fees and $900 in costs following a successful hearing officer's decision in an Individuals with Disabilities Education Act (IDEA) case. The school district raised three objections to the fee award, each of which was rejected by the Third Circuit.

First, the Third Circuit disagreed with the school district's argument, based on a district court decision, that the attorney's fees should be capped at a 2:1 ratio of preparation time to hearing time, which would have reduced the compensable hours from 226.4 to 50. *Id.* at *1. The Third Circuit found that the school district was misconstruing the decision in the prior case, and, in any event, the district court was not bound by the prior decision. Moreover, the court noted the school district's position was disingenuous because "the school district's attorneys spent nearly as many hours preparing for the hearing even though the parents bore the burden on each claim." *Id.*

Next, the court dismissed the school district's argument that the fee should be reduced based on the parents' "limited success" at the administrative hearing. The hearing officer found that the school district did not provide a free appropriate public education (FAPE) to the student in four of the six areas of instruction raised by the parents. The hearing officer also granted all of the requested relief—a determination that the school district denied FAPE to the student, an award for compensatory education, and reimbursement for a unilateral private placement.

The Third Circuit relied on the U.S. Supreme Court's decision in *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983), to reject this argument:

> Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation.... In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit. Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters.

E.C. at *2. Applying this test, the court observed that "courts have held that plaintiff's failure to prevail on all their legal theories do not justify reductions in attorneys' fees where the plaintiffs obtained excellent results, as the parents did here." *Id.* (citations omitted).

Finally, the court rejected the proposition that attorneys' fees should be reduced because of the financial troubles facing the school district. The court noted that financial ability to pay is not a "special circumstance" that would justify the reduction in a fee award. The school district's well known financial difficulties is not a concern that can "be visited upon the shoulders of these plaintiffs nor excuse the school district from its statutory obligation of paying reasonable fees here." *Id.*

Third Circuit Holds School District Denied Student a Free Appropriate Public Education by Recommending an Anticipated Duration for a One on One Paraprofessional

In *Norristown Area Sch. Dist. v. F.C.*, 636 Fed.Appx. 857 (3d Cir. 2016) (unpublished), the Third Circuit affirmed a decision that the school district had not offered a free appropriate public education (FAPE) to a student. It also affirmed the decision to award tuition reimbursement for the parents' unilateral placement of their son and for an award of attorneys' fees. *Id.* at 859.

The parents had argued that the school district did not provide their son, F.C., with a FAPE for three consecutive school years—first, second and third grade. The hearing officer ruled that the school district offered the student a FAPE for first grade, but not second or third grade. The hearing officer also ordered the school district to provide compensatory education services for the FAPE denial in second grade and full tuition reimbursement for the unilateral private school placement for third grade. *Id.* at 860-1. The district court affirmed, but reduced some of the compensatory services for second grade. The court also awarded $139,629.34 in attorneys' fees. *Id.* at 861.

On appeal, the Third Circuit found no error in the district court's conclusion that the student needed one-on-one support while in the general education classroom in order to receive a FAPE in the second grade. The court observed:

> [F.C.'s] placement in a general education classroom may well have been appropriate, but the School District should have provided [F.C.] with the supplementary aids and services he needed to be successful in that environment.

Id. at 862 (internal quotations omitted).

For third grade, the school district had recommended that the student receive a one-on-one paraprofessional while in general education classes, but stated the anticipated duration would be until November, 2012, five months earlier than every other support. *Id.* The school district argued that the anticipated duration was not actual—the time could have been extended. Therefore, the parents were not justified in moving their son to the private school.

The Third Circuit responded that the adequacy of the individualized education program (IEP) must be determined at the time it is offered, not at some later date. Because one-on-one support was critical for F.C. to be successful, the parents were justified in rejecting his IEP and placing him in the private school. *Id.*

The school district also objected to the tuition award for the full school year. Since it amended the IEP in April, it argued the IEP was appropriate going forward and, therefore, the tuition reimbursement should have been reduced for the final three months of school. The Third Circuit agreed with the district court, however, that transitioning F.C. in mid-April would have been harsh, given his difficulties with transitions. *Id.* at 863.

Next, the school district argued that the private school was not appropriate for the student. The Third Circuit found no error in the hearing officer's and district court's conclusions that the student derived "meaningful benefit" from the school because he received instruction and remediation in his areas of need in a program specializing in students with his type of disability. It provided a low student-to-teacher ratio, which was critical to his success, and provided the "highly structured nurturing environment" he needed. *Id.* at 863-4. The court reached this conclusion even though he progressed in some areas, but regressed slightly in others. The court noted F.C. was highly engaged at the program and some of his difficulties could have been due to a change in medication. *Id.* at fn. 14.

Finally, the Third Circuit affirmed the full amount of attorneys' fees awarded by the district court, rejecting the school district's argument that it should be reduced because of the parents' "partial success." The court agreed that fees may be reduced based on partial success.

> But when a party's claims "involve a common core of facts or [are] based on related legal theories," and counsel's time was "devoted generally to the litigation as a whole," the "district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation."

Id. at 864 (quotations in original). In this case, the claims arose from the same common core of facts and the parents succeeded on two significant issues. *Id.*

Second Circuit Holds Failure to Discuss Bullying at IEP Meeting Violates Individuals with Disabilities Education Act

In *T.K. v. New York City Dept. of Educ.*, 810 F.3d 869 (2d Cir. 2016), student L.K. had been subjected to severe bullying by students. The school district refused to discuss this at meetings with school administrators or at L.K.'s Individual Education Program (IEP) meetings, so her

parents placed L.K. in a private school. The Second Circuit affirmed a district court decision awarding parents tuition reimbursement, concluding that the district's refusal violated the Individuals with Disabilities Education Act (IDEA) requirement that students be provided with a free appropriate public education (FAPE). It also found that the private placement was appropriate and that equities favored reimbursement. *Id.* at 872.

The Second Circuit concluded that the school district's refusal to discuss at the IEP meetings concerns regarding L.K. being bullied violated her right to a FAPE because it significantly impeded her parents' procedural right to participate in developing the IEP. *Id.* at 876. The court noted that the record supported the parents' concerns that the bullying would impede her educational progress because: (1) school staff reported that the bullying negatively affected her ability to concentrate, stay on task and complete assignments; (2) undisputed evidence established that she dreaded going to school and was frequently tardy; (3) her father testified "she came home crying on a near daily basis;" (4) school staff reported she was "constantly teased, excluded from groups, and subjected to a hostile environment;" and (5) a doctor "testified that her classroom behavior and demeanor had regressed." *Id.* In sum:

> Here, Plaintiffs were reasonably concerned that bullying severely restricted L.K.'s educational opportunities, and that concern powerfully informed their decisions about her education. By refusing to discuss that bullying during the development of the IEP, the Department significantly impeded Plaintiffs' ability to assess the adequacy of the IEP and denied L.K. a FAPE.

Id. at 877.

The Second Circuit also found that the private school selected by the parents was appropriate. To be appropriate, a private school does not need to comply with the IDEA definition of FAPE. *Id*. at 878. "L.K. made progress 'across the board' there, both academically and behaviorally." *Id.* That L.K. did not receive adequate physical therapy, occupational therapy, speech therapy or counseling services did not render the program inappropriate. *Id.* "Parents need not show that a private placement furnishes every special service necessary to maximize their child's potential." *Id.* (internal quotations and citation omitted).

Finally, the court determined that equities favored reimbursement. "Plaintiffs consistently made good-faith efforts to resolve L.K.'s bullying problem at her public school and generally cooperated with the" school district, and were fully committed to a public education for her. *Id.* Although they put down a deposit at the school prior to the IEP meeting, the school "required Plaintiffs to put down a deposit long before that meeting, and waiting would have imperiled their ability to secure a spot for L.K in the event that their concerns about bullying remained unaddressed." *Id*. at 879. Finally, to the extent there was an adversarial relationship, the school officials bear shared responsibility "by ignoring or rebuffing the parents' repeated attempts to raise their concerns" with school staff. *Id.* (internal quotation omitted).

Ninth Circuit Allows Sub-Class of Students Seeking to Maintain Separate School Placements to Intervene in Class Action against Los Angeles Unified School District

In *Smith v. Los Angeles Unified School District*, 830 F.3d 843, 2016 WL 4011195 (9th Cir. 2016), a sub-class of students with "moderate to severe" disabilities sought to intervene in a long-standing class action against the school district, the *Chanda Smith* litigation, brought by Disability Rights California. The sub-class sought to challenge a settlement requiring students with severe disabilities to be integrated into the school district's general education schools because they "want their children to be schooled separately." The Ninth Circuit reversed a district court decision denying the sub-class' motion to intervene and ordered that their motion be granted. *Id.* at *2.

The underlying issue in the case was the school district's ongoing failure to meet targets to increase the percentage of students with disabilities who were being educated in more integrated settings. As a result, a new settlement agreement, Renegotiated Outcome 7, was reached by the parties which would result in a significant reduction in the number of segregated special day schools in the district. At the time of the motion to intervene, 8 of the 18 segregated programs had closed to enrollment of students under 18 and a significant number of students were either moved into general education programs or were required to be transported to a general education school for at least 12% of the school day. *Id.* at *5.

The court noted that the district's notice of the changes reflected in this agreement to affected parents varied significantly. "Many parents, particularly those for whom English is a second language, were incorrectly led to believe that the services and curriculum offered their children would remain the same despite the transfer to a new school." *Id.* at *7. Also, many parents did not fully realize the effects of the changes until their children began coming home from school with bruises and other injuries at the start of the 2013 school year while in general education schools. "Parents also discovered in fall 2013 that the general education campuses to which their children (and over 500 other moderately to severely disabled children) were being transferred had not been adapted, through tangible construction alterations, to provide a safe and effective learning environment." *Id.*

At meetings with school district officials in August 2013, the independent monitor in the case and class counsel, the intervenors determined that neither the district nor class counsel "represented their interests or believed that special education centers should be part of the continuum of special education opportunities" available in the district." *Id.* at *8. Accordingly, two groups sought to intervene in October 2013, within seventy-one and seventy-nine days of reaching this conclusion. *Id.* The district court denied the motion as untimely, or, alternatively, as unnecessary to protect their interests. *Id.* The Ninth Circuit reversed.

First, the Ninth Circuit held that the district court "abused its discretion in finding Appellants' motions untimely under the totality of the circumstances of this case." *Id.* at *9.

> Timeliness is determined by the totality of the circumstances facing would-be intervenors, with a focus on three primary factors: "(1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay."

Id. (quoting *United States v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004)).

Although the motion to intervene was filed twenty years after the case was commenced and seventeen years after the first Consent Decree in the case, the Ninth Circuit reasoned that the renegotiated settlement in 2012 constituted a change in circumstances and "marked a 'new stage' in the *Chanda Smith* litigation." *Smith* at *10. The court noted that since that time, students were "transferred *en masse* to general education campuses, over parental objections" and most were "now required to spend an average of 12 percent of their instructional day in general education classes" even though their Individualized Education Programs (IEP) "previously recommended full-time placement in a special education center." *Id.* The court then observed that the "Appellants moved to intervene as soon as reasonably practicable following such change" in circumstances. *Id.* at *11.

The Ninth Circuit next determined that, when using the proper standard, intervention would not prejudice the existing parties. The relevant inquiry is prejudice "which flows from a prospective intervenor's failure to intervene after he knew, or reasonably should have known, that his interests were not being adequately represented—and not from the fact that including another party in the case might make resolution more" difficult. *Id.* at *12 (citations omitted). Further, in this case "Appellants were consistently uniformed or misinformed as to the existence and true effects" of the renegotiated agreement. *Id.* at *13. Here, neither the district court nor the district "has pointed to any evidence whatsoever of additional costs or other prejudice suffered between August 2013 and October 2013." *Id.* at *14.

Finally, the Ninth Circuit also found that the reasons for, and length of, the intervenors' delay weigh in favor of intervention. "Appellants moved to intervene approximately one year after the change in circumstances prompting their motion but, as discussed below, only weeks after definitively learning that their interests were not adequately represented by the existing parties." *Id.*

Accordingly, Appellants established the first element, timeliness, for intervention as a matter of right. *Id.* at *16. They also established the next element, a protectable interest in the *Chandra Smith* litigation, as the district has not contested the district court's finding in Appellants' favor on this element. *Id.*

Appellants must also "show that they are so situated that the disposition of the action without Appellants may as a practical matter impair or impede their ability to safeguard their protectable interest." *Id.* Here, the district court erred by determined that denying intervention would not impair Appellants protected interests given the availability of individual due process hearings. The Ninth Circuit concluded this was an error. *Id.* The Ninth Circuit reasoned:

> Not only are individual administrative challenges a comparatively inefficient and ineffective means of achieving system-wide relief, but the administrative proceedings permit Appellants to challenge only the *effects* of Renegotiated Outcome 7 on individual students—not the legality of Renegotiated Outcome 7 itself.

Id. *17 (emphasis in original).

Finally, the Ninth Circuit had little difficulty finding that the Appellants' interests were not being adequately represented by the parties to the action:

> The current parties' interest in transferring students and resources from special education centers to general education campuses is diametrically opposed to Appellants' interest in retaining the system that was in place prior to Renegotiated Outcome 7.

Id.

Sixth Circuit Affirms Holding on FAPE Failure in Transition Case and Remands on Fee Award

In *Gibson v. Forest Hills Local School District,* 655 Fed.Aappx. 423, 2016 WL 3771843 (6th Cir. 2016) (unpublished), the Sixth Circuit reviewed a district court ruling that the Forest Hills Local School District ("Forest Hills") violated the IDEA's FAPE requirements when it failed to adequately plan for a student's post-secondary future. The district court ordered injunctive relief to address a violation of FAPE and awarded the student $327,641.00 in attorney's fees. The Sixth Circuit upheld the FAPE violation, vacated the district court's fee awards, and remanded the case for further proceedings on the matter of fees. *Id.* at *1. The student was represented by the Ohio P&A. NDRN* joined by the Tennessee and Michigan P&As, COPAA and Autism Speaks filed an amicus in support of the plaintiffs. The Amicus brief was authored by Neil N. Vakaria of Jones Day.

When the student Chloe was in middle school, a disagreement began between the school district and her parents about her transition plan. Forest Hills sought to place Chloe in a segregated classroom which focused on improving basic living skills. Her parents wanted Chloe to enroll in a program designed for competitive employment. *Id. at *3.*

The family filed for due process regarding Chloe's program, which had a mixed result. The school district chose not to appeal the hearing decision, and the family appealed. At the second level hearing review, the appeal officer rejected all of the family's claims on appeal, but did not reverse the hearing officer's compensatory education award, stating that the school district had forfeited its claim by failing to appeal the hearing decision. *Id. at *4.*

The family then filed in federal court seeking attorney fees as a "prevailing party." In turn, the school district filed a separate action, asserting that the review officer erred when it upheld parts of the hearing officer's ruling. The family motioned to dismiss the school district's complaint because the district had failed to exhaust administrative remedies as required by the

IDEA. The district court held that the school district violated the FAPE requirement when it failed to comply with three procedures related to transition planning. Both parties then appealed to the Sixth Circuit. *Id.* at *4.

The Sixth Circuit held that Forest Hills' had not exhausted its IDEA administrative remedies because its decision to forego an appeal of the hearing officer's decision meant that it failed to file the appeal notice which is a required part of that process. The appeal notice provides necessary information for the court and parties. *Id.* at *6.

The Sixth Circuit also agreed with the district court that the school district failed to invite Chloe to transition meetings; to take other meaningful steps to insure her interests were considered, and failed to provide her with measurable post-secondary goals (based on age appropriate assessments). *Id.* at *12. However, the court stopped short of finding that all three procedural violations resulted in a substantive FAPE violation. The court held that Chloe was unlikely to have attended the IEP meetings, under the contentious circumstances in which they were held, so that particular procedural violation could not be considered in the FAPE analysis. The other two however, resulted in a substantive violation of FAPE. *Id.* at *13.

The Court then turned to the district's court's "across the board" reduction of the student's fee award. While it agreed with the reduction in general, it held that the district court did not clarify which factors it had actually considered and left somewhat unclear why it chose a 62.5% reduction instead of some other amount. For that reason, the court chose to vacate the district court's fee award and remand for further proceedings specific to that issue. *Id.* at *16.

Ninth Circuit Denies Tuition Reimbursement in IDEA FAPE Placement Case

In *Baquerizo v. Garden Grove Unif. Sch. Dist.,* 826 F.3d 1179 (2016), the Ninth Circuit upheld a district court ruling that the school district's placement offer in a small classroom, rather than mainstream classroom, would provide a free appropriate public education (FAPE).

Carlos Baquerizo's guardian sued for the cost of his private education during the 2009–2010 and 2011–2012 school years claiming that the district failed to comply with the procedural requirements of the IDEA and therefore failed to provide a FAPE in the least restrictive environment (LRE) for Carlos. The administrative law judge (ALJ) denied reimbursement, the district court affirmed, and the Ninth Circuit affirmed. *Baquerizo* at *1.

In the summer of 2007 Carlos was withdrawn from public school by the guardian and enrolled in full-time instruction at a private school (PLRC). The parties litigated the issue of whether it was required to reimburse the guardian for Carlos's private instruction with regard to every school year after 2007. *Id.* at 1182.

A settlement was reached in May 2009 to resolve a due process hearing request from the school district filed on February 12, 2009, alleging that it had "made numerous attempts to

request dates and times convenient for the guardian to complete the assessments" pursuant to an assessment plan created in November 2007. *Id.* Yet, the dispute continued.

The June 2010 IEP, offered Carlos a placement at Buena Park Speech Language Development Center (Buena Park). Like the June 2009 IEP offer, Carlos would not have been placed in a general education class with typical peers at Buena Park. Instead, the IEP would have placed him in a small group with other students with special education needs. In December 2010, the district filed a request for a due process hearing to establish the appropriateness of this placement. *Id.* at 1183.

The district again offered Carlos a placement at Buena Park in the June 2011 IEP and his guardian refused consent to the IEP. In October 2011, the district filed a due process hearing request seeking a declaration that this IEP was appropriate. The ALJ reviewed both the June 2009 and the June 2011 IEPs. The issues before the ALJ were whether the school district committed procedural violations by failing to conduct appropriate assessments of Carlos's needs, whether it offered a FAPE in the IEPs, and if not, whether the guardian should be reimbursed for Carlos's private educational expenses. *Id.*

The ALJ concluded that the guardian failed to show a denial of a FAPE in either the June 2009 IEP or June 2011 IEP. The district court affirmed, after which the guardian appealed to the Ninth Circuit. *Id.* at 1184.

In the Ninth Circuit, the guardian argued that the district violated the IDEA when it failed to conduct the Independent Educational Evaluations (IEE) she requested in the comments to the June 2009 IEP. The Ninth Circuit disagreed, finding that the IEEs, while not technically foreclosed by the language of the Settlement Agreement, were covered by the substance of the Settlement Agreement. *Id.* at 1186.

Second, the guardian provided no case law indicating that she was prevented from "participating" in the IEP process if the school district first prepared an offer to be discussed at the IEP meeting, instead of conducting a "free-wheeling discussion and then creating an offer. It is improper for the district to prepare an IEP without parental input, with a preexisting, predetermined program and a 'take it or leave it' position, but that did not occur in this case. *Id.*

The Ninth Circuit agreed with the ALJ and the district court that any procedural violation of the IDEA on the part of district was excused because any such violations were directly caused by the guardian. Furthermore, whether a procedural violation occurred is only half of the inquiry. The court could only reverse the decision of the ALJ if a procedural violation is sufficient to support a finding that the child in question was denied a FAPE. As such, the June 2009 IEP issues did not deny Carlos a FAPE. *Id.* at 1187.

The Court agreed that it was appropriate to place Carlos in a small-group setting for a transitional period. *Id.* at 1188. Because the public placement offer in the June 2009 IEP did not

violate the IDEA, it was proper for the ALJ and the district court to deny reimbursement. *Id.* at 1189.

With regard to the June 2011 IEP, the guardian asserted two arguments. First, that the district failed to assess Carlos for anxiety, and that no baselines were determined for Carlos's speech and language goals. *Id.* at 1188. By the guardian's own admission, however, an assessment of Carlos's anxiety would not have significantly changed the educational plan in the IEP, because his anxiety was being effectively managed by medication and breathing exercises. *Id.* Second, the guardian argued that the district did not have enough specific information to create a baseline for Carlos in order to build an appropriate speech and language goal. The ALJ noted that "a goal generally requires a baseline," but in this case, Carlos was assessed by a speech teacher in his one-on-one setting. Both the school district and the teacher could not gather the specific data because they needed to observe Carlos's conduct while engaged with peers. As the student was kept out of a classroom environment for approximately four years, the school district created an IEP plan that was as concrete as possible with the available data. *Id.*

The court concluded that the Buena Park placement offer as supported by the district staff's testimony about his needs was a FAPE in the LRE for Carlos, despite the fact that he would not have been placed in a general education setting with typical peers. The proposed compromise represented a reasonable transition to a larger classroom. *Id.* As the district did not violate the IDEA in either the June 2009 IEP or June 2011 IEP, the judgment of the district court was affirmed. *Id.* at 1189.

State Court Judge Orders Connecticut to Revise Its Special Education Funding Scheme

In *Connecticut Coalition for Justice in Educ., Inc. v. Rell, et al.*, No. X07HHDCV145037565S, 2016 WL 4922730 (Conn. Super. Ct. Sept. 7, 2016) (unpublished), the plaintiffs challenged the State of Connecticut's school funding formula, alleging that it violated the state's Constitution. The court partially agreed with the plaintiffs and ordered the state to develop a series of revised policies within 180 days from the date of the decision. *Id.* at 34. The court also found that the state's funding of special education warranted "constitutional concern." Parties on both sides have appealed. (The Connecticut P&A has requested that NDRN submit an amicus brief related to the concerns raised regarding special education funding.*)

Specifically, the court found that the "state's program of special education funding is irrational." *Id.* at *27. In reaching this conclusion, the court specifically found two problems "serious enough to warrant constitutional concern:"

> First is the problem of spending education money on those in special education who cannot receive any form of elementary or secondary education. Second is the evidence that shows that getting picked for special education in this state is mostly arbitrary and

> depends not on rational criteria but on where children live and what pressures the system faces in their name.

Id. at *28.

Regarding the first point, the court took issue with the First Circuit's decision in *Timothy W. v. Rochester, New Hampshire School District*, 875 F.2d 954 (1st Cir. 1989), which held that all students, regardless of the severity of their disability, were entitled to a free appropriate public education (FAPE) under the Individuals with Disabilities Education Act (IDEA), responding:

> The *Timothy W.* case has contributed to this and other states telling school districts to transport, care for and provide extensive services for multiply-disabled children regardless whether the state can do anything that *would look to most people like education*. It is a phenomenon that costs immense sums, but conventional education thinking seems resigned to it.

Rell at *27 (emphasis added).

The court opined that school districts are spending "immense sums" on students who "are too severely disabled to get any benefit from elementary or secondary education." *Id.* at *28. Yet, nowhere in the court's analysis does it recognize that the definition of "education" under the IDEA does go well beyond what "would look like education to most people." The court never referred to the IDEA requirement that school districts must also meet the functional needs of students with disabilities. 34 C.F.R. § 300.320(a)(2)(i)(B).

The court framed the issue to be "about whether schools can decide in an education plan for a covered child that the child has a minimal or no chance for education, and therefore the school should not make expensive, extensive, and ultimately pro-forma efforts." *Rell* at *29. The court went on to stress that "neither federal law nor educational logic says that schools have to spend *fruitlessly* on some at the expense of others." *Id.*at *30 (emphasis added). Accordingly, "the first step is for schools to identify and focus their efforts on those disabled children who can profit from some form of elementary and secondary education." *Id.*

Nevertheless, the court concluded, "Doubtless the state can choose to continue to serve multiply-disabled children in any way it sees fit. It may simply have to rethink forcing local school districts to pay for it with local school money." *Id.*

Regarding the second issue that the identification of students for special education is mostly arbitrary, the court pointed to an expert's report that found "disability identification rates vary so widely between districts" that the expert could not discern a pattern. *Id.* at *31. The expert stated his opinion that "some districts were ignoring problems, some districts were over-identifying problems, and some districts refused to use certain labels." *Id.* The expert further believed that "the state standards allow for serious over-inclusion or under-inclusion in special education." *Id.* Moreover, the court noted that "there isn't any reasonable monitoring of over-identification or under-identification either." *Id.* at *32. Adding, "IDEA compliance is the focus

of a lot of work and some regular samples across the state, but its focus has been on ensuring paperwork compliance and monitoring compliance with the individual education plans that get created without examining their appropriateness." *Id.*

The court ordered the state to "submit new standards concerning special education which rationally, substantially, and verifiably link special education spending with elementary and secondary education." *Id.* at *32. Specifically, the court stated, "The state must end arbitrary spending on special education that has delivered too little help to some and educationally useless services to others; it must set sensible rules for schools to follow in identifying and helping disabled children. *Id.* at *34.

Fifth Circuit Denies Tuition Reimbursement Due to Parents Failure to Cooperate with School District

In *Rockwall Indep. Sch. Dist. v. M.C.*, 816 F.3d 329 (5th Cir. 2016), the parents of a student with a disability, M.C., unilaterally placed her at a private school and sought tuition reimbursement under the Individuals with Disabilities Education Act (IDEA). The Fifth Circuit affirmed a decision by the district court to deny reimbursement based on a finding that the "parents acted unreasonably in unilaterally terminating the process of developing M.C.'s Individualized Education Program ("IEP"). *Id.* at 331.

Due to significant difficulties in school, the parents enrolled M.C. in a residential treatment program. Following her discharge, they enrolled her in a private school and sought reimbursement through a due process hearing. The parents and school district settled that hearing and the district agreed to fund M.C. at the school for the 2010-11 school year and the fall semester of the 2011-12 school year. If the parents planned to re-enroll M.C in the school district they were to notify the district. *Id.* at 332.

The parents notified the district that they were intending to enroll M.C. in the district for the 2012 spring semester. An IEP meeting was begun and the parents and district discussed ways to transition M.C. back to the school district. Near the end of the meeting the parents asked the district to consider retaining M.C. at the private school for the spring semester and try bringing her into the public school for a limited number of classes or activities. *Id.* at 333-35. The meeting concluded without an IEP being developed but with an agreement to reconvene to continue discussions. *Id.* at 336.

Instead of meeting, however, the parents informed the school district that they did not believe the school could provide a free appropriate public education (FAPE) to M.C. and they had no choice but to continue M.C. at the private school. *Id.* at 337. In response to the school district's efforts to reconvene a meeting, the parents stated there was no point in having a follow-up meeting if the district refused the parents' proposal to allow M.C. to remain at the private school. *Id.*

The parents then filed a due process complaint seeking reimbursement for the private school tuition. The impartial hearing officer (IHO) ruled in the parents' favor, finding that the school district's recommendation did not provide a FAPE to M.C. and that the parents met their burden to show they were entitled to reimbursement. *Id.* The school district appealed to district court where the IHO ruling was overturned on a finding that the school district had offered FAPE to M.C. *Id.* at 337-38.

On appeal, the school district argued that the record supported the district court's conclusion that it had offered a FAPE to M.C. In the alternative, they argued that the parents were not entitled to reimbursement regardless of whether they offered a FAPE because the "the parents acted 'unreasonably' during the IEP-development process." The Fifth Circuit agreed. *Id.* at 339.

The court began by noting that the IDEA permits a denial of tuition reimbursement upon a judicial finding that the parents acted unreasonably. *Id.* at 340. Here, the record supports such a finding:

> In sum, the record indisputably reveals that the parents adopted an "all-or-nothing" approach to the development of M.C.'s IEP and that they thereby adamantly refused to consider any of [the district's] alternative proposals that did not involve M.C. remaining at the [private school] for the spring 2012 semester.

Id. at 341. However well-intentioned the parents' actions may have been, those actions "constituted an unreasonable approach to the IEP-development process, rather than the collaborative or interactive approach envisioned by the IDEA" and they are not entitled to tuition reimbursement. *Id.*

Ninth Circuit Holds School District's Refusal to Find Student Eligible and to Disclose Records to Parent Violates the IDEA

In *L.J. v. Pittsburg Unif. Sch. Dist.*, 835 F.3d 1168, (9th Cir. 2016), the district court determined that a student was not entitled to special education eligibility due to his satisfactory performance in general education classes. The court discounted his suicide attempts as not bearing on the need for educational services because they took place outside of school. School records show that in the second through fourth grades, the district had provided L.J. with special education services including counseling, one-on-one assistance, and instructional accommodation, resulting in improved performance. The school district consistently refused, however, to provide L.J. with an IEP that would ensure such services in the future. The Ninth Circuit reversed and remanded the decision of the district court. *L.J. v. Pittsburg Unif. Sch. Dist.* at 1170

L.J.'s difficulties began in second grade when he demonstrated inappropriate behaviors at school, including anger, lack of self-control, and failure to follow rules. After being verbally disciplined by his teacher for bullying other students, L.J. told her that he wanted to die and that life was too hard. Diagnosed with ADHD, ODD, and Bipolar Disorder over the course of that

school year the behavior specialist revised the behavior support plan (BSP) multiple times, but L.J. continued to act inappropriately.

As a result of the failed BSP, the school district proposed moving L.J. to a segregated trailer at a different school, with no special education services, with six other African-American boys with extreme behavior problems. His mother appealed this placement and he was placed elsewhere. After several psychiatric hospitalizations, L.J. was found by the district to be ineligible for special education. His mother filed for due process and the case settled with an agreement for an assessment. *Id.* at 1172.

The IEP team again concluded that he was IDEA ineligible, although he had been receiving special education services. The district also refused his mother's request for school records and additional hospitalizations and suspensions occurred. By the spring of his Fifth Grade year, a hearing officer again found him ineligible for special education because he could succeed academically when he was able to attend school. *Id.* at 1173.

For the Ninth Circuit, the critical issue in this appeal was whether L.J. demonstrated a "need for special education services." The Circuit employs what is termed the "snapshot" rule to judge the appropriateness of the determination on the basis of the information reasonably available to the parties at the time of the IEP meeting. The district court had concluded that L.J. was not eligible for special education because he was academically performing satisfactorily without receiving special education services and on the basis of the general education curriculum. The Ninth Circuit found this was clear error because L.J. was receiving special services, including mental health counseling and assistance from a one-on-one para-educator. The district court's analysis was flawed because many of the services the district court viewed as general education services were in fact special education services tailored to L.J.'s situation. For example, general education instruction does not provide for one-on-one direction, specially designed mental health services or extensive clinical interventions. *Id.* at 1177.

Another issue was whether his disabilities interfered with his education and necessitated special services. The Ninth Circuit found it hard to imagine how an emotional disturbance so severe that it resulted in repeated suicide attempts would not interfere with school performance. That he attempted suicide outside the school environment was immaterial. His emotional disturbance adversely affected his attendance and his teachers all reported that L.J.'s classroom absences, due to psychiatric hospitalizations, did hurt his academic performance. *Id.* at 1178.

With regard to L.J.'s records, the Ninth Circuit held that under the IDEA, parents have the right to informed consent, to be fully informed of all information relevant to the activity for which consent is sought, and the right to examine all pertinent education records relating to their child. *Id*. at 1179. Moreover, parents have the right to invite to attend IEP meetings individuals with knowledge or special expertise regarding their child. L.J.'s mother had the right to have L.J.'s mental health providers at both the May and October IEP meetings, but without

knowledge of the district's records, she waived the attendance of his mental health clinicians at the IEP meetings. The Court stated, "At the very least, she should have received complete copies of the records so that she could provide informed consent regarding the exclusion of his mental health providers from the IEP team." *Id.* at 1179.

The School District also failed to conduct a health assessment for the purpose of determining how L.J.'s health, and particularly his medications, affected his performance. The district court held that this error did not infringe on L.J.'s mother's ability to participate in the IEP process because L.J.'s medications were not administered at school. Again, the Ninth Circuit disagreed, stating it failed to see that the need for a health assessment should depend on where medications are administered. The Ninth Circuit reversed and remanded to the School District for the preparation of an IEP. *Id.* at 1180.

Fourth Circuit Holds School District's Response to Student-on-Student Bullying Not Deliberately Indifferent

In *S.B. ex rel. A.L. v. Bd. of Educ. of Harford County*, 819 F.3d 69 (4th Cir. 2016), the family sued the school district under Section 504 of the Rehabilitation Act of 1973 (Section 504) alleging it discriminated against S.B., a student with a disability, based on student-on-student harassment. They also claimed the school district violated Section 504 by retaliating against S.B.'s stepfather for advocating on S.B.'s behalf. The district court granted summary judgment to the district on both claims and the Fourth Circuit affirmed. *Id.* at 72. The district court found the action to be frivolous. *Id.* at 74.

The Fourth Circuit began its analysis by applying the Supreme Court's holding in *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999), a Title IX student-on-student sexual harassment case, because of the similarity between Title IX and Section 504. *S.B.* at 75. In *Davis*, the Supreme Court held that for a school district to be liable in damages based on student-on-student sexual harassment it would have to be deliberately indifferent to the known acts of harassment. *Davis* at 642. The Fourth Circuit, therefore, held that for school district's to be liable for student-on-student harassment under Section 504, there must also be a showing of deliberate indifference. *S.B.* at 75.

The deliberate indifference standard under Section 504 requires a showing that the student has a disability, was harassed by fellow students based on that disability, that the harassment was sufficiently "severe, pervasive, and objectively offensive that it effectively deprived" the student of educational benefit at school, that the school knew about the harassment, and that it was deliberately indifferent. *Id.* at 76 (internal quotations and citation omitted).

In this case, it was not clear from the record that S.B. was subjected to bullying based on his disability. Moreover, there was no showing that the district was deliberately indifferent. The school investigated every incident of alleged harassment, disciplined the offenders in nearly every case, and finally assigned a paraprofessional to the student. *Id.* at 76-77. The court was careful to note that a complete failure to act or "any half-hearted investigation or remedial

action" would not be sufficient to shield a school from liability. *Id.* at 77. For example, where a school has knowledge that a "series of verbal reprimands" is not reducing student-on-student harassment, the failure to do more may amount to deliberate indifference. *Id.* (quotations in original). Nevertheless, the court continued, "school administrators are entitled to substantial deference when they calibrate a disciplinary response to student-on-student bullying or harassment." *Id.* The court concluded, "In this case, no reasonable juror could find that the school was less than fully engaged with S.B.'s problems, using escalating disciplinary sanctions to punish and deter student-on-student harassment and taking other protective measures on S.B.'s behalf." *Id.*

The Fourth Circuit also affirmed the district court's dismissal of the retaliation claim. It found that the district's decision not to allow S.B.'s stepfather to teach summer school was an "adverse action." However, the district put forth "a legitimate, plausible non-retaliatory reason for its decision." *Id.* at 78. Therefore, there was no casual connection between its adverse action and the stepfather's protected activity. *Id.*

Ninth Circuit Holds Charter School's Refusal to Admit Student with a Disability was Not Discriminatory

In *J.C. ex. rel. W.P. v. Cambrian Sch. Dist.*, 648 Fed.Appx. 652, 653 (9th Cir. 2016) (unpublished), the Ninth Circuit affirmed a district court's summary judgment dismissing a claim that a charter school wrongfully denied a student, J.C., admission based on his disability. The Ninth Circuit agreed with the district court that J.C. had not raised an issue of material fact on causation. Summarizing, the court reasoned under the Americans with Disabilities Act (ADA) J.C. must show that he was denied admission "by reason of his disability." *Id.* at 653. Under Section 504 of the Rehabilitation Act of 1973 (Section 504) he must show that he was denied admission "solely by reason of … his disability." *Id.* (quotation in original; citation omitted).

The charter school had a preference for "existing students," but students who had moved out of the district while they were attending the charter school were excluded from the definition of existing students. The court determined that the charter school's second grade class was at capacity for budget reasons. *Id.* Therefore, the decision "not to admit students on the waiting list, including J.C., was reasonable and not based on discrimination." *Id.* at 654. The court also noted that allegations of a strained relationship between the school and J.C.'s mother and "isolated negative interactions" between the school and the family were not enough to substantiate a finding of disability discrimination. *Id.*

The dissent concurred with the dismissal of the Section 504 claim, based on its "strict" causal standard, but dissented from the dismissal of the ADA claim. *Id.* The dissent began by noting that it is rarely proper to grant summary judgment where motive or intent is at issue. *Id*. The dissent found that J.C. had raised "a genuine issue of material fact as to whether the second-grade enrollment cap was motivated solely by legitimate budgetary concerns or at least in part by discriminatory animus." *Id.* J.C. was first on the waiting list; the school had reduced its

enrollment cap from 89 to 87 students; the school could have moved one of the third graders out of the second and third-grade combination class without adverse financial consequences. *Id.* Additionally, the school staff often responded to J.C.'s disability with frustration: J.C. had been excluded from a class trip to the library and one of the teacher's "forced J.C. and another disabled student to turn their desks around and face the back of the classroom." *Id.*

The dissent noted that any indication of discriminatory motive for a claim of intentional discrimination under the ADA "may suffice to raise a question that can only be resolved by a factfinder." *Id.* at 655 (internal quotations and citation omitted). Therefore, the dissent found that J.C. had "raised a genuine issue of material fact on the causation element of his ADA claim." *Id.*

DC Circuit Holds the Individuals with Disabilities Education Act (IDEA) Does Not Contain an Express Right of Action to Enforce a Favorable Hearing Decision

In *B.D. v. District of Columbia*, 817 F.3d 792 (D.C. Cir. 2016), the parents of a student with a disability, B.D., challenged the services offered to their son. An impartial hearing officer ruled in their favor and ordered compensatory education services. The parents then sued, seeking additional compensatory services, an order enforcing favorable portions of the decision, and an injunction directing the district to place B.D. in a therapeutic residential placement. The district court granted summary judgment to the school district, and the D.C. Circuit affirmed in part and reversed in part. *Id.* at 794.

On the issue of whether the IDEA contains an explicit private right of action, the court began by noting that two possible alternative theories to enforce the hearing officer's favorable decision -- the use of 42 U.S.C. § 1983 and an implied right of action under the IDEA -- were waived by the parents. *Id.* at 800. The court found the specific provision the parents relied upon, 20 U.S.C. § 1415(i)(2)(A), only authorizes suits by parties "aggrieved" by a decision of a hearing officer. So, this section does not provide for an enforcement cause of action where, by definition, the parents are not aggrieved. *Id.* at 801.

A concurrence noted another possible avenue to enforce a favorable impartial hearing decision based on a brief filed by the United States as Amicus Curiae. The parents could file a separate due process hearing seeking enforcement of the favorable decision and if that is not successful appeal it to court. *Id.* at 804.

Regarding the compensatory education claim, the D.C. Circuit found that the hearing officer's award did not meet the appropriate standard for calculating compensation:

> [A]n award of compensatory education "must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." … To fully compensate a student, the award must seek not only to undo the FAPE denial's affirmative harm, but also to compensate for lost progress that the student would have made.

Id. at 798 (citation omitted; quotation in original).

Accordingly, the Circuit Court remanded to the district court for either the court or the hearing officer to fashion an appropriate compensatory education award, stating:

> On remand, the ultimate goal will be not merely to restore B.D. to the position he was in prior to the FAPE denial in August 2011, nor even merely to put him where he would have been in March 2012, the end of the FAPE denial period at issue here. Rather, the … compensatory education award [must seek] to put B.D. in the educational position he would be in at the time of the new award had the District not denied him a FAPE from August 2011 to March 2012[.]

Id. at 799.

Finally, the court held as moot the parents' request for an injunction placing B.D. in an appropriate therapeutic residential program, noting that B.D. had been accepted into an appropriate therapeutic residential program that was capable of implementing his IEP. *Id.* at 803.

Ninth Circuit Determines "Stay Put" Placement for a Partially Implemented Two-Stage IEP

In *N.E. by and through C.E. and P.E. v. Seattle Sch. Dist.*, 842 F.3d 1093 (2016), the Ninth Circuit analyzed the "stay put" placement for a student with a two-stage IEP, involving two different placements, which was partially implemented and then placed in limbo over the summer break.

N.E. is an IDEA eligible student who had attended school in a general education classroom. After some behavioral issues, in May 2015, the Bellevue School District produced an IEP for him that encompassed two stages. The first stage would begin immediately and the second would begin at the start of the 2015–16 school year. Initially, N.E. would finish the final few weeks of the 2014–15 school year at a different school where he would spend most of the day in a one-on-two educational setting with a teacher and a para-educator, but with no other students. Then, beginning on September 1, 2015, N.E. would attend school in a self-contained class full time. *Id. at* *1095.

N.E.'s parents allowed him to finish the school year per the first stage of the IEP, but did not agree to the second stage. Over the summer, the family moved to Seattle. Just before the start of the 2015–16 school year, N.E.'s new Seattle School District proposed a class setting that was similar to the second stage of the May 2015 IEP. Plaintiffs (parents) objected, filed for due process, and sought a "stay-put" placement in a general education classroom. *Id*.

The due process hearing officer held that the self-contained class was N.E.'s stay-put placement, rather than the general class he had attended prior to the development of the new IEP. Plaintiffs appealed the due process decision and filed a motion with the district court seeking a temporary restraining order and a preliminary injunction, requiring the district to place N.E. in a general education class pending the outcome of the due process hearing. The

district court denied Plaintiffs' motion on the ground that they had not established a likelihood of success on the merits and the Plaintiffs appealed to the Ninth Circuit. *Id*.

The court of appeals reviews legal questions, such as the meaning of a statute, *de novo*. In order to rule on "stay put," the Ninth Circuit needed to determine N.E's "then current educational placement," referring to the educational setting in which he was actually enrolled at the time his parent requested a due process hearing. This case had at least two complications: (1) during summer break quite literally, there is no placement, and (2) when an IEP contains two stages, determining the "then-current educational placement" requires one to look either backward or forward. Although the statute refers to "educational placement," not to "IEP," the purpose of an IEP is to embody the services and educational placement or placements that are planned for the child. *Id*. at 1096.

N.E. argued that a multi-stage IEP should be viewed as divisible, containing several discrete "educational placements," and that any unrealized stage within such an IEP should be seen as an unimplemented "educational placement" that cannot serve as the stay-put placement. Thus, because stage two of the May 2015 IEP was never implemented, it cannot be considered the "then-current educational placement." In response, the school district argued that the May 2015 IEP, as a whole, was N.E.'s "then-current educational placement" and that no legal authority precludes a multi-stage IEP or an IEP that spans a summer break. *Id*.at 1097.

Reviewing these arguments, the Ninth Circuit agreed with the defendants that "a partially implemented, multi-stage IEP, as a whole, is a student's then-current educational placement. A multi-stage IEP *could* be structured as several distinct IEPs, but it need not be" …. By the time N.E.'s parents filed their due process challenge, the second stage of the May 2015 IEP had already been scheduled to start … the May 2015 IEP provided that stage two would begin on September 1, 2015, while N.E.'s parents did not request a due process hearing until September 9, 2015. *Id*.

The remaining question for the court was whether the fact that the hearing request occurred during the summer forces it to view stage one as the stay-put placement. The court rejected this reasoning for two reasons. First, the IEP had been implemented, and stage two was always the intended setting in which N.E. would begin the 2015–16 school year. Second, education is forward-looking. The status quo at the time of the hearing request was the anticipated entry into the self-contained program. As such, stage two of the May 2015 IEP was N.E.'s stay-put placement. *Id*.at 1098.

First Circuit Vacates Summary Judgment and Remands to Determine Whether Student has Reading Fluency Deficit and "Needs" Special Education

In *Doe v. Cape Elizabeth Sch. Dist.*, 832 F.3d 69 (2016), the First Circuit vacated the district court's finding of summary judgment in an IDEA eligibility case, and remanded the case to determine whether or not a student was eligible under the IDEA; specifically whether she had a "reading fluency deficit" and "needed" special education.

Appellants Mr. and Mrs. Doe (the Does) appealed the decision of the district court, which affirmed the hearing officer's determination that their child Jane was no longer IDEA eligible. The Does argued that the district court erred as a matter of law because first, it considered Jane's overall academic achievement, when her deficiency in reading fluency was sufficient by itself to support eligibility, and second, it did not make an independent judgment as to Jane's reading fluency deficit. Instead, it deferred to the hearing officer's factual findings, and summarily dismissed additional evidence that the Does submitted. *Id.* at *72.

The First Circuit agreed with the Does after a detailed analysis. It concluded that while Jane's overall academic performance could be relevant, the district court erred in relying on this fact without regard to how it reflects her reading fluency skills specifically. It found that the district court also failed to make an independent judgment as to the additional evidence submitted by the family, affording too much deference to the hearing officer's findings. The court went on to clarify that even if the district court found on remand that the student had a reading fluency deficit, she would not necessarily be eligible for special education unless she also "needed" special education. Grades and standardized test scores could be used to help make that determination. *Id.* at *73.

Jane began receiving special education services due to reading issues in second grade. In seventh grade, her IEP team decided to place her on "consult" status, as she was achieving well in school, so her progress would be monitored, but she would receive no special education services. Her parents were concerned that she might regress without specialized instruction. To address this concern, the IEP team agreed to administer monthly tests to monitor her fluency skills.

About a year later, Jane's IEP team decided that she no longer qualified under the IDEA as she was achieving adequately in all areas, including reading fluency, even without special education. Among the factors considered were her straight-A grades, her performance on generalized state standardized tests, and the results of tests administered specifically to measure her reading skills. *Id.* at *75.

In response, her parents obtained a third party evaluation, which found her reading rate to be very low. That evaluation was reviewed by the IEP team but did not change the eligibility decision. Her parents filed for due process to appeal that decision and submitted post-hearing "additional evidence:" in the form of an affidavit containing the results of more recent fluency test results. The district court noted that the reading fluency probes received "scant consideration" from the hearing officer, but largely adopted the hearing officer's findings regarding her performance. The district court found she did not have a learning disability, and thus was not eligible to receive special education. Her parents appealed. *Id.* at *75.

The First Circuit first held that, in the same manner as "no single assessment or measure could support a finding of a reading fluency deficit, no single assessment or measure may undermine a finding of a reading fluency deficit where other measures could support such a finding." *Id.* at

*80. It thereby concluded that the district court erred in relying on Jane's overall academic achievements without assessing the relevance of such achievements to her reading fluency skills and held that on remand, the district court should determine whether Jane's generalized academic measures might serve as fair proxies of her reading fluency ability. If "yes" it should then weigh all relevant factors and decide whether those components of Jane's academic performance that reflect her reading fluency skills could counteract the (relatively) negative results of specific reading fluency assessments. *Id.* at *81.

With regard to deference, the court reasoned that the duty of an "involved oversight" requires that the court make an independent judgment on the relevance and credibility of the measures in dispute. On remand, therefore, the district court should exercise independent judgment in assessing the relevance of two specific assessments in identifying a reading fluency deficit. The district court also was found to have failed to properly consider the additional evidence submitted by the Does so the court was instructed to include those in its remand analysis. *Id.* at *84.

Regarding the second prong of the eligibility analysis ("needs" special education), the Does argued that the inquiry should focus narrowly on whether Jane needs special education to improve her reading fluency deficit. The school district, by contrast, contended that the "need " inquiry should examine broadly whether Jane requires special education to benefit from the school curriculum. *Id.* at *85.

Finally, the Court held that if Jane has a learning disability, the district court must decide whether she has shown a need for special education. The court found that consideration of Jane's grades and standardized test results was not categorically barred under the "need" inquiry any more than it was categorically barred under the first prong inquiry. *Id.* at *85. If the court decided that Jane meets the federal eligibility standards but not the state standards, the district court would have to address the validity of MUSER's (Maine's) processing disorder requirement and "need" provision. *Id.* at *86.

First Circuit Vacates Summary Judgment in Student Audio Recording Case and Remands on ADA, Section 504, and First Amendment Claims

In *Pollack v. Reg'l Sch. Unit 75,* 660 Fed. Appx. 1, (1st Cir. 2016), the First Circuit vacated the portion of the district court's order granting summary judgment for the school district on the ADA, Section 504, and First Amendment claims relating to a student's right to wear a recording device at school, and remanded the case for determination of the merits of those claims. *Id.* at 2.

The parents of B.P., a seventeen-year-old student with disabilities, which affected his ability to understand and express language, began requesting that the school district allow him to wear an audio recording device to school after a concerning incident. The district denied these requests, citing its policy against the use of electronic devices and concerns about the potential effect on the educational environment. *Id.* at 2.

B.P. filed for due process twice related to this refusal. The first due process complaint alleged that the refusal to permit him to wear a recording device limited his parents' ability to obtain information about his school day and his education. The hearing office denied the claim, viewing it as limited to whether or not his parents were informed sufficiently to participate in his education. While the first hearing was under appeal, B.P's parent also filed a due process hearing request claiming that the failure to permit audio recording denied B.P. himself a FAPE. *Id.* at 3.

B.P. then filed suit in the district court, which granted summary judgment for the District on the ADA, Section 504, and First Amendment claims, as he had failed to exhaust the IDEA remedies as to his own substantive rights. The second hearing request, once denied, merged into the appeal. The parties then agreed that B.P. had properly exhausted. In their appeal to the First Circuit, his parents sought a determination on the merits of the ADA, Section 504, and First Amendment claims, arguing the First Circuit should vacate the summary judgment order, and remand to the district court for consideration on the merits of those claims. *Id.* at 3.

The First Circuit agreed. Rather than finding the case moot, it chose to vacate and remand, stating, "the Parents merely took the actions necessary to clear the procedural hurdle of exhaustion in accordance with the district court's order. The Parents have already undergone lengthy litigation in both administrative and federal forums to achieve resolution of their claims; the only bar remaining to a determination of the merits of these claims was this issue of exhaustion. Now that they have undoubtedly exhausted the process required by the IDEA, it would be inequitable to leave the summary judgment order standing and have these claims dismissed without ever reaching their merits." *Id.* at 3.

Supreme Court Holds Exhaustion Not Required Where Gravamen of Plaintiff's Case is Not the Provision of a Free Appropriate Public Education

In *Fry v. Napoleon Community Schools*, 137 S.Ct. 743, 2017 WL 685533 (Feb. 22, 2017), the Frys sought permission from the school district for a service animal, Wonder, to accompany E.F., a student with significant physical needs, to school. The school district refused, arguing that an individual aide could meet all of E.F.'s needs. *Id.* at *7. The Frys filed a complaint with the U.S. Department of Education Office for Civil Rights, alleging the district's refusal violated Title II of the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act (Section 504). OCR ruled in the family's favor, finding a violation of both statutes. *Id.* The school district then agreed to allow E.F to bring Wonder to school. However, the Frys were concerned the district might resent E.F., so they enrolled her in a different school district, which "enthusiastically received both E.F. and Wonder." *Id.*

The Frys filed suit for damages in federal district court under the ADA and Section 504. The district court dismissed the suit for failure to exhaust administrative remedies under the Individuals with Disabilities Education Act (IDEA). *Id.* at *7-8. At issue was the application of 20 U.S.C. §1415(*l*), which in relevant part reads:

> Nothing in [the IDEA] shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the [ADA], title V of the Rehabilitation Act [including §504], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under [the IDEA], the [IDEA's administrative procedures] shall be exhausted to the same extent as would be required had the action been brought under [the IDEA].

As quoted in *Fry* at *6.

A divided panel of the Sixth Circuit affirmed, holding that §1415(*l*) required exhaustion "whenever 'the genesis and the manifestations' of the complained-of harms were 'educational' in nature." *Id.* at *8. The Supreme Court reversed in a unanimous decision. *Id.* Justice Alito filed a concurring opinion in which Justice Thomas joined. *Id.* at *14. According to the Court:

> We first hold that to meet that statutory standard [of 1415(*l*)], a suit must seek relief for the denial of a FAPE, because that is the only "relief" the IDEA makes "available." We next conclude that in determining whether a suit indeed "seeks" relief for such a denial, a court should look to the substance, or gravamen, of the plaintiff's complaint.

Id. at *8.

Turning to the first point, the Court noted that the right to a FAPE was the principle purpose of the IDEA and that the role of an impartial hearing officer in the IDEA's administrative process was to enforce a child's right to a FAPE. Therefore:

> §1415(*l*)'s exhaustion rule hinges on whether a lawsuit seeks relief for the denial of a free appropriate public education. If a lawsuit charges such a denial, the plaintiff cannot escape §1415(*l*) merely by bringing her suit under a statute other than the IDEA …. But if, in a suit brought under a different statute, the remedy sought is not for the denial of a FAPE, then exhaustion of the IDEA's procedures is not required. After all, the plaintiff could not get any relief from those procedures: A hearing officer, as just explained, would have to send her away empty-handed. And that is true even when the suit arises directly from a school's treatment of a child with a disability—and so could be said to relate in some way to her education.

Id. at *10. In sum, a complainant seeking relief for "other harms, independent of any FAPE denial, is not subject to §1415(*l*)'s exhaustion rule because, once again, the only 'relief' the IDEA makes 'available' is relief for the denial of a FAPE." *Id.*

The Court then addressed the question of how a court could determine whether a plaintiff was seeking relief for a FAPE denial. Here the Court noted that the decisive question was the plaintiff's own claims. "In effect, §1415(*l*) treats the plaintiff as 'the master of the claim': She identifies its remedial basis—and is subject to exhaustion or not based on that choice." *Id.* However, the issue was not a "magic words" approach. The analysis does not rest on whether or not a plaintiff explicitly refers to FAPE or the IEP in the complaint. Instead, the statute

"requires exhaustion when the gravamen of the complaint seeks redress for a school's failure to provide a FAPE, even if not phrased or framed in precisely that way." *Id.*

In determining the gravamen of a plaintiff's compliant, the Court stressed that reviewing courts should consider the different purposes of the IDEA, the ADA and Section 504. The primary purpose of the ADA and Section 504 is to prohibit disability-based discrimination, both inside and outside of the schools for people of all ages, while the IDEA's "goal is to provide each child with *meaningful* access to education by offering individualized … services appropriate to her 'unique needs'." *Id.* (emphasis added; citations omitted). (The Court noted that the precise content of the FAPE standard was before it in *Endrew F. v. Douglas County School Dist. RE-1*, No. 15-827. *Id.* at fn. 5.) Although there is some overlap, "the statutory differences just discussed mean that a complaint brought under Title II and §504 might instead seek relief for simple discrimination, irrespective of the IDEA's FAPE obligation." *Id.*

The Court then offered two clues to help determine whether the gravamen of the complaint was a denial of FAPE or disability-based discrimination. (While the high court's discussion of IDEA's purpose was 8-0, it is at this point that Justice Alito's concurrence parted ways with the majority, *id.* at *15.). As the first clue, courts could ask a pair of hypothetical questions: could the plaintiff have brought essentially the same claim at a facility that was not a school, and could an adult at the school have brought the same grievance. If the answer to these questions is yes, and the complaint does not expressly raise a FAPE claim, then the complaint is "unlikely to be about that subject." But, if the answer is no, "the complaint probably does concern a FAPE, even if it does not expressly say so." *Id.* at *12.

A second clue that the gravamen of the case is a FAPE denial is to consider the history of the proceedings in the case—did the plaintiff previously invoke the IDEA's formal dispute resolution procedures.

> A plaintiff's initial choice to pursue that process may suggest that she is indeed seeking relief for the denial of a FAPE—with the shift to judicial proceedings prior to full exhaustion reflecting only strategic calculations about how to maximize the prospects of such a remedy. Whether that is so depends on the facts; a court may conclude, for example, that the move to a courtroom came from a late-acquired awareness that the school had fulfilled its FAPE obligation and that the grievance involves something else entirely. But prior pursuit of the IDEA's administrative remedies will often provide strong evidence that the substance of a plaintiff's claim concerns the denial of a FAPE, even if the complaint never explicitly uses that term.

Id. at *13. Because the Sixth Circuit never undertook this analysis, the Court remanded the case for it to consider this question. The Court noted there was "nothing in the nature of the Fry's suit that suggests any implicit focus on the adequacy of E.F.'s education." Nevertheless, there is the possibility that the history of the proceedings in the case could suggest something different. *Id.* at *14.

Finally, the Court did not address another issue raised by the plaintiffs in the case—that they were seeking damages, a remedy not available under the IDEA. It noted in a footnote:

> In reaching these conclusions, we leave for another day a further question about the meaning of §1415(*l*): Is exhaustion required when the plaintiff complains of the denial of a FAPE, but the specific remedy she requests – here, money damages for emotional distress – is not one that an IDEA hearing officer may award? The Frys, along with the Solicitor General, say the answer is no. See Reply Brief 2-3; Brief for United States as *Amicus Curiae* 16. But resolution of that question might not be needed in this case because the Frys also say that their complaint is not about the denial of a FAPE, see Reply Brief 17– and, as later explained, we must remand that distinct issue to the Sixth Circuit, see *infra*, at 18-20. Only if that court rejects the Frys' view of their lawsuit, using the analysis we set out below, will the question about the effect of their request for money damages arise.

Id. at fn. 4.

The Court did agree, however, with another example of when exhaustion may be futile, as suggested by the school district:

> They suppose that a teacher, acting out of animus or frustration, strikes a student with a disability, who then sues the school under a statute other than the IDEA. See Brief for Respondents 36-37. Here too, the suit could be said to relate, in both genesis and effect, to the child's education. But the school districts opine, we think correctly, that the substance of the plaintiff's claim is unlikely to involve the adequacy of special education- and thus is unlikely to require exhaustion. See *ibid.* A telling indicator of that conclusion is that a child could file the same kind of suit against an official at another public facility for inflicting such physical abuse – as could an adult subject to similar treatment by a school official. To be sure, the particular circumstances of such a suit (school or theater? student or employee?) might be pertinent in assessing the reasonableness of the challenged conduct. But even if that is so, the plausibility of bringing other variants of the suit indicates that the gravamen of the plaintiff's complaint does not concern the appropriateness of an educational program.

Id. at fn. 9.

Unanimous United States Supreme Court Rejects "Barely More Than *De Minimis*" Educational Progress Standard Under the Individuals with Disabilities Education Act

The Supreme Court first tackled the contours of the obligation to provide students with disabilities with a free appropriate public education (FAPE) pursuant to the Individuals with Disabilities Education Act (IDEA) in *Board of Ed. Of Hendrick Hudson Central School Dist., Westchester Cty.*, 458 U.S. 176 (1982). The Court revisited this question in *Endrew F. v. Douglas County School District RE-1*, No. 15-827, 580 U.S. ---, 137 S.Ct. 988, 2017 WL 1066260 (March

22, 2017). In a unanimous decision, the Court held that the IDEA requires school districts to provide "an educational program reasonably calculated to enable a child to make progress in light of the child's circumstances." *Id.*at 999.

Endrew F., Drew, is a student with autism who attended the respondent's schools from Kindergarten through fourth grade. By fourth grade, his parents were frustrated by his lack of progress: he "exhibited multiple behaviors that inhibited his ability to access learning in the classroom," and he had "severe fears of commonplace things like flies, spills and public restrooms." *Id.* at 996. The parents believed that his academic and functional progress had stalled and his IEPs largely carried over the same goals and objectives from year to year. In April 2010, when the district presented a proposed fifth grade individualized education program (IEP) which the parents viewed as "pretty much the same as his past ones," they removed Drew and placed him in a private school, Firefly Autism House, specializing in educating students with autism. *Id.*

Per the Court, Drew did much better at Firefly.

> The school developed a "behavioral intervention plan" that identified Endrew's most problematic behaviors and set out particular strategies for addressing them. See Supp. App. 198a–201a. Firefly also added heft to Endrew's academic goals. Within months, Endrew's behavior improved significantly, permitting him to make a degree of academic progress that had eluded him in public school.

Id. at 996-7. In November 2010, the district again presented a new IEP which the parents considered no more adequate than that proposed in April. In particular, the behavior plan did not differ materially from his fourth grade IEP even though his experience at Firefly suggested he could benefit from a different approach. *Id.* at 997.

The parents filed a due process complaint seeking reimbursement for Drew's program at Firefly. An administrative law judge held that the school district had provided a FAPE and denied reimbursement. The district court affirmed, but acknowledged that his IEPs "did not reveal immense educational growth." *Id.* (internal quotations omitted). They were, however, "sufficient to show a pattern of, at the least, minimal progress." *Id.* (internal quotations omitted). The Tenth Circuit affirmed, noting that it had long interpreted *Rowley* "to mean that a child's IEP is adequate so long as it is calculated to confer an 'educational benefit [that is] merely … more than *de minimus*.'" *Id.* The Supreme Court vacated the decision and remanded to the Tenth Circuit for "further proceedings consistent with" its opinion. *Id.* at 1002.

The Supreme Court began its analysis with a review of the decision in *Rowley*. It made a concluding statement about Rowley, and then stated its holding:

> While *Rowley* declined to articulate an overarching standard to evaluate the adequacy of the education provided under the Act, the decision and the statutory language point to a general approach: To meet its substantive obligation under the IDEA, a school must

> offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.

Id. at 998-9.

It then provided the rationale for this holding. The phrase "reasonably calculated" recognizes that and IEP requires a prospective judgement by school officials engaged in a "fact-intensive exercise" with the parents. Any review of the IEP will address "the question of whether the IEP is *reasonable*, not whether the court regards it as ideal." *Id.* at 999 (internal quotations and citations omitted; emphasis in original). Nevertheless, the "IEP must aim to enable the child to make progress," which "reflects the broad purpose of the IDEA, an 'ambitious' piece of legislation." *Id.* That the progress "must be appropriate in light of the child's circumstances should come as no surprise. A focus on the particular child is at the *core* of the IDEA." *Id.* (emphasis added).

> The instruction offered must be "*specially* designed" to meet a child's "*unique* needs" through an "[*i*]*ndividualized* education program." §§ 1401(29), (14) (emphasis added). An IEP is not a form document. It is constructed only after careful consideration of the child's present levels of achievement, disability, and potential for growth. §§ 1414(d)(1)(A)(i)(I)-(IV), (d)(3)(A)(i)-(iv).

Endrew F at 999 (emphasis in original).

The Court then noted that *Rowley* dealt with the standard of appropriateness in many cases—for those students in the IDEA's preferred placement in the regular education classroom.

> When this preference is met, "the system itself monitors the educational progress of the child." *Id.,* at 202–203, 102 S.Ct. 3034. "Regular examinations are administered, grades are awarded, and yearly advancement to higher grade levels is permitted for those children who attain an *adequate* knowledge of the course material." *Id.,* at 203, 102 S.Ct. 3034. Progress through this system is what our society generally means by an "education." And access to an "education" is what the IDEA promises. *Ibid.* Accordingly, for a child fully integrated in the regular classroom, an IEP typically should, as *Rowley* put it, be "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." *Id.,* at 203–204, 102 S.Ct. 3034.

Endrew F. at 999 (emphasis added).

The Court reiterated that "for most children, a FAPE will involve integration in the regular education program and individualized special education calculated to achieve advancement from grade to grade." *Id*. at 1000. However, the Court was careful to emphasize, as it had done in *Rowley*, that "this guidance should not be interpreted as an inflexible rule." The Court did not hold that every student with a disability who is advancing from grade to grade is automatically receiving a FAPE. *Id.* at fn. 2.

The Court stressed for a third time the IDEA's preference for fully integrating students with disabilities in the regular classroom, and that for those students FAPE "typically means … providing a level of instruction reasonably calculated to permit advancement through the general curriculum." *Id*. at 1000. For students for whom "that is not a reasonable prospect," their "IEP need not aim for grade-level advancement." *Id.*

> But his educational program must be appropriately *ambitious* in light of his circumstances, just as advancement from grade to grade is appropriately *ambitious* for most children in the regular classroom. The goals may differ, but every child should have the chance to meet *challenging* objectives.
>
> Of course this describes a general standard, not a formula. But whatever else can be said about it, this standard is markedly more demanding than the "merely more than *de minimis*" test applied by the Tenth Circuit. It cannot be the case that the Act typically aims for grade-level advancement for children with disabilities who can be educated in the regular classroom, but is satisfied with barely more than *de minimis* progress for those who cannot.
>
> When all is said and done, a student offered an educational program providing "merely more than *de minimis*" progress from year to year can hardly be said to have been offered an education at all. For children with disabilities, receiving instruction that aims so low would be tantamount to "sitting idly ... awaiting the time when they were old enough to 'drop out.' " *Rowley,* 458 U.S., at 179, 102 S.Ct. 3034 (some internal quotation marks omitted). The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.

Endrew F. at 1000-01 (emphasis added).

The Court concluded by declining "to elaborate on what 'appropriate' progress will look like from case to case." *Id.* at 1001. It cautioned that the absence of a bright-line rule" should not be taken as an invitation for reviewing courts "to substitute their own notion of educational policy for those of the school authorities which they review." *Id.* (quoting *Rowley*).

In *Rowley*, the Court was talking about giving due deference to the decisions of the educational authorities issuing the administrative decisions the courts would be reviewing, not the decisions of the school districts' experts. *Rowley,* 458 U.S. at 206. The Court in *Endrew F.* did not expressly depart from that analysis. However, its discussion of this issue could lead to confusion. The Court stated:

> deference is based on the application of expertise and the exercise of judgment by school authorities. The Act vests these officials with responsibility for decisions of critical importance to the life of a disabled child. The nature of the IEP process, from the initial

> consultation through state administrative proceedings, ensures that parents and school representatives will fully air their respective opinions on the degree of progress a child's IEP should pursue.

Endrew F. at 1001.