A LEGISLATIVE AND JUDICIAL ANALYSIS
OF INDIVIDUALIZED EDUCATION PROGRAM
RELATED SERVICES

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The purpose of this research is to analyze U.S. and Ohio legislation and case law as they relate to related services provided through an individualized education program for students with disabilities. Chapter one provides an introduction to the study. Chapter two provides a review of literature associated with related services as part of a student’s individualized education program, as well as the legislative history of the Education of All Handicapped Children Act of 1975 (PL 94-142) and in 1990 renamed the Individuals with Disabilities Education Act. Chapter three details the methodology with which the study will be conducted.

Next, in chapter four case law is reviewed to determine how state and federal courts have ruled in disputes between parents and local education agencies regarding the provision of related services as part of a student’s individualized education program. In chapter five, the dissertation identifies IDEA’s intended purpose specifically regarding related services. Additionally, chapter five also ascertains the specific outcomes of case law pursuant to the IDEA and related services, details the similarities and differences in cases involving related services, and specifies the trends in case law and judicial decisions.
Finally, chapter six provides guidelines concerning the provision of related services for students with disabilities to school board members, superintendents, district and building administrators, general and special education teachers, related service providers, the Ohio Department of Education, and Ohio and Federal legislators. Disagreements can occur between parents and school districts on the provision of related services to their children. Most often, in the case of related services, parents dispute the delivery, frequency, or location in which the services are provided. School leaders are charged with understanding the many complicated facets of special education law, their state’s procedural safeguards, and making the determination of whether they feel the service is necessary for a student to receive an education which confers meaningful educational benefit. On top of the aforementioned information, school leaders must also ensure school districts can meet their financial obligations in the provision of services to all students. In order to have collaborative relationships with the best interests of the student at heart, educators and parents should work together to determine what services are necessary to meet the child’s individual needs.
To Carrie, Avery, and Emelia: I love you with all my heart.

IF

If you can keep your head when all about you
Are losing theirs and blaming it on you;
If you can trust yourself when all men doubt you,
But make allowance for their doubting too:
If you can wait and not be tired by waiting,
Or, being lied about, don’t deal in lies,
Or being hated don’t give way to hating,
And yet don’t look too good, nor talk too wise;

If you can dream---and not make dreams your master;
If you can think---and not make thoughts your aim,
If you can meet with Triumph and Disaster
And treat those two impostors just the same:
If you can bear to hear the truth you’ve spoken
Twisted by knaves to make a trap for fools,
Or watch the things you gave your life to, broken,
And stoop and build’em up with worn-out tools;
If you can make one heap of all your winnings
And risk it on one turn of pitch-and-toss,
And lose, and start again at your beginnings,
And never breathe a word about your loss:
If you can force your heart and nerve sinew
To serve your turn long after they are gone,
And so hold on when there is nothing in you
Except the Will which says to them: “Hold on!”

If you can talk with crowds and keep your virtue
Or walk with Kings---nor lose the common touch,
If neither foes nor loving friends can hurt you,
If all men count with you, but none too much:
If you can fill the unforgiving minute
With sixty seconds’ worth of distance run,
Yours is the Earth and everything that’s in it,
And---which is more---you’ll be a Man, my son!

Rudyard Kipling

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Finally, sincerest thanks to my wife, Carrie, and our girls, Avery and Emelia. I have been gone way too much throughout this process. Carrie, you are an outstanding wife and mother. Thank you for being so supportive and understanding. I am the luckiest man in the world. Girls, I have missed out on too many good times and activities throughout this process. I look forward to all the fun we’ll have during our evenings, weekends, and summers together. I love you with all of my heart and hope you are proud of me.
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CHAPTER I
INTRODUCTION

Background

Related services can be the forgotten aspect of an Individualized Education Program (IEP), except for the students who need them the most and for the parents who feel strongly that their child is entitled to such services in order to access a free appropriate public education (FAPE). Related services are developmental, corrective, and other supportive services that are required to assist a child with a disability to benefit from special education. Some children need related services to meet their individually designed special education goals. If related services are required to assist a child with a disability to benefit from special education and receive a FAPE, then those services must be provided.¹

The first significant court case to impact children with disabilities dealt with racial segregation rather than special education. The Court’s 1954 pronouncement in Brown v. Board of Education² that “education must be made available to all on equal terms” ultimately served as a basis for the admission to public schools of a number of previously limited or excluded populations, including those classified by disability.³

As teacher and student rights expanded, conversely the rights of federal and state
governments to segregate were restricted. Disability rights issues emerged in the wake of
expanded federal court involvement in education issues, the larger civil rights movement,
and the philosophical “deinstitutionalization” movement within the disability community.
The right to a nondiscriminatory and appropriate education for students with disabilities
resulted from a decade of visible political lobbying and lawsuits.4

The treatment of children with disabilities in public schools until the 1970s had
varied. Prior to successful challenges under the Equal Protection Clause of the
Fourteenth Amendment, the education of children with disabilities was seen as a
privilege rather than a right. For example, in some states, although services in regular
schools were provided to children with mild mental retardation, mild speech
impairments, and mild emotional problems, children with more severe mental or physical
disabilities were sent to institutions and special schools or otherwise excluded from
regular education settings.5

In 1975, five years after the 1970 enactment of the Education of the Handicapped
Act (EHA), EHA was amended by Congress to legislate the Education for All
Handicapped Children Act (EAHCA), Public Law 94-142. The basic rights that P.L.
94-142 gave to students with disabilities included rights to: (1) be provided a free
appropriate public education (FAPE), (2) be educated in a setting that “to the maximum

4 Dixie Snow Huefner, Getting Comfortable With Special Education Law: A Framework for Working with

5 Dixie Snow Huefner, Getting Comfortable With Special Education Law: A Framework for Working with
extent appropriate” allowed interaction with regular education students (least restrictive environment or LRE), (3) be governed by a written, individualized education program (IEP), and (4) be provided related education and services that are based on a thorough evaluation of the student’s needs.6

During the decade of the 1980s, Congress added a number of amendments to EHA. The EHA Amendments of 1990 eliminated the use of the term handicap, substituting instead the term disability. The Act was then renamed the Individuals with Disabilities Education Act (IDEA).7 At the same time, the EHA was renamed IDEA, the disability categories covered under the Act went from eight to ten when autism and traumatic brain injury were added. Two more categories of disabilities were created when multiple disabilities and deaf-blindness were added. The category of hearing impairment was created to recognize those individuals who were impaired rather than deaf. The total number of disability categories then stood and currently stands at thirteen: Autism, Cognitive disability, Deafness, Deaf-blindness, Emotional disturbance, Hearing impairment, Multiple disabilities, Orthopedic impairment, Other health impairment, Specific learning disability, Speech or language impairment, Traumatic brain injury, and Visual impairment.8


Amendments to IDEA were signed into law by President Clinton in June of 1997. The amendments aimed to raise expectations for students with disabilities with the hopes of increasing school readiness, improving competency in challenging subject matter, improving the safety of learning environments, increasing literacy, improving the professional skills of teachers, increasing graduation rates, and promoting partnerships with parents.9

When originally passed in 1975, Public Law 94-142 had four major purposes: “(1) To assure that all children with disabilities have available to them a free appropriate public education which emphasizes special education and related services designed to meet their unique needs; (2) To assure that the rights of children with disabilities and their parents are protected; (3) To assist states and localities to provide for the education of all children with disabilities10; and (4) To assess and assure the effectiveness of efforts to educate all children with disabilities.” Public Law 94-142 provided opportunities for the involvement of physical therapists and other related service providers as these services were not required prior to the law being enacted.11

In order to identify what is excluded as a related service, it is important to first understand the standard established by the United States Supreme Court. Public schools

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10 Paul R. Surburg, Implications of Public Law 94-142 for Physical Therapists, 61, 2 PTJ. 210, (1981) (history of physical therapy as a related service)

11 History: Twenty-Five Years of Progress in Educating Children with Disabilities Through IDEA, Special Education and Rehabilitative Services, United States Department of Education (July 5, 2013), http://www2.ed.gov/policy/speced/leg/idea/history.html
are required to provide related services to students that are essential for the child to have access to school. An example is the case of *Irving Independent School District v. Tatro* (1984). The child at the center of the case was a young female, Amber, born with spina bifida. *Tatro* rose through the American legal system all the way to the Supreme Court of the United States. At the heart of the case was a related service necessary for the student to attend school (i.e., catheterization). The school argued the catheterizations constituted a medical procedure over and above the school’s responsibilities. The basis for the student’s case rested on the idea that catheterization was the only obstacle standing in the way of the child attending public school, which qualified as her least restrictive environment. The Supreme Court established the standard that when a service is necessary or the student will otherwise be barred from receiving an appropriate education and the service can be provided by someone with less training than a physician, then the school must provide the service.13

Historically speaking, Congress passed Public Law 94-142 in 1975 amid concerns that general education classroom teachers would not be ready to educate children with disabilities. Additional fears centered on how depleted school budgets of the late 1970s could provide the mandated services of the law. But, on September 1, 1978, now by law, schools were required to provide a free and appropriate education for all children from

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the ages of six to seventeen who were identified as physically, mentally, or emotionally disabled.  

At the time, and as is currently the case, P.L. 94-142 requires every school district receiving federal funds under the Act to find (Child Find) and educate at the public’s expense all students with disabilities who live within the boundaries of the school district, regardless of the nature or severity of the student’s handicap. It is important to note though, the evaluation accompanying the child find provision for students suspected of having a disability is contingent on the school district receiving written parental consent to initiate the evaluation.

Using P.L. 94-142, Congress required schools to educate students with disabilities at public expense. But, prior to P.L. 94-142, billions of dollars of public funds, although appropriated by Congress, had been spent improving equal access to public schools for minority children under Title I of the Elementary and Secondary Education Act (ESEA) of 1965. In 1975, Congress was apparently trying to level the playing field for students with disabilities, who also represent a minority classification, though not a suspect classification in the U.S. Constitution.

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14 Ernest L. Boyer, Public Law 94-142: A Promising Start?, Educational Leadership. 298, 298-299 (February 1979) (Detailing the start of enacting PL 94-142).


17 Ernest L. Boyer, Public Law 94-142: A Promising Start?, Educational Leadership. 298, 299 (February 1979) (Providing students with disabilities equal access under PL 94-142 as was the case for other minorities with the ESEA of 1965).
P.L. 94-142 built upon the requirements of Section 504 of the Rehabilitation Act of 1973, which guaranteed the right of individuals with disabilities to jobs and a variety of services in various schools, facilities, and agencies that receive federal funds. P.L. 94-142 required states to start educating students with disabilities of preschool age starting September 1, 1978 and students with disabilities ages eighteen to twenty-one starting on September 1, 1980, if education for students without disabilities was provided for students in these age groups or the state had laws or court rulings requiring such services.\textsuperscript{18}

The IDEA law of 1975 was a historic step in providing students with disabilities ages three through twenty-one with a FAPE, but progress still needed to be made. The 1986 amendments (P.L. 99-457) to the EHA (Education for the Handicapped Act) mandated programs and services begin at birth rather than waiting until children with disabilities were three years old. In providing early intervention opportunities for children with disabilities, children were better prepared for the academic and social challenges of public school, as well as life in general.\textsuperscript{19}

In addition, a mandate of IDEA 1997 required schools to report progress to parents and guardians of children with disabilities as often as they report progress to the


\textsuperscript{19} History: Twenty-Five Years of Progress in Educating Children with Disabilities Through IDEA, Special Education and Rehabilitative Services, United States Department of Education (July 5, 2013), http://www2.ed.gov/policy/speced/leg/idea/history.html
parents of children without disabilities.\textsuperscript{20} For instance, if a school and/or district sends course progress reports home for all students halfway through each grading period, parents of students with disabilities who receive specially designed instruction per their IEP must also receive progress reports outlining the child’s IEP goals and objectives progress in addition to the course progress reports. IEP progress reports must again be sent home at the end of every grading period when parents of students both with and without disabilities receive report cards.

Among other changes, the 1997 amendments to IDEA also focused on enhancing the student’s involvement and progress in the general education curriculum and involving general education teachers in the IEP process.\textsuperscript{21} In December of 2004, President George W. Bush signed the Individuals with Disabilities Education Improvement Act (IDEIA) into law, which reauthorized the original IDEA. At the time, the President stated, “The Individuals with Disabilities Education Improvement Act of 2004 will help children learn better by promoting accountability for results, enhancing parent involvement, using

\textsuperscript{20} History: Twenty-Five Years of Progress in Educating Children with Disabilities Through IDEA, Special Education and Rehabilitative Services, United States Department of Education (July 5, 2013), http://www2.ed.gov/policy/speced/leg/idea/history.html

\textsuperscript{21} Power Point Presentation, Faculty of The University of Virginia, Legal Issues: Special Education and Adapted Physical Education (July 5, 2013), http://www.google.com/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=9&ved=0CF4QFjAI&url=http%3A%2F%2Fwww.naset.org%2Ffileadmin%2Fuser_upload%2FPower%2520Point%2FHistory_of_Special_Education_up_to_IDEA_02.ppt&ei=w97WUfqON-WwygGW5oHwBg&usg=AFQjCNE-y5qaFl32A3DcxDaapJL_pHPsUw&sig2=Ld9wsWGvtqOG5-2t_yLctg&bvm=bv.48705608,d.aWc
proven practices and materials, providing more flexibility, and reducing paperwork burdens for teachers, states, and local school districts.”

Much like the mandates associated with the No Child Left Behind (NCLB) Act of 2001, the reauthorization of IDEA in December of 2004 focused on: (1) adding new definitions (e.g., highly qualified, limited English proficient, scientifically-based research); (2) affording states more flexibility in their use of federally allocated funds; (3) affording local education agencies (LEAs/school districts) the ability to use funds for school-wide programs which are apportioned under Part B; (4) allowing LEAs greater flexibility in using funds to carry out requirements of the ESEA; (5) adding requirements for qualifications of special education teachers; (6) requiring states to develop performance goals and indicators for students with disabilities; (7) requiring annual reporting on the achievement of students with disabilities toward the aforementioned performance goals and indicators; (8) requiring states to develop alternate assessments so that no matter the type of extent of a child’s disability, progress toward performance goals and indicators can be measured; (9) requiring linking of records of transient or “migratory” children with a disability among states; and (10) providing a special rule regarding eligibility determination of a disability to include the fact that if a child received inappropriate reading or mathematics instruction or is limited in English proficiency, it must be determined that the child does not have a disability.

22 Individuals with Disabilities Education Improvement Act of 2004, New York State Education Department (July 5, 2013), http://www.p12.nysed.gov/specialed/idea/

23 Alignment with the No Child Left Behind Act, United States Department of Education (July 5, 2013), http://idea.ed.gov/explore/view/p/\_root\_dynamic\_TopicalBrief,3,
With regard to enforcement of the many laws the citizens of the United States of America are to follow, jurisdiction and enforcement range from the local level to the federal level with states, of course, falling in between. The IDEA law is no different but places the greatest emphasis on states in enforcing the many provisions of a law that has been amended several times since its inception in 1975. States are required to monitor, enforce, and annually report the progress attained by individual school districts. States must then report the information gathered from school districts to the United States Secretary of Education.24

Educating students with disabilities is extremely complex due to the thirteen disability categories under which students’ conditions may fall as well as their individual varying degrees of need. Related services are another component of the complex nature of educating students with disabilities. Related services are meant to help students with disabilities benefit from their special education by providing support in needed areas, such as speaking or moving.25 The cases discussed in this dissertation will focus on alleged violations of IDEA regarding students with disabilities and the related services provided to them by school districts. Related services cases will include every category of related services, as possible.

24 Alignment with the No Child Left Behind Act, United States Department of Education (July 5, 2013), http://idea.ed.gov/explore/view/p/root,dynamic,TopicalBrief,3

Purpose of the Study and Questions Addressed by the Study

The purpose of this research is to analyze U.S. and Ohio legislation and case law as they relate to related services provided through an individualized education program for students with disabilities. Three questions will be addressed by the study:

1. What was IDEA’s intended purpose specifically regarding related services?
2. Pursuant to IDEA and related services, what are the specific outcomes of case law and how are related services cases similar and different?
3. What are the current trends in case law pursuant to IDEA and related services?

As district representatives in an Individualized Education Program (IEP) meeting, school administrators are charged with overseeing that a FAPE is offered and ultimately provided to students with disabilities. A FAPE is offered with the creation of an IEP that meets the unique needs of each child in the least restrictive environment and includes special education and related services. The provision of services for students with disabilities as agreed upon by the IEP team is the true indicator of whether the student is receiving a FAPE. Service providers can for example, include an intervention specialist, general education teacher, speech-language pathologist, physical therapist, and/or occupational therapist, among other possibilities. Administrators must be knowledgeable of legislative and case law related to the provision of related services for students with disabilities so, as district representatives at an IEP team meeting, school administrators

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can assist the IEP team in developing individualized education programs that meet each child’s unique needs and can provide the related services necessary for the child to benefit from special education.

**Limitations of the Study**

This study will review applicable statutes and case law regarding the individualized education programs of students with disabilities and the related services within their IEPs, which afford students with disabilities the opportunity to receive special education. Thorough efforts will be made to access regional and national case law relating to this topic through a variety of search options, but some may only be available through LEXIS/NEXIS and other online search engines listed previously in this chapter. By using search engines, it is the author’s hope that all materials are complete and up-to-date. However, a complete analysis of up-to-date case law relating specifically to IDEA cannot be certain. Moreover, not all cases are marked for publication by the respective judges, and not all “unpublished cases” are available even in a digital format.

**Delimitations of the Study**

This study will be delimited to American law through 2013. The study will include accessible, published state and federal case law, statutes, and administrative regulations. Bases reviewed will include those in which parents of students with disabilities have sued the student’s school district, state, or private school under the assertion that the child’s right to a FAPE has been violated due to a disagreement over related services in the child’s individualized education program. Accordingly, cases involving a FAPE, but not contesting provision of related services, will not be included.
Cases reviewed will include students ages three to their twenty-second birthday (i.e., preschool through the high school transition to adult services). Unless available through LEXIS/NEXIS, unreported and unpublished cases will not be included for the study.

Definitions

(Variety of Formats Based on Sources Cited)

**Affirm** – What an appeals court does if it agrees with and confirms a lower court’s decision.\(^\text{27}\)

**Allegation** - A statement of claimed fact contained in a complaint (a written pleading filed to begin a lawsuit), a criminal charge, or an affirmative defense (part of the written answer to a complaint).\(^\text{28}\)

**Appeal** - To ask a higher court to reverse the decision of a trial court after final judgment or other legal ruling.\(^\text{29}\)

**Appellant** - The party who appeals an intermediate appellate court decision he/she/it has lost.\(^\text{30}\)

**Appellate Court** - A court of appeals which hears appeals from lower court decisions.\(^\text{31}\)

**Appellee** - In some jurisdictions the name used for the party who has won at the trial court level, but the loser (appellant) has appealed the decision to a higher court.


Thus the appellee has to file a response to the legal brief filed by the appellant. In many jurisdictions the appellee is called the "respondent."  

_Audiology_ – Includes: (1) Identification of children with hearing loss; (2) Determination of the range, nature and degree of hearing loss, including referral for medical or other professional attention for the habilitation of hearing; (3) Provision of habilitative activities, such as language habilitation, auditory training, speech reading (lip-reading), hearing evaluation, and speech conservation; (4) Creation and administration of programs for prevention of hearing loss; (5) Counseling and guidance of children, parents, and teachers regarding hearing loss; and (6) Determination of children’s needs for group and individual amplification, selecting and fitting an appropriate aid, and evaluating the effectiveness of amplification.

_Autism_ - A developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, which adversely affects a child’s educational performance. Other characteristics often associated with "autism" are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences.

(a) Autism does not apply if a child's educational performance is adversely affected primarily because the child has an emotional disturbance, as defined below under “Emotional disturbance.”


33 Related Services, National Dissemination Center for Children with Disabilities (July. 31, 2012), http://nichy.org/schoolage/iep/iepcontents/relatedservices
(b) A child who manifests the characteristics of autism after age three could be identified as having autism if the criteria in the above paragraph next to “Autism” are met.\(^{34}\)

*Case* – Short for a cause of action, lawsuit, or the right to sue. It is also shorthand for the reported decisions (appeals, certain decisions of federal courts and special courts such as the tax court) which can be cited as precedents.\(^{35}\)

*Child Find* – Child Find requires all school districts to identify, locate, and evaluate all children with disabilities, regardless of the severity of their disabilities. This obligation to identify all children who may need special education services exists even if the school is not providing special education services to the child.\(^{36}\)

*Cognitive Disability* - Significantly subaverage general intellectual functioning, existing concurrently with deficits in adaptive behavior and manifested during the developmental period, that adversely affects a child's educational performance.

(a) "Significantly subaverage general intellectual functioning" refers to an intelligence quotient of seventy or below as determined through a measure of cognitive functioning administered by a school psychologist or a qualified psychologist using a test designed for individual administration. Based on a standard error of measurement and clinical judgment, a child may be determined

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\(^{36}\) What is Child Find?, Wrightslaw (July 9, 2013) http://www.wrightslaw.com/info/child.find.index.htm
to have significant subaverage general intellectual functioning with an intelligence quotient not to exceed seventy-five.

(b) "Deficits in adaptive behavior" means deficits in two or more applicable skill areas occurring within the context of the child's environments and typical of the child's chronological age peers.

(c) A child who was identified by an Ohio school district as having a developmental handicap prior to July 1, 2002 shall be considered a child with a disability if the child continues to meet the definition of “developmentally handicapped”. A child who meets these provisions shall be eligible to receive special education and related services in accordance with the "Operating Standards for Ohio’s Schools Serving Children with Disabilities" effective July 1, 2008.37

Compensatory Damages – Damages recovered in payment for actual injury or economic loss, which does not include punitive damages (as added damages due to malicious or grossly negligent action).38

Complaint – The first document filed with the court (actually with the County Clerk or Clerk of the Court) by a person or entity claiming legal rights against another.39

Concur – To agree.


**Counseling Services** – Services provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel.\(^{40}\)

**Deafness** - A hearing impairment that is so severe that the child is impaired in processing linguistic information through hearing, with or without amplification, and that adversely affects a child's educational performance.\(^{41}\)

**Deaf-blindness** - Concomitant hearing and visual impairments, the combination of which causes such severe communication and other developmental and educational needs that they cannot be accommodated in special education programs solely for children with deafness or children with blindness.\(^{42}\)

**De Novo** - “From Latin, meaning “from the new.” When a court hears a case de novo, it is deciding the issues without reference to the legal conclusions or assumptions made by the previous court to hear the case.”\(^{43}\)

**De Minimis** – “An abbreviated form of the Latin Maxim, de minimis non curat lex, "the law cares not for small things." A legal doctrine by which a court refuses to consider trifling matters.”\(^{44}\)

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\(^{40}\) Related Services, National Dissemination Center for Children with Disabilities (July. 31, 2012), http://nichy.org/schoolage/iep/iepcontents/relatedservices


\(^{43}\) http://www.law.cornell.edu/wex/de_novo

\(^{44}\) http://legal-dictionary.thefreedictionary.com/De+Minimis
**Dissent** – The opinion of a judge of a court of appeals, including the U.S. Supreme Court, which disagrees with the majority opinion.\(^{45}\)

**Due Process** – A fundamental principle of fairness in all legal matters, both civil and criminal, especially in the courts. All legal procedures set by statute and court practice, including notice of rights, must be followed for each individual so that no prejudicial or unequal treatment will result. While somewhat indefinite, the term can be gauged by its aim to safeguard both private and public rights against unfairness. The universal guarantee of due process is in the Fifth Amendment to the U.S. Constitution, which provides “No person shall . . . be deprived of life, liberty, or property, without due process of law,” and is applied to all states by the 14th Amendment. From this basic principle flows many legal decisions determining both procedural and substantive rights.\(^{46}\)

**Early Identification and Assessment of Disabilities in Children** – The implementation of a formal plan for identifying a disability as early as possible in a child’s life. \(^{47}\)

**Emotional Disturbance** - A condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:


\(^{47}\) Related Services, National Dissemination Center for Children with Disabilities (July. 31, 2012), [http://nichy.org/schoolage/iep/iepcontents/relatedservices](http://nichy.org/schoolage/iep/iepcontents/relatedservices)
(a) An inability to learn that cannot be explained by intellectual, sensory, or health factors;
(b) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
(c) Inappropriate types of behavior or feelings under normal circumstances;
(d) A general pervasive mood of unhappiness or depression;
(e) A tendency to develop physical symptoms or fears associated with personal or school problems;
(f) Emotional disturbance includes schizophrenia. The term does not apply to children who are socially maladjusted unless it is determined that they have an emotional disturbance as defined above.48

FAPE – Free and Appropriate Public Education.

Hearing Impairment - An impairment in hearing, whether permanent or fluctuating, that adversely affects a child’s educational performance but that is not included under the definition of deafness in this rule.49

IEP – Individualized Education Program.

Individuals with Disabilities Education Act (IDEA) - A law ensuring services to children with disabilities throughout the nation. IDEA governs how states and public


agencies provide early intervention, special education and related services to more than
6.5 million eligible infants, toddlers, children, and youth with disabilities. Infants and
toddlers with disabilities (birth-2) and their families receive early intervention services
under IDEA Part C. Children and youth (ages 3-21) receive special education and related
services under IDEA Part B.\footnote{50}

*Individuals with Disabilities Education Improvement Act (IDEIA)* – A 2004 law
that reauthorized the original IDEA.

*Interpreting Services* – Includes: (1) The following, when used with respect to
children who are deaf or hard of hearing: Oral transliteration services, cued language
transliteration services, sign language transliteration and interpreting services, and
transcription services, such as communication access real-time translation (CART),
C-Print, and TypeWell; and (2) Special interpreting services for children who are
deaf-blind. \footnote{51}

*Judgment* – The final decision by a court in a lawsuit, criminal prosecution, or
appeal from a lower court's judgment, except for an “interlocutory judgment,” which is
tentative until a final judgment is made. The word “decree” is sometimes used as
synonymous with judgment. \footnote{52}

http://idea.ed.gov/

\footnote{51} Related Services, National Dissemination Center for Children with Disabilities (July. 31, 2012),
http://nichy.org/schoolage/iep/iepcontents/relatedservices

\footnote{52} http://dictionary.law.com/Default.aspx?selected=1056
**Majority Opinion** – A written explanation by one member of the majority of the court after a judgment has been rendered.

**Medical Services** – Services provided by a licensed physician to determine a child’s medically related disability that results in the child’s need for special education and related services. ⁵³

**Multiple Disabilities** - Concomitant impairments (such as mental retardation-blindness or mental retardation-orthopedic impairment), the combination of which causes such severe educational needs that they cannot be accommodated in special education programs solely for one of the impairments. “Multiple disabilities” does not include deaf-blindness. ⁵⁴

**Occupational Therapy** – (1) Services provided by a qualified occupational therapist; and (2) Includes – (A) Improving, developing, or restoring functions impaired or lost through illness, injury, or deprivation; (B) Improving ability to perform tasks for independent functioning if functions are impaired or lost; and (C) Preventing, through early intervention, initial or further impairment or loss of function. ⁵⁵

**Opinion** – The explanation of a court’s judgment.

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⁵³ Related Services, National Dissemination Center for Children with Disabilities (July. 31, 2012), http://nichy.org/schoolage/iep/iepcontents/relatedservices


⁵⁵ Related Services, National Dissemination Center for Children with Disabilities (July. 31, 2012), http://nichy.org/schoolage/iep/iepcontents/relatedservices
Orientation and Mobility Services – (1) Services provided to blind or visually impaired children by qualified personnel to enable those students to attain systematic orientation to and safe movement within their environments in school, home, and community; and (2) Includes teaching children the following, as appropriate: (A) Spatial and environmental concepts and use of information received by the sense (such as sound, temperature, and vibrations) to establish, maintain, or regain orientation and line of travel (e.g., using sound at a traffic light to cross the street); (B) To use the long cane or a service animal to supplement visual travel skills or as a tool for safely negotiating the environment for children with no available travel vision; (C) To understand and use remaining vision and distance low vision aides; and (D) Other concepts, techniques, and tools.\(^{56}\)

Orthopedic Impairment - A severe orthopedic impairment that adversely affects a child’s educational performance. The term includes impairments caused by a congenital anomaly, impairments caused by disease (e.g., poliomyelitis, bone tuberculosis), and impairments from other causes (e.g., cerebral palsy, amputations, and fractures or burns that cause contractures).\(^{57}\)

Other Health Impairment - Having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli that result in limited alertness

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\(^{56}\) Related Services, National Dissemination Center for Children with Disabilities (July. 31, 2012), http://nichy.org/schoolage/iep/iepcontents/relatedservices

with respect to the educational environment. These chronic or acute health problems must adversely affect a child’s educational performance, that:

(a) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and

(b) Adversely affects a child’s educational performance.\(^{58}\)

*Parent Counseling and Training* – Assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child’s IEP or IFSP.\(^{59}\)

*Physical Therapy* – Services provided by a qualified physical therapist. These services generally address a child’s posture, muscle strength, mobility, and organization of movement in educational environments. Physical therapy may be provided to prevent the onset or progression of impairment, functional limitation, disability, or changes in physical function or health resulting from injury, disease, or other causes.\(^{60}\)

\(^{58}\) Evaluations - 6.8 Definitions of a Child with a Disability, Procedures and Guidance for Ohio Educational Agencies Serving Children with Disabilities, Ohio Department of Education Office for Exceptional Children (July 2, 2013), http://www.edresourcesohio.org/ogdse/6_-evaluation/6-8/document

\(^{59}\) Related Services, National Dissemination Center for Children with Disabilities (July 31, 2012), http://nichy.org/schoolage/iep/iepcontents/relatedservices

\(^{60}\) Related Services, National Dissemination Center for Children with Disabilities (July 31, 2012), http://nichy.org/schoolage/iep/iepcontents/relatedservices
**Plaintiff** – The party who initiates a lawsuit by filing a complaint with the clerk of the court against the defendant(s) demanding damages, performance and/or court determination of rights.\(^{61}\)

**Precedent** – A prior reported opinion of an appeals court, a court of original jurisdiction, or a trial court which establishes the legal rule (authority) in the future on the same legal question decided in the prior judgment.\(^{62}\)

**Psychological Services** – Includes: (1) Administering psychological and educational tests, and other assessment procedures; (2) Interpreting assessment results; (3) Obtaining, integrating, and interpreting information about child behavior and conditions relating to learning; (4) Consulting with other staff members in planning school programs to meet the special educational needs of children as indicated by psychological tests, interviews, direct observation, and behavioral evaluations; (5) Planning and managing a program of psychological services, including psychological counseling for children and parents; and (6) Assisting in developing positive behavioral intervention strategies.\(^{63}\)

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\(^{63}\) Related Services, National Dissemination Center for Children with Disabilities (July. 31, 2012), [http://nichy.org/schoolage/iep/iepcontents/relatedservices](http://nichy.org/schoolage/iep/iepcontents/relatedservices)
Recreation Services – Includes: (1) Assessment of leisure function; (2) Therapeutic recreation services; (3) Recreation programs in schools and community agencies; and (4) Leisure education. 64

Rehabilitation Counseling – Services provided by qualified personnel in individual or group sessions that focus specifically on career development, employment preparation, achieving independence, and integration in the workplace and community of a student with a disability. The term also includes vocational rehabilitation services provided to a student with a disability by vocational rehabilitation programs funded under the Rehabilitation Act of 1973. 65

Related Services – Developmental, corrective, and other supportive services that may be required to enable students with disabilities to benefit from special education -- specified in the IDEA to include speech-language pathology, audiology, psychological services, physical and occupational therapy, recreation, and transportation, among others. 66

Remand – To send back. An appeals court may remand a case to the trial court for further action if it reverses the judgment of the lower court, or after a preliminary

64 Related Services, National Dissemination Center for Children with Disabilities (July. 31, 2012), http://nichy.org/schoolage/iep/iepcontents/relatedservices

65 Related Services, National Dissemination Center for Children with Disabilities (July. 31, 2012), http://nichy.org/schoolage/iep/iepcontents/relatedservices

hearing a judge may remand into custody a person accused of a crime if the judge finds that there is reason to hold the accused for trial.67

**Remedy** – The means to achieve justice in any matter in which legal rights are involved. Remedies may be ordered by the court, granted by judgment after trial or hearing, by agreement (settlement) between the person claiming harm and the person he/she believes has caused it, and by the automatic operation of law. Some remedies require that certain acts be performed or prohibited (originally called “equity”); others involve payment of money to cover loss due to injury or breach of contract; and still others require a court’s declaration of the rights of the parties and an order to honor them. An “extraordinary remedy” is a means employed by a judge to meet particular problems, such as appointment of a referee, master, or receiver to investigate, report or take charge of property. A “provisional remedy” is a temporary solution to hold matters in status quo pending a final decision or an attempt to see if the remedy will work.68

**Reversal** – The decision of a court of appeal ruling that the judgment of a lower court was incorrect and is therefore reversed. The result is that the lower court which tried the case is instructed to dismiss the original action, retry the case, or change its judgment.69

**School Health Services and School Nurse Services** – Health services that are designed to enable a child with a disability to receive FAPE as described in the child’s
IEP. School nurse services are services provided by a qualified school nurse. School health services may be provided by either a qualified school nurse or other qualified person.\textsuperscript{70}

\textit{Sensory Diet} – A planned and scheduled activity program designed to meet a child’s specific sensory needs.\textsuperscript{71}

\textit{Social Work Services} – Include: (1) Preparing a social or developmental history on a child with a disability; (2) Group and individual counseling with the child and family; (3) Working partnership with parents and others on those problems in a child’s living situation (home, school, and community) that affects the child’s adjustment in school; (4) Mobilizing school and community resources to enable the child to learn as effectively as possible in his or her educational program; and (5) Assisting in developing positive behavioral intervention strategies.\textsuperscript{72}

\textit{Specific Learning Disability} - A disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculation, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.

\textsuperscript{70} Related Services, National Dissemination Center for Children with Disabilities (July. 31, 2012), http://nichy.org/schoolage/iep/iepcontents/relatedservices


\textsuperscript{72} Related Services, National Dissemination Center for Children with Disabilities (July. 31, 2012), http://nichy.org/schoolage/iep/iepcontents/relatedservices
(b) Disorders not included. Specific learning disability does not include learning problems that are primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.  

*Speech-Language Pathology* – Includes: (1) Identification of children with speech or language impairments; (2) Diagnosis and appraisal of specific speech or language impairments; (3) Referral for medical or other professional attention necessary for the habilitation of speech or language impairments; (4) Provision of speech and language services for the habilitation or prevention of communicative impairments; and (5) Counseling and guidance of parents, children, and teachers regarding speech and language impairments.

*Speech or Language Impairment* - A communication disorder such as stuttering, impaired articulation, a language impairment, or a voice impairment, that adversely affects a child’s educational performance.

*Stay Put Provision* – Within the IDEA, this provision provides that a student’s current IEP and placement are continued until all proceedings between parents and school officials are resolved.

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74 Related Services, National Dissemination Center for Children with Disabilities (July. 31, 2012), http://nichy.org/schoolage/iep/iepcontents/relatedservices

Summary Judgment – A court order ruling that no factual issues remain to be tried and therefore a cause of action or all causes of action in a complaint can be decided upon certain facts without trial. A summary judgment is based upon a motion by one of the parties that contends that all necessary factual issues are settled or so one-sided they need not be tried.77

Transportation – Travel to and from school and between schools; travel in and around school buildings; and specialized equipment (such as special or adapted buses, lifts, and ramps), if required to provide special transportation for a child with a disability.78

Traumatic Brain Injury - An acquired injury to the brain caused by an external physical force or by other medical conditions, including but not limited to stroke, anoxia, infectious disease, aneurysm, brain tumors and neurological insults resulting from medical or surgical treatments. The injury results in total or partial functional disability or psychosocial impairment or both, that adversely affects a child’s educational performance. The term applies to open or closed head injuries, as well as to other medical conditions that result in acquired brain injuries. The injuries result in impairments in one or more areas such as cognition; language; memory; attention; reasoning; abstract thinking; judgment; problem-solving; sensory, perceptual, and motor

76 Understanding the Differences Between IDEA and Section 504, Council for Exceptional Children (October. 4, 2014), http://www.ldonline.org/article/6086/
78 Related Services, National Dissemination Center for Children with Disabilities (July. 31, 2012), http://nichy.org/schoolage/iep/iepcontents/relatedservices
abilities; psychosocial behavior; physical functions; information processing; and speech. The term does not apply to brain injuries that are congenital or degenerative or to brain injuries induced by birth trauma.⁷⁹

*Trial Court* - The court which holds the original trial or remanded trial, as distinguished from a court of appeals.⁸⁰

*Undue Hardship* – An action to accommodate an employee or applicant with a disability that would require significant difficulty or expense when considered in light of factors such as an employer’s size, financial resources, and the nature and structure of its operation.⁸¹

*Unpublished Case* – Refers to an opinion that the court has specifically designated as not for publication. These types of cases are not available for citation as precedent because the judges making the opinion deem the case as “less important” They are considered binding only on the parties to the particular case in which it is issued. These are state specific court rules prohibiting citing of an unpublished opinion as authority.⁸²

*Visual Impairment (including blindness)* - An impairment in vision that, even with correction, adversely affects a child's educational performance. The term includes both partial sight and blindness. Visual impairment for any child means:

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⁸¹ http://www.law.cornell.edu/wex/undue_hardship

⁸² http://definitions.uslegal.com/u/unpublished-opinion/
(a) A visual impairment, not primarily perceptual in nature, resulting in a measured visual acuity of 20/70 or poorer in the better eye with correction; or (b) A physical eye condition that affects visual functioning to the extent that special education placement, materials and/or services are required in an educational setting.  

**Justification of the Study**

School administrators are charged with the task of overseeing an IEP team meeting on at least an annual basis for each child on an IEP in their school. These meetings can range from routine to intense and depend on the needs of the child, the parent’s history in collaborating with the school on their child’s education, and the ability of the IEP team to work together to design an educational program which provides the student with a FAPE.

Educational leadership preparation programs at universities provide school administrators with a background in a variety of necessary topics including special education law. School and special education law courses in these preparation programs provide a foundation for the school administrator acting as the district representative at an IEP team meeting as well as an instructional leader. This foundation of legal knowledge is especially important when dealing with concerned parents who feel their child’s rights have been violated by the school district.

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Thus, depending on the administrator’s background in special education, issues relating to special education for some school administrators can provide significant challenges in providing a FAPE for a child with a disability. Administrators should be aware of the legislation, regulations, and case law related to special education and related services so they can be prepared to speak and act on behalf of the child as well as the school district in an IEP team meeting.

Related services can be an afterthought in an IEP team meeting. Often parents and school districts are focused on ensuring that the appropriate background knowledge, goals, objectives, accommodations, and modifications are in place to help each child receive a FAPE. However related services are an integral part of a child’s FAPE. Related services can be a sensitive subject at an IEP team meeting as the services are often an added expense for a school district. School districts offer a variety of related services through district-employed staff such as speech pathologists, school psychologists, and school counselors. In contrast, related services such as physical therapy, occupational therapy, health or nursing services, and sign language interpreters, to name a few, tend to be services subcontracted by the school district through an outside agency. Such services can seem cost-prohibitive to school administrators.

Due to the infrequency of some related services being necessary (i.e., health services, sign language interpreters, and behavioral therapy), the IEP team is faced with the task of understanding the related service and how the service fits into the child’s FAPE. The school administrator who acts as the district representative on the IEP team is charged with understanding related services, the needs of the child, and how the
provision of such services can impact district finances. Having background knowledge regarding the types of related services, the impact of such services on a student’s FAPE, the financial impact of the service(s), and related court cases involving the provision or refusal to provide various related services can be an asset to a school administrator.

Overview of Remaining Chapters

Chapter Two

This chapter will include a review of literature associated with related services as part of a student’s individualized education program, including discussion of dissertations and scholarly journals as well as the legislative history of the Education of All Handicapped Children Act of 1975 (PL 94-142) and in 1990 renamed the Individuals with Disabilities Education Act.

Chapter Three

Chapter Three will detail the methodology of the study.

Chapter Four

Chapter Four will provide summaries of selected published case law on P.L. 94-142 arranged chronologically within topic of related services.

Chapter Five

Chapter Five will answer each of the three questions previously identified in chapter one. Answers to the questions will provide the reader with information pertaining to IDEA’s intended purpose specifically regarding related services. Additional information will be provided regarding specific outcomes of case law pursuant to IDEA and related services, how related services cases are similar and different, and current
trends in the law pursuant to IDEA and related services. The trends in case law and judicial decisions will be discussed.

**Chapter Six**

The final chapter of this dissertation will provide school board members, superintendents, district and building administrators, general and special education teachers, related service providers, the Ohio Department of Education, and Ohio and Federal legislators with guidelines concerning the provision of related services for students with disabilities. This researcher’s hope is that the more the aforementioned individuals know about the provision of related services, the better stakeholders can work together to improve the education of students and to serve students in an economical manner.
CHAPTER II

REVIEW OF HISTORY AND RELATED LITERATURE

Introduction

While children with disabilities have always deserved an education commensurate with their non-disabled peers, it has only been within the last forty years that the rights of individuals with disabilities have been protected by federal law. A review of the available literature identifies the rights and education of children with disabilities prior to 1975; provides a legislative history leading to the Education of All Handicapped Children Act of 1975; delivers information on the Education for All Handicapped Children Act and subsequent regulations; details Ohio’s enforcement of the law as well as Ohio’s interpretation of policy; and gives an overview of possible related services associated with a student’s Individualized Education Program.

Rights and the Education of Children with Disabilities Prior to 1975

For hundreds of years, individuals with disabilities were looked upon as useless and non-productive members of society, often abused, ignored, and ridiculed for their differences. Deaf and blind individuals were the recipients of the earliest form of “special education” during the 1700s in France. It was not until the 1800s though that someone discovered individuals with disabilities could be trained. This phenomenon began the era of individuals with disabilities being relegated to asylums for training and development. The notion of training individuals with disabilities crossed the Atlantic from Europe to the United States when, in 1817, the first residential school in America
was founded by Reverend Thomas Gallaudet in Hartford, Connecticut. Shortly thereafter, the first training school for the blind opened its doors. By 1850, the Institution for Idiotic Children was established in Massachusetts.  

Society was forced to acknowledge individuals with disabilities during the urban population boom accompanying the Industrial Revolution in the 1700s. Handicap labels began during this time to legitimate the endowment of different kinds of care available to individuals but also to more efficiently and effectively direct resources toward the care of individuals with disabilities. However, in the mid to late 1800s public perception of people with disabilities changed from a supportive model to a model of isolation. Rather than teaching the disabled to function within society, the goal was to teach the disabled to function in an institution.

In 1898, during a speech to the National Education Association, famed inventor Alexander Graham Bell stated that children with disabilities had a right to receive their education in and through public schools. Bell’s mother, who homeschooled him, was deaf but still able to play the piano skillfully, and she taught the young inventor by example not to see people’s limitations but to find solutions to help them overcome their conditions.

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84 James J. Cremins, Legal and Political Issues in Special Education 5 (1983)
86 James J. Cremins, Legal and Political Issues in Special Education 5-6 (1983)
During the 1950s and 1960s, the roots of the *Education of All Handicapped Children Act of 1975* (P.L. 94-142) began to appear. As was the case a hundred or more years prior, a model of segregating students with disabilities from their typically-developing peers persisted. Not until the four cases which made up *Brown v. Board of Education*\(^88\) were heard by the United States Supreme Court did the principles of equal protection and due process under the Fifth and Fourteenth Amendments play a momentous role in public education.\(^89\) With the *Brown* ruling, the idea of educating students with disabilities in the same classroom as typically developing peers coincided with the movement from racial segregation. The nation then came to the conclusion that separate was not equal but detrimental.\(^90\)

Even with the passage of *Brown* but before the enactment of P.L. 94-142, the educational fate of many individuals with disabilities was likely to be dim. In 1967, for example, state institutions were homes to almost 200,000 persons with significant disabilities. Many of these restrictive settings provided only minimal food, clothing, and shelter.\(^91\)

In 1970, U.S. Schools educated only one in five children with disabilities, and many states had laws excluding certain students from school, including children who


\(^{90}\) Laura F. Rothstein, Special Education Law Third Edition 12 (2000)

\(^{91}\) Thirty-five Years of Progress in Educating Children With Disabilities Through IDEA, (U.S. D.O.E, Office of Special Education and Rehabilitative Services), November, 2010, at 3.
were deaf, blind, emotionally disturbed, or “mentally retarded.” Before IDEA, many children were denied access to education and opportunities to learn. By 1975 about three million children with disabilities were not receiving appropriate programming in schools and another one million children were fully excluded from a public education. Therefore, of the eight million children with disabilities in the United States, more than half were receiving inadequate services or no services at all.

In the 1950s and 1960s, the federal government, with strong support and advocacy of family associations, such as The Association for Retarded Children (ARC), began to develop and validate practices for children with disabilities and their families. These practices, in time, laid the foundation for implementing effective programs and services for early intervention and special education in states and localities across the country.

Although it is widely assumed that a federal statute (P.L. 94-142) created educational rights for children with disabilities, some of these rights were first established in state statutes (although not implemented) and also grew out of federal court cases based on the U.S. Constitution. The congressional bills which became P.L. 94-142 in 1975 were originally introduced in 1971, and their consideration by Congress had an impact on the nation by fueling interest in state legislation and in litigation.

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educational rights of students with disabilities were also ensured by two other federal laws: Section 504 of the Rehabilitation Act (Amendments of 1973) and the 1990 Americans with Disabilities Act.\textsuperscript{95}

**A Legislative History Leading to the Education of All Handicapped Children Act of 1975**

There are numerous illustrations of key initial federal legislation that supported improved programs and services for children and adults with disabilities. Notable examples include the following: *Expansion of Teaching in the Education of Mentally Retarded Children Act of 1958*, which Congress used to appropriate funds for the training of teachers of children with mental retardation\textsuperscript{96}; *The National Defense Education Act of 1958*, which significantly increased federal funding for public schools;\textsuperscript{97} *Training of Professional Personnel Act of 1959*, which helped train program administrators and teachers of children with mental retardation; *Captioned Films Acts of 1958*, which supported the production and distribution of accessible films; and *Teachers of the Deaf Act of 1961*, which trained instructional personnel for children who were deaf or hard of hearing. In addition, in 1965, the *Elementary and Secondary Education Act* (ESEA) and the *State Schools Act* provided states with direct grant assistance to help educate children

\textsuperscript{95} Edwin W. Martin, Reed Martin, Donna L. Terman, The Legislative and Litigation History of Special Education, 6, 1 The Future of Children. 25, 36 (Spring 1996) (Laws and background preceding PL 94-142).

\textsuperscript{96} Mitchell L. Yell, The Law and Special Education 61 (1998)

\textsuperscript{97} Mitchell L. Yell, The Law and Special Education 61 (1998)
with disabilities. In 1966, an amendment to ESEA included Title VI, which fulfilled the funding component of the Act by providing grants for programs used by children with disabilities. In 1970, Title VI was replaced by *Education of the Handicapped Act* (EHA), which later became the foundation for the Education of All Handicapped Children Act that would follow half a decade later.

The first federal civil rights law to protect the rights of individuals with disabilities was Section 504 of the *Rehabilitation Act of 1973*. Section 504 of the Rehabilitation Act of 1973 provided the same rights to individuals with disabilities as other civil rights legislation protected the rights of individuals who were discriminated on the basis of race and sex. It is important to note, the aforementioned legislation pertained only to recipients of federal funds (e.g., schools, government agencies, institutions of higher education, private businesses, or corporations). In 1974, the *Elementary and Secondary Education Act* was amended to include the provision of funding of programs specifically for children with disabilities by each state receiving federal special education funding. With the amendments, students with disabilities were assured of the right to an education, the right to specific due process procedures, and the right to be educated in their least restrictive environment. The amendments also included the establishment of the National Advisory Council on Handicapped Children.

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While a number of legislative initiatives provided rights to individuals with disabilities, the legislations stemmed from landmark court decisions which further advanced increased educational opportunities for children with disabilities. For example, the *Pennsylvania Association for Retarded Citizens v. Commonwealth*\(^{101}\) and *Mills v. Board of Education of the District of Columbia*\(^{102}\) established the responsibility of states and localities to educate children with disabilities. These court decisions, which affirmed the right of every child with a disability to be educated, were grounded in the Equal Protection Clause of the 14\(^{th}\) Amendment to the U.S. Constitution and stemmed from the legal theory in *Brown*.\(^{103}\)

Specifically with regard to related services for students with disabilities, there are three landmark Supreme Court decisions: *Board of Education v. Rowley*,\(^{104}\) *Irving Independent School District v. Tatro*,\(^{105}\) and *Cedar Rapids Community School District v. Garret F.*\(^{106}\) In *Rowley*, the Supreme Court overturned the lower court’s decisions which required a school district to provide a sign language interpreter to a child who utilized other strategies to communicate and earned passing grades from one year to the next. Thereby, in the Supreme Court’s eyes, the child received educational benefit. In *Tatro*

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\(^{103}\) Laura F. Rothstein, Special Education Law Third Edition 12 (2000)


and Garret F., the Court affirmed decisions by lower courts requiring districts to provide clean intermittent catheterization and other specialized nursing services including the use of, cleaning, and maintenance of a ventilator so that students could be educated in their least restrictive environments regardless of expense.107 The aforementioned Court decisions provided much needed clarification and guidance for school districts as well as courts at all levels regarding related services, most notably school health services.

**Education for All Handicapped Children Act and Subsequent Regulations**

The *Education for All Handicapped Children Act* (EAHCA) was signed into law by President Gerald Ford on November 29, 1975, and became effective in 1977.108 The EAHCA is actually an amendment to the *Education of the Handicapped Act* (EHA) of 1970. In addition to providing funding from the federal government to states and ultimately local education agencies to provide special education, the EAHCA provided all qualified individuals between the ages of three and twenty-one with the right to a free and appropriate public education, procedural safeguards, integration, and nondiscriminatory testing and evaluation materials and procedures.109 With regard to related services, the Act mandates the school district’s responsibility to provide special

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education and related services which are designed to meet the unique needs of the handicapped child and assist the child to benefit from their educational program.\textsuperscript{110}

Since 1975, legislation has been enacted to explain and extend the requirements of the EAHCA. In 1986 The Handicapped Children’s Protection Act was passed by Congress to extend awards for parents who are prevailing parties of litigation. Also in 1986, Education of the Handicapped Amendments was passed to provide federal incentives to support the adoption of infant and toddler programs.\textsuperscript{111}

Major changes came in 1990 when the EAHCA was renamed the Individuals with Disabilities Education Act (IDEA). Included in IDEA were changes to the language of the law to reflect person-first language and to remove the term “handicapped student” and replace it with “child/student/individual with a disability.” In addition, students with autism and traumatic brain injury were included as beneficiaries of the law, and a transition plan was required on each IEP by age sixteen.

IDEA was reauthorized and improved with the passage of The Individuals with Disabilities Education Act Amendments of 1997. The 1997 amendments to IDEA restructured and ultimately consolidated the law from eight parts to four, reinforced the role of parents, afforded educators and parents the opportunity to mediate to resolve their differences, provided flexibility in the way schools can discipline students with disabilities, and changed the IEP team and content of the IEP.\textsuperscript{112}

\textsuperscript{110} Robert Allen Pruitt, The Scope of Related Services Under the Education for All Handicapped Children Act (December, 1983) (unpublished Ph.D. dissertation, on file with The University of San Francisco).

\textsuperscript{111} Mitchell L. Yell, The Law and Special Education 62-65 (1998)

\textsuperscript{112} Mitchell L. Yell, The Law and Special Education 62-65 (1998)
In December, 2004, President George W. Bush signed into law the *Individuals with Disabilities Education Improvement Act (IDEIA)* which reauthorized IDEA. Major changes or “Improvements” to the Act included new requirements in identifying students with specific learning disabilities and early intervening services. With the changes, rather than relying on a severe discrepancy between intellectual ability and achievement, local educational agencies must consider a child’s response to scientific, research-based procedures to determine whether a child has a learning disability. Lastly, IDEIA requires the evaluation team to review data and discuss the role that response to scientific, research-based interventions play in the evaluation process.\footnote{Q and A: Questions and Answers on Response to Intervention (RTI) and Early Intervening Services (EIS), U.S. Department of Education (Nov. 26, 2013), http://idea.ed.gov/explore/view/p/.root.dynamic.QaCorner.8,}

**Ohio’s Enforcement of the Handicapped Children Act**

Enforcement of IDEA is left up to each individual state to monitor local education agency compliance.\footnote{Robert Allen Pruitt, *The Scope of Related Services Under the Education for All Handicapped Children Act* (December, 1983) (unpublished Ph.D. dissertation, on file with The University of San Francisco).} Nevertheless, the federal government provides the Secretary of Education with the power to withhold funds from Ohio, or any other state, if a local education agency is found to be out of compliance with the intentions and requirements of IDEA.\footnote{Robert Allen Pruitt, *The Scope of Related Services Under the Education for All Handicapped Children Act* (December, 1983) (unpublished Ph.D. dissertation, on file with The University of San Francisco).} In Ohio, the Ohio Department of Education (ODE) affords parents and schools the opportunity to resolve disputes in several different ways. Mediation is a voluntary process for resolving disputes between two parties. For mediation to occur,
both sides must agree to mediate. The mediation process is facilitated by a trained impartial third party, the mediator, who helps the parties communicate with each other about their concerns in an effort to reach a mutually acceptable solution. In addition to mediation, ODE has instituted complaint investigation procedures, allowing issues to be resolved in a timely manner. ODE reviews written and signed allegations concerning violations of state or federal special education law. ODE also has afforded parents, school districts, or other agencies (e.g., county boards of developmental disabilities, Department of Youth Services) the opportunity to request an impartial due process hearing to resolve disagreements relating to special education. The hearing is conducted by an impartial hearing officer who is appointed by ODE. Following the aforementioned information on enforcement of IDEA, it should be noted, during the 1999-2000 school year, $146.5 million dollars were spent on the special education issue mediation, due process hearings and litigation.

To ensure that parents and students are informed of their rights and the aforementioned complaint processes, the Ohio Department of Education requires school districts to provide parents and guardians with procedural safeguards at least annually. Ohio identifies these procedural safeguards by the title, “Whose IDEA Is This? A Parent’s Guide to the Individuals with Disabilities Education Improvement Act of 2004 (IDEA).” Ohio updates the procedural safeguards document to reflect any changes in federal or

116 Dispute Resolution, Ohio Department of Education (Nov. 26, 2013), http://education.ohio.gov/Topics/Special-Education/Mediation-Complaints-and-Due-Process

state law relating to the education of students with disabilities. The last time the current safeguards document was updated was on April 2, 2012. The procedural safeguards provide parents with a wealth of information. Topics range from steps to getting services to forms for mediation, complaints, and due process. The safeguards most comprehensive source of information falls within the section titled, “Answers to Frequently Asked Questions” (FAQs). Topics in the FAQs include: Request for Assistance; Referral; Notices; Surrogate Parents; Consent; Evaluation; Reevaluation; Independent Educational Evaluation; Individualized Education Program (IEP); Extended School Year Services; Student Transfer; Transition; Records; How to Resolve Conflicts and Concerns; Mediation; IEP Facilitation; Complaint Procedures; Due Process; Discipline; and Nonpublic (Private) Schools. The safeguards also provide parents and school districts with helpful definitions regarding special education and include a separate definitions section on disability terms as well.118

A portion of the FAQs section in the procedural safeguards document described above is entitled, “What is the responsibility of the IEP team?” This portion of the safeguards walks parents through the various sections of the IEP while using parent-friendly language. One of the areas of the IEP each IEP team must always consider is the provision of special education and related services. This section assists parents in understanding that the services listed on the IEP should be based on scientific research and are necessary to help children with disabilities participate and progress in

118 Whose IDEA is This? A Parent’s Guide to the Individuals with Disabilities Education Improvement Act of 2004 (Ohio Department of Education, April 2, 2012)
the general curriculum. While it is the decision of the IEP team which services are necessary for each individual child, the safeguards make it clear the services must be research-based and provide children with access to, and progress in, the state-provided and school district-adopted curriculum.119

In addition to the “Whose IDEA Is This?” procedural safeguards, Ohio also provides educators with “Operating Standards for Ohio Educational Agencies serving Children with Disabilities.” The most recent edition of Operating Standards became effective on July 1, 2014 and was subsequently published in August of 2014 by the Ohio State Board of Education and the Ohio Department of Education. A letter preceding the Table of Contents was written by Director of the Ohio Office for Exceptional Children, Dr. Sue Zake. The letter explains that the operating standards were adopted by the State Board of Education to align with revised state-imposed rule requirements. The letter further states that the intent of the operating standards is to identify “in writing to local educational agencies and the United States Department of Education the state-imposed special education rules, regulations, and policies adopted by the State Board of Education that are not required by Part B of the Individuals with Disabilities Education Improvement Act of 2004 or by Part B federal regulations.”120

Much like the procedural safeguards discussed earlier but in greater detail, the operating standards provide information, rules, and guidelines for Ohio educators to

119 Whose IDEA is This? A Parent’s Guide to the Individuals with Disabilities Education Improvement Act of 2004 (Ohio Department of Education, April 2, 2012)

120 Ohio Operating Standards for the Education of Children with Disabilities (Ohio State Board of Education and Ohio Department of Education, July 1, 2014)
follow in educating students with disabilities. Topics in the operating standards include:
State-Imposed Rules, Regulations, and Policies Not Required by IDEA 2004 or Federal
Regulations; Applicability of requirements and definitions; Free appropriate public
education; Child Find; Confidentiality; Procedural safeguards; Evaluations;
Individualized education program (IEP); Parentally-placed nonpublic school children;
Delivery of services; Transportation of children with disabilities; Preschool special
education requirements; Standard for admission, transfer, suspension, and expulsion – the
Ohio state school for the blind and the Ohio school for the deaf; and Rules for providing
braille translation computer media for schoolbooks that are listed for sale by publishers
with the superintendent of public instruction.  

One of the responsibilities educational agencies have in providing a FAPE to
students with disabilities is the provision of related services. Related services are
developmental, corrective, and other supportive services that may be required to enable
students with disabilities to benefit from special education. Ohio’s operating standards
refer to related services in several instances. First, as part of the evaluation process, the
necessity of related services is determined by the evaluation team, similar to the process
determining whether the child needs special education. Later in the operating standards,
qualifications for related services personnel are outlined and, when applicable, refer to
Ohio Revised Code requirements. Related service personnel qualifications are to be
consistent with state-approved or state-recognized accreditation. Related service

\[121\] Ohio Operating Standards for the Education of Children with Disabilities (Ohio State Board of
Education and Ohio Department of Education, July 1, 2014)
providers have not had accreditation requirements waived under any circumstances, and operating standards stipulate that physical and occupational therapists and their assistants must meet licensing requirements pursuant to a specific chapter of Ohio Revised Code.\textsuperscript{122}

\textbf{Ohio’s Interpretation of Policy}

While the EAHCA of 1975 and the law’s most recent reauthorization, IDEA of 2004, provide children with disabilities access and a right to a free and appropriate public education, Ohio interprets the law and provides parents with procedural safeguards and educators with operating standards based on the requirements within the law. In some cases, Ohio has taken the IDEA requirements a step further and has included in the 2014 operating standards a list of state-imposed rules, regulations, and policies not required by IDEA of 2004 or federal regulations.\textsuperscript{123}

Topics included in the state-imposed rules, regulations, and policies not required by IDEA of 2004 include: Definitions; Free Appropriate Public Education; Child Find; Confidentiality; Procedural Safeguards; Evaluations; Individualized Education Program; Parentally Placed Nonpublic School Children; Delivery of Services; and Providing Instructional Material to Children with Visual Impairments or Print Disabilities. For each of the topics listed above, there are anywhere from one to eleven items for implementation under each topic. Each item is a specific component of a child’s right to

\textsuperscript{122} Ohio Operating Standards for the Education of Children with Disabilities (Ohio State Board of Education and Ohio Department of Education, July 1, 2014)

\textsuperscript{123} Ohio Operating Standards for the Education of Children with Disabilities (Ohio State Board of Education and Ohio Department of Education, July 1, 2014)
a special education and often is accompanied by a definition or further explanation of Ohio’s state imposed requirements.\textsuperscript{124}

\textbf{An Overview of Related Services Associated with A Student’s Individualized Education Program}

The related services requirement within IDEA has been a contentious facet of the law.\textsuperscript{125} With respect to IDEA, related services are viewed as a critical component in providing students with a FAPE and an education in their least restrictive environment.\textsuperscript{126} The provision of related services in schools provides inclusive opportunities for the students served but also can include challenges for the school and district as well.\textsuperscript{127} One such challenge in serving greater numbers of students who have chronic diseases and disabling conditions includes the payment for related services.\textsuperscript{128}

Related services are developmental, corrective, and other supportive services that are required to assist a child with a disability to benefit from special education. Some children need related services to meet their individually designed special education goals.

\textsuperscript{124}Ohio Operating Standards for the Education of Children with Disabilities (Ohio State Board of Education and Ohio Department of Education, July 1, 2014)

\textsuperscript{125}Katherine M. Nagle, Opinions from the Marble Palace: Judicial Decision Making in Supreme Court Cases Under the Individuals with Disabilities Education Act (December, 2001) (unpublished Ph.D. dissertation, on file with The University of Utah, Department of Special Education).

\textsuperscript{126}Joyce Anderson Downing, Related Services for Students with Disabilities: Introduction to the Special Issue, 39 Intervention in School and Clinic 202, 195-208 (2004) (determining need for related services)


In addition, if services are considered as related services and are required to assist a child with a disability to benefit from special education and receive a free and appropriate public education (FAPE), then those services must be provided. What follows is an elaboration on specific related services.

Related services are determined at IEP team meetings on an individual basis, and therefore, a comprehensive list is impossible. However, specific examples demonstrate the breadth of possible services associated with an IEP.

Art therapy is the therapeutic use of art making, within a professional relationship, by people who experience illness, trauma, or challenges in living, and by people who seek personal development. Through creating art and reflecting on the art products and processes, people can increase awareness of self and others; cope with symptoms, stress, and traumatic experiences; enhance cognitive abilities; and enjoy the life-affirming pleasures of making art. Art therapy is not currently utilized in an expansive number of schools nationwide or worldwide but, there are pockets of areas in London, England, for example, where the practice is being used in schools to assist children who are experiencing moderate to severe mental health problems. In addition, art therapy in

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131 Art Therapy: Definition of the Profession, American Art Therapy Association (July 23, 2013), http://www.americanarttherapyassociation.org/aata-history-background.html

schools is used with special education students who are having difficulty as a result of learning and/or physical disabilities, behavior disorders, or emotional disturbances which may weaken fine or gross motor control. \(^{133}\) Art therapists are master’s level professionals who hold a degree in art therapy or a related field and are skilled in the application of a variety of art modalities (drawing, painting, sculpture, and other media) for assessment and treatment. \(^{134}\)

Another related service is technology designed to assist students with disabilities. Assistive technology devices are identified in the IDEA 2004 as any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of children with disabilities. Assistive technology devices are available in a variety of categories to address functional capabilities of students with disabilities. However, the term does not include a medical device that is surgically implanted, or the replacement of such device. \(^{135}\)

Assistive technology’s roots lie within the *Technology-Related Assistance for Individuals with Disabilities Act* (Tech Act) of 1988 and subsequently amended in 1994. The Tech Act required all states to develop systems for providing various forms of


\(^{134}\) *Art Therapy: Definition of the Profession*, American Art Therapy Association (July 23, 2013), [http://www.americanarttherapyassociation.org/aata-history-background.html](http://www.americanarttherapyassociation.org/aata-history-background.html)

\(^{135}\) *Definition of Assistive Technology*, Georgia Department of Education (July 23, 2013), [http://www.gpat.org/Georgia-Project-for-Assistive-Technology/Pages/Assistive-Technology-Definition.aspx](http://www.gpat.org/Georgia-Project-for-Assistive-Technology/Pages/Assistive-Technology-Definition.aspx)
technological assistance to children with disabilities. Through financial support, the Act
required states to perform needs assessments, identify technology resources, provide
assistive technology services, and make the public aware of such opportunities for
assistive technology.  

The American Speech-Language-Hearing Association (ASHA) states that the
practice of audiology includes providing services for children with hearing loss and/or
auditory processing disorders. Per ASHA, the role of the audiologist in the schools is
clearly delineated in IDEA regulations. IDEA, Part B, which is applicable to children
ages 3 to 21, defines audiology as follows:

Audiology includes: (1) Identification of children with hearing loss; (2) Determination of the range, nature, and degree of hearing loss, including referral for medical or other professional attention for the habilitation of hearing; (3) Provision of habilitative activities, such as language habilitation, auditory training, speech reading (lip-reading), hearing evaluation, and speech conservation; (4) Creation and administration of programs for prevention of hearing loss; (5) Counseling and guidance of children, parents, and teachers regarding hearing loss; and (6) Determination of children's needs for group and

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individual amplification, selecting and fitting an appropriate aid, and evaluating the effectiveness of amplification.\textsuperscript{138}

Audiology services have been provided as a related service for students with disabilities since the inception of the EAHCA’s requirements. Most schools screen incoming kindergarten students for potential hearing loss, as it is estimated that seventeen out of every 1,000 children under the age of eighteen have a hearing loss. As of 2006, more than 71,900 children ages six to twenty-one were provided services in schools under IDEA’s disability category for hearing impairments.\textsuperscript{139}

Counseling services are provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel.\textsuperscript{140} Counseling services are intended to help all children in the areas of academic achievement, personal/social development and career development.\textsuperscript{141} The provision of counseling services can be traced back to the final regulations for IDEA (1997) when the definition of related services was outlined to include counseling services, among eleven other related services.\textsuperscript{142}

Early identification and assessment of disabilities in children is the implementation of a formal plan for identifying a disability as early as possible in a


\textsuperscript{139} Related Services, National Dissemination Center for Children with Disabilities (Dec. 1, 2013), http://nichcy.org/schoolage/iep/iepcontents/relatedservices\#audio

\textsuperscript{140} Related Services, National Dissemination Center for Children with Disabilities (July 31, 2012), http://nichcy.org/schoolage/iep/iepcontents/relatedservices

\textsuperscript{141} Related Services, National Dissemination Center for Children with Disabilities (Dec. 1, 2013), http://nichcy.org/schoolage/iep/iepcontents/relatedservices\#counseling

\textsuperscript{142} FAQs: Related Services, Wrightslaw (Dec. 1, 2013), http://www.wrightslaw.com/info/relsvcs.faqs.htm
child’s life. 143 As a related service, early identification and assessment of disability in children represents an individual service for one child. If a child’s IEP team determines that identifying and assessing the nature of a child’s disability is necessary in order for the child to benefit from his or her special education, then this related service must be listed in the child’s IEP and provided to the child by the public agency at no cost to the parents. A formal plan would be written to establish the process and procedures by which the child’s disability will be identified.144 Early identification and assessment of disabilities in children stems from the 1986 Education of the Handicapped Amendments which provided federal incentives for the adoption of infant and toddler programs.

Interpreting services were added to IDEA’s list of related services in the 2004 reauthorization and when used with respect to children who are deaf or hard of hearing includes: Oral transliteration services; cued language transliteration services; sign language transliteration and interpreting services; and transcription services, such as communication access real-time translation (CART), C-Print, and TypeWell; and special interpreting services for children who are deaf-blind.145

Medical services are considered a related service only under specific conditions: when they are provided by a licensed physician and (b) used for diagnostic or evaluation purposes only. Medical services as a term means services provided by a

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143 Related Services, National Dissemination Center for Children with Disabilities (July 31, 2012), http://nichy.org/schoolage/iep/iepcontents/relatedservices

144 Related Services, National Dissemination Center for Children with Disabilities (July 23, 2013), http://nichcy.org/schoolage/iep/iepcontents/relatedservices

145 Related Services, National Dissemination Center for Children with Disabilities (July 31, 2012), http://nichy.org/schoolage/iep/iepcontents/relatedservices
licensed physician to determine a child’s medically related disability that results in the
child’s need for special education and related services.\footnote{146}

When referring to medical services as a related service, the 1999 case of Cedar
Rapids Community School District v. Garret F.\footnote{147} is a focal point of the discussion. In
Garret F., the U.S. Supreme Court found that, if a related service is required to enable a
qualified child with a disability to remain in school, the related service must be provided
as long as it is not a purely “medical” service. What is considered a “medical” service in
IDEA’s definition is any service that can only be provided by a licensed physician. If a non-
physician can deliver the services, then the service must be provided by public agencies,
regardless of the staffing or fiscal burdens they may impose. Health care services that
can be provided by a non-physician are not provided under the category of medical
services. However, health care services would be considered school health services and
school nurse services. Examples of such services include bladder catheterization,
tracheostomy tube suctioning, positioning, and monitoring of ventilator settings, to name
a few.\footnote{148}

Music therapy has been broadly defined by a music therapist with an interest in
people with disabilities as “the use of music as a therapeutic tool for restoration,
maintenance, and improvement of psychological, mental and physiological health and for

\footnote{146} Related Services, National Dissemination Center for Children with Disabilities (July 23, 2013), http://nichcy.org/schoolage/iep/iepcontents/relatedservices


\footnote{148} Related Services, National Dissemination Center for Children with Disabilities (July 23, 2013), http://nichcy.org/schoolage/iep/iepcontents/relatedservices
the habilitation, rehabilitation, and maintenance of behavioral, developmental, physical and social skills – all within the context of a client-therapist relationship.”

Music therapy is used with a wide range of populations – people in hospitals, people with psychiatric disorders, older people, people in hospices, people with neurological problems, people with autism, and adults and children with intellectual disability.

Music therapy’s root in education date back to the 1940s when the first college training programs were established and later in the 1980s when The Certification Board for Music Therapists was accredited by the National Commission for Certifying Agencies.

Occupational therapy services are those provided by a qualified occupational therapist and include (1) Improving, developing, or restoring functions impaired or lost through illness, injury, or deprivation; (2) Improving ability to perform tasks for independent functioning if functions are impaired or lost; and (3) Preventing, through early intervention, initial or further impairment or loss of function.

Occupational therapy practitioners work in a variety of educational settings to support the participation of children and youth in a wide range of academic and non-academic activities. The support that occupational therapy practitioners provide


151 History of Music Therapy, American Music Therapy Association (Dec. 1, 2013), http://www.musictherapy.org/about/history/

152 Related Services, National Dissemination Center for Children with Disabilities (July. 31, 2012), http://nichy.org/schoolage/iep/iepcontents/relatedservices
includes direct service to students, as well as training and consultation with parents, educators, administrators, and other school staff. Occupational therapy services in education expanded greatly in the 1960s and 1970s concurrently with the case law and legislation previously described in this chapter. Today, occupational therapy is one of the most frequently utilized related services.

Orientation and mobility services are described in the 1997 amendments to IDEA, which state that such services are “provided to blind or visually impaired students by qualified personnel to enable those students to attain systematic orientation to and safe movement within their environments in school, home, and community.” Orientation and mobility services include: (1) teaching students how to adapt to their environment using their senses in order to travel; (2) teaching students to use the cane for travel and for assistance in overcoming physical obstacles; (3) assisting students in using and incorporating visual aids and strategies as well as other techniques in incorporating the use of their senses in moving about.

The components of an orientation and mobility curriculum include sensory, concept and motor development (fine and gross motor skills); environmental and

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153 Katherine M. Post, Occupational Therapy and Universal Design for Learning, American Occupational Therapy Association, 1, 1-4, (2010), (background on occupational therapists).

154 Occupational Therapy History, Center on Human Development and Disability, Clinical Training Unit, University of Washington (Dec. 1, 2013), http://depts.washington.edu/lend/seminars/modules/ot/history.htm

community awareness; formal orientation and mobility skills; safety issues; the use of community resources; the use of assistive technology; and purposeful and self-initiated movement. Other orientation and mobility skills include basic skills, indoor travel/cane skills, residential travel, light business travel, use of public transportation, metropolitan/urban travel, and special areas/circumstances (i.e., rural travel, mall travel). 156

Parent counseling and training services are those that assist parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child’s IEP. Examples include, but are not limited to: providing parents with information about cognitive and speech and language development; counseling the parents about how to respond at home to a student’s behavior in a manner consistent with the in-school behavior management program; training parents to use the same mode of communication (e.g., sign language) the child would be using at school; and training on how to operate assistive technology devices at home.157


Assisting parents in understanding the special needs of their child and providing parents with information about child development have long been part of the requirements associated with IDEA. The latter portion of the definition associated with helping parents acquire the necessary skills that will allow them to support the implementation of their child’s IEP was added to IDEA during the 1997 reauthorization and was subsequently kept as part of the law in IDEA 2004. It is important to keep in mind, though, parent counseling and training is a related service and would only be part of a child’s IEP if the IEP team agreed it was necessary for the child to receive a free and appropriate public education.\textsuperscript{158}

Physical therapy is one of the related services under Part B of IDEA. Physical therapy is provided to support the student’s individualized education program (IEP). Physical therapists work collaboratively with a student’s IEP team and participate in screening, evaluation, program planning, and intervention. As a member of the IEP team, physical therapists design and implement physical therapy interventions including teaching and training of family and education personnel and measurement and documentation of progress to help the student achieve his/her IEP goal. Physical therapists assist students in accessing school environments and benefiting from their educational program. Physical therapists may be hired through the school district, an intermediate unit, or an outside agency or private practice. Much like occupational therapy, physical therapy has been a longstanding related service for children with

\textsuperscript{158} Related Services, National Dissemination Center for Children with Disabilities (Dec. 1, 2013), http://nichy.org/schoolage/iep/iepcontents/relatedservices#counseling
disabilities. Most recently, physical therapy was included in the IDEA reauthorization of 2004.\footnote{Providing Physical Therapy in Schools Under IDEA 2004, Section on Pediatrics, American Physical Therapy Association (July 24, 2013), http://www.pediatricapta.org/consumer-patient-information/pdfs/09%20IDEA%20Schools.pdf}

Positive behavioral interventions and supports (PBIS) involve a comprehensive set of strategies aimed at providing a student with a disability an improved lifestyle that includes reductions in problem behaviors, changes in social relationships, an expansion of prosocial skills, and an increase in school and community inclusion.\footnote{Related Services – A Closer Look, Wrightslaw (July 24, 2013), http://www.wrightslaw.com/info/relsvcs.indepth.htm}

Psychologists and school social workers may be involved in assisting in developing these positive behavioral intervention strategies. However, as the U.S. Department of Education notes: “There are many other appropriate professionals in a school district who might also play a role . . . These examples of personnel who may assist in this activity are not intended to imply either that school psychologists and social workers are automatically qualified to perform these duties or to prohibit other qualified personnel from serving in this role, consistent with State requirements.”\footnote{Related Services – A Closer Look, Wrightslaw (July 24, 2013), http://www.wrightslaw.com/info/relsvcs.indepth.htm}

PBIS has been part of special education law since being included in IDEA 1997 and happens to be the only approach addressing behavior mentioned in the law. PBIS
continued to be part of the 2004 IDEA reauthorization, and, as of 2013, Ohio has made the implementation of PBIS a requirement for its public school districts.\textsuperscript{162}

According to the 1999 regulations regarding the implementation of the Individuals with Disabilities Education Act (IDEA) Amendments of 1997, “Psychological services includes- (1) Administering psychological and educational tests, and other assessment procedures; (2) Interpreting assessment results; (3) Obtaining, integrating, and interpreting information about child behavior and conditions relating to learning; (4) Consulting with other staff members in planning school programs to meet the special needs of children as indicated by psychological tests, interview, and behavior evaluations; (5) Planning and managing a program of psychological services, including psychological counseling for children and parents; and (6) Assisting in the development of positive behavioral intervention strategies.”\textsuperscript{163}

Recreation services generally are intended to help students with disabilities learn how to use their leisure and recreation time constructively. Through these services, students can learn appropriate and functional recreation and leisure skills.\textsuperscript{164}

According to the final regulations from IDEA 1997, recreation as a related service includes: assessment of leisure function, therapeutic recreation services, recreation\textsuperscript{164}


\textsuperscript{164} Related Services – A Closer Look, Wrightslaw (July 24, 2013), http://www.wrightslaw.com/info/relsvcs.indepth.htm
programs in schools and community agencies, and leisure education. Recreational activities generally may fall into one or more of the following classifications: (1) physical, cultural, or social; (2) indoor or outdoor; (3) spectator or participant; (4) formal or informal; (5) independent, cooperative, or competitive; or (6) sports, games, hobbies, or toy play. Recreational activities may be provided during the school day or in after-school programs in a school or a community environment. Some school districts have made collaborative arrangements with the local parks and recreation programs or local youth development programs to provide recreational services.

Rehabilitation counseling services are “services provided by qualified personnel in individual or group sessions that focus specifically on career development, employment preparation, achieving independence, and integration in the workplace and community . . . The term also includes vocational rehabilitation services provided to a student with disabilities by vocational rehabilitation programs funded under the Rehabilitation Act of 1973, as amended.”

The role of the rehabilitation counselor is to provide students with disabilities “assistance to their vocation, social, and personal functioning through the use of

professionally recognized interaction skills and other appropriate services.” To this end, rehabilitation counseling services generally may include: (1) assessment of a student's attitudes, abilities, and needs; (2) vocational counseling and guidance; (3) vocational training; and (4) identifying job placements in individual or group sessions.\textsuperscript{169}

School health services as identified under IDEA 1997 may include interpretation, interventions, administration of health procedures, the use of an assistive health device to compensate for the reduction or loss of a body function and case management. These services may be necessary because some children with disabilities would otherwise be unable to attend a day of school without supportive health care.\textsuperscript{170}

Possible school health services include: “(1) special feedings; (2) clean intermittent catheterization; (3) suctioning; (4) the management of a tracheostomy; (5) administering and/or dispensing medications; (6) planning for the safety of a student in school; (7) ensuring that care is given while at school and at school functions to prevent injury (e.g., changing a student's position frequently to prevent pressure sores); (8) chronic disease management; and (9) conducting and/or promoting education and skills training for all (including the student) who serve as caregivers in the school setting.”\textsuperscript{171}

Issues or problems at home or in the community can adversely affect a student's performance at school, as can a student's attitudes or behaviors in school. Social work

\textsuperscript{169} Related Services – A Closer Look, Wrightslaw (July 24, 2013), http://www.wrightslaw.com/info/relsvcs.indepth.htm

\textsuperscript{170} Related Services – A Closer Look, Wrightslaw (July 24, 2013), http://www.wrightslaw.com/info/relsvcs.indepth.htm

\textsuperscript{171} Related Services – A Closer Look, Wrightslaw (July 24, 2013), http://www.wrightslaw.com/info/relsvcs.indepth.htm
services may become a necessary component of a student’s IEP in order to help a student benefit from his or her educational program. Social work services in schools includes:

“(1) preparing a social or developmental history on a child with a disability; (2) group and individual counseling with the child and family; (3) working in partnership with parents and others on those problems in a child's living situation (home, school, and community) that affect the child's adjustment in school; (4) mobilizing school and community resources to enable the child to learn as effectively as possible in his or her educational program; and (5) assisting in developing positive behavioral intervention strategies.”

Speech-language pathology services are provided by speech-language professionals and speech-language assistants in accordance with state regulations to address the needs of children and youth with communication disabilities. Speech-language pathology services are one of the initial related services identified under special education and disability law. Under the IDEA regulations, these services include: “(1) identification of children with speech or language impairments; (2) diagnosis and appraisal of specific speech or language impairments; (3) referral for medical or other professional attention necessary for the habilitation of speech or language impairments; (4) provision of speech and language services for the habilitation

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or prevention of communicative impairments; and (5) counseling and guidance of parents, children, and teachers regarding speech and language impairments.”

Transportation as a related service is included in an eligible student's IEP if the IEP team determines that such a service is needed. Transportation services can include: “(1) travel to and from school and between schools; (2) travel in and around school buildings; and (3) specialized equipment (such as special or adapted buses, lifts, and ramps), if required to provide special transportation for a child with a disability.”

Public school districts must provide transportation to students with disabilities in two situations. These are: (1) if a district provides transportation to and from school for the general student population, then it must provide transportation for a student with a disability; and (2) if a school district does not provide transportation for the general student population, then the issue of transportation for students with disabilities must be decided on a case-by-case basis if the IEP team has determined that transportation is needed by the child and has included it on his or her IEP. Much like speech-language pathology services, transportation is one of the initial related services identified under special education and disability law.


Summary

Information pertaining to the rights and education of children with disabilities prior to 1975 showed in essence that children with disabilities did not have a right to a free and appropriate public education and were often placed in separate institutions or separate classrooms away from their peers and the general curriculum. A number of laws played a role leading to *Education of All Handicapped Children Act of 1975*. Most importantly, children with disabilities can look to the landmark *Brown v. Board of Education* decision in 1954 as the foundation for providing individuals who might be different with the right to a free and appropriate public education and the related services associated with such an education. Subsequent to the landmark *Education for All Handicapped Children Act of 1975*, several reauthorizations and accompanying legislation provide additional rights and opportunities for related services to all children with disabilities.

The Ohio Department of Education is charged with enforcing legislation pertaining to students with disabilities and has created procedural safeguards for parents and operating standards for Ohio’s educators with the dual purpose of informing parents and children with disabilities of their rights and providing Ohio educators with standards to follow in implementing educational programs for children with disabilities. Both documents can be found as appendices to this study.

Lastly, the literature provided an overview of twenty possible related services associated with a student’s IEP. The review included a historical perspective as to when the services, when applicable, were part of federal legislation.
After a review of relevant case law associated with related services, this researcher will provide school board members, superintendents, district and building administrators, general and special education teachers, related service providers, the Ohio Department of Education, and Ohio and Federal legislators with guidelines concerning the provision of related services for students with disabilities. This researcher’s hope is that the more the aforementioned individuals know about the provision of related services, the better all stakeholders can work together to improve the education of students and serve students in an economical manner.
CHAPTER III

METHODOLOGY

The selected methodology of research for this study is legal research. Legal research is the search for authority that can be applied to a given set of facts and issues. Legal research will provide the basic information necessary to formulate the limitations, delimitations, and procedures to be used in this study.

Purpose and Questions

As was stated in Chapter One, the purpose of this research is to analyze U.S. and Ohio legislation and case law as it relates to related services provided through an individualized education program for students with disabilities.

Three questions will be addressed by the study:

1. What was IDEA’s intended purpose specifically regarding related services?
2. Pursuant to IDEA and related services, what are the specific outcomes of case law and how are related services cases similar and different?
3. What are the current trends in case law pursuant to IDEA and related services?

Procedures

Materials to be used in the research component of this dissertation include federal regulations and statutes. The American Digest System, National Reporter System, and online search engines (LEXIS/NEXIS, Westlaw, and Findlaw) will be used to find the

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cases. Secondary sources to be used include government documents, scholarly journals, and selected textbook materials. In addition, interviews may be conducted with professors and attorneys with knowledge of law related to the topic.

Procedures for the study of the materials include careful reading of each case. A written summary will include a briefing of the case facts, identification of specific issues brought before the court, and the law applied to the court’s resolution of the case. Cases will be categorized chronologically and within each related services topic.

The American Legal System

The dual judicial system comprised of federal and state courts is the foundation for the American legal system. Courts of appeals are included in each of the federal and state judicial systems so that decisions of lower courts can be reviewed if necessary. Court jurisdiction may be based on the type of case to be heard or geography. Federal courts have exclusive jurisdiction only over cases involving federal laws, controversies between states, and cases involving foreign governments.179

The Federal Judiciary

The United States Constitution establishes the U.S. Supreme Court and gives Congress the authority to establish the lower federal courts. Congress has established two levels of federal courts below the Supreme Court: the U.S. District Courts and the
U.S. Circuit Courts. There are ninety-four District Courts in the federal judicial system. Each state has at least one federal district court. District courts are the trial courts of the federal court system. Federal district courts have jurisdiction to hear nearly all categories of federal cases, involving both civil and criminal matters. District courts hear cases involving citizens of two or more states or cases that involve the United States Constitution or federal law.

The intermediate level of the federal judiciary organizes the ninety-four U.S. judicial districts into twelve regional circuits, each of which has a United States court of appeals (Appendix A). A court of appeals hears appeals from the district courts located within its circuit, as well as appeals from decisions of federal administrative agencies. It is important to note, the decisions of each circuit court are only binding within its specific district. Because of this, it is possible for a decision made in one circuit to conflict with a decision in another circuit.

At the highest level of the federal judiciary lies the United States Supreme Court. The U.S. Supreme Court consists of the Chief Justice of the United States and eight Associate Justices. The number of justices is determined by Congress. Eight is the

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current number of Associate Justices allowed by law along with one Chief Justice. The President of the United States holds the power to nominate justices but appointments are confirmed by the United States Senate.\footnote{A Brief Overview of the Supreme Court, Supreme Court of the United States (Dec. 20, 2013), http://www.supremecourt.gov/about/briefoverview.aspx} Each year, the Supreme Court hears a limited number of the cases it is asked to decide. Those cases may begin in the federal or state courts and usually involve important questions about the Constitution or federal law.\footnote{Supreme Court of the United States, United States Courts (July 8, 2013), http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/DistrictCourts.aspx} As of December 2013, the Chief Justice is John G. Roberts. The Associate Justices are Antonin Scalia, Anthony M. Kennedy, Clarence Thomas, Ruth Bader Ginsburg, Stephen G. Breyer, Samuel A. Alito, Jr., Sonia M. Sotomayor, and Elena Kagan.

**The State Judiciary**

The structure of state court systems varies from state to state. Each state court system has unique features; however, some generalizations can be made. Most states have courts of limited jurisdiction presided over by a single judge who hears minor civil and criminal cases. States also have general jurisdiction trial courts that are presided over by a single judge. These trial courts are usually called circuit courts or superior courts and hear major civil and criminal cases. Some states have specialized courts that hear only certain kinds of cases such as traffic or family law cases. All states have a highest court, usually called a state supreme court that serves as an appellate court and a court of last resort. Many states also have an intermediate appellate court, often called a court of
appeals, that hears appeals from the trial court. A party in a case generally has one right of appeal.\textsuperscript{186}

**Legal Authority**

Legal authority is a published source of law that sets forth rules, doctrine, or reasoning that judges use to make legal decisions. In legal research, the fact that a case is available to read does not necessarily mean it is a published work. Cases that are unpublished will be clearly marked as such. In other words, “published” is not tantamount to “in print.” Only published works are those that can be cited as authority.\textsuperscript{187}

Legal authority refers to types of information available and the power that information has to influence a legal decision. A judge must follow binding authority, but has discretion in the weight given to persuasive authority to the degree by which the information actually persuades. Only primary authority, such as judicial precedents, constitutions, and administrative rulings, can be mandatory, but only if a court superior to the court deciding the case rendered it, and the issue being decided is comparable to the authority being considered. For example, a federal district court must follow decisions of the federal circuit court presiding over its jurisdiction (e.g., a district court in Ohio must follow precedent established in the Sixth Circuit). Also, one circuit court does not have to follow the rulings of a different circuit court; nor does one district court have to follow


\textsuperscript{187} Joseph P. Clark, A Legislative and Judicial Analysis of Sexual Relationships Between American Secondary Students and Their Teachers (May, 2011) (unpublished Ph.D. dissertation, Kent State University) (on file with author)
the rulings of another district court; nor does one state supreme court have to follow the decisions of a different state supreme court. Secondary authority is any authority that is not primary. It is never mandatory. However, it can be used as persuasive authority if no prevailing primary authority exists.\textsuperscript{188}

**Constitutional Law.** The Constitution is the foundation of the United States by establishing this nation’s form of government and defines the rights and liberties of the people and the states. Each state in the United States has its own constitution, but a state’s constitution cannot conflict with the Federal Constitution.

**Statutory law.** Statutory law derives from statutes or laws passed by legislatures rather than from constitutions or judicial decisions.\textsuperscript{189} Even though statutes are not derived from constitutions, they cannot be in conflict with constitutional law. Moreover, state statutes may not require conduct that would violate federal statutes.

**Regulations.** Regulations are rules issued by governmental administrative agencies. The regulatory process can lead to a new Rule, an amendment to an existing Rule, or the repeal of an existing Rule.\textsuperscript{190} Federal and state regulations must be found in accordance with the statutes they are interpreting or determining.

**Case law.** “Case law” represents decisions (i.e., interpretations) made by judges while deciding on the legal issues before them which are considered as the common law

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\textsuperscript{188} Joseph P. Clark, A Legislative and Judicial Analysis of Sexual Relationships Between American Secondary Students and Their Teachers (May, 2011) (unpublished Ph.D. dissertation, Kent State University) (on file with author)

\textsuperscript{189} Federal and State Statutory Law, Williams College Libraries (July 8, 2013), http://library.williams.edu/memex/470/

\textsuperscript{190} Regulatory Process, Regulations.Gov (July 8, 2013), http://www.regulations.gov/#!home;tab=learn
or as an aid for interpretation of a law in subsequent cases with similar conditions. Case laws are used by advocates to support their views to favor their clients and also to influence the decision of the judges.  

**Administrative law.** Administrative law is the branch of law governing the creation and operation of state or federal administrative agencies. Of special importance are the powers granted to administrative agencies, the substantive rules that such agencies make, and the legal relationships between such agencies, other government bodies, and the public at large.  

**Legal Principles**

**Judicial review.** When state or federal judges hear cases, they rely on their interpretation of current statutes and regulations and the prior decisions of judges who have ruled on cases involving similar issues. After receiving a decision with which parties disagree, the parties have the right to appeal to the next higher court. Appellate courts review the records of the lower court to determine if the law was applied correctly in that case and if proper procedures were followed. Courts of appeal can affirm the lower court’s ruling, overturn the ruling, remand the case to the lower court with specific instructions for further action, or a combination of these options. Intermediate level

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192 Administrative Law, Legal Information Institute, Cornell University School of Law (July 8, 2013), http://www.law.cornell.edu/wex/administrative_law

courts are required to review all appealed cases. State and federal supreme courts are not required to review appealed cases, but, in the case of the federal Supreme Court, much of its time is spent on such reviews. In order for a case to be reviewed, four federal Supreme Court Justices must agree to hear the case. State procedures vary across all fifty states.  

**Legal remedies.** When successful in a suit, a victim of a wrongful act or one who has had his or her rights infringed upon has several remedies available. Most often, money in the form of compensatory or punitive damages and attorney’s fees are provided for the purpose of compensating victims for their injuries, losses, and pain/suffering.  

**Legal Literature**

This study will be conducted using the three broad categories of legal research: primary sources, search tools, and secondary sources. Considered in the review of primary and secondary sources is mandatory and persuasive authority.

**Primary sources.** Primary sources are statements of the law itself from a governmental entity, such as a court, legislature, and executive agency, President, or Governor. Examples of primary sources of law include: court decisions, statutes, Federal

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Register, U.S. Code, Code of Federal Regulations, text of legislative bills, contracts, wills, and other legal documents.¹⁹⁶

**Secondary sources.** Secondary sources are materials that discuss, explain, interpret, and analyze what the law is or what it should be, including treatises, law reviews, encyclopedias, ALR annotations, restatements, and legal newspapers. Secondary sources also provide extensive citations to primary legal materials and other relevant secondary sources. Examples of secondary sources in law include: law reviews, legal news, law reference books, articles about law, and books about law.¹⁹⁷

**Mandatory (binding)**¹⁹⁸ authority. All primary sources are either mandatory or persuasive authority. Mandatory authority refers to cases, statutes, or regulations that the court must follow because it is binding on the court. Lower courts are required to follow decisions from higher courts in the same jurisdiction.¹⁹⁹ Mandatory authority often comes from legislatures or higher courts.²⁰⁰

¹⁹⁶ Primary and Secondary Sources in Law, Oesterle Library Information Literacy and Instruction Program (July 8, 2013), http://library.noctrl.edu/subject/business_law_primary_sources.pdf

¹⁹⁷ Primary and Secondary Sources in Law, Oesterle Library Information Literacy and Instruction Program (July 8, 2013), http://library.noctrl.edu/subject/business_law_primary_sources.pdf

¹⁹⁸ University of Maryland Francis King Carey School of Law, Thurgood Marshall Law Library, http://www.law.umaryland.edu/marshall/researchguides/tmllguide/1sec3.html


²⁰⁰ Cornell University Law School Legal Information Institute, http://www.law.cornell.edu/wex/mandatory_authority
**Persuasive (nonbinding)** authority. Although all primary sources are either mandatory or persuasive authority, secondary sources are always persuasive authority. The holding from a court in another jurisdiction or a lower court in the same jurisdiction is persuasive authority. **Persuasive authority** refers to statements that are relevant to a legal dispute, but not binding on the court.

**Search tools.** Search tools help scholars, attorneys, and judges to find primary and secondary sources. Increasingly, search tools that can help a person find full-text legal resources, including state and federal court cases, statutes, and administrative laws, are available online. Internet-based search tools also provide access to legal journals, legislative transcripts, legislative committee reports, and general interest articles from periodicals or other sources. The most comprehensive web-based search tools are LEXIS/NEXIS, Westlaw, and Findlaw.

**Legislative history.** Legislative history provides a chronology of the actions preceding a statute’s enactment. Committee reports relating to the topic, debates, texts

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201 University of Maryland Francis King Carey School of Law, Thurgood Marshall Law Library, http://www.law.umaryland.edu/marshall/researchguides/tmllguide/1sec3.html


203 Cornell University Law School Legal Information Institute, http://topics.law.cornell.edu/wex/persuasive_authority


of bills, floor amendments, congressional hearings, committee prints, and various other documents can make up the contents of a federal legislative history. Committee reports relating to the topic, congressional debates, and texts of bills will provide the majority of information to determine legislative intent. Federal legislative history can be compiled electronically by using several different avenues including, THOMAS, a free service of the Library of Congress, GPO Access, a free electronic document service of the U.S. Government Printing Office, FDsys.gov, a free service of the Government Printing Office, Westlaw, and LexisNexis.

Summary

The purpose of this dissertation is to provide school board members, superintendents, district and building administrators, general and special education teachers, related service providers, the Ohio Department of Education, and Ohio and Federal legislators with guidelines concerning the provision of related services for students with disabilities. This researcher’s hope is that by contributing to the knowledge base regarding the provision of IEP related services, the board members, administrators, educators, the ODE, and federal and state legislators can work together better to improve the education of students and serve students in an economical manner.

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CHAPTER IV
CASE LAW SUMMARIES BY RELATED SERVICE

Introduction

Case law represents decisions or interpretations of law made by judges while deciding on the legal issues before them which are considered as the common law or as an aid for interpretation of a law in subsequent cases with similar conditions. Case laws are used by advocates to support their views to favor their clients and also to influence the decision of the judges.\textsuperscript{209}

In making decisions, a judge, other than a United States Supreme Court judge, must follow binding authority, but has discretion in the weight given to persuasive authority to the degree by which the information actually persuades. Only primary authority, such as judicial precedents, constitutions, and administrative rulings, can be mandatory, but only if a court superior to the court deciding the case rendered it, and if the issue being decided is comparable to the authority being considered. For example, a federal district court must follow decisions of the federal circuit court presiding over its jurisdiction (e.g., a district court in Ohio must follow precedent established in the Sixth Circuit). Also, one circuit court does not have to follow the rulings of a different circuit court; nor does one district court have to follow the rulings of another district court; nor does one state supreme court have to follow the decisions of a different state supreme court.

\textsuperscript{209} Case Law, Legal-Explanations.com (July 8, 2013), http://www.legal-explanations.com/definitions/case-law.htm
This chapter will summarize cases of selected published case law on P.L. 94-142 arranged chronologically within type of related services. In the following seventy-seven cases, students with disabilities and/or their parents and guardians alleged violations of IDEA regarding the student’s right to a free and appropriate public education (FAPE) through the provision of related services by school districts. The following related services cases include fifteen of the twenty categories of related services identified in chapter two. Cases involving the remaining five related services were not able to be located. As a brief review, related services are meant to help students with disabilities benefit from their special education by providing support in needed areas, such as speaking or moving.210

Table 1 displays all twenty categories of related services and the number of cases cited per category throughout the chapter. Definitions of each category may be found in chapter one.

Chapter five will answer each of the three questions previously identified in chapter one. Answers to the questions will provide the reader with information pertaining to IDEA’s intended purpose specifically regarding related services. Additional information will be provided regarding specific outcomes of case law pursuant to IDEA and related services, how related services cases are similar and different, and current trends in the law pursuant to IDEA and related services.

Table 1. *Categories of Related Services and Cases Cited*

<table>
<thead>
<tr>
<th>Related Services Category</th>
<th>Number of Cases Cited Per Category</th>
</tr>
</thead>
<tbody>
<tr>
<td>Assistive Technology</td>
<td>10</td>
</tr>
<tr>
<td>Audiology Services</td>
<td>1</td>
</tr>
<tr>
<td>Counseling Services</td>
<td>2</td>
</tr>
<tr>
<td>Interpreting Services</td>
<td>7</td>
</tr>
<tr>
<td>Medical Services</td>
<td>2</td>
</tr>
<tr>
<td>Music Therapy</td>
<td>1</td>
</tr>
<tr>
<td>Occupational Therapy</td>
<td>7</td>
</tr>
<tr>
<td>Orientation and Mobility Services</td>
<td>1</td>
</tr>
<tr>
<td>Parent Counseling and Training Services</td>
<td>1</td>
</tr>
<tr>
<td>Physical Therapy</td>
<td>1</td>
</tr>
<tr>
<td>Positive Behavior Interventions and Supports</td>
<td>7</td>
</tr>
<tr>
<td>Psychological Services</td>
<td>12</td>
</tr>
<tr>
<td>School Health Services</td>
<td>9</td>
</tr>
<tr>
<td>Speech-Language Pathology Services</td>
<td>3</td>
</tr>
<tr>
<td>Transportation Services</td>
<td>13</td>
</tr>
<tr>
<td>Art Therapy</td>
<td>0</td>
</tr>
<tr>
<td>Early Identification and Assessment</td>
<td>0</td>
</tr>
<tr>
<td>Recreation Services</td>
<td>0</td>
</tr>
<tr>
<td>Rehabilitation Counseling Services</td>
<td>0</td>
</tr>
<tr>
<td>Social Work Services</td>
<td>0</td>
</tr>
</tbody>
</table>
The sixth and final chapter of this dissertation will provide school board members, superintendents, district and building administrators, general and special education teachers, related service providers, the Ohio Department of Education, and Ohio and federal legislators with guidelines concerning the provision of related services for students with disabilities. This researcher’s hope is that the more the aforementioned individuals know about the provision of related services, the better stakeholders can work together to improve the education of students and to serve students in an economical manner.

**Assistive Technology**

*I.H. v. State-Operated School District of the City of Newark.*[^211] A hearing impaired child had been educated over the course of two school years in an out-of-district placement at the Lake Drive School starting at age three until the district-proposed IEP for the 1999-2000 school year rendered the child’s placement back in the Newark City Schools. The school district proposed the same change of placement starting with the 1998-1999 school year, as well. The district’s proposed placement at the Bruce Street School for the Deaf would keep the child within the Newark City Schools at a school for hearing impaired students which is housed within the child’s neighborhood elementary school. Newark City Schools never gave an explanation as to why the Bruce Street School for the Deaf was not a proper placement initially for the child nor did officials provide reasoning for the proposed change in placement.

The child’s mother challenged the change of placement. Following a mediation session, the child was allowed to remain at Lake Drive School. Lake Drive School conducted an evaluation of the child in January 1999. The results of the evaluation concluded that the child should remain at Lake Drive School for the 1999-2000 school year. During the spring of 1999, the school district also evaluated the child and concluded the child’s LRE was the Bruce Street School for the Deaf. The district cited the fact that the Bruce Street School was the child’s neighborhood school and also reasoned the child would have the opportunity to interact with nondisabled peers at Bruce Street School. The child’s mother requested a due process hearing challenging the school district’s placement.

New Jersey’s process for resolving special education disputes begins with mediation. If mediation fails, the case is forwarded to an Administrative Law Judge (ALJ). The ALJ has forty-five days to render a decision on the matter. After the decision has been rendered, there is no additional review under New Jersey’s administrative system but a case can be appealed to New Jersey Superior Court or the Federal District Court. In the instance of the child at the center of this dispute, the ALJ reviewed reports from the school district as well as the district’s proposed IEP which would change the child’s placement to Bruce Street School. The ALJ also reviewed other documented evidence and heard testimony from several witnesses. Upon reviewing the necessary information in this case, the ALJ concluded the school district did not prove that it could provide the child with an appropriate education.
The parent then filed suit in U.S. District Court seeking attorneys’ fees. Eight months after the ALJ’s decision and two weeks after the parent filed suit in U.S. District Court seeking attorneys’ fees, the school district filed an answer and counterclaim challenging the ALJ’s decision. The matter was referred to a Magistrate Judge for summary judgment. The Magistrate Judge reviewed the facts, arguments, testimony, and evidence of the case and sided with the school district. The District Court adopted the Magistrate Judge’s opinion on this case and found the Bruce Street School to be the child’s LRE.

The parent appealed the District Court’s ruling stating the Court did not afford the ALJ proper deference as to his findings of fact. The parent also challenged the District Court’s conclusion that the district-proposed IEP would confer a meaningful educational benefit. Lastly, the parent questioned whether the district’s appeal of the ALJ decision was timely.

Upon appeal of District Court’s ruling, the case was then remanded to the Third Circuit Court of Appeals. The Third Circuit ruled the District Court did not address any of the factual findings regarding deficiencies within the proposed IEP. Under the Third Circuit’s modified “de novo” standard of review, the District Court’s lack of weight afforded to the ALJ’s conclusion in the case led the Third Circuit to rule that proper deference was not given to the ALJ’s findings.

Regarding whether or not the district’s IEP would confer a meaningful benefit for the child, the Third Circuit considered the opportunities for an inclusive education for the child with typically-developing peers at Bruce Street School. But, the Third Circuit
agreed with the ALJ in finding the inclusive or mainstreaming opportunities were “de minimis.” Therefore, the Third Circuit agreed with the ALJ in the change of placement within the district-proposed IEP would confer little meaningful educational benefit to the child in this instance.

Lastly, the Third Circuit ruled on the timeliness of the school district’s appeal of the ALJ’s ruling. The Third Circuit noted had the school district promptly appealed the case following the ALJ’s decision and had it lost, the district may have been able to propose a revised IEP which would provide meaningful educational benefit at the Bruce Street School. The Third Circuit subsequently ruled the school district did not prove the proposed IEP would offer the child with a free and appropriate public education and reversed the District Court’s decision ruling in favor of the parent.

*Nishanian v. Mamaroneck Union Free School District.*

The student had successfully completed freshman and sophomore mathematics courses with the use of assistive technology devices including a Texas Instruments Model 82 (TI-82) graphing calculator. During the spring of the student’s sophomore year, an IEP was prepared which allowed for the use of a graphing calculator. However, a calculator model was not specified in the IEP. Also during that spring, but prior to receiving the IEP, the student’s mother requested the student be allowed to use a more advanced graphing calculator, model TI-92. When the student’s junior year started, the school had not yet provided definitive guidance on whether the student could use the TI-92 calculator. Therefore,

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three weeks into the school year, the student began using the TI-92 on his Math 3A assignments and tests. When the teacher discovered the student using the TI-92 on a test, she alerted the building principal, assistant principals, and department chair. The school administration and involved staff suggested a compromise in which the student could re-take the math test using a TI-82 calculator but could check his answers using a TI-92. The student and parents rejected the proposed compromise, and the student received an “Incomplete” in Math 3A for the first grading period.

Following several unsuccessful attempts by the parent to sway the opinion of members of the board of education and superintendent, a meeting was held between the parents and school district officials. The results of this meeting concluded the student could only use a TI-82 calculator but would be provided with an alternate assessment for completion of the winter holiday break which would be in lieu of his first grading period “Incomplete” grade. The student never turned in the alternate assessment. During the holiday break the parent sent two letters requesting an impartial hearing to amend the IEP and alleging violations of IDEA and section 504 of the Rehabilitation Act of 1973, further stating her child was discriminated against due to his disability. In addition to the testimony at the impartial hearing, a student technology consultation was performed by a certified assistive technology practitioner. The certified assistive technology practitioner recommended that Grant continue using the TI-82 to solve problems and his use of the TI-92 would be solely for checking answers.

Based upon the evidence and testimony, the IHO concluded that the student’s IEP was reasonable, the school district had implemented the IEP’s test modification and
accommodations requirements, and the school district had met its requirements under IDEA and section 504 of the Rehabilitation Act. The parent then appealed the IHO’s decision to the State Review Officer (SRO). The SRO agreed with the IHO on each of the three findings.

The parent appealed by filing four claims against the school district under IDEA and section 504 in District Court. The District Court granted summary judgment for appellants on the section 504 claim and the IDEA claim noting the school district had violated IDEA by not providing the student with the assistive technology (TI-92) necessary to ensure a FAPE. The District Court also faulted the school district for devising a “vague and ambiguous” IEP and for failing to identify which scientific graphing calculator would be appropriate for the student’s Math 3A class. Moreover, the school district was faulted for its back-and-forth decisions on the extent and student’s allowable use of the TI-92 calculator, thereby contributing to the student’s “educational regression.” The District Court awarded the parent $28,391.25 to cover attorneys’ fees and damages. The school district appealed.

When the Second Circuit Court of Appeals reviewed the case, its analysis centered on whether the school district’s denial of the use of a TI-92 calculator deprived him of a FAPE. The Second Circuit found the District Court erred in its comprehension of the certified assistive technology practitioner’s report. The District Court read the practitioner’s report as suggesting the student needed access to the TI-92 calculator in order to succeed in Math 3A, when in fact, the report only recommended the student be allowed to use the TI-92 to check his math problem solving on an “as needed” basis.
After reviewing the necessary information associated with the appeal, the Second Circuit concluded the administrative proceedings were thorough and summary judgment should have been granted to the school district. The Second Circuit then vacated the District Court’s judgment and ruled in favor of the school district as the appellant.

Bradley v. Arkansas Department of Education.213 The mother and father of a male student with high-functioning autism appealed a judgment of the District Court where claims against all defendants were dismissed. The student attended a small school district in Arkansas where fewer than 300 children were enrolled in kindergarten through twelfth grade. The student had received most of his instruction in the general education classroom through sixth grade, with the exception of a portion of his day being spent in the special education resource room. The student also had an attendant with him at all times when he changed classrooms. But, once the student entered seventh grade, the student was required to change classrooms by himself. Changing classrooms on his own caused frustration and anxiety.

The parents of the student became concerned with their son’s lack of progress and called for an IEP team meeting. Unhappy with the results of the IEP team meeting, the parents enlisted a consultant who, as a psychologist specializing in developmental disabilities, had previously evaluated the student in grade school. After observations by the psychologist as well as a behavior consultant, the two consultants made written recommendations. The parents called for another IEP team to discuss the consultants’ recommendations. Following another IEP team meeting (i.e., the annual review of the

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IEP), the parents remained dissatisfied with the school district’s response and requested a due process hearing. With the hearing officer, the school district and parents negotiated an IEP which was acceptable to the parents.

Once the student’s eighth grade year had begun under the agreed-upon IEP, the parents felt the school district was not following the student’s IEP and the parents filed an administrative complaint with the Arkansas Department of Education that spring. The parents accused the school district of hiring an aide without consulting the IEP team, failing to provide training to the newly hired aide, failing to provide agreed-upon software for the student to use at home in a timely manner (the software was sixty days late), and the failure to address unspecified problems with the student’s integrated speech therapy and occupational therapy (OT). Arkansas Department of Education employees conducted an investigation into the parents’ claims and found a basis for the complaint regarding occupational therapy. Because the occupational therapy service had been provided six days late, the school district was ordered to provide two hours of OT services.

Prior to the end of the student’s eighth grade year, the IEP team reconvened to review the IEP in preparation for the student’s freshman year. In May, the parents had requested another due process hearing as they felt the proposed IEP was more vague than the previously negotiated IEP constructed in consultation with the state hearing officer. The current due process hearing officer identified the primary concern as an alleged denial of FAPE to the student due to flaws in the IEP. The parents felt the IEP relied upon inaccurate test data, did not require assistive technology in the form of computer
software the student had utilized previously, did not provide for speech and occupational therapies during extended school year programming, and failed to provide adequate related services as well as a behavior management plan. During the fall of the student’s ninth grade year, the state hearing officer rejected the parents’ request and ruled in favor of the school district and ordered immediate implementation of the IEP. Two months later, the parents filed suit against the Arkansas Department of Education, the school district, and various individuals accusing all involved of violations of the IDEA and the Rehabilitation Act.

Near the end of the student’s ninth grade year, the parents filed another administrative complaint with the Arkansas Department of Education, again alleging a denial of FAPE for their son. After school had let out for the summer, the Arkansas Department of Education issued a ruling stating the investigation found no violations by the school district.

As the student’s sophomore year began, disputes continued between the parents and the school district. The way the student was graded had been changed by the IEP team. Now, the student was graded on all work, not just work he completed. This practice had exposed gaps in the student’s knowledge. At a meeting to discuss a plan of remediation, the father became hostile with the school superintendent and was subsequently arrested and no longer allowed on the school premises. The father then requested homebound schooling after presenting a one-page report from a psychologist diagnosing the student with school phobia. The IEP team agreed the student’s least restrictive environment was the school rather than the home. After the student was not
sent to school, the school reported the student as truant to the authorities, and the student’s father was arrested. At the father’s hearing for threatening the school superintendent and for his son’s truancy, the father was ordered to return his child to school but remain off school grounds.

Prior to the court hearing, the student’s parents had filed two due process hearing requests. The first request challenged the school district’s refusal to pay for an assistive technology evaluation for the student. The second due process request alleged the school district denied the student a FAPE because the district had not arranged for a comprehensive evaluation. The hearing officer found the district had already paid for two assistive technology evaluations and that the district had performed the necessary evaluations. The hearing officer found the district not to be in violation of IDEA.

During the month of March of the student’s sophomore year, another due process hearing request had been made by the student’s father. As a result of the request, later in March the hearing officer ordered the school district to begin providing off-site instruction. The school district complied with the order and the student was educated at a local fire station which was deemed a neutral location. The school district’s psychologist completed an evaluation on the student and came to a conclusion similar to that provided by the parents’ psychologist. The student was school phobic.

In August, prior to the start of the student’s junior year, a full hearing was held requiring an IEP be developed for off-site services, though the instruction would now take place at the student’s home, provided by a teacher approved by both the school district and parents.
During the spring semester of the student’s senior year, the school superintendent had suggested that the student take some classes at a local vocational-technical school. The parents agreed. The school continued to provide a variety of educational and related services through homebound instruction while also providing tuition, transportation, and materials for the student at the vocational-technical school. The parents then requested the student graduate from high school the December following his senior year (2000).

Several years later, in February and March 2004, a trial was conducted in District Court. The Court determined that none of the defendants, including the school district, violated federal law. The parents appealed under IDEA and section 504 of the Rehabilitation Act.

The Eighth Circuit found that the student made educational progress, his IEPs were appropriate under IDEA, and the school district correctly implemented the IEPs. In addition, the Eighth Circuit also found that the school superintendent did not file charges against the student’s father in retribution. Further, since the Eighth Circuit had already held that the school district did not violate the student’s IDEA rights, a retaliation suite under section 504 was precluded. Lastly, the Eighth Circuit also dismissed the claims filed against the Arkansas Department of Education concluding the ADE had not violated any federal law in this matter.

_Aguirre v. Los Angeles Unified School District._ Mara Aguirre challenged the Los Angeles Unified School District’s (LAUSD) implementation of a FAPE for her son, Carlos Castro, for the 1999-2000 and 2000-2001 school years. In a hearing before a

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214 Aguirre v. Los Angeles Unif. Sch. Dist., No. 03-57138, U.S. App. LEXIS 22090 (9th Cir. 2006).
California special education hearing officer (SEHO), Aguirre raised twenty-seven issues contending that the school denied her son a FAPE because it failed to prepare daily reports on Carlos's work and behavior, did not provide him with a one-on-one aide, and failed to provide him with occupational therapy, among other claims. She sought to recover tuition and other expenses incurred when she took her son out of public school and enrolled him in a private school. The parent ultimately prevailed on four of the twenty-seven issues.

The SEHO ruled that LAUSD failed to provide the student with a FAPE as required by IDEA, failed to conduct a timely assessment for assistive technology, and failed to provide the technology. As a result, the SEHO denied the parent's request for tuition and other expenses but awarded the student use of assistive technology for a period not to exceed eight months. The court noted that even without the use of assistive technology, which consisted of a desktop computer, printer, and learning software, the student was making excellent progress.

After the results of the hearing, neither LAUSD nor Aguirre sought further review. But, the parent then sent the district a bill for her attorneys’ fees and costs, totaling $42,104.92. LAUSD requested a detailed billing statement, indicating which fees had accrued for work done towards the successful claims. The parent failed to provide the statement and, after LAUSD refused to pay the fees, she filed a complaint in the District Court. She argued that as the prevailing party she was entitled to recover all her fees, while the district claimed that, because she prevailed on only part of her claims, she should receive a reduced award or no award at all. The District Court granted
Aguirre $21,104.24. The award was calculated based on reasonable attorneys' fees and costs incurred and after the successful assistive technology issue was raised. In calculating the amount of the fee award, the District Court did not appear to consider the degree of success Aguirre attained. LAUSD then appealed the award of attorneys’ fees.

The question before the Ninth Circuit was whether the degree of success standard announced in *Hensley v. Eckerhart*,215 applied to attorneys’ fees awards under the IDEA. In *Hensley*, the Supreme Court considered whether a partially prevailing plaintiff may recover attorneys’ fees for legal services on unsuccessful claims. The Court held that a partially prevailing plaintiff generally may not recover fees for unsuccessful claims but that the level of a plaintiff's success is relevant to the amount of fees to be awarded.

The Ninth Circuit went on to state the *Hensley* standard will help deter submission of multiple claims which may indeed lack merit. Without worry of incurring fees, parents facing litigation could, in theory, bring as many claims as possible, hoping to secure a larger share of a school district's resources than would be otherwise provided to their children. Lawyers may also have incentive to bring baseless claims in order to increase billable hours devoted to a case. The *Hensley* standard offers parents and their lawyers an incentive to avoid making frivolous claims while preserving their ability to raise meritorious claims.

The Ninth Circuit held that attorneys’ fees awarded are governed by the standards set forth by the Supreme Court in *Hensley*. The District Court in this case made a partial attorneys’ fees award to the parent. The Ninth Circuit determined the District Court

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inconsistently applied the *Hensley* standard because it did not consider the parent's degree of success. The Ninth Circuit then vacated the fee award and remanded the case back to the District Court for apportionment of a fee award in accord with the *Hensley* standard.

**A.U. v. Roane County Board of Education.**²¹⁶ In this case before the District Court, the Court consolidated several actions relating to both parties. The plaintiffs (A.U. - child and parents) filed a motion for judgment on the pleadings and administrative record and the defendant's (Roane County Board of Education) motion for summary judgment. The plaintiffs also appealed the hearing officer's decision that Roane County's proposed placement of the hearing impaired child in its Head Start collaborative program would provide a FAPE in the least restrictive environment (LRE). Lastly, the Roane County Board of Education (school district) appealed the hearing officer's conclusion that Roane County must continue to provide mapping services for A.U.’s cochlear implants. The administrative record in this case has been filed with the Court, and the parties did not ask the Court to consider any new evidence.

A.U. was born with a profound hearing loss. At fourteen months old, she received a cochlear implant in her right ear and started auditory verbal therapy. Later, she received a cochlear implant in her left ear. When she became of preschool-age, A.U.’s parents and the school district began to consider possible preschool placements, and an IEP was developed for A.U. After disagreeing on a preschool placement for A.U., the parents and A.U. reached a mediated agreement wherein the school district would pay

for A.U.'s placement at the preschool of her parents’ choice, up to the amount it would have paid for her to attend the district’s proposed placement.

One year later, A.U.’s parents and the school district began to consider an appropriate placement for the upcoming school year. This time, the school district’s proposed placement was in a new collaborative program being developed in Roane County with Head Start. The district also proposed to stop paying for cochlear implant mapping services for the new school year, but agreed to pay for the services during the summer. The parents objected to both the proposed placement and the denial of mapping services, and filed a request for a due process hearing.

The hearing officer found that Roane County's collaborative program with Head Start met the requirements of the IDEA and denied reimbursement to the parents for A.U.’s fees at their chosen preschool placement. The hearing officer also found that Roane County must continue to provide mapping services for A.U.’s cochlear implants. The case then went to the District Court for review. As a result of Rowley, the Court had a two-part inquiry: (1) whether the school district complied with the procedures set forth in the IDEA, and (2) whether the individualized educational program developed through the IDEA's procedures was “reasonably calculated to enable the child to receive educational benefits.” Additionally, A.U.’s parents raised one procedural issue concerning written notice of a change of placement for A.U., and they also contended that Roane County's recommended placement was not the LRE for their child. Roane County argued that the hearing officer erred in concluding that it must continue to provide mapping services for A.U.’s cochlear implants.
With regard to the parents’ contention that the district did not provide written notice before changing A.U.’s placement, the Court found that any procedural violation was harmless. The Court concluded that even if there was a lack of written notice, it did not result in a loss of educational opportunities for A.U., nor did it prevent the parents from participating in the process.

As to whether A.U. was educated in her LRE, the Court initially referred to *Rowley* in that the school district was not required to “maximize each child's potential commensurate with the opportunity provided other children,” but then referred to *Deal v. Hamilton County Board of Education*\(^{217}\) in that it must “confer a ‘meaningful educational benefit’ gauged in relation to the potential of the child at issue.”\(^{218}\) The issue in this case was not whether a proper IEP was developed but rather where the goals of the IEP will be implemented – the Head Start program (school district) or a proposed preschool program (parents). The hearing officer found that the school district presented credible expert testimony that A.U. could receive educational benefit in the district-proposed classroom, even though the district-proposed program was not made up of 100% typically developing children (as the parents had preferred and proposed). Both the hearing officer and District Court concluded that the school district was not required to provide such a program. Thus, the Court affirmed the hearing officer's finding that the school district's program would have provided a FAPE for A.U. in the LRE.

\(^{217}\) *Deal v. Hamilton Cnty Bd. of Educ.*, No. 03-5396, U.S. App. LEXIS 26098 (6th Cir. 2004).

\(^{218}\) *Deal v. Hamilton Cnty Bd. of Educ.*, No. 03-5396, U.S. App. LEXIS 26098 (6th Cir. 2004).
With regard to the dispute as to whether “mapping” of cochlear implants remained a required related service, the Court noted that the definition of “related services” was amended in 2004 to exclude “a medical device that is surgically implanted, or the replacement of such device” from the types of services a school system must provide. The hearing officer and District Court were in agreement in that the amendment was unclear. Therefore, in giving deference to the United State Department of Education’s interpretation of the amendment affecting “related services,” the Court found that the school district was not responsible for mapping of A.U.’s cochlear implants after October 13, 2006. In sum, for the aforementioned reasons, the Court denied the parents’ motion for judgment on the pleadings, and granted in part and denied in part the school district’s motion for summary judgment. The Court only denied the school district’s motion for the “mapping” which took place prior to October 13, 2006. Any “mapping” after that time was not required of the district.

*K.E. v. Independent School District No. 15, St. Francis, Minnesota.* Prior to starting kindergarten, the student (K.E.) was evaluated by a pediatric neuropsychologist based on reports that she had been suffering from severe mood swings and difficulties with hyperactivity, impulsivity, and a decreased attention span. Prior to seeing the pediatric neuropsychologist, the student had already been diagnosed with attention deficit hyperactivity disorder (ADHD), fetal alcohol syndrome, and disruptive behavior disorder. The pediatric neuropsychologist had concluded that K.E. had nonspecific forms of

\[219\] K.E. v. Independent Sch. Dist. No. 15, St. Francis, Minn., No. 10-2176, LEXIS 37737 (E.D. Tenn. 2007).
cognitive disorder and mood disorder along with an 82 IQ. Based on these results, the pediatric neuropsychologist offered a number of recommendations for the student with the hope of strengthening her performance at school.

Near the end of the student’s first grade year, the district conducted its own evaluation to determine whether she was eligible for special education services. The district determined that the student was ineligible for special-education services because her file did not include a current diagnosis of a medical condition that would interfere with her academic performance or progress. Soon thereafter, the parent obtained a diagnosis that her daughter had ADHD. The child was then eligible for special education services under the category of other health impaired (OHI).

After becoming eligible for special education services, the IEP team created an initial IEP for the student. The student moved through her first grade school year and the IEP team met again, late that year, for an annual review.

At the same time, the parent arranged for an outside evaluation to be conducted by a professor of pediatrics and neurology. Many of the findings in the outside evaluation were consistent with the school district's earlier evaluation. The outside evaluator noted if K.E. were to ever plateau in her academic abilities, this may be in correlation to her difficulty in managing her own behavior as well as her ability to follow along with the information presented in the classroom. The outside evaluator also noted that K.E.’s medications might be affecting her performance. To address these deficits, the outside evaluator recommended speech and language services and additional written
language services, as well as small-group instructional time or paraprofessional support in the classroom.

After the school district received a copy of the outside evaluation, the student’s IEP team met to discuss the evaluation findings and recommendations. After discussing Dr. Ziegler’s report in its entirety, the IEP team concluded that two significant changes to the adaptations section of the student’s IEP were appropriate. First, K.E. would have access to an educational assistant (EA) in the classroom, and second, she would be allowed to take sensory breaks as needed. The IEP team determined, however, that the student did not need speech and language services.

Shortly before K.E. finished fourth grade, the district completed a three-year reevaluation of her that resulted in an eleven-page report. In the report, the district again referred to K.E.’s ADHD diagnosis, and it added that K.E., while hospitalized on an unspecified occasion, had been diagnosed with personality disorder and probable bipolar disorder. The reevaluation report included findings similar to the previous evaluation regarding the student’s academic performance and difficulty with language-based learning abilities.

As part of the reevaluation process, the district conducted a "sensory profile," which concluded that K.E. had difficulty processing sensory input and required the regulation of her behavior in school due to the increased distractions and demands. To address the student’s sensory needs, the profile recommended that K.E. be provided with additional sensory input throughout the day and be allowed to take movement breaks as necessary. The district also conducted a functional behavior assessment (FBA), which
identified two behaviors as requiring increased attention: blurting out and negative interactions with peers. Based on the assessment, the district created a behavioral intervention plan (BIP), which identified common triggers for the two targeted behaviors, as well as strategies that staff could use to reduce the likelihood that K.E. would engage in them. As a result of the reevaluation, the district changed K.E.’s listed disability from other health impaired (OHI) to emotional disturbance (ED) with other health disabilities.

After the district completed the reevaluation report, the IEP team met to review the results and make changes to K.E.’s IEP. At that time, the team rewrote some of the IEP goals with greater specificity and incorporated the newly-created BIP into the IEP by reference. The team also included a variety of new adaptations for K.E. in the IEP, including access to sensory tools, supervision by an educational aide during lunch and recess, reading aloud of tests, the opportunity to redo assignments and retake tests for an improved grade, and occupational therapy. During the IEP team meeting, the parent informed the IEP team that K.E. had recently been evaluated by a psychiatric psychologist at the Mayo Clinic and was diagnosed with bipolar disorder with psychotic traits. The student continued to be treated by the psychiatric psychologist throughout the remaining months relevant to this case.

At the beginning of K.E.’s fifth-grade year, the student’s mother had contacted the district to inquire about potential day treatment options for her daughter. The district’s director of special services discussed the available options with the parent and also advised that an IEP team meeting would be necessary before any changes in K.E.’s placement were made. The parent then requested the psychiatric psychologist contact the
school district. The psychiatric psychologist then sent a follow-up letter, describing the student’s mental illness and cognitive abilities while concluding with a list of recommendations the school district might institute for the student’s fifth grade year.

In late October and again in November of K.E.’s fifth-grade year, the district attempted to schedule an IEP team meeting to consider the possibility of day treatment for K.E. And to discuss the psychiatric psychologist’s recommendations. The parent cancelled both of these meetings, however, and the team did not meet until January. In the meantime, the parent filed a due process complaint and request for administrative hearing with the Minnesota Department of Education. When the IEP team meeting did take place, the parent and an attorney for the student abruptly left following a disagreement on how the meeting would proceed. After they left, the remaining members continued the meeting. The IEP team discussed the psychiatric psychologist’s recommendations and revised the student’s IEP. The team also determined that it would be appropriate to conduct a new evaluation of the student to develop current assessments. The school district then sent K.E.’s parent a proposed IEP, accompanying documentation, and a recording of the meeting, but the parent refused to consent to the changes or the proposed evaluation.

Shortly thereafter, prompted by what the psychiatric psychologist described as worsening mood symptoms, the student was excused from school temporarily, and the psychiatric psychologist wrote a letter to the director of special services providing additional information concerning K.E.’s status and recommended a reduction in school hours and home-bound instruction, effective immediately, for two months. The director
of special services then sent a letter responding to the psychiatric psychologist indicating that an IEP meeting would be necessary because a shortened school day would affect K.E.'s academic performance and invited the psychiatric psychologist to participate in the IEP team meeting.

After sending this letter, the school district’s director of special services urgently scheduled an IEP team meeting, but, at the request of parent’s attorney, the meeting was then rescheduled. The student’s parent and attorney did not attend the rescheduled meeting, and, due to their absence, the psychiatric psychologist declined to participate via telephone. The IEP team proceeded anyway and discussed the psychiatric psychologist’s recommendation for a reduction in school hours and K.E.'s recent behavior and academic performance. Although the team determined that a shortened school day was not appropriate for the student at that time, the team revised the IEP to incorporate additional accommodations focused on tracking the student’s emotional mood and providing her with a variety of sensory breaks. The social worker for the school district also agreed to create additional coping strategies to assist staff when working with K.E. The school district provided the parent with notes from the meeting, accompanying documentation, and a proposed IEP, but the parent did not consent to the revisions.

Following the meeting, the psychiatric psychologist then responded to the school district’s director of special services letter and reasoned that the director did not fully understand the severity of the student’s problems. The psychiatric psychologist then proposed placing the student in either a day-care setting or a different school district with more resources. The district’s director of special services replied to the psychiatric
psychologist reiterating that the educators who worked with K.E. had not observed the same changes in mood and academic performance that served as the basis for psychiatric psychologist’s recommendations.

The parent then filed an amended due process complaint and request for administrative hearing that included additional requests for a shortened school day, transportation, and an appropriate therapeutic education. During a due process hearing that lasted nine days, the ALJ received testimony from a variety of individuals associated with either the school district or the student, as well as expert witnesses who testified about the complexity of the student’s mental illness. The ALJ concluded that the school district had failed to comply with several procedural requirements of the IDEA, and that the school district's failure to conduct appropriate evaluations, to include the results of both outside and its own evaluations in K.E.'s IEPs, and to develop an appropriate IEP and BIP and revise them as necessary to address K.E.'s lack of progress, had denied her a FAPE from December of K.E.'s second-grade school year until February of her fifth-grade year (i.e., the date that the parent filed the amended due process complaint). When the school district appealed the ALJ's decision to the District Court, the Court granted the school district's motion for judgment on the administrative record, concluding that the district had indeed provided the student with a FAPE. On behalf of the student, an appeal was filed to the Eighth Circuit Court of Appeals.

The student’s legal counsel contended that the District Court failed to apply the correct standard of review because it did not afford the level of deference to the ALJ's findings and conclusion that the IDEA requires. Since K.E. did not challenge any
specific finding or conclusion made by the District Court as erroneous except for the contention the student was denied a FAPE, the appellant’s sole argument was that the decision was improper because it contradicted the opinion of the ALJ. The Eighth Circuit though rejected the appellant’s assertion that the District Court failed to apply the necessary level of deference in this matter.

After carefully weighing the information provided within both the ALJ’s findings and the findings of the District Court, the Eighth Circuit noted the District Court drew a different conclusion than the ALJ due to the Court’s own understanding (differing) of the law in this matter. Further, the Eighth Circuit Court of Appeals similarly declined to address the merits of K.E.’s argument that the school district violated her procedural rights because it failed to include assistive technology in her IEPs. The Eighth Circuit noted, the IDEA requires that a school district provide assistive technology if a child's IEP team determines that the child needs access to that technology in order to receive a FAPE. K.E. contended that the school district never considered assistive technology or conducted assistive technology assessments or evaluations to determine whether such technology was appropriate. It should also be noted the ALJ rejected a similar argument and K.E. did not raise the issue before the District Court. Therefore, the Eighth Circuit chose not to incorporate a decision on assistive technology as part of its decision.

Additionally, the student’s legal counsel asserted that her IEPs were deficient because they failed to provide proper adaptations to address her bipolar disorder. In particular, she contended the school district developed IEPs that failed to provide therapeutic services to address the student’s mental health needs. The student’s legal
counsel contended that because the school district did not give her necessary psychological and social work services, she therefore was not provided with a FAPE.

But, when the school district developed K.E.’s IEPs it had received contradictory information about whether K.E. suffered from bipolar disorder nor did school officials ever have the opportunity to meet with or speak to the psychiatric psychologist as they had attempted. Because of the aforementioned contradictory information and inability to speak with the parent’s expert regarding K.E.’s needs, the Eighth Circuit concluded that K.E.’s IEPs were sufficient and provided the services and adaptations necessary to provide her with a FAPE. For the previously stated reasons, the Eighth Circuit had affirmed the District Court’s decision in favor of the school district.

*Petit v. United States Department of Education.* In 2004, Congress amended the IDEA. The amended Act provides that related services and assistive technology devices do not include a medical device that is surgically implanted, or the replacement of such a device. Further, under the amended Act, a school district is not responsible for selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing surgically implanted medical devices.

Appellants are parents of children who are eligible to receive a free appropriate public education under the IDEA and whose children use cochlear implants. A cochlear implant is a device used by individuals with severe hearing disabilities. These devices are surgically implanted, and they include both internal and external components. To function properly, a cochlear implant must be routinely mapped to provide optimal

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performance of the device. The United States Department of Education (USDOE) disseminated regulations in 2006, which state that school districts are not required to provide the mapping of cochlear implants as an assistive technology service. After the USDOE issued the final regulations, the school districts in which the appellants reside stopped providing implant mapping.

The appellants filed suit to challenge the exclusion of mapping from the regulatory definition of related services. The appellants argued that the regulations are founded on an impermissible construction of the IDEA as they define related services to exclude the mapping of cochlear implants. Secondly, the appellants argued that the USDOE’s 1983 regulations provided for audiology services and at the time, audiology services included mapping. Therefore, it was argued that the 2006 mapping regulations violate the IDEA. The District Court rejected the appellants’ claims and granted summary judgment to the USDOE. The appellants then appealed to the D.C. Circuit Court.

The D.C. Circuit Court concluded that the phrase, audiology services, as used in the IDEA's definition of related services does not clearly encompass mapping of cochlear implants. They also found that the mapping regulations represent a permissible construction of the IDEA, because they are rationally related to the underlying objectives of the Act. The D.C. Circuit further found that the mapping regulations do not fundamentally lessen the protections afforded by the 1983 regulations. The D.C. Circuit denied the appellants’ claims and affirmed the District Court's grant of summary judgment to the United States Department of Education.
R.P. v. Alamo Heights Independent School District.\textsuperscript{221} R.P., plaintiff and appellant in the case, is a student in the Alamo Heights Independent School District (AHISD). A lawsuit was brought by her parents, R.P. And C.P., against defendant and appellee, AHISD, under the IDEA for allegedly failing to provide her with a FAPE, as required by law. The District Court granted AHISD's motion for summary judgment. R.P. then appealed to the Fifth Circuit Court of Appeals.

On appeal, the student stated that she was denied a FAPE for three reasons: (1) her parents were not permitted to fully participate in Admissions, Review, and Dismissal (ARD) committee meetings; (2) AHISD delayed providing her with an assistive technology device because school personnel did not timely complete an AT evaluation; and (3) AHISD did not conduct a functional behavioral assessment (FBA) before developing a Behavior Intervention Plan (BIP) for her.

It is important to note that in Texas, members of the ARD committee prepare an eligible student's IEP. The committee includes the parents of the child with the disability, at least one of the child's regular education teachers, at least one special education teacher, a representative of the school district, a school psychologist to interpret evaluation results, any other individuals who have knowledge or special expertise regarding the child, and the child, if appropriate.

Prior to the District Court and Fifth Circuit hearing the case, the student was ten years old attending the AHISD at the time of her due process hearing. R.P. was eligible for special education services as a child with autism, mental retardation, and a speech

impairment. Further, the student was in essence nonverbal, and so a variety of communication methods had been employed at school to help her communicate.

Due to her essentially nonverbal nature, the student used a Picture Exchange Communication System (PECS) for communication during her kindergarten year. When in first grade, the student’s parents purchased a Go Talk voice output device as they were frustrated with her progress. At school, the student continued to use the PECS for communicating but the school district also incorporated the use of the Go Talk on a trial basis. It was noted that the student had greater success in working with the PECS than the Go Talk.

At the beginning of her second grade year, AHISD completed a Full Individual Evaluation (FIE) for the student, identifying her with the primary disability category of Autism. The FIE report noted that R.P. was comfortable and successful in using PECS and it expressed the view that a speech output system should not be considered until her language further developed. Nonetheless, AHISD continued to assess R.P.’s use of the Go Talk. However, in the ARD meeting at the end of her second grade year, the student’s father (R.L.P.) reported the student’s expressive language at home had decreased. AHISD staff conducted three in-home sessions focusing on PECS and Go Talk in order to generalize R.P.’s successful use of the communication system in the home environment. The ARD committee also requested that AHISD complete an AT assessment for communication by the first of October in the student’s third grade year (2008).
The ARD committee convened in October of R.P.'s third grade year (Fall 2008-Spring 2009), but the AT assessment was not presented, nor was the AT assessment presented at a December 2008 ARD meeting, which was convened after the school principal ended the October meeting early due to R.L.P's behavior. In December 2008, R.L.P. sent the principal a letter asking about the status of the AT assessment due October 1, 2008. In January 2009, a licensed specialist in school psychology who was part of the ARD committee sent an email to R.P.'s speech therapist inquiring about the status of the assessment. In the due process hearing, Houser testified that she subsequently learned the assessment had been completed. At the year-end ARD meetings to prepare R.P.'s fourth grade (2009-2010) IEP, the ARD committee finally discussed the results of the AT assessment. Also at the meeting, R.L.P. raised concerns about AHISD's slow implementation of a voice output device for R.P., and a school employee informed him that the school was in the process of implementing a voice output device for R.P. The ARD committee then requested a second AT evaluation. Shortly thereafter, R.P.'s mother, C.P., wrote the principal a letter, raising concerns about the delay that would result from a further information gathering process.

Prior to the end of school year ARD meeting, the record shows that the student was using a more advanced voice output device, known as a DynaVox, no later than April of her third grade year. Some of her IEP goals also required the use of a voice output device. She was not, however, issued her own device, but instead she borrowed devices from other students. Additionally, AHISD began trying an additional device, the Tango, in an effort to determine which device was best suited for R.P.
AHISD completed the second AT evaluation at the beginning of R.P.'s fourth grade year (2009-2010), and she began using the DynaVox regularly. R.P.'s parents and her teachers testified that she made significant progress with the aid of the DynaVox.

On November 24, 2009, R.P. filed a written request for a due process hearing with the Texas Education Agency (TEA). The student proclaimed a number of defects in AHISD's handling of her education, which she alleged denied her a FAPE. A two-day due process hearing was held in March 2010 after which the TEA hearing officer issued a lengthy decision, determining that R.P. had not been denied a FAPE and finding for AHISD on all claims. Furthermore, the hearing officer’s decision noted that AHISD had not met its obligations under the law in all circumstances.

R.P. then filed suit in the District Court and AHISD subsequently filed a motion for summary judgment. The District Court's order found the student had not been denied a FAPE and entered judgment on behalf of AHISD. R.P. moved for reconsideration of the judgment, which the District Court denied. The appeal to the Fifth Circuit followed.

It should be noted that under a clear error standard, the Fifth Circuit will not reverse the District Court unless it is left with a definite and firm conviction that a mistake has been committed. Following this standard, the Fifth Circuit reviewed the record associated with R.P.’s case, including over 4,000 pages of exhibits, transcripts from the due process hearing, and over ten hours of tape-recorded ARD committee meetings.

Additionally, it is important to note, the FAPE required by the IDEA does not need to be the best possible one, nor one that will maximize the child's educational
potential; rather, it need only be an education that is specifically designed to meet the child's unique needs, supported by services that will permit the student to benefit from the instruction. Nevertheless, the student’s IEP must be likely to produce progress, not regression or result in only inconsequential improvement.

The Fifth Circuit explained that when parents challenge the appropriateness of an IEP, it first determines whether the state has complied with the IDEA’s procedural requirements. It then determines whether the IEP developed according to the necessary procedural requirements was reasonably calculated to enable the child to receive educational benefits. The Fifth Circuit has identified four factors it believes can serve as indicators of whether an IEP meets the aforementioned requirements: (1) the program is individualized on the basis of the student's assessment and performance; (2) the program is administered in the least restrictive environment (LRE); (3) the services are provided in a coordinated and collaborative manner by the key stakeholders; and (4) positive academic and nonacademic benefits are demonstrated.

The Fifth Circuit was unclear after reviewing the record whether AHISD completed the AT assessment by October 1, 2008. Further, the Fifth Circuit determined it was more important AHISD personnel did not discuss the AT evaluation at the Fall 2008 ARD meeting so that AT evaluation results could be incorporated into the student’s 2008-2009 IEP. Instead, AHISD personnel presented the AT assessment results at the late May 2009 ARD meeting, at which time the committee was preparing for Fall 2009. Specifically, the results of the AT evaluation were presented approximately nine months late. The Fifth Circuit held that R.P.’s IEP was not sufficiently individualized because
this assessment, which the ARD committee required AHISD to complete, was not presented to the ARD committee or incorporated into R.P.’s 2008-2009 IEP.

Under Supreme Court and Circuit precedent, the question was not whether R.P. maximized her educational potential when she used PECS between Fall 2008 and Fall 2009 (the time of the delinquent AT evaluation). The Fifth Circuit asserted that the question was whether the student demonstrated more than de minimis positive academic and nonacademic benefits. Because R.P. made greater strides with a voice output device (Dyna Vox), it was projected that PECS was perhaps not allowing her to reach her maximum educational potential. However, the Fifth Circuit noted, achieving one's maximum educational potential is not what is required by law. The Fifth Circuit then held that R.P. did demonstrate positive academic and nonacademic benefits while using the PECS. Therefore, based on its review of the record, the Fifth Circuit was not able to ascertain that a mistake has been made regarding whether R.P. received an educational benefit from her IEP with respect to her use of AT devices. While AHISD’s handling of the Fall 2008 AT assessment was not ideal, the Fifth Circuit held that when all the relevant factors are evaluated, the student had indeed received a FAPE. Therefore, the District Court’s judgment was affirmed.

M.C. v. Katonah-Lewisboro Union Free School District. Plaintiffs (appellants) in this case are H.C. And J.C. who are the parents acting both individually and on behalf of their child, M.C. The parents appealed a District Court decision taking

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place on May 24, 2012, which granted summary judgment to the defendant (appellee), Katonah-Lewisboro Union Free School District (Katonah) on the parents' claim for tuition reimbursement under the IDEA. Leading up to the District Court decision, parents sought review of the administrative decision by a State Review Officer (SRO) denying the parents tuition reimbursement for the 2008-2009 school year based on the SRO's determination that Katonah's IEP offered M.C. a FAPE. The SRO annulled the decision of the IHO, which found that Katonah's IEP failed to provide a FAPE to M.C. And ordered Katonah to reimburse the parents for the 2008-2009 school year at the Windward School, which the IHO found to be an appropriate placement. On appeal, the parents argued that the District Court failed to apply the preponderance of the evidence standard in concluding that the 2008-2009 IEP was appropriate; the District Court improperly considered the retrospective testimony of M.C.'s proposed second grade teacher; and the District Court relinquished its responsibilities under *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993).

In this case, the parents challenged the substantive adequacy of the 2008-2009 IEP, arguing that the IEP offered the same failed programs from previous years under which M.C. had failed to progress; the IEP failed to address M.C.'s individualized special education needs; and the IEP did not offer an appropriate FM system to enable M.C. to hear.

The District Court conducted an independent review of the administrative record and concluded that the 2008-2009 IEP was reasonably calculated to enable M.C. to make progress. The Second Circuit found no error in this conclusion. In affirming the SRO's
decision, the District Court independently considered test results and witness testimony that confirmed that M.C. made progress during the 2006-2007 and 2007-2008 school years. The Second Circuit agreed with the District Court's conclusion that the 2008-2009 IEP was reasonably calculated to enable the student to continue making progress at Katonah.

Further, the Second Circuit stated, in relying on its earlier conclusion that M.C. made progress in previous years, the District Court also rejected the parents' arguments that M.C.’s special education needs were not met in the 2008-2009 IEP. In particular, the Court noted that even if the current IEP (2008-2009) was similar to previous IEPs, the student was able to make meaningful progress under past IEPs. Therefore, comparable progress would be made under the current IEP as well. For the aforementioned reasons, the Second Circuit agreed with the District Court's conclusion based on the preponderance of the evidence.

Lastly, in considering the parents' arguments that the 2008-2009 IEP inadequately addressed M.C.’s needs for assistive technology because it specified use of the Radium broadcast FM system as opposed to the Phonak personal system, the District Court concluded that Katonah did not fail to provide a FAPE where its IEP provided for a different assistive technology than the model preferred by the parents' audiologist, particularly where parents offered no evidence to demonstrate the inadequacy of the Radium system. In agreeing with the District Court, the Second Circuit stated that the IDEA does not require that an IEP furnish every special service necessary to maximize each handicapped child's potential. Also, a school district does not fail to provide a child
with a FAPE simply because it employs one assistive technology over another; rather, a FAPE is provided as long as the technology employed is reasonably calculated to permit the child to receive educational benefits. Therefore, the Second Circuit could not conclude that the District Court erred in finding that the district had provided an effective technology, even if not the one preferred by the parent.

The Second Circuit reasoned that since it agreed with the District Court's conclusion that Katonah offered M.C. a FAPE for the 2008-2009 school year, it did not need to address the question of whether the parents demonstrated that they were entitled to reimbursement because the Windward School was an appropriate placement, as supported by the evidence. The Second Circuit stated it had considered all of the parents' remaining arguments and found them to be without merit. Therefore, due to the previously stated reasons, the judgment of the District Court was affirmed.

**K.M. v. Tustin Unified School District.** In this matter, two cases were consolidated for oral argument. The cases raised questions about the obligations of public schools under federal law to students who are deaf or hard-of-hearing. The plaintiffs' central claim was that their respective school districts have an obligation under the Americans with Disabilities Act (ADA) to provide them with a word-for-word transcription service so that they can fully understand the teacher and fellow students without undue strain and consequent stress.

K.M., a high school student in the Tustin Unified School District (Tustin) in Orange County, California, and D.H., a high school student in the Poway Unified School

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District (Poway) in San Diego County, California, both have hearing disabilities. The parents requested that, to help their children follow classroom discussions, their school districts should provide them with Communication Access Realtime Translation (CART) in the classroom. CART is a word-for-word transcription service, similar to court reporting, in which a trained stenographer provides real-time captioning that appears on a computer monitor. In both cases, the school district denied the request for CART but offered other accommodations. Also in both cases, the student first unsuccessfully challenged the denial of CART in state administrative proceedings and then filed a lawsuit in Federal District Court.

In the District Court, both K.M. and D.H. claimed that the denial of CART violated both the IDEA and Title II of the ADA. In each case, the District Court granted summary judgment for the school district, determining that the school districts had fully complied with the IDEA and that the plaintiff's ADA claim was foreclosed by the failure of her IDEA claim. On appeal, both K.M. and D.H. did not contest the conclusion that their respective school districts complied with the IDEA. They challenged, however, the District Courts' grants of summary judgment on their ADA claims, because the students maintain that Title II imposes effective communication obligations upon public schools independent of school districts' obligations under the IDEA.

The Second Circuit was then faced with determining whether a school district's compliance with its obligations to a deaf or hard-of-hearing child under the IDEA also necessarily establishes compliance with its effective communication obligations to that child under Title II of the ADA. The Second Circuit did not find in either statute an
indication that Congress intended the statutes to interact in the context of schools, automatically abandoning any Title II claim where a school's IDEA obligation is satisfied. Essentially, in some situations, but not others, schools may be required under the ADA to provide services to deaf or hard-of-hearing students that are different than the services required by the IDEA.

Specifically, the factors that the public entity must consider in deciding what accommodations to provide deaf or hard-of-hearing children are different. The key variables in the IDEA framework are the child's needs and opportunities. When developing a deaf or hard-of-hearing child's IEP for IDEA purposes, the IEP team is required to consider, among other factors, the child's language and communication needs, opportunities for direct communications with peers and professional personnel in the child's language and communication mode, and whether the child needs assistive technology devices and services.

Under the ADA effective communications regulation, a public entity is also required to furnish appropriate auxiliary aids and services where necessary. Under the ADA another variable is added: in determining how it will meet the child's needs, the ADA regulations require that the public entity give primary consideration to the requests of the individual with disabilities. That provision has no direct counterpart in the IDEA. Although the IDEA requires schools to consult with parents and to include the child in IEP meetings whenever appropriate, it does not require that requests of the parent(s) or child be weighted.
Because of the differences between the IDEA and ADA statutes, the Second Circuit was not able to theorize how the two statutes will interact in particular cases. Due to the inability to theorize, the Second Circuit was required to reject the argument that the success or failure of a student's IDEA claim dictates, as a matter of law, the success or failure of his or her Title II claim. As a result, courts evaluating claims under the IDEA and Title II must analyze each claim separately under the relevant statutory and regulatory framework. Therefore, due to the previously stated reasons, the Second Circuit reversed the grants of summary judgment on the ADA claims in both cases and remand the cases back to the District Court.

**Audiology Services**

*C.M. v. School Board of Miami-Dade County, Florida.*\(^{224}\) C.M. was born on November 24, 1998, with profound bilateral sensorial hearing loss. Upon being asked their preference in C.M.’s communication either orally (spoken language) or manually (sign language) by the diagnosing audiologist, C.M.’s parents indicated that they wanted C.M. to be an oral communicator. The audiologist then recommended that C.M. be fitted with hearing aids and begin auditory-verbal therapy (AVT). After doing considerable research, C.M.’s parents were in agreement that AVT was the best methodology for their child. Soon thereafter, when C.M. was nine months old, her parents had C.M. fitted with hearing aids and took her to see Kathy Bricker, an audiologist with the University of Miami Ear Institute, for an hour of AVT each week.

After determining that C.M. was not getting enough sound from the most powerful hearing aids available, C.M.’s parents consulted with experts and ultimately decided that the child should receive a cochlear implant. C.M. was successfully implanted with a cochlear implant in April 2000 with activation of the device taking place three to four weeks after surgery.

The implant manufacturer and distributor, Cochlear, without recommending a particular program, recommends that children who are implanted with a cochlear device receive an educational program that maximizes exposure to meaningful sounds, particularly exposure to spoken language every day.

Although Cochlear does not recommend any particular program, the surgeon who performed the implantation recommends AVT. With the surgeon’s recommendation and the fact C.M. had already been receiving AVT, she continued to receive AVT for one hour each week.

In the summer of 2001, at age 2 ½ years old, C.M.’s parents enrolled her in a half-day summer program at their local synagogue, then ultimately enrolled her in the full-day year-round synagogue preschool program. Although the synagogue accepts disabled students like C.M., it does not provide them with special education classes, such as AVT.

Until C.M. turned three in November 2001, the AVT she received was paid for through the Miami-Dade County Early Intervention Program (EIP). After age three, the EIP no longer pays for AVT. In addition, until the age of three, C.M. received oral motor therapy and other special education services under the authority of a public agency.
In late 2001, the Miami-Dade School Board (school district) received written materials from the Early Intervention Program in order to determine whether C.M. was a candidate for receiving special education services from the school district. School district staff and C.M.’s parents met in November 2001 and again in January 2002 to discuss C.M.’s eligibility for special education services, ultimately agreeing on her eligibility for such services.

C.M.’s parents indicated that they were satisfied with C.M.’s current private preschool placement at the synagogue and that they wanted C.M. to continue to receive AVT but have the school district pay for it. The school district explained to C.M.’s parents that the district did not provide AVT but that it did have other programs to recommend.

The school district utilizes the verbotonal (VT) approach, rather than AVT, to develop the oral communication skills of hearing-impaired students who communicate orally. Like AVT, VT focuses on sharpening listening skills and strengthening the auditory pathway. AVT and VT are both oral methods within the oral mode of communication (as opposed to manual methods such as sign language). The school district began using VT in the early 1980s. Since that time, the school district had spent approximately $80,000 to train its personnel in using VT strategies and techniques. The school district did not have staff trained in AVT.

Regarding C.M.’s academic classes, the school district advised C.M.’s parents at the January 2002 meeting that there was no age-appropriate, public school placement option available in Miami-Dade County that the school district could offer in an inclusive
However, the school district did recommend placement in a self-contained special education class for hearing impaired children at one of the public schools. The class was taught by a teacher for the deaf and hearing impaired who was also trained in VT. The children in the class were grouped according to their abilities.

The school district also offered C.M. two other alternative placements. The first in a varying exceptionalities, reverse mainstream class at an elementary school. The second at a half-day, self-contained speech/language class, taught by a certified teacher for the deaf at Myrtle Grove Elementary School.

After listening to the school district’s recommendations, C.M.'s parents informed the district that they were not interested in any of them. The parents then repeated their desire for C.M. to remain in the synagogue preschool, but have the school district pay for C.M.'s AVT. The school district refused to pay for C.M.'s AVT. Instead, the school district offered 90 minutes of small group instruction and specialized instruction in expressive and receptive language skills utilizing VT techniques only.

The school district prepared an IEP for C.M. for the period January 11, 2002, to January 9, 2003 which included VT techniques, not AVT. Although C.M.'s parents signed the January 2002 IEP, they wrote a comment on the document indicating their child was in need of AVT to fully access her education.

After speaking with the speech-language pathologist who would be providing services to C.M., C.M.’s parents concluded that the school district’s offer was inadequate for their child and on January 31, 2002, C.M.’s parents filed a due process hearing challenging the school district’s refusal to provide C.M. with AVT.
On May 20, 2002, the school district and C.M.'s parents entered into a mediation agreement. However, shortly thereafter, C.M.'s parents contacted school officials to inform them that they did not want to have another IEP meeting and that they preferred to go ahead with the due process hearing. During this time, C.M.'s parents kept her in private school and in private AVT.

The due process hearing before an Administrative Law Judge (ALJ), that C.M.'s parents requested on January 31, 2002, was held February 12 through 14, 2003, and March 11 through 12, 2003. The ALJ issued an opinion which made two independent, alternative conclusions relevant to the IDEA when denying the parents' challenge to the IEPs.

First, the ALJ determined that it was without the authority, and thus jurisdiction, to provide C.M.'s parents with retroactive relief of reimbursement for AVT under the 2002 IEP or the successor IEP. According to the ALJ, the fact that C.M. had never been enrolled in public school, let alone unilaterally removed from public school, rendered it without jurisdiction to award any reimbursement for C.M.'s AVT.

Second, and alternatively, the ALJ assumed that even if it had jurisdiction to award C.M. parents reimbursement for AVT, C.M.'s parents had not shown that the school district’s failure to offer AVT constituted the denial of a FAPE.

The ALJ determined that while there was no question that the child had benefitted significantly from the AVT she received, AVT is not the only accepted and proven therapeutic methodology that can help her become a better oral communicator and thereby access her education. The ALJ concluded that VT is an accepted and proven
therapy and that it is the school district’s prerogative, not the parents', to choose which of these accepted and proven methodologies will be provided at public expense.

C.M.'s parents then filed their complaint in District Court. Their complaint sought reimbursement from the School Board for C.M.'s private AVT, transportation to and from AVT, mapping (programming) for C.M.'s cochlear implant, and batteries for C.M.'s implant.

In District Court, C.M.'s parents claimed the school district violated the IDEA by refusing to provide C.M. with a FAPE in 2002 and 2003, and the ADA by refusing to accommodate C.M. According to the District Court, it did have authority to review the ALJ's decision as to whether the 2002 and 2003 IEPs provided the student with a FAPE. However, the District Court determined that it was without jurisdiction to order the school district to reimburse C.M. for audio-verbal training and related expenses. The District Court dismissed the parents' IDEA claim for lack of subject matter jurisdiction. C.M.'s parents appealed.

C.M.'s parents never challenged the school district’s assertion, or the ALJ's conclusion, that VT is a well-recognized means by which to teach hearing-impaired children to speak. While C.M.'s parents may not want such a program, the IDEA does not grant them a right to select among various programs. Rather, the school district offered C.M. what was required under the IDEA, which is a FAPE.

Because C.M.'s parents only asserted that AVT is the best and most desirable method to educate C.M., they failed to state a claim under the IDEA. The IDEA does not permit them to challenge an IEP on the grounds that it is not the best or most desirable
program for their child. Due to the aforementioned information, the Eleventh Circuit affirmed the District Court's dismissal but remanded the case with directions for the District Court to modify the dismissal as one for failure to state a viable claim for relief under the IDEA.

**Counseling Services**

*A.F. v. Washoe County School District.* A.F., an elementary school student with severe emotional and behavioral problems, brought suit against the Washoe County School District (school district). The IEP team formulated an IEP that specified the disciplinary protocol that school district officials were to use in order to control A.F.'s behavioral problems. In his complaint, A.F. Alleged that on two separate occasions school district officials and police officers violated the discipline provisions of his IEP with both incidents causing A.F. to suffer severe emotional distress.

A.F. filed suit in Federal District Court, alleging a claim under the IDEA and a state-law claim for negligent supervision. The District Court dismissed his IDEA claim for lack of subject matter jurisdiction because he failed to exhaust his administrative remedies. The District Court also dismissed his state-law negligence claim for lack of supplemental jurisdiction. On appeal, A.F. contended to the Ninth Circuit that he was not required to pursue his administrative remedies because doing so would have been futile. The Ninth Circuit reviewed the question of whether A.F. was required to exhaust his administrative remedies *de novo*, but nonetheless affirmed the District Court’s decision.

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225 A.F. v. Washoe Cnty Sch. Dist., No. 03-15090, U.S. App. LEXIS 3761 (9th Cir. 2004).
The Ninth Circuit determined that A.F. had failed to show that the injuries about which he complained could not have been remedied through the IDEA's administrative procedures. The Ninth Circuit noted severe emotional distress suffered as a result of a district's failure to comply with a child's IEP can be relieved, to some extent, by providing the child with psychological counseling. Since an administrative hearing officer could have ordered the school district to provide the student with psychological counseling, and psychological counseling might have relieved the emotional harm he suffered, the student was required to exhaust the IDEA's administrative procedures prior to bringing suit in federal court. Since the student then failed to show that pursuit of administrative remedies would have been futile, and pursuit of administrative remedies is a jurisdictional prerequisite to bringing an IDEA claim, the District Court's order dismissing the action was affirmed by the Ninth Circuit.

**R.J. v. Nevada County Human Services Agency.** R. J. (plaintiff) brought this action brought under the IDEA seeking judicial review of the decision of a California Special Education Hearing Officer (hearing officer) regarding her rights and entitlements under the IDEA. R.J.’s parents sought reimbursement for costs associated with placing her in a summer camp for children with ADD in the summer of 2003. The Nevada County Human Services Agency (defendant) denied the plaintiffs’ right of reimbursement for the summer camp, relying on the hearing officer’s decision, which found that plaintiffs had not established a right to extended school year services (ESY). R.J.’s parents responded by arguing that the IEP team reached the wrong conclusion about the

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extent of damage that two months without therapy would cause, and thus plaintiffs were entitled to recover their costs for unilaterally placing R.J. in the summer camp. The District Court concluded the plaintiffs’ argument was flawed in two respects. First, R.J.’s parents provided no authority for their proposition that the IEP team was “wrong;” they did not cite any case law, statutory authority, or expert testimony to support their position. Because the plaintiffs did not establish that the lack of ESY constituted a denial of FAPE, they were not entitled to be reimbursed for the summer camp.

Additionally, the plaintiffs sought reimbursement for costs associated with unilaterally placing R.J. At a residential treatment facility in rural Utah, in the winter of 2005. Neither party contested the hearing officer’s finding that during three school years, the defendants failed to provide certain mental health services promised in R.J.’s IEPs, thus amounting to a denial of a FAPE. The Court noted the record’s indication that at the time of her removal and placement at the residential treatment facility, the defendant had made an IEP offer to plaintiffs that was designed to meet her mental health needs and was therefore in compliance with FAPE. Rather than contesting whether the 2005 IEP would constitute a FAPE, the plaintiffs asserted their disbelief in defendant's ability to actually provide the services promised.

The hearing officer found that the defendant had failed to provide everything it had promised under the last two IEPs. Specifically, the hearing officer concluded that the defendant's failure to provide all of the therapy sessions outlined in the IEP constituted a denial of FAPE. However, the hearing officer also found that regardless of the denial of FAPE, the plaintiffs were not justified in unilaterally placing R.J. in a private program
because the defendant had offered appropriate mental health services during the present school year, and the defendant’s failure to provide counseling services had been rectified by the hearing officer’s order of reimbursement for the cost of compensating services plaintiffs arranged.

The District Court noted that the hearing officer awarded the plaintiffs the amount of services promised, but not provided, under the IEP rather than the full cost of a private placement. The Court further noted that the plaintiffs did not provide any witnesses who advised the parents on the need for private placement for mental health treatments. The District Court concluded that the hearing officer was well within her discretion in refusing to reimburse the plaintiffs for their placement of R.J. in a private facility, given the lack of evidence suggesting the need for a residential placement. Therefore, the Court denied the plaintiffs’ claim for reimbursement of their unilateral private placement costs.

Interpreting Services


A.R., a deaf student, was at the Furnace Woods School in the Hendrick Hudson Central School District, Peekskill, New York. A.R. had minimal residual hearing and excelled at reading lips. During the year before she began attending Furnace Woods, a meeting between her parents and school administrators resulted in a decision to place her in a regular kindergarten class in order to determine what supplemental services would be necessary to her education. Several members of the school administration prepared for A.R.’s arrival by attending a course in sign-language interpretation, and a teletype

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machine was installed in the principal's office to facilitate communication with her parents who were also deaf. At the end of the trial period it was determined that A.R. should remain in the kindergarten class, but that she should be provided with an FM hearing aid which would amplify words spoken into a wireless receiver by the teacher or fellow students during certain classroom activities. A.R. successfully completed her kindergarten year.

An IEP was prepared for A.R. during the fall of her first-grade year. The IEP provided that A.R. should be educated in a regular classroom at Furnace Woods, continue to use the FM hearing aid, and receive instruction from a tutor for the deaf for one hour each day and from a speech therapist for three hours each week. A.R.’s parents agreed with parts of the IEP, but insisted that A.R. also be provided a qualified sign-language interpreter in all her academic classes in lieu of the assistance proposed in other parts of the IEP. Such an interpreter had been placed in A.R.’s kindergarten class for a two-week experimental period, but the interpreter had reported that she did not need his services at that time. The school administrators likewise concluded that A.R. did not need such an interpreter in her first-grade classroom. They reached this conclusion after consulting the school district's Committee on the Handicapped, which had received expert evidence from A.R.’s parents on the importance of a sign-language interpreter, received testimony from A.R.’s teacher and other persons familiar with her academic and social progress, and visited a class for the deaf.

When the Rowley’s request for an interpreter was denied, A.R.’s parents requested and received a hearing before an independent examiner. After receiving
evidence from both sides, the examiner agreed with the administrators' determination that an interpreter was not necessary because A.R. was achieving educationally, academically, and socially without the use of an interpreter. The examiner's decision was affirmed on appeal by the New York Commissioner of Education on the basis of substantial evidence in the record. The Rowley’s then brought an action in the United States District Court for the Southern District of New York, claiming that the administrators' denial of the sign-language interpreter constituted a denial of the FAPE guaranteed by the Education for All Handicapped Children Act (Act) (now IDEA).

The District Court found that A.R. was well-adjusted and able to interact and communicate with her classmates. The District Court also found that A.R. had developed a rapport with her teachers. The Court concluded that A.R. performed better than the average child in her class and was advancing easily from grade to grade, but that she understood considerably less of what goes on in class than she could if she were not deaf. Thus, the Court determined that A.R. was not learning as much, or performing as well academically, as she would without her handicap. This difference between A.R.’s achievement and her potential led the Court to decide that she was not receiving a FAPE.

A divided panel of the Second Circuit Court of Appeals affirmed the lower court’s decision. The Court of Appeals agreed with the District Court's conclusions of law, and held that its findings of fact were not clearly erroneous.

The United States Supreme Court granted certiorari to review the lower Courts' interpretation of the Act. The Supreme Court’s review necessitated the Court consider
two questions: What is meant by the Act's requirement of a FAPE? And, what is the role of state and federal courts in exercising the review granted by 20 U.S.C. 1415?

The U.S. Supreme Court noted that this was the first case in which it had been called upon to interpret a provision of the Act. As noted previously, the District Court and the Court of Appeals concluded that the Act itself does not define “appropriate education,” but left the responsibility to the courts and the hearing officers to give meaning to the requirement of an appropriate education. The Court noted that the respondents agreed that the Act defines “FAPE,” but contended that the statutory definition was not practical and therefore did not offer judges guidance in their consideration of disputes involving the identification, evaluation, or educational placement of the child or the provision of a FAPE.

The U.S. Supreme Court disagreed with the lower courts, finding that Congress did define FAPE. The Court went on to find that other portions of the statute also provided a window into congressional intent. At the time of enactment, Congress found that roughly one in eight children with disabilities in the United States were excluded entirely from the public school system and more than four million children with disabilities were receiving an inappropriate education. In addition, the Court found that the Act required states to extend educational services first to those children who were receiving no education and second to those children who were receiving an inadequate education. The Court then found the intent of Congress was that previously excluded handicapped children be educated in public schools and be provided an individualized education.
On the other hand, the Court also found the Act to lack language prescribing the level of education to be provided to children with disabilities. In relation to the decisions of the lower courts, the U.S. Supreme Court noted the statute did not include a requirement that states maximize the potential of handicapped children equal to the opportunity provided to typically-developing children. The Court further ascertained that by passing the Act, Congress sought primarily to make public education available to handicapped children. But in their hope to provide students with disabilities access to public education, Congress did not impose a greater educational standard on states to make such access meaningful. In fact, the Court noted that Congress recognized that the process of providing special education and related services to children with disabilities was not guaranteed to produce any particular outcome. The Court therefore found that the intent of the Act was to provide children with disabilities access to an appropriate public education rather than to guarantee any particular level of a public education.

The respondents contended the goal of the Act was to provide each child with a disability an equal educational opportunity. Notwithstanding this response, the Court found that the requirement of a state to provide specialized educational services to children with disabilities did not cause an additional requirement that such services maximize each child's potential equal to the opportunity provided to typically-developing children.

The Court also noted that the educational opportunities provided by public school systems in the United States indisputably differ from student to student, depending upon various factors that might affect a particular student's ability to understand and use
information presented in the classroom. In light of the aforementioned information, the Court then found that the requirement that states provide “equal” educational opportunities would therefore seem to present an entirely impractical standard. The Court also found the same to be true if children with disabilities were provided with only such services as were available to nondisabled children. Only providing such services to children with disabilities would likely not meet the requirement of a FAPE. On the other hand, the Court found to require the provision of every special service necessary to maximize each handicapped child's potential to be outside Congress’ intent.

The United States Supreme Court concluded that the District Court and the Court of Appeals erred when they held that the Act required New York to maximize the potential of each child with a disability commensurate with the opportunity provided typically developing children. The Court found instead that Congress sought primarily to identify and evaluate handicapped children, and to provide them with access to a free public education. Using the aforementioned information, the Court concluded that the Act provided disabled students with access to specialized instruction and related services which were individualized to provide educational benefit.

The Court also determined that a state satisfies the FAPE requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. The Court noted that such instruction and services must be provided at public expense, must meet the state's educational standards, must approximate the grade levels used in the state’s regular education, and must comply with the child's IEP. In addition, the IEP, and therefore the individualized instruction,
should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to meet the standards of advancement from grade to grade.

In summary, the United States Supreme Court concluded that the Court of Appeals erred in affirming the decision of the District Court. The Court noted that neither the District Court nor the Court of Appeals found that petitioners had failed to comply with the procedures of the Act, and the findings of neither court would support a conclusion that A.R.’s educational program failed to comply with the many requirements of the Act. The Court then found that in light of the District Court’s conclusion, and the fact that A.R. was receiving personalized instruction and related services calculated by the Furnace Woods school administrators to meet her educational needs, that the lower courts should not have concluded that the Act requires the provision of a sign-language interpreter.

_Zobrest v. Catalina Foothills School District._ 228 J.Z. Attended grades one through five in a school for the deaf, and grades six through eight in a school within the Catalina Foothills School District in Arizona. While he attended public school, the school district provided the student with a sign-language interpreter. For religious reasons, J.Z.’s parents enrolled him for the ninth grade in the sectarian Salpointe Catholic High School. J.Z.’s parents requested that school district provide a sign-language interpreter to their son during his classes in the parochial high school. The school district

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requested that the county attorney provide an opinion on the constitutionality of providing such a service; the deputy county attorney subsequently advised that providing an interpreter on the school's premises would violate the Federal Constitution. The question was next referred to the Arizona attorney general, who agreed with the deputy county attorney's opinion.

The student and his parents filed suit against the school district in the United States District Court for the District of Arizona. The plaintiffs sought injunctive relief and reimbursement for the cost of hiring an interpreter at their own expense. The student and his parents asserted that the IDEA required the school district to provide the student with an interpreter, and that such relief was not barred by the establishment of religion clause of the Federal Constitution's First Amendment.

The parties agreed that (1) sign-language interpretation was a service to which the student was entitled pursuant to federal regulations promulgated under the IDEA, and (2) the school district would have paid for an interpreter if the student had attended a public school or a nonreligious private school. Upon review of the case, the District Court granted the school district's motion for summary judgment, on the ground that furnishing an interpreter in the sectarian or parochial school would promote the student's religious development at government expense and would subsequently intertwine church and state in violation of the establishment of religion clause. The Ninth Circuit Court of Appeals affirmed the case on appeal and noted that the IDEA, if applied as proposed by the Zobrests, would advance religion and therefore violate the establishment of religion clause.
On certiorari, the United States Supreme Court reversed. The High Court held that the establishment of religion clause did not deny the school district from providing a sign-language interpreter to accompany the student to classes at the parochial high school because (a) such a service was part of a general government program that distributed benefits neutrally to any child qualifying as “handicapped” under the IDEA, regardless of whether the school the child attended was sectarian or nonsectarian, or public or nonpublic, (b) such an extension of aid to the student did not amount to an impermissible direct subsidy of the school, (c) since the IDEA does not create a financial incentive for parents to choose a sectarian school, an interpreter's presence there could not be attributed to state decision-making, (d) nothing in the record suggested that a sign-language interpreter would do more than accurately interpret whatever material was presented to the class as a whole.

Petersen v. Hastings Public Schools. 229 This case involved three hearing-impaired children and their parents’ appeal of District Court judgment which rejected their challenge to the Hastings Public Schools' decision to educate hearing-impaired students by use of a particular sign language system other than that used in their homes.

N.P, A.P., and K.J. (i.e., severely hearing-impaired students), required sign-language interpreters in the classroom. They used the strict Signing Exact English (SEE-II) signing system in their homes. The children's school district had developed a “modified” SEE-II system which utilized strict SEE-II principles 85% of the time. The

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school district used modifications of the SEE-II system, which the school district
designed, to supplement the educational needs of hearing-impaired children the
remaining 15% of the time. The modifications include several simplifications of the strict
system, which the school district used to allow young students just beginning to sign to
learn the language more easily. After the parents' numerous requests to the school district
to implement a strict SEE-II system were rejected, the parents sought a state
administrative hearing on behalf of the children with the Nebraska Department of
Education.

When the hearing officer found that the school district articulated reasonable
grounds for its modification of the strict SEE-II system, but that an individualized
educational program should be developed for each child which provides for an interpreter
during both academic and nonacademic portions of the school day, the children and their
parents then filed suit. In the subsequent suit, the magistrate judge affirmed the hearing
officer’s decision. The parents then appealed that decision to the Eighth Circuit.

The children and parents argued on appeal that the IDEA and ADA required the
school district to provide classroom instruction in the signing system the children choose
rather than the school district's choice. The children and parents argued that in choosing a
modified SEE-II system, the school district deprived the children of a FAPE. They also
argued that the school district violated the ADA, contending that the modified system
deprived the children of access to or participation in their education programs and
therefore discriminated against them because of their disabilities. In sum, the parents’
appeals centered on whether the school district's choice of a modified signing system for
each child's individualized educational program was “reasonably calculated” to enable the children to receive the educational benefits they were entitled to under the IDEA.

The Eighth Circuit noted that the Act required the school district to implement a signing system that was reasonably calculated to confer educational benefits on their hearing-impaired children. The Court further noted that the evidence of the programs and the resulting progress by the students showed that the system implemented by the school district satisfied the requirement that the system confer educational benefits upon the students. Therefore, the Court concluded that the District Court did not err in its ruling that the signing system used by the school district provided the children with adequate education under the IDEA.

The parents and children also argued that the choice of signing used by the school district violated the ADA and its implementing regulations. Specifically, they contended that section 12132 of the ADA required the school district to utilize the signing system the children use in their homes. The Eighth Circuit determined that the District Court did not err in analyzing the issue or determining that there was no discriminatory effect on the students. The Court noted that there was ample evidence that after the school district had implemented the modified signing system, the children's academic results improved. Thus, the system had proven to be an effective means of communication. Based on the aforementioned reasoning, the Eighth Circuit affirmed the judgment of the District Court.

*Cefalu v. East Baton Rouge Parish School Board.* Early in 1997, the Fifth Circuit vacated the judgment of the District Court in favor of the plaintiff and remanding

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the case for further consideration. Upon the Fifth Circuit’s ruling, all parties filed petitions for a rehearing of the case. Upon receiving the petitions for a rehearing, the Circuit Court asked the United States Department of Education to submit an amicus curiae brief to assist the Court in interpreting the statute. This case examined the responsibility of the school district to provide the student, C.C. III (C.C.), with an on-site sign language interpreter at a parochial school in which he was voluntarily enrolled by his parents. The parents sued to obtain on-site services.

The Department of Education responded that the statute imposed no obligation on the school district to provide the services on-site so long as a FAPE had been made available to the student. In its response, the Department noted that only a small percentage of the cost of the special education services was derived from federal grants under the IDEA and that the remainder of the costs were paid through the use of local and state funds. Under the Department’s interpretation, the IDEA did not require a school district to expend its nonfederal funds for the provision of special education services to students voluntarily enrolled in private schools. Instead, the school district must make a FAPE available to all students with disabilities and shall provide a proportionate share of federal funds to students voluntarily enrolled in private schools.

Furthermore, the Fifth Circuit noted that after issuing its opinion, Congress passed amendments to the IDEA. The Court noted that these amendments specifically stated that an agency was required only to provide students voluntarily enrolled in private schools with a proportionate share of federal funds under the IDEA and is not required to pay for the cost of the special education services.
The Court found that in light of the amendments to IDEA approved by Congress that year (1997), the Court withdrew its earlier opinion. The Court then held that the East Baton Rouge Parish School Board was not legally obligated to provide an on-site sign language interpreter to the plaintiff at the private school. The Court noted that all parties agreed that the student was offered an appropriate IEP by the school district until C.C. transferred from the public school where the services were to be provided, to the private school subsequently attended. The Court determined that in having offered a FAPE to C.C., the school district was not required to provide the on-site interpreter to the student. Thus, the Fifth Circuit reversed the District Court’s opinion and entered judgment for the defendant school district and required each party to bear its own costs.

*Marquez v. The Commonwealth of Puerto Rico.* J.M. was a developmentally delayed and hearing-impaired teenager who attended public school in Puerto Rico. On behalf of J.M., his parents filed suit to compel officers of the Department of Education of the Commonwealth of Puerto Rico to provide him with a sign language interpreter which had been ordered several months earlier by a hearing officer. The suit asserted claims under IDEA; Title II of the ADA; section 504 of the Rehabilitation Act; and two provisions of the Puerto Rico Civil Code.

In Puerto Rico, all public elementary schools are run by the Commonwealth's Department of Education (Department). The Department, which receives millions of dollars in federal funding for special needs students each year, chose not to appeal the hearing officer's order. Although the Department provided an interpreter for the rest of

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231 Marquez. v. Commonwealth of P.R., No. 02-2721, U.S. App. LEXIS 26253 (1st Cir. 2003).
that school year, it stopped providing one when J.M. began the next school year, even though it acknowledged his continued need for one. When his parents, his IEP team, and the superintendent of his school confirmed that need and requested that an interpreter be provided promptly, the Department did not respond.

When sued, the Commonwealth, the Department of Education, and the individual defendants replied that the federal court lacked jurisdiction under the Eleventh Amendment. They also sought dismissal of the case on grounds of untimeliness, exhaustion, and lack of statutory standing, and said that the conditions for preliminary injunctive relief had not been met. Unconvinced, the trial court granted the preliminary injunction and denied the defendants' motion to dismiss.

The defendants appealed to the First Circuit, challenging the trial court's grant of a preliminary injunction and its denial of its motion to dismiss based on Eleventh Amendment immunity. With regard to the Eleventh Amendment question, the First Circuit held that the defendants waived any Eleventh Amendment immunity to section 504 claims by accepting federal educational funding, thus affirming the trial court’s decision.

The First Circuit also found that there was sufficient evidence to support the District Court's conclusion that a sign language interpreter was necessary to provide J.M. with the FAPE guaranteed to him under the IDEA and the accommodations required for him under section 504. The First Circuit also concluded that the District Court did not abuse its discretion in determining that, without a sign language interpreter and with no immediate prospects of one, J.M. would suffer irreparable harm.
Lastly, the First Circuit also concluded that the District Court did not abuse its discretion in finding that the factors regarding the balance of hardships and the public interest favored the plaintiffs. The Court noted that the defendants did not argue these points on appeal and affirmed the grant of preliminary injunctive relief. In referencing *School Committee of Burlington v. Department of Education*, the Court also concluded that tort-like money damages, as opposed to compensatory equitable relief, was not available under IDEA. Further, the Court was not able to determine that a damages award under section 504 or Title II was available.

In sum, the First Circuit affirmed the grant of the preliminary injunction and the denial of Eleventh Amendment immunity on grounds of waiver under section 504. The Court then remanded the case with instructions to stay the claims under Title II of the ADA, and for further proceedings consistent with its opinion. The Court also awarded costs to the plaintiffs.

**D.F. v. Red Lion Area School District.** D.F.’s parents (plaintiffs) submitted a motion for a preliminary injunction. The foundation of this matter is a dispute over whether the defendant, Red Lion Area School District (school district), complied with various statutes and administrative orders regarding the district's provision of special education services for D.F., a deaf-blind boy, who at the time of this case was nine years old. D.F. had been enrolled in school in the district, but was placed in a residential program for children with deaf-blindness in Massachusetts. After an incident in which

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D.F. bit a teacher at the residential program, D.F.’s parents subsequently withdrew him from the program. D.F.’s parents then sought to enroll him in his former school within the district. After a number of meetings and evaluations of D.F., the school district recommended placement at an out-of-district private school for the blind in Maryland. D.F.’s parents rejected the out-of-state placement and continued to seek placement in his home school.

D.F.’s parents subsequently filed for a due process hearing. The hearing officer found that the appropriate placement for D.F. was the school he would normally attend if he were not a student with a disability (i.e., his home school). The hearing officer also ordered the district to have a program and placement in place for D.F. within thirty school days of the receipt of the decision. Both parties filed exceptions to the hearing officer's decision. The school district’s exceptions related to D.F.’s placement. Subsequently, a Special Education Appeals Panel affirmed the hearing officer's determination that the appropriate placement for D.F. would be in his regular education school within the district. Neither party appealed the decision and order of the Appeals Panel. D.F.’s parents then filed a complaint with the Division of Compliance of the Bureau of Special Education of the Pennsylvania Department of Education (PDE) requesting that the PDE order the school district to comply with the Hearing Officer's decision. Several months later, the PDE issued a Complaint Investigation Report (CIR), concluding that the school district had not complied with the hearing officer's decision because the IEP had not been developed within thirty days of the Appeals Panel affirmation of the hearing officer’s decision. The CIR ordered nearly two months of
compensatory education but did not provide for further compensatory education citing D.F.’s absence from school in causing the lack of participation in the education program.

After an inability to come to agreement on the implementation of D.F.’s IEP, specifically with regard to a “Deaf-Blind Coordinator,” his parents then filed a complaint alleging violations of the IDEA, section 504 of the Rehabilitation Act of 1973, 29 U.S.C. section 794 et seq., the Americans with Disabilities Act (ADA), 42 U.S.C. section 12131 et seq., and 42 U.S.C. section 1983. The plaintiffs also simultaneously filed motion for a preliminary injunction.

A “Deaf-Blind Coordinator” was described as a person with experience and training in working with children with deaf-blindness. This individual would provide training to D.F.’s regular education teacher, special education teacher, and therapists. The individual would also consult with D.F.’s teachers, therapists, parents, and intervener on an ongoing basis.

The plaintiffs sought an order requiring the school district to: (1) immediately comply with and implement all provisions of D.F.’s IEP and the order of the hearing officer; (2) obtain, contract with, or hire a professional who is trained and experienced in working with children who are deaf-blind to serve as a deaf-blind coordinator and to train and support D.F.’s school team within five days of the court's order; (3) implement the training and support of D.F.’s intervener and school team as set forth in his IEP within ten days of the court's order.

In deference to the PDE, the Court found the disputed IEP to be final, though the Court noted that in order to come to a conclusion as to the plaintiff’s motion, the Court
had to ascertain the district’s compliance with the IEP. Additionally, in order to ascertain compliance with the IEP, the Court had to focus on whether the school district provided a “deaf-blind coordinator,” a qualified “intervener,” and a qualified “intervener trainer.”

Based on the wide-ranging qualifications of the individual which the district hired as D.F.’s “deaf-blind coordinator,” as well as the qualifications of his “intervener,” the Court found that the school district had complied with the provisions of D.F.’s IEP relating to those two positions. However, the Court noted that the district had not identified a specific “intervener trainer” to work with D.F.’s intervener. The Court did not find the individual whom the school district identified as the intervener trainer to be qualified for the position. Therefore, the Court found that the school district had not complied with the IEP. Consequently, the plaintiffs had shown that they were likely to succeed on the merits of their IDEA claim in this respect.

Therefore, the Court found that with the exception of intervener training, the school district had complied with the IEP, and the district had made “extraordinary efforts” to support D.F. The Court concluded that the school district was well-positioned to implement D.F’s program in compliance with his IEP. The Court further found that in this case, compensatory education was not an adequate substitute for hiring a qualified intervener trainer to provide the requisite training as set forth in the IEP. Therefore, the Court issued a preliminary injunction directing the school district to provide a qualified intervener trainer to work with D.F. And his intervener.
Board of Education of Appoquinimink School District v. Samuel Quinton

Johnson V. The plaintiffs, the Board of Education of the Appoquinimink School District sought judicial review of an administrative hearing decision rendered by the Administrative Hearing Panel (panel) in connection with a complaint filed by the parents of S.Q.J. V (S.J., defendants). In the complaint, the Johnsons alleged that their son's educational needs were not being met in the school district; therefore, he should be placed in a private school at public expense. The Johnsons specifically sought placement at St. Anne's Episcopal School (St. Anne's). S.J. was a twelve-year-old deaf child.

S.J. Attended the Delaware School for the Deaf (DSD) since he was approximately sixteen months old. An IEP was developed each year to meet the student’s educational needs. During their son’s fifth grade year, due to his below grade level performances on certain measures, the Johnsons became concerned about their son's continued placement at the DSD, and requested that he be enrolled at St. Anne’s and be provided with a full-time interpreter. The district responded that it would only provide an ASL interpreter for the student if he was enrolled in one of their public schools.

The defendants then filed a request for a due process hearing before the Panel. As a result of a hearing, the Panel issued a decision finding that the school district complied with the IDEA by providing the student with a FAPE, and therefore, the district did not have an obligation to fund the student's private placement at St. Anne's. However, the Panel also concluded that the school district erred when it declined to provide the student with a full-time sign language interpreter while he attended St. Anne's as a

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parentally-placed private school student. The school district challenged the Panel’s assertion that it erred in declining to provide a full-time sign language interpreter while the student attended St. Anne’s.

The Court concluded that the Panel’s decision was erroneous since the school district had provided the child with a FAPE, and the parents chose to place their son in a private school. The Court noted that with regard to parentally-placed private school students, a public school district must (1) locate, identify, and evaluate children with disabilities who are enrolled by their parents in private schools within the district; and (2) allocate a proportional share of federal IDEA funds to provide special education and related services to parentally-placed private school children. The Court further noted that the amount of the proportional share is determined by comparing the number of disabled students attending private schools in the district to the total number of children with disabilities being educated in the district. As a result of this funding structure, special education services in private schools are less extensive than the services that a student with a disability enrolled in a public school is entitled to receive.235

The Court cited that in this case, the school district had presented evidence that the proportional share of Federal Part B funds allocated to it for private school services amounted to $3,639.00. The cost for the student’s full-time interpreter exceeded $37,000 per year. In light of this evidence and because the IDEA imposed no obligation on the school district to provide related services on an individualized basis to a parentally-placed

private school student, the Court concluded that the Panel's decision was erroneous as a matter of law, and the Court granted summary judgment in favor of the school district.

Medical Services

*Williams v. Gering Public Schools.* Appellee, M.W., is a multi-handicapped child who was born on November 15, 1971. This action was initiated by M.W.’s mother, Rita Wilson, by filing a petition with the Nebraska Department of Education (NDE) against the Gering Public Schools (school district) and the NDE, alleging that M.W. had been denied a FAPE. The subject of the dispute was an IEP in which the school district recommended that M.W. receive a nine-month school year at Educational Service Unit No. 13 (ESU-13) and no residential placement.

The student’s mother alleged that residential placement at the Martin Luther Home, in Mitchell, Nebraska, was necessary for M.W. And that the Child Development Center (CDC) in Scottsbluff, Nebraska was also more appropriate than ESU-13 because CDC provided a twelve-month program designed to meet M.W.’s special educational needs. Citing the previous information, Ms. Wilson proposed that M.W. reside at the Martin Luther Home in Mitchell and be educated at CDC in Scottsbluff.

In their response to Ms. Wilson’s proposition, the school district disagreed that M.W. required residential placement in order to receive a FAPE, or that a twelve-month school year was necessary, and proposed that ESU-13 was an appropriate educational placement. The NDE agreed with the school district that residential placement was not necessary or appropriate. Due to the dispute, the NDE then appointed a hearing officer,

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and a three-day administrative hearing began in early September 1987. The issues presented at the administrative hearing were (1) whether M.W. was entitled, as a part of her special educational services, to a residential placement, and, if so, the location of that residential placement, and (2) the length of the school year for M.W. And where her schooling should take place.

The hearing officer denied Ms. Wilson's request for residential placement as a part of her daughter's IEP, but ordered the school district to prepare an IEP for M.W.'s placement in a twelve-month program at the CDC. Since the hearing officer found that residential care was not a necessary part of M.W's IEP, Ms. Wilson's petition was dismissed with regard to NDE.

The school district then filed a petition for judicial review, and Ms. Wilson filed an answer and cross-petition for judicial review. In her cross-petition, Wilson named both the school district and the NDE as parties. In early August 1988, the District Court for Scotts Bluff County entered a final order affirming the hearing officer’s decision. The school district then filed a motion for new trial on August 12, 1988, and Ms. Wilson filed a motion for new trial on August 29, 1988. Both motions were subsequently overruled on August 29, 1988, that is, both the school district and Ms. Wilson filed notices of appeal on September 21, 1988, and September 26, 1988, respectively.

In its appeal, the school district contended the District Court erred in affirming the hearing officer's evidence-supported, final decision requiring a twelve-month school year and placement at CDC. In her cross-appeal, Ms. Wilson contended the District Court erred in finding that M.W. did not require a residential educational placement in order to
benefit from her special education program and in dismissing the NDE as a party to the action. In its brief, the NDE claims it is no longer a proper party to these proceedings, and it has filed a motion to dismiss the cross-appeal for want of jurisdiction. The NDE contends the Nebraska Supreme Court lacks jurisdiction to determine issues concerning the NDE because Ms. Wilson did not file her notice of appeal in a timely manner with the District Court. It is noted that Ms. Wilson’s motion for new trial was not made until more than ten days after the Court’s final order.

The Nebraska Supreme Court noted the record shows that the appeal of the school district was timely filed and gave Ms. Wilson the right to cross-appeal, but only against the appellant (school district). Since the school district was the only appellant in this case, it was necessary for appellee Wilson to timely file a notice of appeal to preserve her rights against the NDE, another appellee. Since Ms. Wilson failed to do so, the NDE’s motion to dismiss the cross-appeal regarding the NDE for lack of jurisdiction was sustained.

The type of education M.W. received was centered on enhancing her basic living skills. M.W. was being trained to open her mouth to receive food, to swallow food, and to tolerate a wet washcloth to her face. M.W. Also participates in a visual tracking program and a toileting program.

The Court noted that each time M.W. has been moved and her educational program interrupted, she has suffered a regression. Given the nature of M.W.’s handicapping conditions, M.W. would suffer undue regression with a three-month lapse
in programming. Therefore, in order for M.W. to receive a FAPE, she must have a
twelve-month school year.

The Court also noted that while M.W. was at ESU-13 from 1978 through 1985,
she made no progress, regressed in her eating and drinking skills, and generally
deteriorated both educationally and physically. M.W. did make small and intermittent
progress while previously participating in a twelve-month school year and received
educational benefit from her program during her twenty months in that program. But, the
Court noted, even small and intermittent progress was an improvement over her progress
at ESU-13. The Court then determined that M.W. needs to be in one facility where she
can receive her education on a year-round basis without interruption and that her
educational placement should be at the Child Development Center in Scottsbluff, where
year-round service is available.

In this case, the school district did not contend that the residential placement
sought herein is a necessary medical service, but rather that the question is whether
residential placement is a related service required to be provided as part of the student’s
FAPE. M.W. was entitled to receive special education and sufficient related services to
permit her to benefit educationally from that instruction. Residential care is defined in
section 79-3312 as food and lodging and any other related expenses which are not a part
of the education program, but such care shall not include expenditures for medical and
dental services which are the parent or guardian’s responsibility. In this case, the
Nebraska Supreme Court has determined that a good-faith effort had been made to
educate M.W. in her least restrictive environment. The Court further found that
residential placement or the institutionalization of the student was not necessary for educational purposes. Therefore, the Court agreed with the hearing officer’s finding that a residential placement was not required for M.W. to benefit educationally from her IEP.

Ultimately, the Nebraska Supreme Court affirmed the judgments of both the District Court and hearing officer, while sustaining the NDE’s motion to dismiss Ms. Wilson's cross-appeal for lack of jurisdiction in the Nebraska Supreme Court.

*Courtney T. v. School District of Philadelphia.*\(^{237}\) C.T. was twenty-two years old at the time of this case and suffers from learning disabilities, speech and language impairments, attention deficit hyperactivity disorder, and other mental health disorders. Due to her educational needs, the school district paid for C.T. to attend private schools beginning in 1993 when she entered kindergarten.

Since 2001, C.T.’s needs advanced and required a variety of educational and medical placements including periods of hospitalization and residential institutionalization in New Mexico where she was unilaterally placed by her parents. C.T. ultimately did well at the residential placement in New Mexico and was returned to Philadelphia during the summer of 2003. C.T. flourished at the Pathway School (Pathway) during the 2003-2004 school year but, by the beginning of the following school year, her emotional condition began to deteriorate and Pathway could no longer serve her needs.

In December 2004, C.T.’s parents unilaterally placed her back at the residential setting in New Mexico where her condition continued to worsen in 2005. Her condition

worsened so much so that the residential placement in New Mexico informed her parents that it could no longer provide sufficient care for C.T. because of her self-abusive and aggressive behaviors. C.T.'s parents then placed her in a psychiatric hospital in Houston, Texas. However, the psychiatric hospital discharged her in late May 2005 because it was unable to serve her needs. The following day, C.T.'s parents enrolled her in Supervised LifeStyles (SLS), a long-term psychiatric residential treatment center in New York. SLS did not have educational accreditation nor did it have an on-site school, special education teachers, or school affiliation.

C.T. spent more than six months at SLS being treated in the acute care wing. She did not receive educational services during this period and most of her days were spent in intensive individual and group psychotherapy. The school district sought to conduct a neuropsychological evaluation in June 2005, but was unable to do so because C.T.'s parents advised that she was not sufficiently stable at the time. Also, according to the school district, C.T.'s parents stated that her educational plan from the residential placement in New Mexico could not be implemented at SLS because of her emotional state.

In October 2005, C.T.'s parents informed the school district that she could be evaluated. An evaluation was conducted shortly thereafter. The results of the evaluation noted C.T.'s limited academic capacity at the time and recommended focusing her instruction on adaptive and vocational skills. One month later, in mid-November 2005, the school district assembled C.T.'s IEP team and developed an IEP based on the evaluation. Several weeks later in early-December 2005, C.T. was transferred from the
acute care ward at SLS to the post-acute ward. She was later discharged in late-July 2006.

In November 2005, C.T.’s parents (plaintiffs) requested a due process hearing to compel the school district to reimburse them for the cost of her stay at the residential treatment facility in New Mexico and SLS. The parents also sought to compel the school district to provide compensatory education for the time C.T. spent at SLS, in the event that tuition reimbursement was denied. The parents further sought to require the school district to pay for an independent evaluation of C.T.

A hearing was conducted in January 2006. The school district agreed to reimburse the parents for C.T.’s stay at the residential treatment facility in New Mexico but opposed reimbursement for the SLS placement on the ground that a medical crisis precipitated her stay there.

The hearing officer faulted the school district for failure to develop an IEP in June 2005 and for not providing educational services beginning when C.T. entered SLS. The hearing officer rejected arguments that C.T.’s expenses at SLS were medical as opposed to educational, concluding that her educational needs could not be separated from her medical needs. The hearing officer also determined that SLS was an appropriate placement. Thus, the hearing officer awarded tuition reimbursement for C.T.’s stay at SLS from May 2005 through January 2006.

The appeals panel reversed the decision of the hearing officer. The panel noted that C.T.’s admission to SLS was prompted by a psychiatric crisis and was therefore necessary for medical reasons rather than educational purposes. The panel also noted that
the services provided to C.T. during the first four months were medical rather than educational in nature. Therefore, the panel saw it as inappropriate to award tuition reimbursement for her stay at SLS.

C.T. Appealed this decision to the United States District Court for the Eastern District of Pennsylvania. In its analysis, the District Court separated C.T.'s treatment into two distinct time periods. The first period covered her stay in SLS's acute care ward from May 23, 2005 to October 12, 2005. The second period covered from October 12, 2005, when C.T.'s parents informed the school district that she could be evaluated, until January 26, 2006, the date through which the hearing officer awarded tuition reimbursement.

For the first period, the District Court concluded that C.T. was not entitled to tuition reimbursement because SLS did not constitute special education within the meaning of the IDEA. With regard to the second period, the District Court awarded tuition reimbursement. It stated that, once the school district began providing educational services to C.T., it also had an obligation to provide related services. In that regard, the Court determined that C.T.'s treatment at SLS was a related service. It also concluded that the costs of SLS were not excluded by the medical services exception to federal regulations requiring the provision of related services. Finally, the District Court denied the plaintiffs' request for compensatory education for May 2005 through October 2005 in lieu of tuition reimbursement. The Court held that the school district developed C.T.'s IEP within a reasonable period of time.

Upon appeal, the Third Circuit did not find that SLS was an appropriate placement, thus plaintiffs were not entitled to tuition reimbursement. The Third Circuit
also found that due to the plaintiffs’ failure to demonstrate the appropriateness of the private placement, the Third Circuit was not required to determine whether the school district deprived Courtney of a FAPE for tuition reimbursement purposes.

Further, the Third Circuit did not find the school district at fault or impose substantial costs on it. The Third Circuit noted an IEP serves to ensure that the student receives services which are reasonably calculated to provide meaningful educational benefits. In this case, though, C.T.’s medical providers indicated that she was not sufficiently stable to receive educational services when she entered the acute-care ward at SLS. In addition, C.T.’s condition had deteriorated over the preceding months, ultimately requiring that she leave the residential treatment facility in New Mexico. The Third Circuit concluded, the school district could not reasonably have been expected to create an IEP without having the opportunity to evaluate C.T.’s changing educational needs.

The Third Circuit further found that the school district did not deny C.T. a FAPE, thereby entitling her to compensatory education. The school district had previously conceded before the District Court that it denied a FAPE to C.T. during her stay at the residential treatment facility in New Mexico and agreed to reimburse C.T. for the expenses associated with her stay. Then, once the school district was informed of C.T.’s admission to SLS, school officials reconvened her IEP team approximately two weeks after the parents informed the District of C.T.’s admission, to reevaluate her needs and develop a new IEP. The Third Circuit then concluded that C.T. And her parents were not entitled to tuition reimbursement or compensatory education for her stay at SLS from May 29, 2005 through January 26, 2006.
Music Therapy

*Carroll v. Metropolitan Government of Nashville and Davidson County.*²³⁸ The plaintiff is a child named E.C. who had been diagnosed with Rett Syndrome. Through her parents, she requested an administrative hearing with respect to her school placement and other matters. A state hearing officer entered a comprehensive order adopting many of the positions argued by E.T.’s parents, but the defendant school district (the Metropolitan Government of Nashville and Davidson County, Tennessee) did not fully implement the order. E.T.’s parents then filed an enforcement suit in Federal District Court, and the school district filed a separate action for review of the hearing officer’s order. The two cases were consolidated by the Court.

The District Court held a brief hearing where four witnesses testified on behalf of the school district. E.T.’s counsel was prepared to put two witnesses on the stand, but before either of the witnesses could take the stand the Court announced it was reversing the administrative decision and ordered E.T. be placed at a school that differed from the school identified by the hearing officer.

The plaintiff then appealed the District Court’s decision. The first of two main tenets of her appeal was that the District Court erred in reversing portions of the hearing officer’s order which were not challenged by the school district. The second tenet of the plaintiff’s appeal stated the District Court denied the child and her parents an opportunity

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²³⁸ Carroll v. Metropolitan Gov’t. of Nashville and Davidson Cnty., No. 91-5749, U.S. App. LEXIS 538 (6th Cir. 1992).
to be heard since they were not allowed to call any witnesses and since the defendants were able to call four witnesses.

The following will provide background to this case. E.T. was born on July 24, 1984 and was severely handicapped by Rett Syndrome. Rett Syndrome is a degenerative condition which occurs only in females and causes individuals to have profound mental retardation and physical disabilities. In April 1988, an IEP team decided that due to her disability, E.T. should be placed in a self-contained classroom within a school and receive one-on-one instruction. At the next IEP annual review which took place a year later, the IEP team determined that extended school year (ESY) services would be required. But, the school district did not provide such services. On their own, E.T.'s parents eventually obtained comparable services through the local Department of Mental Health and Retardation.

At the next IEP team annual review which would cover the 1989-1990 school year, the IEP team agreed E.T. should receive language consultation and occupational therapy. As was the case with the previous IEP, no ESY services were provided by the school district.

At the next IEP team annual review, the school district proposed placement for the summer of 1990 in a program that had lacked evidence of success. Again, since the parents did not have the support or assistance of the school district, E.T.'s parents placed her in an integrated setting with a special education teacher paid by the Department of Mental Health.
Late in the summer of 1990, the school district unilaterally decided to assign E.T. to an institution known as the Hickman School. Shortly after this decision was announced, a Tennessee Department of Education hearing officer convened the administrative hearing referred to above. E.T.'s parents objected to the Hickman School placement and argued that the school district had not complied with E.T.'s IEP and had not provided the required related services. Her parents desired to have E.T. placed in a regular kindergarten class with a full-time aide under the supervision of a special education teacher. E.T.’s parents also pursued related services, including music therapy.

The hearing officer found that E.T. had benefited from being integrated into a regular educational program with individualized instruction. He also found that she had benefited from music therapy. The hearing officer determined that the school district had violated the Education for All Handicapped Children Act for failing to follow her agreed-upon IEP. The hearing officer ordered the IEP team to meet within fifteen days to develop an IEP that included a plan for a self-contained class and one-on-one instruction under the supervision of a certified, experienced special education teacher. He also ordered that the IEP should provide for music therapy by a fully qualified registered music therapist. The hearing officer directed that E.T. be placed at a school in the area where she lived.

In the ensuing District Court proceedings, the school district claimed that E.T. could not receive an appropriate education at the school identified by the hearing officer. The school system also challenged the hearing officer's determination that E.T. should receive music therapy from a certified music therapist.
The shortcomings of the District Court’s procedures upon hearing the matter in January 1991 were previously explained. In short, the school district presented its case first with four witnesses testifying on its behalf. Without hearing from E.T.’s counsel or her two witnesses, the Court ruled on the school district’s behalf, reversing the ruling of the hearing officer.

On appeal, the case then went to the Sixth Circuit Court of Appeals. The Sixth Circuit agreed with E.T. that the District Court erred in reversing the hearing officer’s decision, specifying procedural violations by the school district.

With regard to music therapy, the Sixth Circuit determined the hearing officer viewed music therapy from the narrow view of the student attending her home school rather than the school proposed by the school district. Since the hearing officer was not aware of the music program at the district-proposed school, and since the District Court would need to revisit the school placement issue, the Sixth Circuit asked the District Court to review the music therapy issue. The Sixth Circuit also viewed the question of one-on-one instruction in connection with the question of school placement. As was the case with music therapy, the Sixth Circuit asked the District Court to review the topic of one-on-one instruction in the district-proposed school placement.

For the matters described above in addition to the child’s counsel having the opportunity to present two witnesses, the Sixth Circuit remanded the matter for completion of the hearing and reconsideration in the light of all the evidence. Formally, the Sixth Circuit vacated the appealed order and remanded the case for further proceedings.
Occupational Therapy

_Timothy W. v. Rochester, New Hampshire, School District._ 239 T.W. was born two months prematurely on December 8, 1975 with a number of severely impairing afflictions. As a result, T.W. was a multiply handicapped individual. His mother attempted to obtain appropriate services for him. T.W. did receive some services from the Rochester Child Development Center, but he did not receive educational programming from the Rochester School District when he became of school age.

On February 19, 1980, the Rochester School District convened a meeting to decide if T.W. was considered educationally handicapped under the state and federal statutes, thereby entitling him to special education and related services. The school district heard testimony from a number of medical professionals who recommended an educational program be created for T.W. including related services such as occupational and physical therapy. Testimony also included a conclusion of another professional who reported that T.W. had no educational potential while another medical professional testified hydrocephalus had destroyed part of T.W.’s brain. The meeting was adjourned without making a final decision. At a meeting that was reconvened on March 7, 1980, the school district decided that T.W. was not educationally handicapped. The district came to the conclusion that his handicap was so severe he was not capable of benefitting from an education, and therefore was not entitled to special education and related services. Subsequently, during the years of 1981 and 1982, the school district did not provide T.W. with any sort of educational program.

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In May 1982, the New Hampshire Department of Education reviewed the Rochester School District's special education programs and made a finding of noncompliance, stating that the school district was not allowed to use the criterion of whether or not a student was capable of benefitting in determining eligibility for special education services. No action was taken in response to this finding until one year later, on June 20, 1983, when the school district met to discuss T.W.’s case. During the meeting, two staff members from the Rochester Child Development Center reported that T.W. responded to the stimuli of bells and his mother's voice, and recommended frequent handling and positioning as well as physical therapy. The school district, however, continued its stance of not providing T.W. with any educational program or services.

In response to a letter from T.W.’s attorney, on January 17, 1984, the school district's placement team met. In addition to the previously provided information from medical professionals and staff at the Rochester Child Development Center, the team reviewed a report from a physical therapy expert for disabled children who had provided services to T.W. on seven occasions. The PT expert had concluded that T.W. responded to motion and handling and enjoyed loud music. Further, she identified T.W.’s educational needs. The placement team recommended that T.W. be placed at the Child Development Center so that he could be provided with a special education program. The Rochester School Board, however, refused to authorize the placement team's recommendation to provide educational services for T.W., contending that it still needed more information. The school district's request to have T.W. be subjected to a neurological evaluation, including a CAT Scan, was refused by his mother.
On April 24, 1984, T.W. filed a complaint with the New Hampshire Department of Education requesting that he be placed in an educational program immediately. On October 9, 1984, the Department of Education issued an order requiring the school district to place him in an educational program within five days, until the appeals process on the issue of whether T.W. was educationally handicapped was completed. The school district, however, refused to make any such educational placement. On October 31, 1984, the school district filed an appeal of the order. There was also a meeting on November 8, 1984, in which the Rochester School Board reviewed T.W.’s case and concluded he was not eligible for special education.

On November 17, 1984, T.W. filed a complaint in the United States District Court, alleging that his rights under the Education for All Handicapped Children Act, the corresponding New Hampshire state law, section 504 of the Rehabilitation Act of 1973, and the equal protection and due process clauses of the United States and New Hampshire Constitutions, had been violated by the Rochester School District. The complaint sought preliminary and permanent injunctions directing the school district to provide him with special education, and $175,000 in damages.

A hearing was held in the District Court on December 21, 1984. T.W.’s mother, physical therapist, and experts in providing special education services to severely disabled children testified to T.W.’s sensory abilities, reactions to feelings and stimuli, and to his educational needs including the need for occupational and physical therapy as well as a communication program. Dr. Patricia Andrews, a developmental pediatrician, was the only person who testified that T.W. did not have educational needs and could not
benefit from education. Her only contact with T.W. had been during an evaluation when he was two months old. While she testified that T.W. was profoundly mentally retarded and that an X-ray study of his brain showed he had virtually no cortex present, she also stated that such a study alone could not predict how much functioning was going to develop. On January 3, 1985, the District Court denied T.W.'s motion for a preliminary injunction, and on January 8, stated it would abstain on the damage claim pending exhaustion of the state administrative procedures.

On December 7, 1984, the State Commissioner of Education had ordered that a diagnostic prescriptive program be implemented for T.W.; that he receive three hours of tutoring per week; and that an evaluation be made concerning his capacity to benefit. T.W.'s attorney, not the school district, made the necessary arrangements, and T.W. entered the school district's ABLE 2 program in May 1985. The ABLE reports on T.W. indicate that he is handicapped, has educational needs, and would benefit from an educational program. An evaluation summary prepared on August 2, 1985 by Susan Keefe, a teacher who worked with T.W. in the ABLE program, concluded that he demonstrated abilities in visual development, auditory development, tactile development, cognition communication, language, and social development. Keefe noted that T.W. had made particular progress in learning to move his head towards a person speaking his name and in learning to activate a communication switch. Subsequently, T.W. was allowed to attend the ABLE program intermittently for three weeks in October and November 1985, another three weeks in December 1985, and four weeks in May and

In September 1986, T.W. Again requested a special education program. In October 1986, the school district continued to refuse to provide him with such a program, claiming it still needed more information. Various evaluations were done at the request of the school district. From late December 1985 through October 1986, a number of evaluations were conducted by various medical professionals whose results ranged from T.W.’s ability to learn was unlikely to the need for certain related services.

The school district, on January 12, 1987, arranged another diagnostic placement at the Rochester Child Development Center. A report of March 13, 1987 by Dr. Schofield, an expert in special education for the severely handicapped, indicated that T.W. was aware of his environment, could locate to different sounds made by a busy box, and attempted to reach for the box himself. He recommended the establishment of specific teaching/learning strategies for Timothy. On June 23, 1987, Rose Bradder, Program Coordinator at the Center, also recommended that T.W. continue to receive educational services. Furthermore, experts in the field of special education retained on behalf of T.W. All concluded that he responded to certain stimuli and was capable of learning.

On May 20, 1987, the District Court found that T.W. had not exhausted his state administrative remedies before the New Hampshire Department of Education, and prohibited pretrial discovery until this had been done. On September 15, 1987, the hearing officer in the administrative hearings ruled that T.W.’s capacity to benefit was not a legally permissible standard for determining his eligibility to receive a public education,
and that the Rochester School District must provide him with an education. The Rochester School District, on November 12, 1987, appealed this decision to the United States District Court by filing a counterclaim, and on March 29, 1988, moved for summary judgment. T.W. filed a cross motion for summary judgment.

The District Court held hearings on June 16 and 27, 1988, to determine whether T.W. qualified as an educationally handicapped individual. In addition to the previously mentioned reports, the District Court heard testimony from various experts on this subject at hand. On July 15, 1988, the District Court rendered its opinion first ruling that under the Education for All Handicapped Children Act, an initial determination as to the child's ability to benefit from special education must be made in order for a handicapped child to qualify for education under the Act. The Court then reviewed the materials, reports, and testimony and found that T.W. was not capable of benefitting from special education. This determination resulted in the defendant (school district) not being obligated to provide special education under either the federal statute (EAHCA) or the New Hampshire statute. T.W. then appealed the District Court’s order.

The First Circuit Court of Appeals took the case and determined that the primary issue was whether the District Court erred in its rulings of law. The First Circuit found that it did, and therefore, did not review the District Court’s findings of fact. The First Circuit then identified that since the Act’s language mandates that all handicapped children are entitled to a free appropriate education, they must then determine whether T.W. is a handicapped child, and if he is, what constitutes an appropriate education to meet his unique needs.
The First Circuit then determined that there was no question that T.W. fit within the Act's definition of a handicapped child since he is multiply handicapped and profoundly mentally disabled. The First Circuit noted that T.W. had been described as suffering from severe spasticity, cerebral palsy, brain damage, joint contractures, cortical blindness, is not ambulatory, and is quadriplegic. Upon reviewing the record, the First Circuit concluded that the Act's language dictates the holding that T.W. is a handicapped child who is in need of special education and related services because of his handicaps. Therefore, according to the Act, he must be provided with such an educational program. The First Circuit noted that there is nothing in the Act's language which supports the District Court's conclusion that an initial determination as to a child's ability to benefit from special education must be made in order for a handicapped child to qualify for education under the Act. The First Circuit further noted that the language of the Act requires the school district to provide an educational program for every handicapped child in the district, regardless of the severity of the handicap.

The First Circuit reversed the judgment of the District Court, ruling in favor of T.W. The First Circuit then remanded the case to the District Court determining that the District Court shall retain jurisdiction until a suitable IEP is developed for T.W. by the school district. The First Circuit required T.W. be placed in an interim special educational placement until a final IEP was developed and agreed upon by the parties. The District Court was then given the responsibility to determine the question of damages. Lastly, the First Circuit assessed costs against the school district.
Natchez-Adams School District v. Searing. This appeal stemmed from a public school district (plaintiff) seeking reversal of an administrative hearing officer’s conclusion that a student with a disability (defendant) enrolled by his parents in a private school, was entitled to occupational therapy (OT) under the IDEA. The defendants, E.S., through his parents, Pamela and Michael Searing, responded to the motion and filed a cross-motion for summary judgment to affirm the administrative hearing decision.

At the time of this case, E.S. was a seven-year-old student at the Cathedral School (Cathedral) in Natchez, Mississippi. At an early age, E.S. was diagnosed with ataxic cerebral palsy. Following this diagnosis, it was recommended that E.S. receive occupational, physical and speech therapy. E.S. initially received these educational and related services in Houston prior to the family moving from Houston to Natchez, Mississippi. In Natchez, E.S. was enrolled in a public school in the Natchez-Adams School District where he received educational services as well as occupational and physical therapy. Prior to the finalization of a revised IEP for E.S., the Searings decided to enroll him in Cathedral, a private, religious school. The school district informed the Searings that if they placed E.S. in the private school, the school district would no longer provide related services as part of a FAPE. The Searings enrolled E.S. At Cathedral anyway, and Natchez-Adams discontinued the provision of occupational therapy.

In an effort to resolve the dispute related services between the Searings and Natchez-Adams, a due process hearing was conducted. In his report, the hearing officer first concluded that children with disabilities who are placed by their parents in private

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schools are entitled to special educational services under the IDEA. He then ordered Natchez-Adams to provide occupational therapy for E.S. in accordance with an evaluation to be performed by an occupational therapist. In disagreement of the results of the due process hearing, the school district filed a complaint in Federal District Court. The issues presently before the District Court were: (1) whether the IDEA required the school district to provide educational services to a child voluntarily enrolled by his parents in a private school, and if so, (2) whether occupational therapy was required for E.S. to benefit educationally.

The Court found that the IDEA requires a local school district to make an equitable distribution of the IDEA resources made available to it among eligible students regardless of whether they attend a district school or a private school. The Court noted that the resources may not be sufficient to provide every child with every service he or she desires, or even needs. Therefore, the local school district is given some discretion in allocating its resources. However, the Court concluded, in exercising its discretion, the local school district may not do so by totally excluding students who do not attend district schools.

As a result of the aforementioned information, the Court found that Natchez-Adams had not fulfilled its legal obligations to Evan under the IDEA. Thus, the Court upheld the hearing officer’s decision. The Court found that Natchez-Adams could not refuse to provide educational services for E.S. while he attended Cathedral merely because he was not enrolled in a public school in the district.

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After having determined that Natchez-Adams had a legal obligation to provide E.S. with an opportunity to participate in a program of benefits, the Court turned its attention to the argument that OT was not required for him to benefit educationally. The Court noted that while the IDEA did not require the school district to maximize E.S.’s capacity for learning, it did require a “basic floor of opportunity,” consisting of access to specialized instruction and related services (Rowley, 1982). The Court further noted that the IDEA ensured access to educational services by requiring the responsible public agency to design and implement an IEP for each child with a disability. Since Natchez-Adams failed to establish or revise an IEP for E.S., the Court concluded that it was not required to ascertain whether a preponderance of the evidence supported the hearing officer’s decision. Thus, Natchez-Adams had violated the IDEA by failing to provide E.S. with a meaningful and legitimate opportunity to participate in a program of benefits and by failing to provide E.S. with access to educational services by designing and implementing an IEP for him.

In considering relief for E.S., the Court concluded that the hearing officer erred when he ordered Natchez-Adams to provide E.S. with occupational therapy of a frequency and duration recommended by an occupational therapist. However, the Court noted that an evaluating therapist did not have the sole authority to make decisions affecting E.S.’s educational program as decisions of that nature are relegated to IEP teams. Such decisions must be the product of the IEP process and must be made by an IEP team. Because the hearing officer did not strictly adhere to the aforementioned requirements, the Court found that the relief which he ordered was inappropriate.
Though, the Court determined that the Searings were entitled to relief. The Court concluded that the Houston IEP was still in effect and unless and until Natchez-Adams revised its contents in accordance with the standards and requirements within applicable regulations, the school district was obligated to provide the recommended related services. The Court therefore determined that Natchez-Adams was required to provide E.S. with at least thirty minutes of occupational therapy per week.

In sum, the school district’s arguments that E.S. did not have a right to related services while he attended Cathedral and that he no longer requires occupational therapy to benefit educationally were without merit. Therefore, the Court denied the district’s motion. In light of the Court’s ruling, the Searings’ cross-motion was granted in all respects except that Natchez-Adams was not required to provide E.S. with occupational therapy as ordered by the hearing officer. However, Natchez-Adams was required to provide E.S. with at least thirty minutes of occupational therapy per week as set forth in his Houston IEP.

*Erickson v. Albuquerque Public Schools.* 242 Susan Erickson brought action against the Albuquerque Public Schools (school district) on behalf of her son, M.E. Erickson appealed the District Court's decision that M.E. was not entitled to compensatory education because the school district did not violate the IDEA and New Mexico stay-put provisions.

At the time this case began in 1995, M.E. was thirteen years old and in the seventh grade. He had been diagnosed with bipolar disorder and learning disabilities.

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M.E. had received Occupational Therapy (OT) for a number of years. In fact, he had received OT since he was in pre-school. His October 1994 IEP called for two hours per week of OT services. But, the IEP was not specific in what type of OT should be provided. One of the two hours of OT service per week utilized hippotherapy, an occupational therapy involving horses. M.E.'s subsequent IEP which was dated June 1995 continued to provide two hours of occupational therapy per week. But, again, the type of OT was not specified nor was hippotherapy identified in the IEP. The IEP team held an IEP meeting in September 1995, where the school district proposed and subsequently reduced M.E.'s occupational therapy to one hour per week ultimately discontinuing hippotherapy. M.E.'s mother objected to the elimination of hippotherapy, but agreed to the reduction to one hour of occupational therapy per week. The school district immediately canceled M.E.'s hippotherapy.

After the district’s decision to discontinue hippotherapy, M.E.’s mother, Susan Erickson, requested a due process hearing, charging that the school district violated the IDEA by canceling hippotherapy, discontinuing hippotherapy during the pendency of the appeal, and failing to provide M.E. with a FAPE. The hearing officer found the school district violated the IDEA's stay-put provision by discontinuing hippotherapy during the course of the administrative proceeding. The hearing officer also found the school district failed to make an individualized decision regarding M.E.'s educational needs by predetermining that occupational therapy would be provided at school, rather than at an outside facility. Because of these violations, the hearing officer awarded M.E.
compensatory education of one semester of hippotherapy. The hearing officer found that the school district provided M.E. with a FAPE.

The school district pursued an administrative appeal of the hearing officer's decisions that the school district failed to make an individualized decision regarding M.E.’s educational needs, predetermined the occupational therapy to be provided, and violated the stay-put provision. The school district also appealed the award of compensatory education. The administrative appeal officer found the school district's predetermination that M.E.’s occupational therapy would be provided at school did not violate the IDEA, because school districts can change the location of services. The appeal officer concluded the September 1995 IEP provided M.E. with a FAPE and the school district did not violate the stay-put provision, so M.E. was not entitled to compensatory education.

Upon receiving the decision from the appeal officer, M.E.’s mother then filed a civil complaint alleging the appeal officer erred. The District Court granted the school district's motion for summary judgment, adopting the findings of fact and conclusions of law of the appeal officer. The District Court found the stay-put provision did not apply because the elimination of hippotherapy was a change in methodology of services rather than a change in educational placement. The District Court concluded M.E. was not entitled to compensatory education because he was not denied a FAPE. M.E.’s mother then appealed the District Court’s determination that her son was not entitled to compensatory education.
The first issue of the Tenth Circuit was whether the school district violated the stay-put provision by failing to provide hippotherapy to M.E. during his mother’s appeal. The IDEA regulations require that during the pendency of any proceedings the child shall remain in his or her then current educational placement. M.E.’s mother contended the stay-put provisions required the school district to continue providing two hours of occupational therapy per week, including one hour of hippotherapy, until her appeal was resolved. The stay-put provision does not apply when the parent and the school district agree to changes in the services previously delivered. M.E.’s mother agreed to a reduction from two hours to one hour of occupational therapy per week. Because the school district and M.E.’s mother agreed, implementation of the reduction of hours did not violate the stay-put provision.

The issue then became whether the cancellation of hippotherapy violated the stay-put provision. Both the District Court and the appeal officer found hippotherapy to be a form of treatment, not an educational placement or service delivery provision. If found to be an educational placement or service delivery provision, the school district would have been required to continue providing hippotherapy until a judgment was made by a court. M.E.’s mother then argued that the language in the New Mexico stay-put provision was broader than the IDEA stay-put requirement. The Tenth Circuit determined that the New Mexico stay-put provision required the school district to maintain the present delivery of services. M.E.’s present delivery of services, as determined in his IEP, was one hour of occupational therapy; his IEP did not specify hippotherapy as necessary for him to benefit from special education. The school district continued providing occupational
therapy during the pendency of the appeal and therefore, did not violate the New Mexico stay-put provision.

The second issue before the Tenth Circuit was whether the school district made an individualized placement decision concerning M.E. His mother contended that before the September 1995 IEP meeting, the school district decided to provide occupational therapy only at the school and predetermined that it would decrease the amount of M.E.’s occupational therapy and eliminate hippotherapy. During District Court proceedings, the school district argued, and the District Court subsequently determined that compensatory education is not an appropriate remedy for a procedural violation of the IDEA. The appeal officer found the school district predetermined that it would end hippotherapy, but did not predetermine the amount of occupational therapy. The real question for the Tenth Circuit to answer was whether a failure to provide an individualized placement decision is remediable by an award of compensatory education.

The Tenth Circuit agreed with the District Court in its determination that compensatory education is not an appropriate remedy for a procedural violation of the IDEA. The Tenth Circuit also denied M.E.’s mother’s request for attorneys’ fees and affirmed the judgment of the District Court.

*John M. v. Evanston Community Consolidated School District Number 65.*

The parents of J.M. filed suit, claiming that the Evanston Community Consolidated

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School District violated J.M.'s rights under the IDEA. Both sides appealed aspects of the District Court decision.

J.M.’s disability was Downs Syndrome. During the 1999-2000 school year he was in third grade and was educated in a regular classroom but also received 400 minutes of special education services. Included in his special education services were 150 minutes per week of speech and language resources, thirty minutes per week of direct occupational therapy (OT) services, and sixty minutes per month of physical therapy (PT) services. He also had the support of a full-time teacher's aide.

In the spring of 2000, the school district conducted the required triennial evaluation of J.M. which would ultimately be used to provide direction for his IEP for the 2000-2001 school year. The parents and the school district disagreed about how to perform the evaluation. The parents were opposed to standardized assessments and ultimately refused to allow the school district to utilize such diagnostic materials. The parents did agree to an evaluation procedure, but did not incorporate the use of standardized testing. As a result of the evaluations performed by the occupational and physical therapists, the school district proposed thirty minutes of OT consultation per week, thirty minutes of direct PT per week, and thirty to sixty minutes of PT consultation per month.

The parents were displeased with the proposed IEP and requested private OT and PT evaluations. The parents hired a therapist from a private organization that conducted the evaluation in July 2000. The parents paid $800 for the private evaluation. The special services director (director) believed that the school district's evaluations were appropriate
and rejected the request that the district pay for the private evaluation. Instead, the
director requested a due process hearing. At the due process hearing, the school district
prevailed on all issues except two technical violations. One of the violations involved the
occupational therapist. She had received her MA in OT in August 1999 and passed her
licensing exam in March 2000, but she did not receive her license until May 2000. Under
those circumstances she could legally work in the school district, but only with more
supervision than she received. According to the hearing examiner, there was no
indication that the OT did not perform her services satisfactorily, but, as compensation
for the technical licensing problem, the hearing officer ordered sixty minutes per week of
direct OT services be provided to J.M. in addition to the amount already provided for in
the IEP. The hearing officer also found that the social and emotional goals in the IEP
were nondescript. The hearing officer ordered the school district to improve upon this
area of IEP writing. In all other respects, the IEP was upheld.

The case then moved to the Federal District Court, where the judge considered the
parties' cross-motions for summary judgment without additional evidence. He said the
parents were entitled to damages in the form of one year of compensatory occupational
therapy, $800 to cover the fee for the independent evaluation, the use of an inclusion
facilitator if one is available at no cost to the district, and, because he found them to be
prevailing parties, attorneys’ fees and costs. The parents' motion for compensatory
education as to physical therapy, speech therapy, reading, and math was denied. The
school district's motion was granted upholding the IEP. The parties cross-appealed in the
Seventh Circuit Court of Appeals where the appeals were consolidated for the Court’s consideration.

The school district specifically appealed the award of reimbursement to the parents for independent evaluations of J.M.’s abilities, the order for direct OT services to J.M., and the determination that the parents were the prevailing parties and were therefore entitled to attorneys’ fees. In the parents’ cross-appeal, they contended that the school district committed procedural violations in drafting J.M.’s IEP and that the school district had demonstrated an inability to provide adequate services without outside assistance from an expert who is authorized to supervise the IEP process.

The Seventh Circuit first noted that a FAPE is an education provided by qualified personnel and thus affirmed the District Court’s order for compensatory OT services. The Seventh Circuit then considered the school district’s contention that the parents were not entitled to reimbursement for their outside evaluations. The Seventh Circuit noted that the parents would only be entitled to reimbursement for their private evaluations if the school district's PT and OT evaluations were not appropriate. During the due process hearing, the hearing officer found that the school district's evaluations were appropriate.

But, on the same subject, the District Court found that the school district did not comply with a regulation which requires it to give the parents the agency criteria when they request an independent evaluation. The Seventh Circuit determined that the District Court's finding was not supported by a preponderance of the evidence in the administrative record nor did new evidence offered to the District Court support a
different conclusion. Therefore, the Seventh Circuit determined that the parents were not entitled to reimbursement.

In the cross-appeal, the parents contended that the school district seriously infringed on its participation in the IEP process specifically citing that the IEP conferences were rushed and insufficient. Therefore, the parents’ opportunity to participate in the process was infringed. The Seventh Circuit noted though, that the record did not support a finding that the parents' rights were in any meaningful way infringed.

The parents also contended that the school district did not assess J.M.'s progress through achievement testing and that there was no explanation of why testing was not done. They also argued that there was no adequate statement of goals for J.M. And that the IEP failed to provide for his behavioral and social-emotional needs. After reviewing the record, the Seventh Circuit found that the IEP met the *Rowley* standards.

Finally, the parents contended that the school district cannot provide a FAPE to J.M. without supervision, technical assistance, and training from an outside inclusion facilitator who would have authority to manage J.M.'s case, no matter what the cost. The Seventh Circuit noted, the hearing officer rejected this contention and found that the school personnel were well-qualified and trained. The Seventh Circuit further noted that the District Court had ordered a facilitator only if there would be no cost to the school district.

With regard to the award of attorneys’ fees for the parents, the Seventh Circuit noted the parents previously prevailed due to a technical violation. Since the Seventh
Circuit viewed the technical violation as serious in nature and involving a primary issue in the case, they agreed with the District Court that the parents were entitled to some amount of attorneys’ fees. However, the Seventh Circuit pointed out, since the parents' win had been reduced, the District Court should now reconsider the amount of fees to be awarded, if any at all, in light of the changed circumstances.

The Seventh Circuit affirmed the judgment of the District Court as to the requirement for compensatory occupational therapy services, the requirement for an inclusion facilitator if it involves no additional expense to the school district, the finding that the IEP was otherwise adequate, and the determination that the parents were the prevailing party. But, the Seventh Circuit reversed the judgment as to the award to the parents for the outside evaluation. They then remanded the case to the District Court for further proceedings noting that each side shall bear its own costs.

M.S. v. Mullica Township Board of Education. The plaintiffs (parents) brought suit against the Mullica Township Board of Education (school district) asserting that the school district failed to provide their son, M.S., Jr, with a FAPE. The parents sought tuition reimbursement for their unilateral placement of M.S., Jr. in private school for the 2004-2005 school year, as well as reimbursement for additional private occupational therapy sessions and independent evaluations performed on M.S., Jr. The school district filed a counterclaim, appealing the Administrative Law Judge's (ALJ) decision that plaintiffs were entitled to reimbursement of costs associated with certain independent evaluations of M.S., Jr.

A Child Study Team (CST) consisting of staff members of the Mullica Township Board of Education, evaluated M.S., Jr. when he was three years old and determined that he was a preschool student with a disability. Subsequently, an IEP was created for M.S., Jr., and he was enrolled in the school district’s preschool. In preschool, M.S., Jr. received early intervention services, including occupational therapy (OT), speech therapy, and physical therapy (PT). The related service which was most relevant to this dispute involved the IEP-required provision of thirty minutes of OT once per week.

The following year, the CST convened and drafted an IEP in which the student would continue to receive OT once each week for thirty minutes. The student’s mother signed the IEP agreeing with the program and related services. Though, despite the CST's conclusions regarding M.S. Jr.'s progress in occupational therapy, his mother sought an independent evaluation by an occupational therapist at Voorhees Pediatric Hospital. Ms. Bliss recommended occupational therapy once a week for sixty minutes. Shortly thereafter, the student’s mother sent a letter to the CST inquiring as to whether the CST would cover the expense of the additional OT.

As a result of continued disagreement between the parents and school district, M.S., Jr.’s parents requested a due process hearing with the hopes of the school district covering the costs of the student’s tuition at an out-of-the-district placement as well as evaluations, and attorneys’ fees. A due process hearing was not scheduled and the student attended the Orchard Friends School for nearly a full school year until he was dismissed due to nonpayment of tuition. A due process hearing was then requested by the parents. As a result of the hearing, the ALJ ruled in favor of the school district in all
aspects except for the district’s responsibility to cover the costs of an evaluation conducted by an outside agency. M.S., Jr.’s parents then filed suit with the District Court.

The plaintiffs appealed the ALJ's decision denying them reimbursement for their costs associated with Orchard Friends School (including tuition and transportation) and reimbursement for transportation costs and insurance co-pays associated with private occupational therapy. They also sought to enforce the ALJ's order directing the school district to reimburse the parents for the costs of specific independent evaluations; and sought attorneys’ fees and costs. The school district filed a counterclaim, appealing the ALJ's decision regarding the reimbursement of costs of the independent evaluators. The parents moved for summary judgment and the school district cross-moved for judgment on the administrative record.

The Court concluded that the preponderance of the evidence did not support the finding that M.S., Jr. failed to progress or that the occupational therapy services provided by the school district were not reasonably calculated to confer a meaningful educational benefit on M.S., Jr. Thus, the Court determined that the plaintiffs were not entitled to reimbursement for tuition and related costs associated with M.S., Jr.'s attendance at Orchard Friends School. The Court also found that they were not entitled to reimbursement for private occupational therapy co-pays and transportation costs.

The Court further concluded that the plaintiffs were not entitled to reimbursement. The Court noted that the three evaluations at issue were all performed after M.S., Jr.’s unilateral removal from Mullica Township's School and while he was attending Orchard
Friends School. The Court found that the evaluations were not obtained by the plaintiffs in consultation with the school district or with the intention that M.S., Jr. would return to the district.

For the aforementioned reasons, the Court held the plaintiffs were not legally entitled to reimbursement for the independent evaluations. Accordingly, the Court found that the school district was entitled to judgment appealing the ALJ's decision regarding the reimbursement of costs of the independent evaluators. Therefore, the Court denied the plaintiffs' motion for summary judgment and grant the school district’s motion for judgment on the administrative record.

Lower Merion School District v. Doe.245 Student Doe suffered from mild spastic diplegia and a weakness in visual motor skills. Prior to entering kindergarten, at the request of his parents, Doe was evaluated for special education services. The Lower Merion School District (school district) determined Doe was ineligible for special education services under IDEA, but was eligible to receive occupational therapy under section 504. The school district offered Doe's parents a section 504 plan that would have provided Doe one thirty-minute session of direct occupational therapy (OT) per week along with ongoing teacher consultations and related accommodations; Doe's parents rejected the proposal.

Doe's parents enrolled him in a private school with a full-day kindergarten program. Full-day kindergarten was not offered in the school district. Though, Doe's parents also enrolled him in the his home school within the Lower Merion School District

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so he could receive the OT services offered by the district. Since he was not attending classes at its school, the district refused to provide the section 504 therapy, contending section 504 and IDEA have fundamentally different purposes; that is, IDEA concerns providing public educational services, whereas section 504 deals only with access to those services. The school district did state that Doe would be eligible to receive occupational therapy services through the section 504 plan if he were a student attending school in the district.

A Department of Education hearing officer reviewed the matter at Doe's parents' request and issued an order requiring the school district to provide Doe with the services outlined in the section 504 plan so long as he was dually enrolled and received those services at the district's school.

On appeal, the Commonwealth Court determined the hearing officer was correct in his opinion. The Court referred to the regulations which implement section 504 in Pennsylvania and required only that a child be enrolled in the district from which he seeks services; they do not require the student attend classes at a district school in order to receive those services. As a result of their position, the Commonwealth Court determined section 504's purpose was best met by requiring the district to provide section 504 services as part of a FAPE for student Doe. Thus, the Court agreed with the hearing officer’s interpretation of the principles of Veschi to section 504. The Commonwealth Court granted an appeal in order to determine whether a school district was required to provide services pursuant to section 504 to an otherwise eligible student who was dually enrolled in public and private school.
The school district argued that Doe could not be correctly enrolled in the district's school because he did not attempt to take school courses, but only desired section 504 services. The district also argued that the Commonwealth Court's decision could have led to instances where public schools would have to make significant alterations to schedules and facilities to accommodate a private school student's needs at the public school. Doe countered that section 504 should be broadly interpreted, and that the court could not interpret Pennsylvania regulations implementing section 504 to violate section 504 itself. Therefore, Doe argued that he was rightly dually enrolled in private school and the district's school.

In referring to Chapter 15 of the Pennsylvania Code which applied section 504, this provision required a student to be enrolled in the district to gain section 504 benefits, but, it does not specify a student must attend classes at the district's public school. The Supreme Court of Pennsylvania determined that it could not interpret Chapter 15 in a way that would inhibit the application of section 504's mandates. The Court found that Chapter 15 recognized the full array of school responsibilities and was meant to implement section 504, not to sever the entitlements due to an otherwise eligible student with a disability.

The Court noted that the school district acknowledged student Doe was disabled, and that he would be entitled to section 504 services were he attending classes in its school. The Court found that the district’s obligation was twofold: (1) providing the education, and (2) providing the means of accessing it. The Court further noted that absent in the regulations was the requirement that student Doe’s education be at the
district's school in order to have access to an appropriate education. The Court also found that the school district was not required to pay for the student’s private school education. But, since student Doe was entitled to section 504 benefits and dually enrolled in private school and the district's school, the Supreme Court of Pennsylvania held that the Lower Merion School District was required to provide appropriate section 504 privileges to him without cost.

*Marshall Joint School District v. C.D.*[^246] In 2004, C.D. was diagnosed with Ehlers-Danlos Syndrome (EDS), which is a rare genetic disease. C.D.'s symptoms were deemed serious, including poor upper body strength and poor postural and trunk stability, among other limitations. In this instance, C.D. Also suffered from chronic and intermittent pain. Two years later, in 2006, C.D. was also diagnosed with attention deficit hyperactivity disorder.

After the EDS diagnosis, C.D. was evaluated and deemed eligible for special education services under the IDEA. Under his subsequent IEP, C.D. received adaptive physical education six times a month, physical therapy, occupational therapy, assistive technology, supplemental aids and services, and program modifications in his academic classes.

In January 2006, when C.D. was in first grade, a second IEP was created that contained new goals and limits for his participation in physical education class. A year later, as required by the IDEA, the school district began a triennial reevaluation of C.D.'s eligibility for special education. Under the IDEA, schools must follow a two-step process.

to determine whether a student is a child with a disability and thereby eligible for special education services. First, the student must have one of the conditions listed in the statute. Although EDS is not listed, there is a category titled “Other Health Impairment” under which EDS could fall under if it adversely affects a child’s educational performance. Second, if the child's condition does adversely affect his educational performance, then the team must determine whether special education is necessary.

During the reevaluation, the team found that C.D. was performing at grade level in his classes. He had met many of his specific IEP goals for physical education (PE), and he no longer had many of the original problems that prompted his need for special education in PE. After considering all the evidence, the team concluded that the EDS did not adversely affect his educational performance.

Although this finding alone disqualified C.D. As a child with a disability, the team also investigated whether he was still in need of special education and related services. The team found that C.D. did not need special education because his needs could be met in a regular education setting with some slight modifications for his medical and safety needs. The team then recommended that a health plan be drafted by his physicians and the school nurse, providing precise restrictions on C.D’s participation in PE class.

C.D.'s parents disagreed with the team's conclusions. They maintained that because he cannot safely perform all of the activities in PE class, he is entitled to special education. They sought and obtained administrative review of the team's decision. Following eight days of hearings, the ALJ found that when the team evaluated his
eligibility it committed several errors. Due to the opinion of one of C.D.’s physicians, the ALJ found that C.D.’s ability to fully and safely perform and participate in certain physical activities at school, including regular PE class and recess, was adversely affected by his EDS. The school district sought review by the District Court. The District Court did not receive or review any new evidence but instead, relied on the record developed before the ALJ and subsequently upheld the ALJ’s findings. The school district appealed to the Seventh Circuit.

The Seventh Circuit then narrowed the facts before it to identify its role primarily to determine if whether the ALJ erred in finding that C.D.’s educational performance was adversely affected and that whether he required special education in his PE class. The Seventh Circuit found that the ALJ applied the wrong legal standard in determining whether the EDS adversely affected C.D.’s educational performance. The Seventh Circuit also noted that while there was evidence that the EDS could affect C.D.’s educational performance, there was no substantial evidence to support the ALJ’s finding that it had an adverse effect. Instead, the evidence was that the student’s progress over the course of the previous IEPs had substantially improved his performance to the point that all school district members of the team agreed that C.D.’s average performance and overall improvement indicated that his health condition did not have an adverse effect on his educational performance. Using this information, the Seventh Circuit concluded that the ALJ erred in the application of legal standard and committed clear error in her factual findings. The Seventh Circuit reversed the judgment of the District Court and remanded the case with instructions to enter judgment in favor of the school district.
Orientation and Mobility Services

*KDM v. Reedsport School District.* KDM, was a minor who was legally blind and had cerebral palsy. While Oregon provides services to individuals with disabilities who attend public schools, the Oregon administrative regulation left it to the discretion of individual school districts whether to provide such services to children enrolled in private school. Notwithstanding, the regulation specifically provided that the aforementioned services shall be provided in a “religiously-neutral setting.” In this case, the defendant, Reedsport School District (school district) was willing to provide such services to KDM, but not at KDM's parochial school. Upon appeal of the lower court’s decision, the Ninth Circuit was required to determine whether the school district's refusal to provide services at the school violated the IDEA or KDM's rights under the Free Exercise, Establishment, or Equal Protection Clauses of the Constitution.

While attending public school, KDM received the services of a vision specialist, physical therapy, and special equipment at his school. As a result of their religious beliefs, KDM’s parents transferred him to Harbor Baptist Church School (Harbor Baptist), a sectarian school. After the transfer, the school district continued to supply him with special equipment (braillers, computers, and other special equipment) at his new school. However, viewing the Harbor School setting as not religiously-neutral, it no longer supplied the vision specialist at the school. Instead, the school district provided the vision specialist service at a fire hall down the street from Harbor Baptist. Neither the adequacy of the service nor the safety for KDM to travel to and from the fire hall in

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transportation provided by the school district were disputed by either party in this matter. The vision specialist service was provided for approximately ninety minutes twice a week.

In bringing this matter to court, KDM sought declaratory and injunctive relief requiring the school district to place a vision specialist at Harbor Baptist. KDM made three claims: (1) the school district refused to provide a vision specialist at school violated the IDEA; (2) it violated the Free Exercise and Establishment clauses of the First Amendment; and (3) it denied plaintiff the equal protection of the laws. The District Court entered judgment holding that the IDEA did not require the school district to provide services at a private school, but that the Oregon regulation which permitted services to be offered to private school students only in a religiously-neutral setting violated the Free Exercise, Establishment, and Equal Protection Clauses and ordered its enforcement.

Thus, the plaintiff cross-appealed, contending that the IDEA required the school district to provide KDM with services on site at Harbor Baptist. The Third Circuit noted that while the IDEA required states to provide special education and related services to children with disabilities in private schools, since its amendment in 1997, the Act had specifically provided that special education and related services may be provided to children with disabilities on the grounds of private and parochial schools. The Third Circuit further noted that every circuit court which had considered whether the IDEA as amended in 1997 required services to be provided on site at a private school had
concluded it did not. Therefore, the Ninth Circuit agreed with the precedent set by the other courts and concluded that the District Court properly declined to grant plaintiff relief under the IDEA.

Additionally, the Court was required to determine whether the free exercise rights of KDM and his parents were wrongfully burdened by the application of Oregon's regulation, which prohibited the school district from providing special education services to KDM at the sectarian school he attended. In determining this question the Court relied upon the distinction the Supreme Court has recognized in the Establishment Clause context “between a statute's invalidity on its face and its invalidity in particular applications.”

Since the adequacy of KDM’s IEP nor his safety in traveling to the fire hall was in dispute, the Ninth Circuit did not find any basis for the District Court's ruling that the regulation required KDM and his parents to choose between enrolling at Harbor Baptist and receiving special education at the fire hall or enrolling at a nonreligious school and receiving in-class services. Thus, the Ninth Circuit found that application of the Oregon

regulation to KDM's situation did not place an impermissible burden on KDM's or his parents' free exercise of their religion.

The Ninth Circuit noted that the District Court also found that the Oregon regulation violated the Establishment Clause because it required the State Superintendent of Education to decide on a case-by-case basis whether particular settings were religious. The Court noted that Agostini v. Felton,256 was the latest in a line of cases rejecting an entanglement claim when applied to judgments by officials overseeing regulatory orders concerning the religious character of activities. Therefore, the Ninth Circuit concluded that the regulation did not offend the entanglement prong of the Lemon test as noted in Agostini. The Court found that since the District Court did not determine that it offended the first (secular purpose), or second (primary effect to advance or inhibit religion) prong of the test, it need go no further.

The District Court held that the regulation violated the Equal Protection Clause because it had the effect of allowing in-class services to students with disabilities at nonreligious schools but prohibited such services to disabled students at religious schools. The Ninth Circuit noted that such a distinction lacked a rational justification. The Ninth Circuit further noted that because parochial school students are not a suspect class, scrutiny of their treatment by the state fell under the rational basis test. In this case, the parties stipulated that the state of Oregon interpreted its constitution to require the provision of special education and related services in a religiously-neutral setting. Thus, the Ninth Circuit concluded that KDM and his parents have not been denied the equal

protection of the laws. Therefore, based upon the previously identified information, the Ninth Circuit reversed the judgment of the District Court.

**Parent Counseling and Training Services**

_Aaron M. v. Yomtoob_. A.M. (plaintiff) was a student diagnosed with autism who had been enrolled in a private residential facility located in Massachusetts. A.M.’s parents were residents of the Hawthorn School District No. 73 (defendants or school district) in Lake County, Illinois. A.M.’s parents had filed a request for a special education due process hearing to challenge the appropriateness of his IEP. The parents challenged both the procedures taken to develop A.M.’s IEP and the decision by the school district to reduce the number of reimbursable parent training trips to A.M.’s private residential facility from the previously authorized twelve to six. Subsequently, A.M.’s parents’ appealed the result of the due process hearing, alleging that the hearing officer made erroneous findings of fact and law. In addition, the plaintiffs also alleged that the district had violated the “stay-put” provisions of the IDEA. The District Court was charged with determining both parties’ motions for summary judgment.

Although the record noted that A.M. was functioning well in a special education setting within the public school system, A.M. was initially placed in the residential program because he was not generalizing his skills at home and outside of the school setting, which reduced the value of the instruction he was provided at school. The record further indicated that A.M.’s placement in Massachusetts was anticipated to be temporary and was intended to help him learn to control his behavior and also to teach A.M.’s

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257 Aaron M. v. Yomtoob, No. 00 C 7732, LEXIS 1531 (N.D. Ill. 2003).
parents the skills and strategies to work with A.M. so he could return to his home. Therefore, the district agreed to reimburse A.M.’s parents for up to twelve visits to Boston per year, either for training or to pick A.M. up or drop him off. However, A.M.’s parents took only six trips to Boston.

At an IEP team meeting in which the parties agreed to continue A.M.’s residential placement in Massachusetts, the school district requested to decrease the annual number of trips for his parents from twelve to six. A.M.’s parents disagreed and requested a due process hearing. The issues before the hearing officer were: (1) whether A.M.’s IEP complied with the IDEA; and (2) whether the district should be permitted to reduce the number of reimbursable parent trips from twelve per year to six. The hearing officer noted that the parents did not claim that A.M. had been denied a FAPE. The hearing officer issued a decision in which she determined that the number of reimbursable visits provided for in A.M.’s disputed IEP was appropriate. A.M.’s parents’ appealed the result of the due process hearing, specifically in that the reduction of reimbursable trips was reasonable, and that the process followed in formulating Aaron's IEP was acceptable under the IDEA.

With regard to the “stay put” provision of the IDEA, the District Court noted that A.M.’s parents were reimbursed for the any trips which exceeded the six trips per year that the hearing officer deemed was appropriate to meet A.M.’s educational needs. Thus, the defendants had complied with the stay-put provision of the IDEA, and the Court therefore granted summary judgment to the school district on this claim.
Concerning the plaintiffs’ challenge of the creation of the disputed IEP, the Court noted that the plaintiffs did not argue that A.M. was denied a FAPE; they argued that the hearing officer improperly gave district administrators “a controlling veto over all other team members” in the IEP process. The Court noted that federal regulations stipulate that an IEP should be developed through consensus, but that the public agency has the ultimate responsibility in ensuring that the IEP includes the services that the child needs in order to receive a FAPE.

The Court found that in order to constitute a violation of IDEA, a procedural flaw must have caused harm to A.M. The question was whether the development of the IEP deprived A.M. of a FAPE. In this case, A.M.’s parents did not argue that he was denied a FAPE, therefore they could not recover for any procedural deficiencies, even if they were able to successfully prove them.

With regard to the parents' challenge of the reduction of reimbursed travel, the Court agreed with the hearing officer's observation that, although twelve reimbursed trips were authorized by the earlier IEP, the parents had never taken twelve trips per year to Massachusetts for training. The Court also noted the hearing officer’s determination that A.M.'s parents were making significant progress with A.M. when he visited home, thus finding that six reimbursable visits per year to Boston was sufficient. Therefore, the Court affirmed the hearing officer's finding that the IEP related services provision, allowing six reimbursable trips per year, was reasonable. In sum, the Court granted the school district's motion for summary judgment.
Physical Therapy

_Polk v. Central Susquehanna Intermediate Unit 16, Central Columbia Area School District and Bloomsburg Area School District._ The parents of C.P., a child with severe mental and physical impairments, claimed that defendants, the local school district and the larger administrative Intermediate Unit, which oversees special education for students in a five-county area, violated the EHA because they failed to provide C.P. with an adequate program of special education. Specifically, C.P.’s parents contended that the defendants’ failure to provide direct physical therapy from a licensed physical therapist once a week hindered C.P.’s progress in meeting his educational goals.

Background with this case begins with the student’s disability. At the age of seven months C.P. contracted encephalopathy, a disease of the brain similar to cerebral palsy. He is also mentally retarded. At the time of this case, C.P. was fourteen years old, but had the functional and mental capacity of a toddler. He received special education from defendants, the Central Susquehanna Intermediate Unit #16 (the CSIU) and Central Columbia Area School District (the school district). C.P. had a full-time personal classroom aide in a class with other mentally disabled students. His education consisted of learning basic life skills such as feeding himself, dressing himself, and using the toilet.

The Third Circuit noted the record was unclear, but ultimately determined, until 1980, it seemed as though the CSIU and the school district provided C.P. with direct physical therapy from a licensed physical therapist. Since 1990, however, under an at the

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time, newer, consultative model, C.P. no longer received direct physical therapy from a physical therapist. Instead, a physical therapist came once a month to train C.P.’s teacher in how to integrate physical therapy with his education. To be clear, during the consultative physical therapy sessions, the therapist did not provide any therapy to C.P. directly, but instead taught his teacher how to perform the therapy. The Third Circuit noted that C.P.’s parents did not object to the consultative method, but argued that, to meet his individual needs, the consultative method must be supplemented by direct, hands-on physical therapy.

In support of their position, C.P.’s parents provided evidence that direct physical therapy from a licensed physical therapist had significantly expanded his physical capacities. In the summer of 1985, C.P. received two weeks of intensive physical therapy from a licensed physical therapist at Shriner's Hospital in Philadelphia. According to C.P.’s parents, this brief treatment produced dramatic improvements in his physical capabilities. While at Shriner’s Hospital, a doctor prescribed that C.P. receive at least one hour a week of direct physical therapy. Because the CISU and school district were unwilling to provide direct physical therapy as part of C.P.’s special education program, his parents hired a licensed physical therapist to work with C.P. At home.

C.P.’s parents recognized that the school program had benefited C.P. to some degree, but argued that his educational program was not appropriate because it was not individually tailored to his specific needs, as the EHA required. C.P.’s parents believed that in order to comply with the EHA (specifically his right to a FAPE), the CISU and school district must provide one physical therapy session per week with a licensed
physical therapist. C.P.’s parents first challenged his IEP before a Commonwealth of Pennsylvania Department of Education hearing officer. The hearing officer found that C.P. was benefiting from his education, and that his education was appropriate. That finding was later affirmed by the Pennsylvania Secretary of Education.

After exhausting administrative remedies to their dissatisfaction, C.P.’s parents brought suit in the District Court for the Middle District of Pennsylvania. The District Court granted summary judgment in favor of the school district and the CISU. The Court held that because C.P. derived some educational benefit from his educational program, the requirements of the EHA had been met.

Upon appeal, the Third Circuit reversed the District Court's grant of summary judgment. The first item on which the Third Circuit based its decision was whether the school district and CISU, in violation of the EHA procedural requirement for IEPs, had refused to consider providing students with disabilities with direct physical therapy from a licensed physical therapist. The second item which the Third Circuit based its decision, centered on its conclusion that the District Court applied the wrong standard in evaluating the appropriateness of the child's education. More specifically, the Third Circuit determined that the District Court erred in evaluating a severely handicapped child's educational program by a standard under which even slight progress satisfied the substantive provisions of the EHA's guarantee of a FAPE. The Third Circuit cited evidence that would support a finding that the program prescribed for C.P. Afforded no more than trivial progress. Due to the preceding information, the Third Circuit reversed
the District Court’s decision and remanded the case for further proceedings consistent with its opinion.

**Positive Behavior Interventions and Supports**

_Gellerman v. Calaveras Uniform School District._ On appeal to the Ninth Circuit, the parents of J.G. contended that the District Court inappropriately granted summary judgment because of the existence of disputed issues of material fact. The Ninth Circuit reviewed for “clear error” the District Court's “factual determinations.”

The Ninth Circuit determined that the District Court had correctly reversed the administrative hearing officer's determination that J.G.'s classroom aide must have prior experience working with Joseph in his home program if the school district is to provide J.G. with a FAPE. The Court noted that J.G.'s IEP did not require the school district to assign a classroom aide who had previously worked in J.G.'s home program. Moreover, the Court observed that an IEP addendum came the closest to including such a requirement by referring to the behavioral consultant’s recommendation that the aide be someone who was familiar with J.G.’s abilities and also worked in the home for the sake of consistency. The IEP team did not agree to assign an aide who had previously worked in J.G.’s home. The Court concluded that the IEP provided for an individualized program which was reasonably calculated to enable J.G. to receive educational benefits, therefore meeting the requirements of the IDEA.

The Court noted J.G.'s “significant” achievement both academically and socially from kindergarten through the beginning of third grade within regular education classes.

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259 Gellerman v. Calaveras Uniform Sch. Dist., No. 00-17205, U.S. App. LEXIS 16133 (9th Cir. 2002).
Shortly after J.G.’s third grade school year began, his classroom teacher and parents became concerned about several areas related to his academic and social abilities. In response to such concerns, the IEP team met shortly thereafter and agreed immediately to place an aide in J.G.’s classroom to implement a behavior modification program designed by a behavioral consultant.

The Ninth Circuit referred to the District Court’s opinion noting two of the reasons that supported the District Court’s ruling. First, the Court pointed to the testimony of the behavioral consultant’s testimony, which included inconsistencies in the Court’s opinion as to whether J.G.’s home aide could adequately serve as his classroom aide. Second, the Court noted that all who testified were in agreement in that J.G.’s interim classroom aide served satisfactorily in the role, even though she had not worked previously in J.G.’s home. Therefore, the Court concluded that such agreements undermined the finding of the administrative hearing officer that J.G.’s aide needed such experience in order for the IEP to provide him with educational benefit. Due to the previous information, the Ninth Circuit concluded that the evidence did not support the administrative hearing officer’s determination that either J.G.’s IEP or the requirements of the IDEA required that the school district assign to J.G.’s classroom an aide who had previously worked in his home program. With regard to whether the aide assigned to J.G. possessed the necessary qualifications to serve as his classroom aide, the Ninth Circuit agreed with the District Court’s conclusion that the aide’s education, experience, and favorable references demonstrated that her assignment as J.G.’s classroom aide was
reasonably calculated to ensure that he would receive educational benefit, thus affirming the District Court’s decision.

_Alex R. v. Forrestville Valley Community Unit School District #221._

A.R., through his mother, appealed the District Court's entry of judgment in favor of the Forrestville Valley, Illinois Community Unit School District # 221 (school district). In his appeal, A.R. argued that the school district did not provide him with a FAPE from April through November 2001 and that it committed several other violations of the IDEA.

A.R. suffers from a form of the rare neurological disorder called Landau-Kleffner Syndrome. This disorder begins in childhood and affects parts of the brain that control speech and comprehension. Children suffering with this disorder may exhibit symptoms which include hyperactivity, poor attention, depression, and irritability.

The school district knew that A.R. had the syndrome before he entered kindergarten in the late summer of 1998, and in May 1998 prepared an IEP for him. The IEP called for A.R. to be included in the regular-education classroom at the German Valley Grade School and provided the following services: individualized instruction; the assistance of a classroom aide; an extended kindergarten day for instruction and therapy; and speech and language services for sixty minutes per week. The school district subsequently prepared similar IEPs for A.R. in April 1999 and April 2000, slightly adjusting the program annually to meet A.R.'s changing needs before he moved on to the first and second grades. It was noted that although A.R. exhibited behavioral problems

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consistent with his disability, he committed no disciplinary infractions from kindergarten through second grade.

During A.R.’s year in the second grade (2000-2001), his parents divorced, his sister was sexually assaulted, and his disability-related behavior began to impede his learning. The resource room teacher who worked with A.R. for all of that year testified that A.R.’s disability-related behavior did not impede his learning until the second half of the year, although even then learning was still possible with sufficient redirection. One of A.R.’s second grade teachers, however, testified that his behavior impeded his learning. It was noted that despite whatever impediment to learning existed, A.R.’s record showed satisfactory progress for every course in his second grade year.

Faced with worsening behavior, in February 2001 the school district directed one of its school psychologists to conduct a Functional Behavioral Assessment (FBA) of A.R. The school psychologist had almost a decade of experience as a school psychologist and had previously conducted four such assessments. She also had worked with A.R. since before kindergarten. In April 2001, the school district prepared a functional behavioral analysis based on the school psychologist's data. The analysis concluded that A.R. had problems with off-task behavior and making noise.

The school district also arranged for observations of A.R. by outside consultants. The school district and A.R.’s mother agreed to wait until after the outside consultants completed their observations and provided input before completing a formal Behavioral Intervention Plan (BIP) to guide A.R. to more appropriate behavior. The outside consultants’ observations took place in April and September 2001. In its reports, the
outside evaluator congratulated the school for having a very competent team of professionals working with A.R. Further, the outside evaluator also commended A.R.'s third-grade teacher for having a very welcoming classroom and noted that A.R.'s aides supported his needs. The outside evaluators made several recommendations, such as breaking tasks into smaller blocks of time, which the school district implemented for A.R. in the third grade. The school district went a step further and arranged for an observation by a specialist in low-incidence disabilities who had earlier worked with another student diagnosed with the same syndrome. This observation took place in October 2001. The low-incidence disabilities specialist observed A.R. And made a number of recommendations that the school district then implemented.

In the middle of the observation process by outside consultants, the school district’s IEP team convened in May 2001 to prepare the IEP for A.R.'s upcoming third-grade school year. The third-grade IEP called for A.R. to study math and social studies in the inclusive regular-education classroom, and to study reading, language, and spelling in a resource room. Related services on the IEP included special speech and language training for one hour per week; a classroom aide; occupational therapy for two hours per semester; and social-work services for one hour per semester.

A.R. began the third grade in the late summer of 2001. At that point, he was nine years old and weighed about 150 pounds. He soon began to commit a series of violent attacks on staff members, his fellow students, and property. The IEP team reconvened on September 26, 2001 and revised A.R.'s IEP to include the services of an individual aide and a sensory diet.
Less than two weeks after the IEP team meeting in late September 2001, A.R. displayed dangerous behavior to himself and school staff by leaving the school building, crossing the street to an auto body shop, and swinging a piece of sheet metal at staff members who came to retrieve him. Shortly thereafter, on October 10, the district's IEP team met yet again, but, this time, to draft a BIP, which the team completed on October 17. The plan called for various tactics, including, among other things, an adapted curriculum; more visual aids; sensory breaks; and a pop-top water bottle. Before the plan was implemented, however, A.R. became increasingly violent.

The day after the IEP team met, on October 11, A.R. began pacing in the back of his classroom and speaking loudly. He swung his backpack near students and desktop computers and charged his individual aide, striking her. A.R. then began rolling around the room, first near students' desks and then near the legs of a folding table holding computer equipment. School staff removed A.R. to another classroom, where he imitated karate-style chops and kicks. He also charged his teacher, ramming her into the classroom door, clawing her, and leaving scratch marks on her chest.

Beginning on October 12, A.R. served a five-day suspension for this incident. Also after this episode, A.R.'s mother filed a charge with the Illinois Department of Children and Family Services, alleging that A.R.’s teacher kicked him without justification during these events. The ensuing investigation did not find that the teacher engaged in any wrongdoing. A.R.’s mother also complained to the sheriff's department, but the investigation by law enforcement resulted in no charges being filed against the teacher. In response to these events, the school superintendent wrote a memo to staff

members, dated October 16, in which he instructed staff to summon law enforcement if A.R. flees.

On October 19, A.R. left school during the day and walked home, while an aide and the principal followed him. On October 22, he once again became disruptive in class. After school staff evacuated the other students, A.R. pulled papers from the wall and tore them. He rifled through other students’ desks, taking pencils and biting them in half. He kicked a bucket of Legos across the room. Beginning on October 23, A.R. served a two-day suspension for this incident.

The IEP team again met on October 24 and revised A.R.’s IEP to place him in the regular education classroom at the Leaf River Grade School, in accordance with the request of A.R.’s mother that he be reunited there with one of his favorite teachers, who had transferred to that school. Additional services listed on A.R.’s IEP included an individual aide, occupational therapy for two hours a semester, speech and language therapy for one hour per week, and social work services for one hour per semester. On October 26, A.R. began at the new school. Around lunchtime on that day, a caseworker from the Department of Children and Family Services arrived to investigate a charge against A.R.’s mother regarding a problem at home. A.R. met the caseworker in a conference room, but then left the room rolling on a chair into his classroom, where he hit another student and rammed the teacher several times.

Although the teacher tried to stop A.R. from leaving the room, he once again managed to leave school. Several staff members followed him, and someone at the school called the police. A.R. led a procession of his pursuers through the playground,
down a sidewalk, and to the edge of a cornfield. There, he turned to his aide, made a derogatory statement and disappeared into the cornfield. After a three-hour search involving both fixed-wing and rotary aircraft, as well as searchers on the ground, rescuers found A.R. stuck in the muddy banks of the Leaf River. His body temperature was 92.7 degrees Fahrenheit.

After A.R. recovered from hypothermia and served a ten-day suspension for his actions on October 26, the school district assigned him to a special classroom for students with behavioral disorders at the Mary Morgan Elementary School. At his new school, A.R. was part of a program that had fewer than eight students and was staffed by a classroom teacher, a student teacher, two aides, and a social worker who was in the room almost full-time. Despite the increased attention, over the next five months A.R. would scratch, kick, swear at, and make comments about murdering, staff members. On one occasion, he attacked and drew blood from two female staff members. He also committed numerous attacks on school property, including one incident in which he urinated on the floor.

On October 29, 2001, A.R.’s mother initiated administrative proceedings with the Illinois State Board of Education, asserting that the school district failed to comply with the IDEA. After a hearing at which both sides presented testimony and other evidence, the hearing officer began her legal analysis by observing that the main issue in this case was whether the school district offered the student a FAPE as required under the IDEA. To determine whether the school district had provided a FAPE required the determination of whether the school district complied with the IDEA's procedural requirements, and
also developed an IEP that was reasonably calculated to enable the child to receive educational benefits.

After reviewing the evidence and testimony in the case, the hearing officer concluded that, although the school district had complied with the procedural requirements of the IDEA, it had nonetheless violated the statute by failing to develop an IEP that was reasonably calculated to enable this student to receive educational benefit. The hearing officer also concluded that the school district violated its obligation to educate A.R. in the least restrictive environment. Ultimately, the hearing officer ordered the school district to appoint private consultants who would manage and deliver A.R.’s public education. The hearing officer also required that the school district develop a disability awareness and sensitivity curriculum and begin teaching this curriculum to every class within the district from kindergarten to twelfth grade by the second semester of the 2002-2003 school year. In addition, the hearing officer required that the school district return A.R. to a regular-education classroom.

The school district then filed an action in the District Court, seeking reversal of the hearing officer's order. On the parties' cross-motions for summary judgment, the District Court framed the primary issue as whether the school district was unreasonable in the IEP it developed and in carrying it out during the September 2000 through November 2001 period. After reviewing both the administrative record and new evidence that both parties had submitted, the District Court concluded that the hearing officer's determination was contrary to the multitude of evidence and reversed the administrative order. In its order, the District Court referenced A.R.’s escalating pattern
The first issue addressed by the Seventh Circuit was whether the District Court erred when it considered the disruptive impact that A.R. had on other students as a relevant consideration in deciding whether he received an appropriate education. The Seventh Circuit noted A.R.'s main argument before the District Court was that his education was inappropriate because, between April and November 2001, it failed to meet the criterion of appropriateness. Thus, his education was not provided pursuant to a valid IEP. The Seventh Circuit further noted, *Rowley* instructs that an IEP is valid when (1) it was adopted according to the IDEA's procedures and (2) it is reasonably calculated to enable the child to receive educational benefits. To meet the second, substantive criterion of Rowley, an IEP must respond to all significant facets of the student's disability, both academic and behavioral. An IEP that fails to address disability related actions of violence and disruption in the classroom is not reasonably calculated to enable the child to receive educational benefits. The Seventh Circuit found that it was correct for the District Court to consider the history of A.R.'s disability, including his disruptive outbursts in the classroom, when evaluating the substantive adequacy of A.R.'s IEP.

The Seventh Circuit next considered whether the District Court applied the correct legal standard in determining whether A.R. received an adequate IEP. The Seventh Circuit found that the District Court did apply the correct legal standard on the point of whether A.R. received an adequate IEP. Therefore, the primary and correct issue of violence and disruption, as well as citing the school district's frequent revisions to A.R.'s IEP that were designed to manage that behavior.
before the District Court to focus on was whether, between April and November 2001, A.R.’s IEP was reasonably calculated to enable the child to receive educational benefits.

The Seventh Circuit then reviewed A.R.’s contention that the District Court erred by not providing due weight to the hearing officer's decision. The Seventh Circuit pointed out that the more the District Court relied on new evidence, the less it should defer to the administrative decision. In this case, both parties presented new evidence in the District Court. Some of this new evidence was very important to the determination of whether A.R. received an appropriate education. The Seventh Circuit concluded the new evidence was also a significant part of the total record before the District Court. Furthermore, the Seventh Circuit noted the District Court specifically distinguished that it reviewed both the administrative record and the evidence put forth for the first time before the Court. With the aforementioned information, the Seventh Circuit concluded that the District Court did not err by giving the hearing officer's findings and decision limited weight.

The Seventh Circuit addressed the final issue of law, A.R.’s contention that the school district violated the IDEA because the BIP of October 17 was inadequate. The school district adhered to the procedure of conducting a FBA and then implemented a BIP upon suspending A.R. Furthermore, A.R.’s behavior began to impede his learning during second grade, and at that point the school district’s IEP team was required to consider whether to implement a behavioral intervention plan. In this case, the IEP team again, followed proper procedure, thereby complying with the procedural requirements concerning a behavioral intervention plan. In short, the Seventh Circuit determined that
the school district's BIP could not have fallen short of substantive criteria that do not exist, and therefore concluded that it was not substantively invalid under the IDEA.

The Seventh Circuit then turned its attention to whether A.R.’s IEP was reasonably calculated to enable him to receive educational benefits. The Seventh Circuit observed A.R.’s earlier IEPs meshed with his advancement from grade to grade; his lack of disciplinary infractions; and, until some point during the 2000-2001 year in second grade, unimpeded learning. The Seventh Circuit found that A.R.’s report card showed satisfactory progress in all courses during the second-grade year to be significant in this matter. Thus, the Seventh Circuit concluded that plenty of objective factors indicated that the earlier IEPs were likely to produce progress.

The Seventh Circuit further noted that when A.R.’s disability suddenly led to rapidly increasing symptoms between late September and late October 2001, the school district responded in a way that, based on its experience with A.R., appeared reasonably likely to produce progress. Although the school district's efforts ultimately did not lead to a favorable outcome, the Seventh Circuit found no clear error in the District Court's finding that A.R.’s IEPs were reasonably calculated to enable the child to receive educational benefits. Therefore, the school district met the first requirement, A.R.’s education was provided as per his IEPs.

As to the second requirement, the Seventh Circuit saw no clear error in the District Court's finding that the school district took a thoughtful, measured approach to A.R.’s education and thus did not act in bad faith. The Seventh Circuit noted A.R.’s earlier IEPs were carried out by staff with about the same level of training, or lack
thereof, which A.R.’s teachers and other staff had between April and November 2001. The Seventh Circuit determined that the school district cannot be said to have acted in bad faith when it relied on such staff members to carry out those IEPs.

In conclusion, the Seventh Circuit found that the District Court correctly focused on whether the school district provided A.R. with adequate IEPs and, in deciding that question, properly took into account the different aspects of A.R.’s disability, including his outbursts in the classroom. Because the District Court relied on extensive evidence beyond the administrative record, it was required to give the administrative decision significantly less deference. The District Court committed no clear error of fact in concluding that A.R.’s IEPs were valid and that the school district took a thoughtful, measured approach to his education. Thus, the Seventh Circuit affirmed the judgment of the District Court.

*Kenton County School District v. Jeffrey Hunt and Lynn Hunt.* In this case, the plaintiff, Kenton School District (school district) appealed the District Court’s order which upheld a decision by the Kentucky Exceptional Children Appeals Board (Appeals Board) requiring the district to reimburse J.H.’s parents, Jeffrey and Lynn Hunt, for expenses relating to (1) his summer placement at two different programs in consecutive years and (2) his year-long placement at Chileda Rehabilitation Institute. The District Court agreed with the Appeals Board that the school district failed to provide J.H. with a FAPE during the years in question and that the reimbursement was, therefore, required.

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On appeal to the Sixth Court, the school district argued that the District Court and the Appeals Board incorrectly came to conclusions on issues that were not raised before the hearing officer, who found in favor of the school district. The Sixth Circuit reversed the lower court’s decision because neither the Appeals Board nor the District Court conducted a full factual inquiry into (1) whether J.H. needed ESY services to justify summer programs in two consecutive years; (2) whether J.H.’s IEP denied him a FAPE for a school year, warranting a private placement; (3) whether the school district, with additional evidence presented in the District Court, established that the IEP for a school year was not deficient; and (4) whether that evidence should have been presented in earlier proceedings before the hearing officer and the Appeals Board.

With regard to ESY, the Sixth Circuit found that the Appeals Board erred by ignoring the clear mandate the Sixth Circuit had previously issued in *Cordrey v. Euckert.*\(^\text{262}\) In *Cordrey*, the Court found that it is the advocate of ESY services who bears the burden of proof in order to “meet the standard of significant skill losses of such degree and duration so as seriously to impede progress toward educational goals.”\(^\text{263}\)

As to whether J.H.’s IEP denied him a FAPE for a school year, which warranted private placement, the Sixth Circuit referred again to *Cordrey* in that they could not “condone an imposition of a heavy financial drain upon the public.” The Court stressed that an appropriate education was not synonymous with the best possible education, nor, is it education which enables a child to achieve his full potential. The Court further noted


that the school district's resources were limited and it must make decisions on how to balance all of the various needs of a child such as J.H. Since the district had decided on a proper course of action with the input and consent of J.H.'s parents, the district had therefore fulfilled its legal obligation to J.H. Therefore, in light of the aforementioned information, the Sixth Circuit reversed the lower court's decision on this matter. Because the Sixth Circuit found that the Appeals Board committed a number of reversible legal errors and that the District Court relied on the opinion of the Appeals Board without a full evidentiary hearing, the Circuit Court remanded the case to the District Court for a full hearing on the issues raised by the parties. The Sixth Circuit gave directions that on remand the District Court should place the burden of establishing the need for an ESY and a lack of FAPE on the plaintiffs.

**Travis G. v. The New Hope-Solebury School District**. T.G. was diagnosed with autism at an early age. He received Applied Behavioral Analysis (ABA) therapy, verbal behavior instruction (VB), occupational therapy (OT), and physical therapy (PT) in a combination of his home and a preschool and later an elementary school program. Following a school district-proposed reduction in the number of hours per week in which T.G. would receive his ABA and VB, as well as a specified ESY placement, T.G.’s parents requested a due process hearing disagreeing with the reduction in services and the proposed ESY placement. The hearing officer found the IEP to be appropriate and required that it be implemented. The parents appealed the hearing officer’s decision to the Commonwealth of Pennsylvania, Special Education Appeal Panel (Appeal Panel). The

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In their appeal, the plaintiffs alleged that the hearing officer and the appeal panel erred in finding that the IEP first proposed by the school district was appropriate for T.G. T.G.’s parents also alleged the hearing officer and appeal panel erred in directing that the IEP be implemented, in denying them compensatory educational services, and in denying their request to have T.G. Attend a parent-preferred camp for his ESY program at district expense. The parents further alleged that the school district retaliated against them citing several different reasons. As a result, the plaintiffs alleged that the school district violated the relevant portions of the IDEA, section 504 of the Rehabilitation Act, the ADA, and section 1983.

The District Court found that after thoroughly reviewing the testimony of all of the plaintiffs' and the school district's witnesses and finding no conflicting evidence, the Court concluded that while the proposed IEP (which included the district-proposed ESY) may not have offered T.G. the best possible education, it is was more than adequate to provide him a meaningful educational benefit. Thus, the Court affirmed the findings of both the hearing officer and the Appeals Panel that the proposed IEP was appropriate and should be implemented.

The Court further concluded that with regard to his compensatory education claim, the school district provided T.G. with a substantial number hours of ABA/VB and
OT than were called for in the interim IEP. Therefore, the Court found no error in the findings of the hearing officer and the Appeal Panel that T.G. had already received any and all compensatory education to which he was entitled. Additionally, the plaintiffs sought compensatory and punitive damages under section 1983 for the school district’s alleged denial of T.G.’s rights to a FAPE and to reasonable accommodations under the ADA and section 504 of the Rehabilitation Act, and for retaliating against them for exercising their rights under the IDEA. The school district’s argument went undisputed by the plaintiffs that these claims were no longer apparent. The District Court agreed with the school district’s argument. Therefore, in light of the aforementioned information, the District Court concluded that the defendants' motion for summary judgment should be granted.

*Fisher v. Stafford Township Board of Education.* Nancie Fisher (Fisher, appellant) sought reimbursement from the Stafford Township Board of Education (school district, appellee) for payments she made in connection with the education of her son, T.C., who has been diagnosed with Pervasive Developmental Disorder and autism. Fisher contended that the District Court erred in denying her claim for reimbursement because she was entitled to such monies pursuant to the IDEA under either one of two theories: (1) the theory that the Board failed to properly implement T.C.’s IEP and/or (2) the unilateral placement theory.

Upon moving into the school district, T.C.’s IEP called for aide services throughout his school day. In addition, T.C.’s aides were required to have received

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specialized behavioral training from the LOVAAS Training Institute of UCLA
(LOVAAS). Though at the beginning of T.C.’s first school year in the district, the school
was unable to find a LOVAAS-trained personal aide for T.C. Therefore, Fisher decided
to keep T.C. out of school until a proper aide was found. She eventually found a
qualified person in December of T.C.’s first school year in the district, though that person
resigned prior to the following school year. Two aides were hired to replace the aide who
recently resigned. One of the aides worked on Mondays, Wednesdays, and Fridays,
while the other aide worked on Tuesdays and Thursdays. The Tuesday/Thursday aide
resigned after two weeks, and so Fisher decided to keep T.C. out of school on Tuesdays
and Thursdays until a new LOVAAS-trained aide could be found. The
Monday/Wednesday/Friday aide informed Fisher that she believed she should be paid a
higher salary than was provided by the school district in its collective bargaining
agreement. Fisher agreed to supplement Rogers’ salary for the services she provided.

As of October of T.C.’s second school year in the district, the school had not been
able to replace the Tuesday/Thursday aide. Fisher made the unilateral decision to take
T.C. out of school and instructed Rogers to report to Fisher’s home (at Fisher’s expense)
on Mondays, Wednesdays, and Fridays in order to train another aide. Once the new aide
was trained, the individual was hired by the school district as T.C.’s in-school aide. The
new aide also expressed concern with the salary paid by the Board. Fisher requested that
the school district pay the aide a higher wage but was denied. Upon denial of her request,
Fisher agreed to supplement the new aide’s salary.
Fisher ultimately filed a Complaint with the Department of Education alleging that the school district had violated the IDEA and sought reimbursement of the money she had spent above and beyond the aides’ salaries provided by the school district, as well as for those periods of time when the district did not provide a LOVAAS-trained aide and Fisher provided one at her own expense. Fisher claimed that the school district had violated the IDEA because it failed to provide T.C. with the services required by his IEP, as T.C. had gone for periods of time either without any aide at all, or without a properly qualified aide. The school district responded that it was not aware of Fisher's concerns, had seen no evidence to demonstrate how much money Fisher had spent to supplement T.C.'s education, and did not believe such supplementation was necessary.

The case was referred to an ALJ, who determined that the Board had not violated the IDEA because it had no reason to believe that it was not providing for all of the services required by the IEP. The ALJ also found that Fisher had failed to comply with the regulations governing reimbursement and that the school district had offered T.C. a FAPE in accordance with the IDEA. Fisher then appealed to the District Court, which affirmed the ALJ's decision. Fisher then appealed to the Third Circuit.

Fisher contended that she was entitled to reimbursement because the school district failed to properly implement T.C.’s IEP. Fisher argued that T.C. was without a qualified aide for five weeks and that without her supplementation of pay, the aides would have never remained on the job.

The Third Circuit found that Fisher’s accusation that her son was without an aide for five weeks was incorrect as he still had the Monday/Wednesday/Friday aide for that
time period. Fisher's statement that T.C. was without an appropriate aide for a full five weeks was misleading. Due to her dissatisfaction with the situation, Fisher made a unilateral decision to remove T.C. from school for the entire five-week period, even though there was a district-provided, LOVAAS-trained aide available to T.C. in school three days a week. The Court found that it was not unreasonable for the district to take a few weeks to find a suitable replacement after the Tuesday/Thursday aide resigned. Therefore, the Third Circuit agreed with the District Court when it held that the district's inability to provide T.C. with a LOVAAS-trained aide for a total of ten days was a “de minimis occurrence.” The Court ruled that Fisher had not demonstrated that the district failed to properly implement T.C.'s IEPs; therefore, she was not entitled to reimbursement.

Another argument espoused by Fisher suggested that she was entitled to reimbursement on a unilateral placement theory. The District Court noted that in a typical reimbursement case, a parent who has withdrawn his or her child from public school and unilaterally placed him or her in private school while challenging the child's IEP seeks reimbursement for the private school tuition. In the case before the Third Circuit, Fisher sought reimbursement for her unilateral decision to supplement the salaries of certain of T.C.'s aides, despite the fact that she did not challenge the IEP itself during the period that the expenditures were made. The Third Circuit agreed with the District Court’s conclusion that this instance did not appear to be a case involving unilateral placement, nor could Fisher properly assert a claim for reimbursement on such a theory. Thus, the Third Circuit agreed with the District Court’s rulings and concluded that the school
district did provide T.C. with FAPE, and Fisher could not receive reimbursement under a unilateral placement theory.

**J.N. v. New York City Department of Education** 266 The nature of action stems from J.N.’s parents’ (plaintiffs) request for a modified de novo review of an impartial hearing officer’s decision and a subsequent decision by the state review officer, regarding the adequacy of J.N.’s IEP. The New York City Department of Education (school district) cross-moved for summary judgment.

Previously, J.N., a child with autism, attended a preschool in the district and received special education services. A subsequent IEP developed for J.N. resulted in a recommendation that J.N. be placed in a special class with an 8:1:2 ratio of students to teachers to aides. The IEP further provided for twelve hours per week of special education itinerant teacher (SEIT) services, three hours per week of occupational therapy (OT), and one hour per week of physical therapy (PT).

J.N.’s parents learned via letter that, as a result of a lottery, J.N. was offered a seat at the New York Center for Autism Charter School (charter school) and could begin attending classes at the start of the coming school year. The Charter School was a state-approved public school whose students were classified with autism or pervasive developmental disorder. The charter school employed the Applied Behavior Analysis (ABA) model and provided a 4:1:3 student to teacher to aide ratio for each class. In contrast, the charter school did not offer after-school related services such as speech therapy and occupational therapy.

266 J.N. v. New York City Dep’t. of Educ., No. 09 Civ. 20 (RJS), LEXIS 33239 (S.D.N.Y. 2010).
Prior to the plaintiffs formally accepting J.N.’s seat at the charter school, the Committee on Special Education (CSE) convened in order to develop J.N.’s IEP for the coming school year. At the meeting, J.N.’s parents informed the school district that J.N. had been accepted into the charter school. The CSE formulated an IEP that recommended that J.N. be placed in a specialized class on a twelve-month basis with a 6:1:1 student to teacher to aide ratio. The IEP further recommended the related services of individual speech and language therapy (two-and-a-half hours per week), occupational therapy (two-and-a-half hours per week), and physical therapy (thirty minutes per week). The IEP did not recommend the continuation of SEIT services, as those services were only provided for preschool students.

Shortly thereafter, J.N.’s parents formally accepted the seat at the charter school and notified the DOE by letter that they would be placing their child in the charter school. Because the charter school did not offer the after-school related services recommended by the IEP, the plaintiffs filed a due process complaint seeking to have those services provided privately at the DOE's expense. After hearing testimony and reviewing the evidence, the IHO concluded that J.N.’s placement at the charter school, without related services, provided him with a FAPE.

As a result, the plaintiffs appealed the decision of the IHO to the SRO. Subsequently, the SRO issued a decision finding that, since the school year had already ended, the appeal was rendered moot. The SRO noted that the student's educational needs were changing and declined to review the merits of plaintiffs’ claims. An appeal to the District Court followed.
Several months after the appeal was filed with the District Court, the Court issued an order, pursuant to the IDEA’s “stay put” provision, requiring the DOE to continue providing J.N. with SEIT services (twelve hours per week) and speech and language services (three hours per week) throughout the pendency of the appeal. The plaintiffs moved for modified de novo review of the administrative decisions and the defendants cross-moved for summary judgment.

The complaint alleged that the IEP was procedurally deficient in four respects: (1) the CSE failed to make a specific placement recommendation; (2) no general education teacher was present at the IEP meeting; (3) no parent member was present at the IEP meeting; and (4) the IEP failed to make provision for a functional behavioral analysis. The Court found the plaintiffs' first complaint was without merit as an IEP need not recommend a placement at a specific school in order to satisfy the IDEA. Therefore, the CSE's failure to specify a school location does not, in and of itself, constitute a procedural deficiency.

With regard to the plaintiffs’ second complaint, the complaint alleged that the IEP meeting was not properly constituted because it lacked a general education teacher. The Court noted that the IDEA required the presence of a general education teacher at an IEP meeting only if the child is, or may be, participating in the regular education environment. In this case, not only was the student placed in a specialized class since beginning school, his parents had also enrolled J.N. at a charter school which did not offer a general education environment. Therefore, the presence of a general education teacher at the IEP meeting was unnecessary and did not constitute a procedural defect.
The plaintiffs also argued that the IEP meeting was improperly organized because it did not include a parent member. However, the plaintiffs acknowledged that they waived the right to have a parent participate in the IEP meeting. Thus, the Court ruled the absence of a parent member at the IEP meeting did not establish a procedural violation.

The next complaint alleged that the IEP was procedurally inadequate because the DOE failed to conduct a functional behavioral assessment (FBA), which is the process of determining why the student engages in behaviors that impede learning and how the student's behavior relates to the environment. The Court noted that the failure to conduct an FBA did not render the IEP procedurally inadequate if the IEP provided strategies to address the student's behavior. In this case, an FBA was unnecessary because the entire charter school program incorporated the ABA methodology. Therefore, the Court found that there was no evidence to suggest that the DOE's failure to conduct an FBA resulted in the denial of a FAPE.

Additionally, the plaintiffs argued that the charter school placement without SEIT and related services was substantively inadequate to provide J.N. with a FAPE, and they subsequently described the Charter School as offering a “one size fits all” program that did not sufficiently address J.N.'s individual needs.

The Court disagreed by citing evidence from testimony that J.N.'s individualized needs were being addressed by the charter school's curriculum through its provision of intensive ABA instruction throughout the school day. As a result of charter school administrators’ testimony and evidence, the Court further noted that the charter school developed an individualized academic program for each student based on that student's
needs. The Court also found that the evidence suggested that J.N.'s placement at the charter school, where he was in a class of four children who received intensive individualized instruction provided by four instructors, provided a greater opportunity for J.N. to progress than the placement reflected on the disputed IEP, which recommended J.N. Attend a class of six children and two adults.

The plaintiffs also questioned the efficacy of the charter school's embedded approach given that over half of the students receive after-school related services. The Court noted the testimony of the charter school’s executive director at an earlier hearing in which she testified that while these services were not educationally necessary, some parents relied on them as a way to provide their children with structure outside of the school day. The Court supported the IHO’s finding that the testimony, when coupled with the defendants’ other evidence, indicated that J.N.'s educational needs were being met through the charter school.

Additionally, the plaintiffs argued that the IEP failed to provide adequate parent training and counseling, as New York regulations required for parents of a child with autism. On this matter, the Court again agreed with the IHO’s finding that a parent training provision was unnecessary, since the charter school provided a “comprehensive parent training component” that satisfied the requirements of the regulation.

The Court concluded that the school district had established by a preponderance of the evidence that the charter school curriculum without SEIT and related services was reasonably calculated to enable J.N. to receive educational benefits. In agreeing with the finding of the IHO, the Court concluded that the charter school placement did not reduce
J.N.’s level of service but only provided the services in a different manner. Thus, in giving due weight to the findings of the IHO, the Court found that the IHO’s conclusions were supported by the record and that plaintiffs had not produced evidence establishing that the conclusions were reached in error.

In sum, for the aforementioned reasons, the Court found that (1) the defendants complied with the procedural requirements of the IDEA, and (2) the IEPs were reasonably calculated to enable J.N. to receive educational benefits. Therefore, the Court ruled that the plaintiffs’ motion for modified de novo review was denied, and the defendant’s motion for summary judgment was granted.

**M.W. v. New York City Department of Education.** M.W. was diagnosed with autism and Pervasive Developmental Disorder, Attention Deficit Hyperactivity Disorder, certain speech and language disorders, and fine and gross motor deficits. Despite his diagnoses, M.W. had an average IQ and was able to learn. His autism and developmental disorders, however, presented behavioral and social-emotional problems that resulted in academic under-performance and required speech, occupational, and physical therapies. M.W. also required direct, hands-on supervision during the school day from a paraprofessional, who helped him stay focused when his attention strayed and calmed him in the event of a behavioral crisis.

After M.W.’s parents rejected the IEP for the 2009-2010 school year, M.W. attended Luria, a private, Montessori school, where he had the support of his full-time paraprofessional in a classroom designed for typically developing students. On January 267 M.W. v. New York City Dep’t. of Educ., No. 12-2720, U.S. App. LEXIS 15328 (2nd Cir. 2013).
30, 2010, M.W.’s mother sent an email to Luria indicating a desire to re-enroll M.W. for the 2010-2011 school year before the Committee on Special Education (CSE) developed the contested IEP subject to this appeal. Shortly thereafter, M.W.’s mother submitted an application to Luria which included a tuition contract and down payment to hold M.W.'s spot.

Though M.W. progressed socially during the 2009-2010 school year, he continued to display behaviors which impeded his progress through the 2010-2011 school year. When his behavioral outbursts became too disruptive for the rest of the class, M.W.’s paraprofessional removed him from the classroom to work with him outside, sometimes on the floor.

On June 10, 2010, the CSE convened to develop M.W.’s 2010-2011 IEP. M.W. was seven years old at the time, and the IEP was for his second-grade year. The IEP described M.W. As an autistic child of average intelligence with Pervasive Developmental Disorder. The IEP noted that M.W. had made progress in the area of peer interactions and, while at Luria during the 2009-2010 school year, M.W. made friends and was able to participate and communicate with and respond to his peers. The IEP, however, also noted that M.W. had significant self-regulation difficulties, became frustrated easily, and struggled to calm himself in the event of a behavioral crisis.

The IEP recommended placement in an inclusive, general education environment with integrated co-teaching services with a 12:1 staffing ratio, five days a week, for a ten-month school year. The IEP also provided M.W. with a full-time behavioral management paraprofessional to give him one-on-one help self-regulating in times of
behavioral crisis, as well as the following related services: counseling, one thirty-minute session per week with two other students; occupational therapy (OT), three, thirty-minute one-on-one sessions per week; physical therapy (PT), two, thirty-minute one-on-one sessions per week; speech-language therapy, two, thirty-minute one-on-one sessions per week; and another round of speech-language therapy but for one, thirty minute session per week.

The IEP also noted that M.W.'s behavior was seriously interfering with instruction and that he required additional adult support. Due to the behavioral circumstances identified in the IEP, a behavioral intervention plan (BIP) was required. The BIP was also incorporated into the IEP. The BIP identified behavioral challenges such as emotional meltdowns, poor self-regulation, and poor attention which impaired M.W.'s academic progress. To combat M.W.’s behavioral challenges, the BIP recommended a reward system, as well as praise and encouragement, along with positive modeling as strategies to modify his negative behaviors. The overarching goal of the BIP was to teach M.W. to become more attentive and focused and to better control himself when frustrated. In order to implement the aforementioned strategies with fidelity, M.W.'s teacher, paraprofessional, and his parents were to collaborate. However, it should be noted that due to Luria’s system for collecting data, in which Luria’s teachers did not use formal assessments to track progress and rely on note-taking and observation to track the child's progress, the BIP did not quantify data relating to the frequency of M.W.’s behavioral outbursts. Furthermore, Luria did not provide a functional behavior assessment (FBA), and the NYCDOE did not request or develop one.
On July 1, 2010, the NYCDOE sent a letter to M.W.'s parents that classified M.W. as an autistic student and recommended a Collaborative Team Teaching (CTT) classroom at P.S. 197, the Ocean School, with the related services that the IEP recommended. M.W.’s mother visited the school but decided to keep M.W. At Luria and immediately began the administrative-review process seeking reimbursement for the 2010-2011 school year.

On July 8, 2010, M.W.’s parents filed their demand for due process and requested a hearing with an Impartial Hearing Officer (IHO). The parents subsequently amended their demands on September 29, 2010. On May 2, 2011, M.W.’s parents submitted their closing brief after twelve hearing days that took place over the entire 2010-2011 school year. During the hearing, M.W.’s parents argued that the IEP would have denied their child a FAPE because the IEP Team created a BIP without the benefit of an FBA and the IEP failed to provide parent counseling and training as a related service. The parents also argued that the P.S. 197 placement was defective because the recommended ten-month program exposed M.W. to regression risks. Finally, M.W.’s parents argued that the IEP assigned their child to an overly restrictive environment.

The IHO agreed with M.W.’s parents regarding the BIP, the omission of parental counseling, and the inadequacy of a ten-month program. However, the IHO made no explicit findings as to whether a general education environment with ICT services would be too restrictive. The IHO found Luria to be an appropriate placement and accordingly ordered M.W.’s parents be reimbursed. The NYCDOE sought review by a State Review Officer (SRO). The SRO reversed the IHO’s determinations and denied tuition
reimbursement. Subsequently, M.W.’s parents appealed and after relying heavily on the SRO's analysis, the District Court affirmed that decision. The parents then appealed to the Second Circuit Court of Appeals.

The Second Circuit noted, procedural violations warrant tuition reimbursement only if they impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process, or caused a deprivation of educational benefits. The Second Circuit further illustrated that parents must articulate how a procedural violation resulted in the IEP's substantive inadequacy or affected the decision-making process.

In M.W.’s case, his parents allege that the NYCDOE committed two procedural violations: it failed to undertake an FBA in developing the BIP and it failed to include parental training and counseling in the IEP. The parents also assert that the SRO incorrectly relied on retrospective testimony to justify those omissions.

The Second Circuit noted that the failure to conduct an FBA does not render an IEP legally inadequate under the IDEA so long as the IEP adequately identifies a student's behavioral impediments and implements strategies to address that behavior. With regard to M.W.’s parents’ appeal, the Second Circuit placed the emphasis on the parents to illustrate how the lack of an FBA resulted in the BIP’s inadequacy or prevented meaningful decision-making. With the aforementioned information in mind, the Second Circuit affirmed the SRO's decision that the hearing record does not support the IHO's determination that the lack of an FBA rose to the level of denying the student a FAPE where the IEP addressed behavioral needs.
Next, M.W.’s parents argued that the IEP's failure to include parental counseling denied their son a FAPE. The Second Circuit noted that in order to enable parents to perform appropriate follow-up intervention activities at home, New York requires that an IEP provide parents of autistic students training and counseling.

The Second Circuit noted that the IHO again decided that parent counseling and training were required and that parent workshops that would have been provided to the parents by the Ocean School would not give M.W.’s parents the tools necessary to perform follow-up at home. The SRO conversely concluded that the counseling omission did not deny M.W. A FAPE because M.W.’s mother was a certified special education teacher who had received, through her own initiative, training and counseling in the therapies that M.W. had previously used, and because the public school assigned to M.W. provided training and counseling. The SRO also observed that the BIP required collaboration between paraprofessional, the parents, and M.W.’s teacher in order to implement and support the recommended behavior-modification strategies.

Using the aforementioned information, the Second Circuit deferred to the SRO’s analysis concluding M.W.’s parents had not persuaded them that the parental counseling omission would deprive M.W. of FAPE. The SRO's analysis noted that mom's experience and the supports in the BIP provided adequate assurance that M.W.’s developmental plan and education would continue at home.

With regard to M.W.’s contention that his IEP did not afford him the opportunity to be educated in his least restrictive environment (LRE), the Second Circuit considered whether the CTT services were overly restrictive along the continuum of services.
available to M.W. in a general education environment. Since the IHO did not make any conclusions or findings regarding the LRE per se, and because in the Second Circuit’s opinion the SRO thoroughly addressed the LRE mandate and the appropriateness of the CTT services, the Second Circuit deferred to the SRO’s conclusions.

The Second Circuit’s review of the record reveals that M.W.’s autism and related disorders caused behavioral issues that disrupted class and impaired his educational development. The school psychologist and NYCDOE representative on the CSE concluded that M.W. would benefit from two teachers in the classroom versus one because of the importance of M.W. being exposed to typically developing peers. The Second Circuit noted that the school psychologist also emphasized segregating M.W. to a special education classroom would be detrimental to his development. At the IEP meeting, no one expressed disagreement with the recommendation for a CTT classroom. The Second Circuit further noted that a multitude of the evidence supported the SRO's conclusions that the IEP recommendation of CTT services in a general education setting was appropriate and reasonable.

Lastly, plaintiffs also argued the NYCDOE's failure to provide a twelve-month program denied their son a FAPE. The IHO determined that the CSE failed to justify the elimination of a twelve-month program and the administrative record did not support a reduction in services from a twelve-month program to a ten-month program. Conversely, the SRO noted that the IHO did not cite to any evidentiary basis in her ruling and concluded that the determination that the school district’s decision not to offer twelve-
month services denied the student a FAPE was not supported by the hearing record. The Second Circuit again deferred to the SRO’s conclusion.

Thus, after having considered all of the parents' arguments on appeal, the Second Circuit found them to be without merit. The Court concluded that the SRO correctly determined that the IEP was substantively adequate and, despite alleged procedural flaws, provided M.W. a FAPE. Therefore, the Second Circuit affirmed the District Court's order granting summary judgment for defendant-appellee NYCDOE.

In summary, M.W., an autistic child, was enrolled in a private school by his parents after they felt that the New York City Department of Education's (NYCDOE) IEP failed to provide him with a FAPE. Consequently, M.W.’s parents then filed a due-process complaint against the NYCDOE seeking tuition reimbursement. After twelve days of hearings, an impartial hearing officer granted the parents the relief they sought. The NYCDOE appealed to a state review officer, who reversed the hearing officer’s decision. M.W.’s parents then filed a civil action in United States District Court for the Eastern District of New York, which affirmed the state review officer’s order denying tuition reimbursement. M.W.’s parents then appealed the District Court’s decision to the Second Circuit Court of Appeals, contending that the IEP’s integrated co-teaching services violated the IDEA’s least restrictive environment (LRE) mandate by placing M.W. in a classroom with as many as twelve other students who also had IEPs. Nonetheless, the District Court’s decision was affirmed by the Second Circuit Court of Appeals.
Psychological Services

In the Matter of the “A” Family.\textsuperscript{268} Child A was the male adopted son of H.A. and B.A., the respondents in this case, and was within the age parameters of those entitled to special education as a handicapped child. The appellant was the school district in which the parents were residents. The appeal was from the mandatory injunctive order of the District Court, Eleventh Judicial District, Flathead County, requiring the school district to provide an educational placement for Child A, including an intensive psychotherapy program at the Devereux Foundation, Santa Barbara, California, for one year. Transportation costs of the parents in connection with the placement of Child A were also required to be paid in the court’s order. The District Court denied the school district’s motion to amend or alter the findings of fact and mandatory injunction and an appeal followed.

For several years, Child A was identified by the school district as mildly mentally retarded. He had been placed in the special education program in the public school system of his county, being mainstreamed into several classes for nonhandicapped students. His parents felt that he was not progressing in school and that he had periods of retrogression emotionally that made him uncontrollable, a danger to himself, and a threat to others. The parents took Child A, at their own expense, to the Developmental and Evaluation Clinic of the Children's Hospital in Denver, Colorado, for a complete educational evaluation. There the staff concluded that Child A was functionally retarded as a result of a primary handicapping condition of severe emotional disturbance.

\textsuperscript{268} In re. the “A” Family, No. 14815, LEXIS 189 (Mont. 1979).
schizophrenic process. As a result, the parents requested that the child’s classification be changed from mildly mentally retarded. They further asked that Child A be placed at the Devereux Foundation, in Santa Barbara, California, to receive intensive psychotherapy, along with a residential school program.

The Child Study Team decided that Child A was not severely emotionally disturbed, schizophrenic process, but rather that he was mildly mentally retarded and that he should not be placed in the Devereux Foundation. The parents requested a special education hearing regarding Child A's identification and placement. A hearing, however, was not held because the rules then in effect on special education complaints were repealed by the Montana Superintendent of Public Instruction.

On May 15, 1978, the State Superintendent adopted emergency rules for special education complaints. The parents of Child A renewed their request for a hearing. They named both the school district and the State Superintendent as the opposing parties.

A hearing at the county level was held first. The hearing officer agreed with the parents’ assertion and found that Child A was severely emotionally disturbed, schizophrenic process. The hearing officer concluded that Child A was in need of an intensive psychotherapy program in a residential school such as provided by the Devereux Foundation. He dismissed the Superintendent as a party.

The school district appealed to the Superintendent of Public Instruction, who appointed a hearing officer for another hearing at the level of the Superintendent's office. The parents again named the Superintendent as a party. On September 26, 1978, the hearing officer reached the same conclusions as the hearing officer at the county level.
The parents filed suit on August 21, 1978 in the District Court, requesting a mandatory injunction ordering the Superintendent of Public Instruction and the Board of Trustees of the school district immediately to comply with the hearing officer's decision. On October 26, 1978, the Board of Trustees of the school district filed a complaint in the District Court, seeking review of the hearing officer's decision. Both cases were eventually consolidated. The hearing officer who had been appointed by the Superintendent of Public Instruction also dismissed the Superintendent as a party.

On March 20, 1979, the District Court affirmed the decision of the hearing officer and required an educational placement of Child A in the Devereux Foundation for one year. The Court also entered a declaratory order that the administrative rules of procedure adopted by the Superintendent of Public Instruction created a dual hearing procedure in which a parent must also proceed against the superintendent in this type of case. The District Court declared that such procedure violated the Education for All Handicapped Children Act of 1975, on the ground that the administrative rules prevented a final decision being made where both the Board of Trustees and the superintendent were not a party to the same procedure.

The school district, through its Board of Trustees, appealed from the mandatory injunction finding that Child A is severely emotionally disturbed, schizophrenic process and that Child A was required to be placed for one year in the Devereux Foundation. The Superintendent of Public Instruction appealed the order of the District Court requiring that she be a party given her final decision in the case at bar and challenged the
conclusion of the District Court that her administrative regulations deprived the parents of due process.

The school district’s appeal proposed that there was insufficient evidence to support the findings of the District Court that Child A was severely emotionally disturbed, schizophrenic process, requiring his institutionalization at Devereux. The school district’s appeal also requested review of whether the mandatory institutionalization of Child A was in compliance with the requirement that he be educated in the least restrictive environment. Finally, the school district also appealed as to whether the district was responsible for the provision of psychotherapy for Child A.

On review of the record, using the preceding information, the Supreme Court of Montana sustained the finding of the District Court, Eleventh Judicial District, Flathead County, that Child A was severely, emotionally disturbed, schizophrenic process, requiring his placement in an educational surrounding such as Devereux. As to whether the mandatory institutionalization of Child A was in compliance with the requirement that he be educated in the least restrictive environment, the Court had to determine whether the evidence supported the removal of Child A from the regular school environment in his county, or whether the special education program in his county, aided by supplementary programs, was satisfactory to provide Child A with a FAPE.

On the one hand, the school district contended that Child A was mildly mentally retarded, while the parents claimed their child was severely emotionally disturbed. The District Court found from the evidence that as a participant in the mildly mentally retarded special education program, Child A was not making substantial progress and
may be regressing. The District Court also concluded from the evidence that Child A was indeed severely emotionally disturbed. The Supreme Court of Montana noted that once the District Court had accepted that premise, it was necessary that Child A be placed in the Devereux Foundation School, thus, affirming the finding of the District Court.

As to the third issue raised by the school district, that psychotherapy was not properly allowable as a related cost for Child A, and that the parents or another public agency should bear the burden of such costs, the Court found psychotherapy was not regarded as a medical service but rather should be included as part of psychological services, which may be part of the related costs. In summary, the Court agreed and affirmed the District Court’s decisions relating to its judgment in favor of the “A” Family.

_Tice v. Botetourt County School Board._ M.T., by and through his parents Connie Tice and Kevin Tice, appealed the order of the District Court entering judgment in favor of the Botetourt County School Board. The Tices' claims were for reimbursement of educational expenses under the Education for All Handicapped Children Act of 1975 (Act), for violation of due process and for the state tort of intentional infliction of emotional distress.

M.T. was an eleven-year-old boy, of above-average intelligence, but who suffered from both learning and emotional disabilities. M.T.’s problems came to light when he encountered difficulty performing at school, which in turn led to even more problems at home. As M.T.’s situation deteriorated, his parents conferred with his

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first-grade teacher. They determined that the best course for M.T. was to seek special education services. On March 19, 1986, school officials received the Tices’ formal request that M.T. be evaluated for special education. This referral initiated the evaluation process which is the focus of the litigation at hand.

A Child Study Committee (Committee) was appointed from the personnel at M.T.’s school to consider the Tices’ referral. On April 18, 1986, some twenty-two administrative working days after the referral, and twelve days after state regulation required the meeting to take place, the committee met and unanimously recommended that M.T. be assessed for special education services. The evaluation process should have been completed within sixty-five working days of the initial referral. But instead, Botetourt County did not convene a meeting of an eligibility committee to decide M.T.’s placement until October 13, 1986, over 200 days after the evaluation referral and well into M.T.’s second grade year.

At the meeting, the eligibility committee determined that M.T. was not handicapped and, therefore, was not eligible for special education services. The Committee did recommend that he receive counseling at his parents' expense. M.T.’s parents requested that the committee's decision be deferred until M.T. could be evaluated by outside professionals. Seventeen days later, the eligibility committee agreed to this request, and also agreed to pay for the evaluations.

M.T.’s parents were referred to Dr. Gray, a licensed child psychiatrist, who examined M.T. on November 16, 1986. Dr. Gray found M.T. to be suffering from deteriorating mental and emotional problems, which were both a cause and an effect of
his troubles at school. He recommended immediate placement in special education services. A copy of Dr. Gray's report was received by the school board on December 1, 1986.

On December 4, 1986, M.T. became hysterical at school and was taken home by his mother. Once home, his condition worsened. Later that day, on the advice of Dr. Gray, M.T. was admitted to the Roanoke Valley Psychiatric Center. He was suffering from what his psychiatrist characterized as a nervous breakdown.

While hospitalized, M.T. was treated for depression, paranoia, and anxiety. Roanoke Valley attempted to meet M.T.’s educational, emotional, and physical needs. Thus, he received educational services five days per week for five hours each day from a certified school program operated by the hospital. M.T. Also participated in therapy programs, received individual counseling, and participated in recreational activities in behavioral modification. M.T. was released from Roanoke Valley on December 24, 1986.

Meanwhile, on December 17, 1986, the eligibility committee reconvened and rescinded its previous decision concerning M.T. The committee found him eligible for special services as a handicapped child in both the emotionally disturbed and learning disabled categories. The committee decided, however, to await M.T.’s release from Roanoke Valley to address his needs.

On January 6, 1987, M.T.’s mother met with Botetourt County officials to discuss his IEP for the rest of the 1986-1987 school year. An IEP was designed in consultation with her to address M.T.’s emotional and learning problems. The IEP did not provide for
individualized psychological counseling, and none was requested by M.T.’s parents. Mrs. Tice agreed to and signed the IEP. M.T. And his parents continued to receive counseling from Dr. Gray through June 1987 at the parents’ expense. M.T.’s condition improved greatly, and he successfully completed first grade.

In July 1987, M.T.’s parents demanded full reimbursement of the expenses incurred during M.T.’s hospitalization from the school board as well as for the counseling done after M.T. received his IEP. They claimed that because of the undue delay in M.T.’s evaluation, he was denied the FAPE to which he was entitled under the Act. They argued that this denial necessitated M.T.’s hospitalization and subsequent need for psychiatric help and that these were necessary related services for his education. The school board rejected their claim. M.T.’s parents then requested and were granted a formal due process hearing.

On February 18, 1988, the hearing officer issued an opinion finding in favor of Botetourt County. While finding that the school board had violated the evaluation time limits established by state regulation, the hearing officer nonetheless held that because M.T.’s parents failed to prove that these delays caused or significantly contributed to M.T.’s hospitalization, they could not recover this expense under the Act. The hearing officer also held that the counseling services rendered to M.T. while hospitalized and thereafter were purely medical and thus not compensable under the Act. As to the expense of his schooling while hospitalized, the hearing officer found it not covered by the Act because it was necessitated primarily because of M.T.’s medical and emotional needs. M.T.’s parents appealed this decision.
By consent of the parties, M.T.’s parents’ appeal was consolidated with a separate original due process hearing over whether Dr. Gray's counseling services should be included in M.T.’s 1987-1988 IEP. A hearing on both matters was held before a state review officer on April 12, 1988. On similar reasoning, the review officer affirmed the hearing officer's decision not to order reimbursement. The issue of M.T.’s 1987-1988 IEP was settled by the parties.

In the settlement, the school board agreed to periodically consult Dr. Gray about M.T.’s progress and his IEP. M.T.’s parents agreed to drop any claims for reimbursement for Dr. Gray's services rendered in the 1987-1988 school year. M.T.’s parents also agreed that psychiatric consultations were not necessary for M.T.’s IEP and not reimbursable under the Act.

On June 20, 1988, M.T.’s parents filed suit in District Court challenging the review officer's decision. His parents also alleged a due process violation as well as intentional infliction of emotional distress. Moreover, M.T.’s parents requested an award of attorneys’ fees as a prevailing party on their claim for reimbursement of Dr. Gray's fees for the 1987-1988 school year.

After a bench trial, the District Court upheld the ruling of the state review officer in all respects. In an opinion issued on June 5, 1989, the Court agreed that the record did not support a finding that the school board's violations of the evaluation time limits created M.T.’s need for psychiatric care. The court held that even if these violations denied M.T. A FAPE from March through December 1986, M.T.’s hospitalization was a medical service not covered by the Act. With regard to the schooling that M.T. received
while hospitalized, the District Court determined the parents could not be reimbursed because the school board had decided to address M.T.’s needs after he was released from Roanoke Valley, and this reasonable decision on educational policy deserved deference. The Court also denied reimbursement for the post-hospitalization psychotherapy on a finding that it was not necessary to M.T.’s IEP. Furthermore, the Court declined to award M.T.’s parents attorneys’ fees under the Act, finding that they were not a prevailing party on their claim for the 1987-1988 school year. On the Tices’ claims for damages, the Court entered judgment in favor of defendants on a finding that their actions were under the auspices of official immunity. The claim regarding intentional infliction of emotional distress was also rejected because of the lack of evidence that anyone affiliated with the Botetourt County School System acted intentionally to inflict such distress on M.T. or his parents. After denial of the Tices’ motion to amend the judgment, M.T.’s parents appealed to the Fourth Circuit.

On appeal, M.T.’s parents argued that the trial court erred by linking in any way reimbursement under the Act on a finding of a causal connection between the school board’s uncontested violations of the evaluation time limits and the need for M.T.’s hospitalization and subsequent psychotherapy. They argued that the lower court mistakenly assigned to them the burden of proof on this point and that, regardless, they proved there was a causal connection. M.T.’s parents also challenged the lower court's holding that the services M.T. received while hospitalized and afterward were not related services covered by the Act.
In this instance, in order to determine whether M.T. was receiving a FAPE from December 1986 until the end of the 1986-1987 school year, the Fourth Circuit utilized the twofold inquiry set out in *Rowley*. First, has the school district complied with the procedures set forth in the Act? And second, was the IEP developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?

As to the first part of the *Rowley* inquiry, the Fourth Circuit found that the school district did not comply with the Act’s procedures by failing to complete M.T.’s evaluation on time and that, at the time of his hospitalization, he was handicapped as defined by the Act. The Fourth Circuit also found that the school district’s procedural violations resulting in a six-month delay had direct cause in there being no IEP in place at the time of M.T.'s hospitalization and placement at Blue Ridge. Therefore, the Fourth Circuit determined, at that time, M.T. was not receiving a FAPE.

With regard to M.T.’s parents’ psychotherapy claim, the Fourth Circuit found that the procedural violations had no impact on whether M.T.’s IEP adequately assured him a FAPE after January 6, 1987. Thus, the Fourth Circuit noted that in order for M.T.’s parents to prevail on the claim for expenses incurred after this date, they must prevail on the second, more difficult prong of the *Rowley* inquiry. They must prove that M.T.'s IEP, absent psychiatric counseling, was not reasonably calculated to enable him to receive educational benefits. The Fourth Circuit determined M.T.’s parents were unable to meet this burden, thus affirming the District Court's holding that after January 6, 1987, M.T. was receiving a FAPE. With the Fourth Circuit’s affirmation of the District Court, the school board was not required to reimburse M.T.’s parents for the cost of counseling.
With regard to whether M.T.’s parents were eligible for reimbursement of expenses while he was hospitalized in Roanoke Valley, the Fourth Circuit noted that M.T. was not receiving a FAPE at the time he was hospitalized. Therefore, his parents’ reimbursement of incurred expenses while at Roanoke Valley relied upon whether the Tices’ placement was proper to meet the Act’s educational goals. The Fourth Circuit noted that the District Court erred in finding the placement improper as its reasoning was such that hospital placements would burden the school board beyond that contemplated under the Act. The Fourth Circuit found the District Court’s decision improper since the Act’s definition of special education included instruction in hospitals and institutions. Just because M.T. was hospitalized while he received educational instruction did not make the placement improper.

The District Court also found the placement unnecessary and improper because of the eligibility committee's decision to wait until M.T.'s release from Roanoke Valley to meet his special educational needs. The Fourth Circuit disagreed since M.T.’’s first hospitalization was due to the school district's malfeasance in evaluating his special needs. Therefore, the Fourth Circuit felt Botetourt County must bear responsibility for what may have been a proper placement under the Act. Since the Fourth Circuit found the District Court's reasons for finding this placement were based on incorrect premises, they vacated that finding and remanded for further consideration.

In rejecting the Tices' claim for reimbursement of M.T.’s hospital expenses, the District Court held that the hospitalization, because it was necessitated by M.T.’s short-term psychiatric needs rather than any educational need, was not a reimbursable
medical expense. The Fourth Circuit found that this case lacked persuasive evidence that M.T.’s educational and emotional disabilities, either before or after his nervous breakdown, were so severe that hospitalization was necessary to provide him with a FAPE. As the Supreme Court has noted in *Irving Independent School District v. Tatro*, the medical services exclusion was designed to spare schools from an obligation to provide a service that might well prove unduly expensive and beyond the range of their competence. Using the Tatro decision, the Fourth Circuit found justifiable application of the rule in this case as well. To require Botetourt County to bear the costs of this short-term hospitalization and the attendant medical services would be an unjustified expansion of the school district's liability and would reach a result beyond the Act's purpose.

While hospitalized, M.T. also received services which could have been included as special education and related services. The Fourth Circuit noted that the Act included provision of a FAPE to hospitalized students in its definition of special education and that related services included psychological and counseling services. Thus, the educational services, and much of the counseling services M.T. received while hospitalized, may be recoverable even though the medical expenses during the hospital stay were not.

In conclusion, the Fourth Circuit vacated only that portion of the District Court's order denying reimbursement of expenses M.T.’s parents incurred during his December 1986 hospitalization. The case was then remanded to the District Court for further factual findings as to whether M.T.’s placement during this period was proper. If the District

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Court found the placement proper, it would then determine which expenses were incurred for special education and related services and order reimbursement only for those expenses.

*Taylor v. Garden Grove Unified School District.* In this case, the District Court entered a preliminary injunction ordering a severely emotionally disturbed child to be placed in San Marcos Treatment Center, a residential facility in Texas operating under appropriate state authorization in a dual capacity as a school and as a psychiatric hospital. Garden Grove School District (school district), the local educational agency responsible under the EHA for providing a free appropriate public education for the child, appealed this decision.

The Ninth Circuit noted the key issue in this case was whether the District Court erred in its holding that the Taylors had a substantial likelihood of success in their claim that San Marcos was an appropriate placement rather than the school district's contention that the institution is a hospital and thus, an excluded medical service.

The Ninth Circuit upheld the District Court’s injunction holding that placements in similar institutions are appropriate under the EHA. The Ninth Circuit reasoned its decision was based upon such placement being necessary to ensure that the child does not lose out on an education mandated by the EHA. The Court further concluded that under the EHA an injunction is a more appropriate remedy and that damages are inappropriate.

T.T. was a seriously emotionally disturbed youth who, at the time of this appeal, was seventeen years old. In September 1986, the school district referred T.T. to Orange

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County Health Care Agency (County Mental Health) for mental health services. An IEP was developed and T.T. was placed in a special education school at public expense, with psychotherapy and the prescription and monitoring of medication provided by County Mental Health. This arrangement failed and T.T. was ultimately arrested for physical aggression against his family. He spent a total of approximately two months in juvenile hall between March 30, 1987 and September 13, 1987.

Meanwhile, in September 1987, T.T.'s mother contacted the school district and requested a new IEP meeting to determine an appropriate residential placement for T.T., as the previous placement had failed. The IEP team met on October 8, 1987 and determined that T.T. required placement in an appropriate therapeutic setting as soon as possible. A week later, T.T. was released by the probation department for placement in coordination with County Mental Health. Unfortunately, no placement was identified and T.T. spent an additional six months in juvenile hall, where his condition deteriorated. Ultimately, he was transferred from juvenile hall to the Adolescent Psychiatric Unit of the University of California at Irvine Medical Center.

Additional IEP meetings were convened in March and May of 1988. On May 9, 1988 an IEP was developed which stated that T.T. was medically stable, that he required a long-term residential placement when released from the Irvine Medical Center, and that a state hospital was not an appropriate placement for him. Notwithstanding this evaluation, County Mental Health was appointed as a temporary guardian and removed T.T. from Irvine Medical Center and transferred him to Camarillo State Hospital.
On June 29, 1988, T.T.’s parents were appointed co-guardians. A few days later, the parents requested an emergency IEP meeting to select an appropriate residential placement for T.T. The special education director for the school district denied this request. The Taylors then requested a due process hearing which was convened on August 30, 1988. Meanwhile, on September 28, 1988, the Taylors removed T.T. from Camarillo State Hospital and placed him once again in Irvine Medical Center. T.T. was released from Irvine Medical Center on November 10, 1988 when his parents’ insurance coverage for the year was exhausted. He remained at home and received outpatient treatment from Irvine Medical Center until January 10, 1989.

On December 8, 1988, the hearing officer came to a decision and found that T.T.’s social, emotional, medical, and educational needs were intertwined, and ordered that T.T. be placed in a twenty-four-hour residential facility that would provide: an on-site school program to forestall truancy; a program of structured activities throughout the day and evening that will encourage social interaction in therapy sessions and classroom discussions; psychotherapy including individual, group, and family sessions to address T.T.’s depression, which had adversely affected his educational performance, including his social withdrawal and nonparticipation in classroom discussion; a psychiatrist on call, but not necessarily on duty, to prescribe and monitor the amount of antidepressant medication; a nurse on the premises of the placement to check T.T.’s somatic complaints; and a responsible adult to administer his medication.

After the hearing officer’s decision, the IEP team met four times in late December 1988 and early January 1989. At these meetings, County Mental Health proposed five
placements for T.T. These placements were all rejected as being either unavailable or unable to provide the level of care ordered by the hearing officer. At the first of these meetings, the Taylors proposed San Marcos Treatment Center as their son’s placement. The school district and County Mental Health representatives rejected this proposal.

On January 10, 1989 T.T. was again placed at Irvine Medical Center because of psychological regression which culminated in an attack against his father. The Taylors' insurance, which provided for forty-five days of inpatient psychiatric treatment per calendar year, paid for this placement. The situation reached a breaking point because the Taylors' 1989 coverage was to expire on February 24, 1989 and no appropriate educational placement had been agreed upon.

On January 20, 1989, the Taylors filed a complaint in District Court asserting that those responsible for providing T.T. with public education and mental health services, had violated his right to a FAPE. The Taylors sought preliminary and permanent injunctive relief, which would place T.T. At San Marcos at no cost to them. After an evidentiary hearing, the District Court granted the Taylors’ motion for a preliminary injunction on February 23, 1989, the day before the Taylors' insurance coverage ran out. The District Court found that the Taylors would probably succeed when the case proceeded to a final determination on the merits, and that they were likely to suffer irreparable harm if no residential placement was immediately identified. Therefore, the Court ordered that Todd be placed at San Marcos Treatment Center within twenty-four hours, and that the school district implement a contract with San Marcos and effect payment for the placement within thirty days.
The District Court viewed the situation as an emergency and swiftly ordered T.T.'s placement in a facility outside California on an interim basis until a final determination on the merits could be made. The District Court also made it clear that its order assigning the school district primary liability for the costs of the placement at San Marcos was only an interim decision pending a final decision. Before a final order would be entered, the Court would try to have a breakdown of costs from San Marcos so that the costs could be apportioned among the other defendants, which included public agencies that would be responsible for T.T. if he had no other means of support. The Ninth Circuit inferred the District Court's order to mean that the school district will not be responsible for costs which the Court would determine as exempted medical expenses.

In the matter before the Ninth Circuit, the school district contended that the District Court erred in entering the preliminary injunction because the plaintiffs had no likelihood of success on the merits. The school district maintained that it would succeed on the merits because the District Court erred in holding that the EHA authorized placement of a handicapped student in institutions like San Marcos. The school district characterized San Marcos as a psychiatric hospital, providing excludable medical services for which the school district was not financially responsible under the EHA.

The District Court, however, rejected the school district's characterization of San Marcos as a hospital, finding it instead to be a boarding school facility with the capability of providing medical services as found by the hearing officer to be necessary for T.T. The District Court also rejected alternative placements which had been suggested by the
defendants, in large part because those facilities were not schools and provided no program of regularized education.

The Ninth Circuit noted that the record supported the District Court in that San Marcos operated a full-time school in which virtually all of its residents were enrolled. The record also noted that San Marcos was a state accredited educational institution. The Ninth Circuit further determined that at least four residents at San Marcos, at the time of this appeal, had been placed there to receive a FAPE under the EHA. The Ninth Circuit determined that the aforementioned factors supported the District Court's finding that San Marcos was an educational institution.

The Ninth Circuit subsequently noted that the record supported the District Court's conclusion that T.T.’s placement at San Marcos was necessary to meet his educational as opposed to his medical needs. Also of note was that T.T. was intellectually able to absorb academic education at least through the high school level. The Ninth Circuit found the placement was not ordered in response to any medical crisis, recalling that the IEP developed on May 9, 1988 stated that T.T. was medically stable and that a state hospital was inappropriate for him. The Ninth Circuit cited the District Court’s conclusion that T.T. required a highly structured environment in which academic skills would be taught as well as where personal and social contacts were an ordinary and necessary element of the surroundings, and reasoned that the described environment was characteristic of a school, not of a hospital.

In conclusion, the Ninth Circuit found that the plaintiffs established a likelihood of success on the merits. The Ninth Circuit noted that the Taylors would incur harm if the
decision were to favor the defendants, citing the fact that the Taylors' insurance coverage was about to expire on the eve of the Court's grant of the preliminary injunction. In this matter, the District Court was faced with an emergency situation where a readily available appropriate placement was necessary to provide T.T. with his educational and related needs. The District Court also eased the financial burden of the school district by sharing the costs between the various public agency defendants as well as leaving open the possibility of relocating T.T. to California if an appropriate in-state placement could be found. Using the aforementioned information, the Ninth Circuit affirmed the preliminary injunction of the District Court.

**Babb v. Knox County School System.** On behalf of J.B., his parents, Joe and Sharon Babb, appealed a determination that the Knox County, Tennessee school system did not have any responsibility for costs associated with the time J.B. spent in Peninsula Psychiatric Hospital (Peninsula). The Babbs' argued that J.B. was handicapped under the Education for All Handicapped Children Act (Act). They sought reimbursement for the costs related to J.B.'s stay at Peninsula, arguing that his stay was in keeping with the Act and necessary to provide Jason with appropriate educational services. The Sixth Circuit agreed with J.B.'s parents and reversed the District Court's judgment.

J.B. had a long history of abnormal behavior and academic failure. Born in 1975, J.B. lived with his father and stepmother, the Babbs, until he was eight years old. Then, from the ages eight to thirteen, J.B. lived with his mother and stepfather in North

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Carolina. In November 1988, J.B. returned to Knoxville, Tennessee, to again live with his father and stepmother.

The Sixth Circuit noted that J.B.'s history of trouble began early. At the age of four, he was expelled from pre-school for breaking a gerbil's leg and urinating on other children. At the age of five, he attempted to strangle a female classmate and to set the classroom Christmas tree on fire. During the next five years, J.B.'s behavior did not improve. He continued to have difficulty in school and the school eventually threatened to expel him for his behavioral problems. In addition to his problems at school, he also set a house on fire causing some $900 in damage. He also broke his stepbrother's arm at least once during this period. Finally, in November 1988, J.B.'s mother and stepfather felt that they could no longer control J.B., and they asked the Babbs, Jason’s father and stepmother, to take him back.

The day after J.B. returned to Knoxville, Jason’s stepmother enrolled him in South Middle School, a Knox County public school. At the time of enrollment, Mrs. Babb told both the school principal and school counselor of J.B.'s long history of behavioral and academic problems and requested that he be formally evaluated. In January 1989, the school counselor evaluated J.B. And concluded that he was not seriously emotionally disturbed. The academic and psychological evaluations were limited, concentrating exclusively on J.B.'s three months at South Middle School. Following the evaluation, school officials met with Mrs. Babb and informed her that J.B. was not eligible for special services under the Act. At that time, Mrs. Babb signed a statement agreeing with the determination that J.B. was not eligible for the special
services. Mrs. Babb signed an additional statement acknowledging she had been fully apprised of the rights she and J.B. possessed under the Act, including the right to independent evaluation and the right to object to or disagree with the school system's determination of J.B.'s status.

In mid-February 1989, one week after receiving the results of J.B.'s evaluation, the Babbs learned for the first time that during the previous three months the school had placed J.B. on in-school suspension numerous times and that the school was planning to expel him. With this information, the Babbs removed J.B. from the Knox County school system and placed him in Peninsula, a private hospital that contained a specially designed educational program for emotionally disturbed children. While at the hospital, a clinical psychologist evaluated J.B. And determined that he suffered from Conduct Disorder, Severe Solitary Aggressive Type, and Paranoid and Schizoid Traits. J.B. remained at the hospital and attended classes there for three hours a day from February 21, 1989 until August 1, 1989.

Subsequent to placing J.B. At Peninsula, the Babbs requested a due process hearing to determine whether J.B. was emotionally handicapped and thus eligible for special educational services under the Act. The Babbs also sought reimbursement for educational expenses associated with J.B.'s stay in Peninsula. On October 25, 1989, a hearing officer for the Tennessee State Department of Education found that the Babbs had placed J.B. in Peninsula for noneducational, medical reasons and the Babbs' expenses were not covered under the Act. The hearing officer also found that even if J.B. had been placed in Peninsula for educational reasons, reimbursement was not appropriate because
the Babbs had supplied only a lump-sum billing from Peninsula that included all of J.B.'s expenses, both medical and nonmedical. The hearing officer made very few findings of fact and concluded that the Babbs had the burden of establishing the amount of reimbursement for educational expenses. The hearing officer found that because there was insufficient proof of the appropriate expenses related to education, no award could be made.

The Babbs then challenged the hearing officer’s decision in Federal District Court. The District Court affirmed the prior decision and found that the Babbs had failed to exhaust their administrative remedies. The Court specifically found that the Babbs failed to seek a due process hearing challenging the school system's assessment that J.B. was not entitled to special services under the Act. The Court found that if the Babbs had pursued administrative remedies, less restrictive alternatives might have been arranged. Instead, because the Babbs acted unilaterally placing J.B. in a locked ward in a psychiatric hospital, J.B. went from the least restrictive environment of a public school to the most restrictive setting possible. The Court found that this change in J.B.'s circumstances was a clear contradiction of the express legislative purpose of the Act.

The District Court further found that J.B. was placed in Peninsula primarily for medical reasons and, therefore, expenses incurred at Peninsula related to his education were not reimbursable. The Court also found the Babbs had failed to submit a breakdown of expenses related to education, and even if the Babbs were entitled to reimbursement, the District Court would have been unable to set the appropriate amount.
On appeal, the Babbs argued that the District Court erred by not determining that J.B. was clearly emotionally handicapped and qualified for special services under the Act, that plaintiffs had complied with the administrative exhaustion requirements in a timely fashion, and that the lower court’s decision to place J.B. in Peninsula was appropriate in light of his educational needs. The Babbs argued that for the aforementioned reasons, they should be reimbursed for the costs associated with the placement.

The school system responded by arguing that the District Court correctly found that the Babbs placed J.B. in Peninsula primarily for medical reasons, that medical expenses are not reimbursable under the Act, that the school system properly found that J.B. was not emotionally handicapped and thus did not qualify for special services, and that even if the Babbs did qualify for reimbursement, they failed to properly prove which expenses were educational.

The Sixth Circuit noted after reviewing the District Court's findings of fact and the record, that at the time J.B. was enrolled as a student in the Knox County school system and during his time at Peninsula, he was seriously emotionally disturbed under the provisions of the Act and therefore qualified as a student with a disability who was eligible for the special protections and services under the Act.

The Sixth Circuit then turned its attention to the question of whether the Babbs should be reimbursed for their expenditures arising from J.B.’s placement in Peninsula. In applying the first part of Rowley to the Babbs’ case, the Sixth Circuit noted the school did not strictly adhere to the procedures for determining whether J.B. was handicapped.
The Act requires school systems that are determining whether a child is handicapped to fully examine the child's academic, emotional, and psychological profile while conducting a full and individual evaluation in all areas related to the suspected disability. In this case, the evaluator only considered J.B.'s three months in the Knox County school system rather than consulting with his psychologist, his mother and stepfather in North Carolina, or his father. The evaluator also failed to consult J.B.'s academic record in North Carolina.

With regard to the second prong of Rowley, the Sixth Circuit found that the school did not create an individualized educational program and did not meet J.B.'s specialized needs. The Sixth Circuit then examined the Babbs' choice of placing J.B. in Peninsula to determine whether it was the appropriate choice that best met his educational needs in the least restrictive environment. The Sixth Circuit found that the Babbs' choice best fulfilled J.B.'s special educational needs. In reference to whether the school system was required to reimburse the Babbs for J.B.'s stay at the Peninsula, the Sixth Circuit noted that the concept of education under the Act clearly embodied both academic instruction and a broad range of associated services traditionally grouped under treatment. Therefore, any attempt to distinguish academics from treatment when defining educational placement ran counter to the clear language of the Act.

In conclusion, the Sixth Circuit found that J.B. was handicapped and was eligible for a FAPE that included psychological care and related services. The Sixth Circuit further found that the Knox County School System failed to adhere to the procedural requirements to determine whether J.B. was handicapped. As a direct consequence of the
school system’s procedural failure, J.B. was deprived of an individualized educational program to meet his special needs.

The Sixth Circuit reversed the District Court's judgment and remanded the case to the District Court to determine the expenses that were covered and to be reimbursed to J.B.’s parents. The Sixth Circuit further noted the fee determination would include attorneys’ fees.

_Sioux Falls School District v. Koupal._273  Renee Koupal, mother of six-year-old B.K. who has been diagnosed with severe autism, appealed the judgment of the Circuit Court of the Sixth Judicial Circuit Hughes County, South Dakota, which had rejected her challenge of a school district's refusal to include specific teacher training in her child's education plan. B.K. received special education from the Sioux Falls School District (school district), which included instruction through the TEACCH method, a program developed at the University of North Carolina specifically designed for children with autism. TEACCH stands for “Treatment and Education of Autistic and related Communication, handicapped CHildren.” When B.K.'s IEP was prepared in both 1991 and 1992, B.K.’s mother attached to the IEPs several typed pages designated as "Other Related Services" which detailed her feelings that due to several different factors, staff who work with B.K. should receive autism-specific training which should minimally include the five-day TEACCH training course. The IEP team and school district allowed Ms. Koupal’s statement to be included in the IEP.

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The five-day TEACCH course is taught twice per year in South Dakota. One five-day session of the training is held in Rapid City and the other is held in Sioux Falls. Space in each training is limited to twenty-five people and both trainings are provided by Dr. Tom Stanage, director of the autism program at the University of South Dakota.

The school district and the mother agreed that B.K.'s teachers had always been competent in the TEACCH method, until the mother learned in May 1992 that a summer teacher had not taken the five-day TEACCH course. Ms. Koupal considered the course mandatory for B.K.'s teachers, since the IEP team and school district agreed with her attachment to the IEP. She complained to the school district's Director of Exceptional Children's Services (Director). Even though the Director later classified Ms. Koupal's attached pages as “nonbinding recommendations,” which the school district would attempt to follow, the district responded by arranging for the teacher to attend the course. The teacher could only attend the class four of the five days, due to conflicts in her schedule. To make up for the missed training day, the school district paid two special education teachers, trained and experienced in the TEACCH method, to work with the teacher for ten hours.

When school district officials met with B.K.'s mother on December 11, 1992 to review his IEP, the school district announced its intent to exclude from B.K.'s IEP language specifically requiring the five-day TEACCH course for his teachers. The school district assured Ms. Koupal that B.K. will continue to receive TEACCH method instruction, but the mother feared that teachers trained with anything less than the full
five-day TEACCH course would cause B.K. to regress and therefore initiated a due process hearing.

A hearing examiner heard evidence on March 26, 1993 and determined that teacher training could be included in an IEP. The hearing examiner further determined that it was inappropriate for the school district to remove the five-day course requirement from B.K.’s current IEP. The school district appealed, and, on independent review, the state Circuit Court reversed. On further appeal, Ms. Koupal requested that the South Dakota Supreme Court determine whether the Circuit Court erred in holding that specific teacher training could not be mandated in B.K.’s IEP. Secondly, Ms. Koupal wanted the Court to determine if the trial court erred in finding immaterial the teacher training language in B.K.’s two previous IEPs. Lastly, Ms. Koupal asked the Court to consider her entitlement to attorneys’ fees.

With regard to whether the Circuit Court erred in holding that specific teacher training could not be mandated in B.K.’s IEP, the Supreme Court of South Dakota agreed and found that these definitions do not include teacher training as a service. The Court concluded that although the federal list of related services may not be all inclusive, the scope of the listed services failed to encompass specific teacher training. Therefore, since teacher training is not a related service under federal law, it cannot be required in an IEP.

With regard to whether the trial court erred in finding immaterial the teacher training language in B.K.’s two previous IEPs, the trial court deemed the contents of the prior IEPs irrelevant to determining what should be included in his present IEP. The
Supreme Court of South Dakota agreed with the Circuit Court’s decision. The Court noted that it was unable to find a requirement in IDEA which binds school authorities or parents indefinitely to the terms of an IEP. The Circuit Court held that the proposed IEP requiring TEACCH methodology for B.K., but not mandating specific teacher training, complied with IDEA in that it was reasonably calculated to enable B.K. to receive educational benefits. Since this is all the IDEA requires, the Court determined it could not require the school district to go above and beyond what is required by law. Lastly, the Court reasoned that since Ms. Koupal did not prevail in her appeal, her request for attorneys’ fees was denied.

Butler v. Evans\(^{274}\) As a child, N.B. experienced severe emotional and psychological troubles that made it difficult for her to be educated in a regular school. Her local school recommended that she be placed in a residential educational facility that could provide a structured setting designed to accommodate her condition. Before her local school and the Indiana Department of Education could process this placement, N.B.’s condition forced her parents to have her committed to a psychiatric hospital for several months. After N.B. was released from the hospital, the state of Indiana placed her in a residential educational facility. Nevertheless, her parents sought reimbursement from the state for the costs of N.B.’s hospitalization. The Seventh Circuit affirmed the District Court's denial of the Butlers' reimbursement claim because N.B.’s hospitalization did not result from delays by the state of Indiana in processing her placement, nor did the hospital care constitute “related services” reimbursable under the IDEA.

\(^{274}\) Butler v. Evans, No. 99-3135, U.S. App. LEXIS 22356 (7th Cir. 2000).
N.B. endured a series of emotional disturbances during her childhood and was diagnosed with severe schizophrenia. Upon evaluation, N.B.’s condition was such that it required residential placement which was recommended by her school district and ultimately agreed upon by her IEP team. However, during the prolonged process of securing residential placement, N.B.’s condition required immediate medical intervention. Following a request from N.B.’s school that she be examined by a psychiatrist, N.B.’s parents admitted her voluntarily to Valle Vista Hospital. Shortly thereafter, before N.B.’s school had filed the residential placement application with the Indiana Department of Education, N.B.’s parents transferred her to Our Lady of Mercy Hospital in Dyer, Indiana, where she would stay for the next six months. During her hospital stay, N.B. received medical treatment for her psychiatric needs at a cost of $121,021.13, though N.B. did not receive educational services in line with her IEP.

N.B. remained hospitalized at Our Lady of Mercy Hospital for an additional five months while awaiting transfer to the school district-proposed residential facility. Approximately seven months after her initial hospitalization, N.B. moved to a residential special education program at the Maryhurst School in Louisville, Kentucky.

Meanwhile, a class of disabled children and their parents filed a class-action lawsuit in Federal District Court against the Indiana Department of Education. The class alleged that the long delays between the development of IEPs requiring residential placement and the actual residential placements violated the IDEA. N.B.’s parents added N.B. And themselves as plaintiffs to the lawsuit. The class was granted partial summary
judgment as the judge explained that an IEP must be implemented as soon as possible following its development.

The class action suit was settled shortly thereafter following negotiations between the two sides. The order provided that the plaintiffs were eligible to petition through administrative adjudication for educational and related services reimbursement for each member of the class who incurred costs for education and related services between the date of the IEP and the date of actual placement.

Pursuant to the administrative procedure described in the agreed order, the Butlers filed a reimbursement claim for N.B.'s bills from Our Lady of Mercy Hospital because the hospitalization occurred during the delay between completion of N.B.'s IEP and her placement at the Maryhurst School some seven months later. An Indiana Department of Education independent hearing officer approved the Butlers' claims. However, because the services that N.B. received at Our Lady of Mercy Hospital were primarily medical and psychiatric, the Indiana Board of Special Education Appeals reversed the hearing officer's decision and found that N.B.'s psychiatric hospitalization was not “education or related services” as required for reimbursement by the agreed order. The Butlers appealed the final denial of their reimbursement claim and a magistrate judge then affirmed the decision of the Board of Special Education Appeals.

The Seventh Circuit found that the state of Indiana was not liable for N.B.'s hospitalization charges because those expenses resulted from “special circumstances.” Local school officials approved N.B.’s IEP, but the IEP was written for a homebound placement and anticipated N.B.’s release from the hospital shortly thereafter. The IEP
recommended placement at a residential educational facility to serve N.B.'s particular educational needs, not placement at a hospital for further medical treatment. However, N.B.'s psychological condition demanded emergency action. N.B.'s unstable psychological condition necessitated her hospitalization and rendered her unable to handle the residential placement recommended by the IEP. In fact, N.B. required hospital care for several months so that she was fit to be transferred to residential care. Upon her release, N.B.'s commitment ended upon the determination that she no longer posed a risk to herself or others and the state of Indiana had already moved her to a residential placement. The District Court and the Indiana Board of Special Education Appeals found that N.B.'s transfer to the hospital and subsequent commitment were special circumstances that delayed her residential placement. The Seventh Circuit agreed with the aforementioned conclusions.

Moreover, N.B.'s hospital charges were not recoverable because only payments for “education or related services” are reimbursable under the agreed order. The Seventh Circuit noted that in interpreting IDEA’s related services clause, the Ninth Circuit held that inpatient psychiatric hospitalization, like N.B.'s hospitalization, was not a special education placement and that the hospitalization was not a related service compensable under the IDEA.²⁷⁵ The Court agreed that N.B. was admitted to the hospital for medical reasons, not for educational purposes, and received almost exclusively medical services, not educational ones. Thus, the Court determined that N.B.'s hospitalization was

provoked by a psychiatric crisis, was not approved by her IEP team, occurred at a medical facility that did not provide educational services, and had not been approved by the state as her residential educational institution.

The Seventh Circuit concluded that N.B.’s hospitalization was not an attempt to give her meaningful access to public education or to address her special educational needs within her regular school environment. Therefore, this was not a case in which the student with a disability required medical assistance to remain in a regular school since N.B. was committed to a psychiatric hospital. Education was not the purpose of her hospitalization. Thus, the Seventh Circuit found that the District Court and the state appeals board did not err in finding that N.B.’s hospitalization was a medical service extending beyond diagnostic and evaluation purposes and therefore excluded from reimbursement. The Seventh Circuit affirmed the District Court’s order.

M.C. v. Voluntown Board of Education.276 At the crux of this case was whether M.C. (plaintiff), a student with a disability, was entitled to reimbursement under the IDEA from the defendant, Voluntown Board of Education (Voluntown or school district) for the costs of private school tuition and private psychological counseling. Voluntown appealed to the Second Circuit from a judgment of the District Court which ordered the school district to reimburse M.C. for such costs.

As a result of his educational needs and “severe depression,” M.C. was placed on homebound instruction for his seventh grade school year. In preparing for the following school year, the IEP team determined that homebound instruction should continue over

the summer, though an advocate at the meeting on the student’s behalf suggested a private placement to recover from his decline in academic performance while on homebound instruction. The parents unilaterally placed M.C. At the private placement. Due to M.C.’s academic gains made over the summer and his subsequent promotion to eighth grade due to his gains at the private placement, the school district agreed to place M.C. At the facility pending a negotiated agreement with the placement. When talks between the school district and private placement broke down, M.C.’s parents required a due process hearing and unilaterally placed M.C. At the private facility. M.C. continued placement at the private facility during the year in which the due process hearing was conducted. Dissatisfied with the results of the due process hearing, M.C.’s parents appealed the decision to the District Court. The District Court ruled in favor of M.C. The school district appealed the District Court’s decision to the Second Circuit. The Second Circuit noted that due to the prior proceedings, the two disputes remaining for the Court’s consideration were: (1) whether M.C. was entitled to reimbursement for the costs of the private placement for the second year spent at that school; and (2) whether M.C. was entitled to reimbursement for the costs of psychological treatment when M.C. was in the seventh grade.

With regard to reimbursement for the second year of private placement, the Second Circuit disagreed with the District Court’s ruling in favor of M.C. The Circuit Court noted that in making its ruling, the District Court declined to consider whether either of the placements proposed by M.C.’s IEP for that year was adequate under the IDEA. The Circuit Court noted the Supreme Court's decision in *School Committee of*
Burlington v. Department of Educ. of Massachusetts, 277 which answered whether the parents of a child with a disability were entitled to reimbursement for the costs of a private school based on two questions: (1) whether the challenged IEP was adequate to provide the child with a FAPE; and (2) whether the private educational services obtained by the parents were appropriate to the child's need. Therefore, if the challenged IEP was adequate, the district had met its obligations under the IDEA. Thus, only if a court were to determine that a challenged IEP was inadequate should it proceed to the second question. In that case, reimbursement would only be appropriate if the parents' private placement was itself adequate under the Act.

The Circuit Court concluded that the District Court erred by leaping over the first step and going directly to the second step of the Burlington test, by failing to consider first whether either of the placements proposed in M.C.'s IEP for the school year in question was adequate. The Second Circuit then remanded this portion of the case for the District Court to consider whether either of the IEPs proposed placements was adequate.

With regard to whether M.C.’s parents should be reimbursed for the costs of psychological counseling, the Second Circuit referenced the IDEA noting that a disabled child was entitled to psychological counseling at no cost if such services are “required to assist the child to benefit from special education.” The Second Circuit referred to Ash v. Lake Oswego School District278; Mary P. v. Illinois State Board of Education279; Garland

Independent School District v. Wilks\textsuperscript{280}; see also Bernardsville Board of Education v. J.H.,\textsuperscript{281} in noting that courts have consistently held that reimbursement was not appropriate in situations where parents unilaterally arranged for private educational services without ever notifying the school district of their dissatisfaction with their child's IEP.

The Second Circuit noted in the case of M.C. that his parents did not raise any issue with regard to the extent or nature of the psychological counseling services provided for M.C. in his IEPs until at least eight months after M.C.'s treatment with his psychologist had ended. Since M.C.'s parents had failed to question the appropriateness of M.C.'s IEPs in a timely manner, the Court concluded that M.C. was not entitled to reimbursement for the costs of his psychological counseling services.

In conclusion, for the aforementioned reasons, the Second Circuit vacated the judgment of the District Court insofar as it ordered the school district to reimburse M.C. for the costs of private school tuition for one school year. The Circuit Court also remanded the case for further proceedings to determine whether the district was required to reimburse M.C.'s parents for the cost of his second year of private placement. Lastly, the Second Circuit reversed the judgment of the District Court’s order that Voluntown reimburse M.C. for the costs of private psychological counseling.


Department of Education, State of Hawaii v. Cari Rae S.\(^{282}\) In the matter before the Court, the Department of Education of the State of Hawaii (HDOE) appealed a hearing officer’s decision in favor of C.S. (defendant or student). The hearing officer found that the HDOE violated the “child find” provisions of the IDEA by failing to evaluate the C.S. for a suspected disability earlier than it did. The hearing officer awarded costs totaling $7,713 to the student that were incurred for treatment, diagnosis and evaluation during a five-day hospitalization. The Court noted that the characterization of the costs for C.S.’s hospitalization was a key issue in the appeal.

Despite the “child find” violation, the HDOE contended that it fulfilled the IDEA by providing the student a FAPE because she subsequently graduated from high school. The HDOE also contested the award of costs incurred during C.S.’s hospitalization, arguing that such services were not related services as defined by IDEA. C.S.’s hospitalization occurred several months prior to when she was found “emotionally impaired” by the HDOE. The Court determined that the costs associated with C.S.’s hospitalization were related services and the HDOE was responsible for payment.

With regard to the child find violation, the HDOE did not specifically challenge the merits of the child find violation, or argue that it should not have suspected earlier that C.S. should have been referred for an evaluation for IDEA services. Rather, the HDOE emphasized that C.S. eventually graduated from high school and thus was provided with a FAPE. Therefore, since C.S. benefited in her education by graduating,

she received a FAPE. The Court agreed with the hearing officer’s conclusion that the HDOE should have discerned much earlier than it did that C.S. should be evaluated. Essentially, the HDOE had reason to suspect a disability, and reason to suspect that special education services may be needed, thus violating the child find provisions by failing to evaluate C.S. earlier.

The Court then turned its attention to whether the costs associated with C.S.’s hospitalization were medical services, which are not related services and therefore not reimbursable or whether the services were for diagnostic and evaluation purposes, which are reimbursable as an exception to the exclusion of medical services. First, the Court noted that C.S.’s hospitalization occurred immediately after a School Support Team (SST) meeting in which the student’s behavior and medical help were discussed. The Court concluded that the SST meeting was the beginning of the evaluation process. However, the Court also noted part of C.S.’s problems resulted from drug use. While evaluations conducted on the student referred to her drug use, they also identified C.S. as having Oppositional Defiant Disorder (ODD). As was previously stated, even in light of the admission of drug use, the Court weighed all the facts of the case, including C.S.’s ODD diagnosis, and agreed with the hearing officer in that the SST meeting, just prior to the student’s hospitalization, was the start of the evaluation process and suspecting she had a disability.

With regard to reimbursement, the Court concluded that approximately $8,000 in costs associated with C.S.’s hospitalization were necessary for a proper evaluation and diagnosis. The Court found that the costs were related services due to the “child find”
violation and that the student was subsequently found to be emotionally impaired and thus qualified for IDEA services. Therefore, the Court agreed with the hearing officer’s decision to award hospitalization costs to C.S.

Dale M. v. Board of Education of Bradley-Bourbonnais High School District No. 307. The District Judge held that a public school district in Illinois had violated its duty under the IDEA to provide D.M. with a FAPE. D.M. became a student in the district in 1993, when he was fourteen years old. He soon became a serious disciplinary problem. He disrupted classes and was truant. The following year he was placed in a therapeutic day school designed to deal with disruptive and truant students. But, in his first four months he attended school only twenty days, though when he did attend he behaved himself, did the assigned work, and got good grades. For some time he had been drinking alcohol to excess and also consuming illegal drugs. In January 1995 D.M. was hospitalized for depression and at the same time charged with residential burglary and theft of a car. He was placed on probation for these offenses. When he got out of the hospital he refused to return to school, but received home instruction until November, when he was again charged with residential burglary and this time was sent to jail. D.M. was examined by a psychologist who found that he did not have a learning disability but instead what the psychologist called a conduct disorder, along with depression and substance abuse.

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The school district wanted to send D.M. back to the therapeutic day school. Instead, his mother obtained D.M.’s release from jail and placed him in the Elan School, a residential school in Maine. She demanded that the school district pay for D.M.’s expenses in attending Elan, as otherwise he would not be getting the FAPE to which he was entitled. The school district refused. The Elan School does not offer psychiatric or other medical treatment for substance abuse or depression. It is a boarding school for difficult children. D.M. did not like the school, and was excluded from most school activities because of his belligerent attitude.

The mother sought reimbursement of the expenses associated with D.M.’s attending Elan. Her claim was heard in succession by two hearing officers appointed by the state. The first hearing officer ordered the public school district to pay for D.M.’s attendance at Elan. But the second, reviewing officer, reversed the order of the first. The reviewing hearing officer was unable to find evidence that Elan provided a superior educational experience for D.M. than the therapeutic day school. Furthermore, Elan did not provide treatment for his conduct disorder or his depression and substance abuse; it merely provided confinement, thus solving the problem of his truancy. The hearing officer did not think that the statute required the school district to pay for confining a truant student.

Upon appeal, the District Judge reversed and ordered reimbursement. The school district had paid pursuant to the District Court's order, and D.M.’s mother incorrectly argued that the district’s payment makes the appeal moot. The Seventh Circuit noted, a judgment creditor who pays the judgment pending appeal instead of posting a
supersedeas bond, which would automatically stay collection, is entitled to the return of its money if the decision is reversed, and so the payment does not moot the appeal unless the appellant has relinquished his right to seek repayment if he wins. The school district had not relinquished the right to the return of its money.

The Seventh Circuit agreed with the reviewing officer’s decision that D.M.’s placement at the Elan school was not a FAPE. The Circuit Court noted that more deference should have been given to the reviewing officer by the District Judge. It was indisputable that D.M. had psychological problems that interfered with his obtaining an education, even though he does not have a learning disability. The Seventh Circuit noted that the statute refers explicitly to psychological services as one type of related service that the statute may require a school district to pay. Without them, the provision of an appropriate program might not be possible. In D.M.’s case, the Elan School did not provide psychological services; rather, it provided confinement. Further, D.M. was placed in Elan not from any school in the defendant school district, but from jail. Therefore, the Seventh Circuit viewed Elan as a jail substitute. The Seventh Circuit described D.M. As an incorrigible truant and lawbreaker, and went on to say that he does better in every respect when he is in a custodial setting than when he lives at home. The Seventh Circuit also found that the only difference between the therapeutic day school in which the school district placed D.M. And Elan, is that Elan is a boarding school specializing in juvenile delinquents.

The Seventh Circuit found it important to state that D.M.’s problems were not primarily educational. The Circuit Court noted that D.M. exhibited the intelligence to
perform well as a student and that he was not stricken with a cognitive disability that prevented him from applying his intelligence to the acquisition of an education, even without special assistance. The Circuit Court concluded that D.M.’s problem was a lack of proper socialization, resulting in a significant criminal record by one so young. The Court further noted that D.M.’s substance abuse interfered with his schooling and also his ability to conform to the law and thereby avoid jail. In conclusion, the Seventh Circuit reversed the lower court’s judgment in favor of plaintiffs because the defendant school district was not responsible for the cost of confinement.

**Nack v. Orange City School District.** In this matter, the plaintiff, D.N., appealed the District Court’s grant of summary judgment to the Orange City School District (school district). D.N. had sued Orange for denying him a FAPE due to concerns with his IEP. The District Court concluded that his IEPs did not deny D.N. A FAPE and granted summary judgment to the school district.

D.N. began attending Orange as a fifth-grade student. Prior to attending Orange, he had been diagnosed with a speech-language deficit and a learning disability, and was found eligible for special education services. Orange educated D.N. in accordance with the dictates of this fifth-grade IEP which had been developed at his previous school.

D.N. performed successfully both academically and behaviorally throughout his fifth grade year. However, beginning in October of his sixth grade year and continuing throughout the remainder of that school year, D.N. began experiencing disciplinary problems at school. D.N.’s IEP was amended to address the IEP team’s concerns with

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284 Nack v. Orange City Sch. Dist., No. 05-3256, U.S. App. LEXIS 18666 (6th Cir. 2006).
D.N.’s behavior. Among the amendments to the IEP, was for D.N. to attend a social skills group in the Middle School Positive Alternative Success Strategies (MPASS) classroom, a special education classroom. Subsequent to the IEP team meeting, D.N.’s mother repeatedly communicated her unhappiness with D.N.'s placement in the MPASS classroom.

Due to both absence and suspension from school, D.N. was attending school infrequently by the end of February. Even with a number of meetings between Mrs. Nack and school officials as well as changes to his IEP, D.N.’s attendance continued to be sporadic. In April of his sixth grade year, D.N. was hospitalized for almost a week after making suicidal threats at home that he attributed to his problems at school.

In May of his sixth grade year, D.N.’s IEP team met several times to develop an IEP for his seventh-grade year. The team developed an IEP that identified the MPASS classroom as the least restrictive environment (LRE) for D.N. And recommended he spend a portion of his day in that classroom. D.N.’s mother disagreed with his placement in the MPASS classroom for part of his school day and refused to consent to the IEP. The following month, Mrs. Nack filed a due process complaint against the school, and Orange filed its own due process complaint the same month, seeking to impose a more restrictive environment on D.N. The Impartial Hearing Officer (IHO) found the MPASS LRE provided D.N. with a FAPE, except that the IEP did not include weekly psychotherapy sessions for D.N. The IHO found that the omission of psychotherapy denied D.N. A FAPE. On appeal, the State Level Review Officer (SLRO) agreed with the IHO's conclusions, except that the SLRO found the IEP was sufficient without psychotherapy.
Thus, the SLRO found completely in Orange's favor. D.N. Appealed to the District Court, and the Court granted summary judgment to Orange, affirming the SLRO’s decision that the IEP provided D.N. with a FAPE.

Upon appeal to the Sixth Circuit, the Nack’s made three specific procedural challenges to his IEPs and also alleged that D.N.’s sixth and seventh-grade IEPs were not reasonably calculated to enable him to receive educational benefits. D.N. Argued that Orange procedurally violated his IDEA in the following ways: (1) it predetermined a particular program for D.N. without regard for his individual needs; (2) all of D.N.’s IEPs at Orange failed to procedurally comply with the IDEA; and (3) Mrs. Nack was given inadequate notice with regard to D.N.’s seventh-grade IEP.

The Sixth Circuit found Nack’s claim of predetermination to lack evidence that Orange had pre-decided David's fate prior to the IEP meeting. The Court noted that Mrs. Nack was given a number of opportunities to comment on the proposed IEP and her concerns were taken seriously by the school district. The Court concluded that the record lacked evidence to prove a procedural violation of the IDEA through predetermination.

In response to the Nack’s assertion that all of D.N.'s IEPs at Orange failed to procedurally comply with the IDEA, the Sixth Circuit noted that the primary shortcoming of the sixth-grade IEP was its failure to provide a baseline by which to measure D.N.’s future progress. Nonetheless, D.N.'s proficiency test results, which he scored at or above proficiency standard in all categories, along with other information gleaned from the record, showed D.N.'s progress. Thus, he received educational benefits from the sixth-grade IEP as implemented.
The Nacks also asserted that Orange's written notice to Mrs. Nack concerning D.N.’s seventh-grade IEP fell short of the notice required under the IDEA because it failed to adequately discuss the various placement options which were to be considered. Unconvinced, the Sixth Circuit determined that the notice provided by Orange clearly stated the other options considered by the IEP team and also stated why those options were rejected.

In determining whether D.N.’s IEPs were calculated so that he would receive educational benefit, the Sixth Circuit disagreed with the Nacks’ assertion that D.N.’s lack of progress during his sixth grade year was in direct correlation to Orange’s IEP. The Court noted, the IDEA does not guarantee success--it only requires a school to “provide sufficient specialized services so that the student benefits from his education.” The Court further noted, D.N.’s seventh-grade IEP incorporated the many of the recommendations made at the IEP team meeting.

In responses to Orange’s motion requesting attorney’s fees and costs related to the Nacks’ failure to include in the joint appendix portions of the record that Orange designated in its proof brief, the Sixth Circuit found that Orange complied with the rule regarding joint appendices, though, the Court found that Orange failed to respond to the Nacks’ initial inquiry on this subject. The Court granted in part and denied in part Orange’s motion for costs and attorneys’ fees. The Court denied the reimbursement request for the $135 in attorneys’ fees and found that the parties should jointly bear the expense for the costs of preparation of the supplemental appendix. The Court further

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limited Orange to the award of costs for appendix preparation to $367.13, or half of the costs incurred by Orange in producing the portions of its supplemental appendix not included in Nack's joint appendix.

Lauren W. v. Radnor Township School District.286 At the time of this case, L.W. was a twenty-year old student who resided within the Radnor Township School District (school district). She suffered from a variety of conditions which entitled her to a FAPE pursuant to the IDEA.

L.W. Attended private school until the fifth grade, but in 1996, when she was ten years old, she enrolled in the school district and attended Radnor Middle School through the seventh grade. Thereafter, however, L.W.'s parents, dissatisfied with the proposed IEP, unilaterally placed her at the Hill Top Preparatory School (Hill Top), a private school in Rosemont, Pennsylvania, for the 1999-2000 school year, which was her eighth grade year.

L.W.'s parents paid the Hill Top tuition for the 1999-2000 school year but requested a special education due process hearing in which they could seek reimbursement from the school district for that tuition. The parties, however, negotiated a settlement of that claim, and consequently the hearing was discontinued. Under the settlement, the school district agreed to pay the Hill Top tuition for the 1999-2000 school year and her parents' attorneys’ fees in lieu of its obligation to provide a FAPE for that year. On the other hand, L.W.'s parents waived all of their federal and state claims.

relating to L.W.’s placement through the 1999-2000 school year. In accordance with its agreement, the school district issued a check to appellants for $21,975 on November 15, 2000, to cover the 1999-2000 Hill Top tuition.

By the time the school district issued the tuition check, the 2000-2001 school year, L.W.’s ninth-grade year, had begun. L.W. remained at Hill Top that year, and her parents again paid her tuition and again sought reimbursement from the school district. In November 2000 the school board approved reimbursement for L.W.’s ninth grade at Hill Top. But, from December 2000 until February 2002 the parties could not reach a final agreement with respect to the terms for the school district to reimburse appellants for the tuition for the 2000-2001 school year. The obstacle standing in the way of a final agreement centered on L.W.’s parents’ unwillingness to agree to a waiver-of-rights clause for that year similar to the one in the 1999-2000 agreement. In particular, L.W.’s parents objected to waiving L.W.’s right to related services beyond the Hill Top curriculum, as they believed that L.W. needed these services to meet her educational needs. The school district, however, would not accept the agreement to fund the 2000-2001 Hill Top placement without the waiver clause. As the dispute continued, L.W. began the tenth grade at Hill Top with her parents paying the 2001-2002 tuition.

With resolution of the dispute over reimbursement for the 2000-2001 and 2001-2002 school years not yet resolved, on May 28, 2002, the school district proposed an IEP for the 2002-2003 school year which was L.W.’s eleventh grade year. This IEP proposed placing L.W. in a public school Bridge Program. L.W.’s parents, however, were
not satisfied with the proposed IEP and consequently sought a due process hearing to address their concerns.

Whereas the school district refused to fund the Hill Top placement pending due process review, on July 18, 2002, L.W.'s parents filed an action in the District Court petitioning for a judgment. The judgment stated that Hill Top was L.W.'s proper placement, and her parents sought injunctive relief requiring the school district to fund L.W.'s placement at Hill Top until they resolved the dispute over the 2002-2003 tuition. This action was successful and the District Court granted the relief the plaintiff sought. On September 16, 2003, in further proceedings the District Court required the school district to pay L.W.'s tuition at Hill Top, extending to the 2003-2004 school year pending final judicial review of the IEP. In compliance with the District Court's decisions, the school district paid the Hill Top tuition for the 2002-2003 and 2003-2004 school years.

The parties engaged in an administrative due process hearing extending over five separate sessions from July 22, 2002 until October 22, 2002, relating to the years after the 1999-2000 school year. This hearing culminated in a hearing officer determining that the 2000 settlement agreement barred litigation of claims that pre-dated the execution of the agreement. The hearing officer also determined that the school district was responsible for L.W.'s Hill Top tuition for the 2000-2001 and 2001-2002 school years which her parents had advanced to Hill Top. The hearing officer also found the proposed IEP for the 2002-2003 school year was appropriate but L.W. was not entitled to related services or compensatory education for the time she spent at Hill Top. Both parties appealed the
hearing officer's decision to the Pennsylvania Special Education Appeals Panel which, on January 22, 2003, affirmed the hearing officer's decision.

On March 11, 2003, L.W.’s parents initiated the civil action leading to the appeal in the District Court seeking review of the administrative decision (Count I); a declaratory judgment regarding L.W.’s pendent placement (Count II); damages for the district’s alleged retaliation against them in violation of the First Amendment (Count III); damages for retaliation in violation of section 504 of the Rehabilitation Act (Count IV); and claims pursuant to section 504 of the Rehabilitation Act and 42 U.S.C. section 1983 for the district's violation of the “child find” requirement (Count V).

The school district answered and filed the two counterclaims that were previously described. The school district based one counterclaim on an unjust enrichment theory in which it sought the return of a portion of the Hill Top tuition that it paid pursuant to one of the District Court's orders referred to earlier. The school district based its second counterclaim, constituting an appeal from the administrative decision awarding appellants reimbursement of the 2000-2001 and 2001-2002 Hill Top tuition, on the theory that the Hill Top placement was not appropriate. On October 19, 2004, the parties filed cross-motions for disposition of Count I of the complaint on the administrative record. The school district also sought summary judgment on appellants' remaining counts.

On June 3, 2005, the District Court upheld the administrative decision in all aspects. The court, however, deemed Count II of appellants' complaint seeking a declaratory judgment with respect to the expenses of L.W.'s pendent placement to be moot because the court already had granted appellants all the relief they could obtain on
that count and because L.W. no longer was a student at Hill Top. Further, the Court granted the school district's motion for summary judgment dismissing the retaliation claims in appellants' Counts III and IV brought under 42 U.S.C. section 1983, the First Amendment and section 504 of the Rehabilitation Act, respectively, and dismissing the child find duty claim raised in Count V. Finally, the Court requested that the school district's counsel advise it as to the status of the school district's counterclaims.

The parties subsequently filed cross-motions for summary judgment on the counterclaims, and the District Court on July 21, 2005 granted appellants' motion on them. On August 1, 2005, the Court entered judgment in favor of the school district on Counts I, III, IV, and V and dismissed Count II of the complaint and entered judgment for appellants on the school district's counterclaims. Thus, the District Court disposed of all aspects of the complaint and counterclaims. The parties appealed and cross-appealed to the Third Circuit from the Court's orders of June 3, 2005 and July 21, 2005, and from the judgment of August 1, 2005. The parties did not, however, challenge the order dismissing Count II of the complaint as moot.

The Third Circuit determined that the appellants had failed to produce sufficient evidence to establish that there was a genuine issue of material fact on their charge that the school district denied funding and related services for L.W. without the required waiver for a retaliatory reason. The Third Circuit further stated that the evidence was without basis to link the appellants' campaign to secure funding and related services and the school district's delay in satisfying or rejecting their requests. Thus, because the appellants had failed to make a showing sufficient to survive a motion for summary
judgment on the causation element of a retaliation claim, the District Court correctly granted summary judgment against them on that claim.

With regard to Count I, the Third Circuit noted that under the IDEA a student with a disability is entitled to a FAPE until age 21. However, an award of compensatory education allows a disabled student to continue beyond age twenty-one in order to make up for the earlier deprivation of a FAPE. The Circuit Court further noted, under the IDEA a student is receiving an inappropriate education if the program is not providing significant learning and conferring a meaningful benefit.

In determining whether L.W. received an appropriate education at Hill Top during the 2000-2001 and 2001-2002 school years, the Circuit Court noted that the hearing officer determined that Hill Top provided L.W. with appropriate social and psychological services and that she continued making gains in those areas. In fact, a teacher at Hill Top testified that L.W. received constant feedback and monitoring with respect to her social-skill needs, and L.W. Attended group counseling twice a week with a psychologist or a social worker. In addition, Hill Top had a clinical psychologist on staff and every student had a counselor or clinician available whenever extra support was needed. Thus, L.W. progressed under these conditions, specifically with respect to her social skills.

Additionally, the district’s school psychologist produced a Comprehensive Evaluation Report on July 24, 2000, indicating that L.W.’s social and emotional well-being improved dramatically while she was at Hill Top. Similarly, the proposed IEP for the 2002-2003 school year indicated that since entering Hill Top L.W.’s experience had been extremely positive with improved grades, self-esteem and friendships,
according to her teachers. The Third Circuit also noted that L.W.'s parents solicited a private psychologist whose report indicated that she was doing very well at Hill Top. Based on the aforementioned information, the hearing officer concluded that L.W. was a successful student making progress each year and demonstrating good relationships with her peers. In fact, L.W.'s parents, in their deposition testimony, corroborated the previous assessments of her progress.

The Third Circuit noted that while the District Court concluded that L.W.'s work habits and behavior were inconsistent, the record required that a court nevertheless conclude that Hill Top provided significant learning and conferred a meaningful benefit on L.W. With the aforementioned information in mind, the Third Circuit determined that compensatory education for the related services allegedly not provided at Hill Top was not warranted and that the appellants had failed to offer evidence that demonstrated that the District Court committed clear error.

The Third Circuit moved on to the next matter in this case in which the appellants argued that even if L.W. was not entitled to compensatory education under the IDEA, she was entitled to that relief under section 504 of the Rehabilitation Act. The Third Circuit found the Hill Top curriculum, without additional related services, provided L.W. with a FAPE and thus satisfied the school district's obligations. Due to the facts in this case, compliance with federal law did not require that the school district offer related services to L.W.

Under the next issue of contention, the appellants argued that they were entitled to reimbursement for the cost of an independent educational evaluation they obtained even
after they expressed their agreement with the school district's evaluation. The Third Circuit noted while L.W.'s parents both checked “yes” and signed the school district's evaluation, their agreement did not preclude them from obtaining their own evaluation. But, in obtaining their own evaluation, L.W.'s parents could not make a claim on the school district to pay for it.

In Count V of their complaint, appellants sought compensatory damages for violations of the IDEA's child find duty which required the school district to have a system in place to identify, locate, and evaluate all children with disabilities residing in their district. Appellants alleged that in 1992 L.W.'s mother spoke to school district elementary school officials about her daughter's educational needs, and she was told that the school district could not accommodate L.W. And that she should find a private school for her at her parents' expense. The District Court held that the settlement agreement barred the claim as it waived appellants' federal and state actions and released the school district from any liability relating to L.W.'s education and placement through the 1999-2000 school year.

In the matter before the Third Circuit, the appellants argued that the District Court erred because the school district rescinded the settlement agreement by breaching its obligation under the agreement to pay attorneys’ fees to appellants' prior counsel. Thus, they contended that the waiver of rights provision in the agreement was not binding. The Third Circuit found that there was no genuine issue of material fact with respect to the school district's alleged breach and repeal of the contract. The Third Circuit concluded that the appellants had failed to provide any evidence indicating that the prior attorney
was not paid. The Third Circuit further proposed that if the school district did not pay the
attorney the problem is the attorney’s, not appellants’, insofar as the appellants do not
contend that the attorney is seeking payment for his services from them even though a
substantial time has elapsed since services were performed. Thus, the alleged breach was
not damaging to them.

On cross-appeal, the school district argued that the District Court erred in
affirming the administrative decision holding that L.W.’s parents were entitled to tuition
reimbursement for the 2000-2001 and 2001-2002 school years. The school district argued
that Hill Top was not appropriate because it did not offer the resources or training
adequate to provide L.W. with significant learning or a meaningful benefit, and thus the
school district should not have to reimburse L.W.’s parents for the requested tuition.

On these matters, the Third Circuit deferred to the factual findings of the hearing
officer and the District Court that the Hill Top placement was appropriate. As was cited
earlier, both the hearing officer and District Court concluded that the services provided to
L.W. At Hill Top were appropriate and that she continued to make progress in reaching
her academic, social, and behavioral goals. The Third Circuit noted, the school district
had not provided evidence that superseded these factual findings. Accordingly, the Third
Circuit affirmed the District Court’s decision that the school district was responsible for

Regarding the matter of unjust enrichment, the hearing officer and the District
Court both concluded that the school district's proposed IEP for the 2002-2003 school
year and placement in the public school's Bridge Program was appropriate. However, the
school district already had paid for the 2002-2003 Hill Top tuition pursuant to a prior District Court order requiring it to fund the tuition during the pendency of the dispute as Hill Top was L.W.’s “pendent” placement. The school district believed that due to the hearing officer and District Court’s rulings, it was entitled to a partial reimbursement for the 2002-2003 tuition under the theory of unjust enrichment. The school district contended that L.W.’s parents should reimburse it for the portion of the 2002-2003 tuition after December 20, 2002, the deadline the hearing officer imposed at which time L.W. was to return to the public school district where the program was deemed appropriate. The school district’s argument was rejected by the District Court and the Third Circuit agreed with the District Court’s decision on this matter.

Citing the preceding reasons, the Third Circuit affirmed the orders entered on June 3, 2005, and July 21, 2005, and the judgment entered on August 1, 2005. The Third Circuit also ruled that the parties will endure their own costs on this appeal.

Ashland School District v. Parents of Student E.H. 287 E.H., a student in the Ashland School District (school district) at the time of this case, first began suffering from emotional problems in 1998, while in the third grade. At the same time, E.H. began exhibiting difficulty with peer integration, was teased by other children, and developed migraine headaches. By 2000, E.H.’s fifth-grade year, the migraines became so severe that E.H.’s parents hospitalized her. E.H.’s treating physician determined that the child was suffering from anxiety and depression, and that the migraines had a medical origin but were triggered by psychological factors.

At this time, the school district identified E.H. As eligible for special education services and developed an IEP. After the school district implemented this IEP, E.H. repeated the fifth grade, with improved results. Throughout sixth grade and the first two trimesters of seventh grade, E.H. maintained strong academic performance, and even participated in a program at Southern Oregon University for talented and gifted children. During the latter part of seventh grade, however, E.H. became depressed, began to talk about suicide, and suffered from frequent migraines that ultimately required hospitalization in the spring of 2003.

During eighth grade, the 2003-2004 school year, E.H. Attended one class a day at Ashland Middle School, and spent the remainder of the school day at Willow Wind, a district-operated alternative education program. In September of that school year, the school district provided E.H.’s parents with a twenty-three page pamphlet that outlined their rights and responsibilities under the IDEA. Among other things, this pamphlet notified them that a court or hearing officer might refuse to reimburse them for private school costs if they failed to notify ASD of their objections to the IEP prior to private school enrollment. In late April 2004, near the end of E.H.'s eighth grade year, the school district held an IEP team meeting to consider strategies to smooth E.H.’s transition to high school the following school year. Over the summer, E.H. was hospitalized on two occasions for suicide attempts. By this time, E.H.’s treating physicians and therapists were recommending residential treatment, rather than an ordinary public school, to address E.H’s persistent emotional and medical problems.
In September 2004, shortly after E.H.’s second discharge from the hospital, the school district reconvened the IEP team to draft a new IEP. At the meeting, E.H.’s parents communicated their desire to enroll their child in Willow Wind, as they had done the previous school year, but the program declined because it was unable to monitor the child closely enough to prevent another suicide attempt. Thus, the school district's personnel wrote a modified IEP for the next school year, to which the parents did not object. Although the parents enrolled E.H. full time at Ashland High School in the fall of 2004, they indicated to the school district that they were actively searching for a residential facility in which to place their child.

By late November 2004, E.H.’s emotional problems resurfaced. The parents and school district agreed that homebound instruction was appropriate, and the school district provided a tutor. The school district did not draft a new IEP as it believed that the home placement was only temporary pending the child's transfer to a private residential facility. In December 2004, E.H. was once again hospitalized for suicidal tendencies and threatening to injure family members. E.H. briefly returned to Ashland High School for a total of twelve days between December 14, 2004, and January 24, 2005. On January 24, E.H.’s parents transferred the child from Ashland High School to Youth Care, a private out-of-state residential treatment program. Prior to this transfer, the parents never indicated any dissatisfaction with the education the school district provided the child, and the school district never volunteered that, under some circumstances, it was obligated to pay for residential educational facilities.
Youth Care operates several private residential educational facilities that provide both medical and educational support to enrolled students. E.H. initially attended its principal residential treatment program, located near Salt Lake City, Utah. Youth Care's treatment plan listed E.H.'s significant mental health challenges as chronic depression, repeated suicide attempts, and a homicidal fixation on E.H.'s father and sister. Youth Care provided psychological care, intensive counseling, and educational support sessions. In July 2005, E.H.’s parents and Youth Care agreed to transfer the child to Youth Care's Pine Ridge facility, which offered less intensive psychological treatment.

On September 8, 2005, after E.H. had been enrolled in Youth Care for approximately seven months, E.H.’s parents mailed the school district a formal letter indicating that they were unhappy with the educational services it had provided and requesting reimbursement for the cost of the residential placement. After receiving this letter, the school district convened a meeting to draft a new proposed IEP. E.H.’s parents rejected that IEP in late January 2006, and requested a due process hearing before a state hearing officer to determine whether the school district had provided E.H. with a FAPE and whether they were entitled to reimbursement for the costs of residential treatment.

The hearing officer concluded that the IEPs the school district offered in September 2004 and December 2005 did not provide E.H. with a FAPE. The hearing officer further concluded that Youth Care did provide a FAPE and was therefore an appropriate placement. The hearing officer found that the parents had removed E.H. from Ashland High School without notifying the school district of their concerns with the education it was providing. Under Oregon Administrative Rule 581-015-0156(4) (2004)
3, which required the parents to notify the school district of their concerns either at an IEP meeting or ten days prior to withdrawing E.H., the hearing officer was justified in denying or redacting reimbursement.

For the period prior to September 18, ten days after the parents gave the school district notice of their objections to the IEP, the hearing officer ordered the school district to reimburse E.H.’s parents for half of the cost of this residential program. The hearing officer also granted E.H.’s parents full reimbursement for all residential care expenses for the period after September 18, 2005. Although the parents did not satisfy the notice requirement, he concluded that the foregoing considerations compelled requiring the school district to reimburse the parents. Moreover, because the school district had the statutorily required ten days notice with respect to this time period, the hearing officer determined that it was proper to award the parents full reimbursement. The school district appealed the hearing officer's decision to the U.S. District Court for the District of Oregon.

The District Court reversed the hearing officer's award of reimbursement. Upon conducting an independent review of the record, the District Court determined that the parents were not entitled to reimbursement for the expenses associated with the residential placement either before or after they provided the school district with notice. The District Court's determination rested on several factors, such as the high cost of residential facilities; the parents' clear failure to adhere to the statutorily required notice requirement; the medical, rather than educational, nature of E.H.’s placement; the parents' failure to give the school district notice that they were rejecting the IEP; the school
district’s cooperation and willingness to revise E.H.’s IEP whenever the parents wished to change E.H.’s placement; and the parents’ apparent unwillingness to consider returning E.H. to a school within the district. The District Court also rejected the parents' request for interim relief, or reimbursement for E.H.’s residential care during the allegedly delayed administrative proceedings, concluding that the hearing officer's decision was not unreasonably delayed. E.H.’s parents timely appealed the District Court’s decision.

Upon appeal to the Ninth Circuit, E.H.’s parents first contended that the District Court applied the wrong standard of review to the hearing officer's decision. The parents argued that the District Court reviewed the hearing officer's decision to grant reimbursement for abuse of discretion. The Ninth Circuit noted that this claim relied on a misreading of the relevant statutory language and their precedent.

The Ninth Circuit noted that contrary to the parents' assertion, a District Court reviews a state hearing officer's award of reimbursement de novo. In other words, the court must give deference to the state hearing officer's findings, particularly when they are thorough and careful, and avoid substituting its own notions of sound educational policy for those of the school authorities which it reviews. In the end, however, the Court is free to determine independently how much weight to give the state hearing officer's determinations.

The parents also argued that the District Court's relatively brief opinion did not satisfy the standard of review. The Ninth Circuit stated, although they would have preferred that the District Court's opinion be more detailed, it adequately responded to the hearing officer's conclusions before reaching a contrary result.
Under the parents’ appeal, they argue that the Ninth Circuit must give deference to the hearing officer's conclusions. The Ninth Circuit disagreed with this assertion, for like the District Court, they may not substitute their own notions of sound educational policy for those of the school authorities which were under review. Instead, they focused their review on the District Court's decision.

The Ninth Circuit noted, in a case such as this one, where the parents sought reimbursement for private school expenses, they are entitled to reimbursement only if a federal court concludes both that the public placement violated IDEA and that the private school placement was proper under the Act. Thus, because the District Court had equitable discretion to craft appropriate relief in this case, the Ninth Circuit reviewed its decision to deny reimbursement for abuse of that discretion.

E.H.’s parents contended that the District Court's conclusion that they are not entitled to reimbursement was predicated on several errors. But, the Ninth Circuit ruled that given the evidence before the District Court, its consideration of each of the factors was proper. Therefore, the Circuit Court ruled that because each of the District Court's conclusions was amply supported by the record, they could not say that the District Court abused its discretion by denying the parents' claim for reimbursement.

Thus, because the Ninth Circuit concluded that the District Court did not abuse its discretion by denying E.H.’s parents' request for reimbursement, they must reach their alternative claim for reimbursement under the IDEA's stay-put provision. Once a state hearing officer concludes that a residential placement is necessary to provide a child with a FAPE, the child's school district must pay for the cost of that placement for the
pendency of any subsequent appeal. E.H.’s parents contended that because the hearing officer's decision was unreasonably delayed, their entitlement to relief under the stay put provision was improperly reduced. Thus, they claim that the District Court abused its discretion denying their request for interim relief reimbursement for E.H.’s residential treatment for the time period after the hearing officer should have issued his opinion but before he actually did. The Ninth Circuit disagreed with the parents’ argument.

In this case, the District Court found that the hearing officer's delay was not unreasonable. The Ninth Circuit stated this determination was based on the numerous motions and briefs the parties filed, as well as the voluminous record. There were many motions before the hearing officer, and the District Court reasonably concluded that he decided each motion in a timely fashion. Thus, the District Court did not abuse its discretion by denying E.H.’s parents' motion for interim relief. Thus, the Ninth Circuit affirmed the District Court’s decision.

**School Health Services**

**Amber Tokarcik v. Forest Hills School District.** At the time of this appeal, plaintiff-appellee, A.T., was a fourth-grade student in the Forest Hills School District (school district). She was born with spina-bifida, a congenital physical defect, and was paralyzed from the waist down. Because A.T.’s condition prevented her from emptying her bladder voluntarily, intermittent catheterization was necessary approximately every four hours. In 1976, when A.T. entered kindergarten in the regular public school program, her parents requested the school personnel to perform the necessary

catheterization once a day. The school district refused to provide the service. Consequently, some member of A.T.'s family had gone to the school each day to catheterize her. A.T. had no mental deficiencies and her educational performance was normal for a child her age.

Prior to the 1977-1978 school year, A.T.'s parents and the school staff attempted to agree upon an appropriate IEP for Amber. Consensus appeared to have been reached concerning special transportation to and from school, and an adaptive physical education program. But the continuing impasse over the provision of the clean intermittent catheterization (CIC) services led A.T.'s parents to request a due process hearing. At the hearing, the school district contended that Pennsylvania law does not require school nurses to catheterize students. Thus, unless a member of A.T.'s family came to the school to perform the CIC, the district would have to provide A.T. with a special educational placement, which would have been most likely at her home with a tutor. In contrast, A.T.'s parents presented the testimony of Dr. Lynch, Director of the Bureau of Children's Services in the Pennsylvania Department of Health, who maintained that catheterization is no longer considered a surgical procedure and that the general duties of school nurses would include CIC. The local hearing examiner declared that the school district was not legally required to perform the catheterization services. On appeal, the Secretary of Education, upheld the findings and opinion of the local examiner in a decision dated December 22, 1978.

Having exhausted their administrative remedies, A.T. And her parents brought suit in the District Court against the school district, its secretary and superintendent, and
the Pennsylvania Department of Education and its Secretary (hereinafter collectively appellants), alleging violations of 42 U.S.C. section 1983, section 504 of the Rehabilitation Act of 1973, 29 U.S.C. section 794, and the EAHCA, 20 U.S.C. section 1401 et seq. They requested provision of catheterization for A.T. And compensatory and punitive damages. In a memorandum opinion and order of May 19, 1980, the District Judge dismissed the section 1983 and Rehabilitation Act claims against the Department of Education as well as the section 1983 damages claim against the Pennsylvania Department of Education Secretary. No appeal was taken from that order, and the parties proceeded with cross motions for summary judgment on the EAHCA claims.

The Third Circuit noted that the trial judge relied exclusively on the administrative record and an additional set of stipulations, and granted the plaintiffs’ motion for summary judgment. The Court directed the school authorities to provide CIC services for A.T. As long as she remained a student in the Forest Hills district and was in need of such services. The Third Circuit further noted that in coming to this conclusion, the District Court first held that the court action contemplated by the EAHCA was clearly in the nature of a de novo proceeding and not an appeal from an agency decision. Although the complaint had not been filed within the thirty-day statutory limit for appeals from administrative determinations, the District Court considered that the suit was nevertheless timely under either the two-year or six-year limitations statutes which governed virtually all actions in Pennsylvania.

Crediting the Tokarcik’s expert Dr. Lynch, who testified that school nurses were qualified to perform catheterization, the court concluded that the provision of CIC would
require only a few minutes a day and at most a minimal expenditure of funds. Further, the alternatives to providing CIC, either placement in a special class for the handicapped or at-home instruction, were much more expensive and would violate the mainstreaming principles embodied in the EAHCA. The Court thus held that CIC fell within the meaning of a related service under the Act, specifically either a supportive service, or a school health service. The trial judge reserved the question of damages and attorneys’ fees for a later date, and directed further briefing on those aspects of the case by the parties. The Third Circuit affirmed the District Court’s decision on this matter.

The following is a summary within the Third Circuit opinion’s on this case. The absence of clear legislative guidelines similarly accounted for the question whether CIC was a related service. The statutory language and general principles informing the Act did offer partial guidance as to whether Congress intended CIC to fall within the realm of related services.

Under the EAHCA, a child is entitled to a FAPE which is comprised of special education and related services designed to meet the handicapped person's unique needs. The Third Circuit noted that the special education component, which dealt with the proper environment in which to educate a child, was not the issue in this case. Few, if any, would dispute that A.T. would benefit most from placement in the regular classroom. Instead, the dispute in this case centered on related services, the nature and quality of the services that the school must deliver to A.T. so that she could be educated in her least restrictive environment.
On the one hand, A.T.’s parents contended that she was entitled to the CIC service because without it she could not remain and participate in the regular public school program. On the other hand, school authorities argued that the CIC was not a related service, first because it was not connected with a special education program, and second, because it was a medical, not an educational, service. Further, the appellants insisted that under Pennsylvania law, school nurses were not required to perform catheterization.

The Third Circuit determined that because special education specifically considers instruction in a regular classroom, related services necessarily include what is required within reason to make such a setting possible for a child who can benefit from it. Further, the Third Circuit noted that since an appropriate education for a physically handicapped child with a normal intellectual capacity aims at promoting achievement roughly equivalent to that of her nondisabled peers, special education for A.T. should entail classroom instruction, for the nature of her handicap was not so severe as to preclude the possibility of education in a regular environment. Therefore, such a placement would demand, in terms of related services, only that the school make the classroom physically accessible to A.T. And reasonably provide for health needs that might otherwise interfere with classroom performance. By providing A.T. with transportation to and from school, she had physical access to her classroom thus, as long as she received CIC for her health needs, her classroom performance would not be obstructed.
Moreover, the regulations themselves place realistic limitations on the nature of the school health services to be provided under the EAHCA. In prescribing that a school nurse be capable of rendering the services, the drastic medical services that only a doctor can perform--and which the school authorities fear they will be asked to furnish in the future--are by definition excluded.

The Third Circuit then referred to a notice issued by the Department of Education which reinforced this interpretation of CIC as a related service. The Circuit Court then went on to note that the notice explicitly stated that Part B of the EAHCA, and section 504 of the Rehabilitation Act of 1973, mandated public educational agencies to provide CIC as a related service, when it is required to provide a free appropriate public education, including services in the least restrictive environment.

The Third Circuit then stated its opinion in which providing A.T. with CIC conforms to the goal of self-sufficiency on which Congress premised passage of the Act. The Circuit Court then cited legislative history by stating, with proper education services, many handicapped individuals would be able to become productive citizens, contributing to society instead of being forced to remain burdens. Therefore, the Third Circuit Court of Appeals affirmed the order of the District Court requiring the provision of CIC as a related service.

*Irving Independent School District v. Tatro.*\(^{289}\) The parents of an eight-year-old girl suffering from spina bifida and requiring catheterizing every three or four hours by a procedure known as clean intermittent catheterization (CIC) brought suit against state

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school officials in the United States District Court for the Northern District of Texas for an injunction requiring the school district to provide her with CIC, and for damages and attorneys’ fees. As a result of spina bifida, the child suffered from orthopedic and speech impairments and had a problem with her bladder which prevented her from emptying her bladder voluntarily. Consequently, she must be catheterized every three or four hours to avoid injury to her kidneys. To accomplish this, a procedure known as CIC was prescribed. The CIC procedure is described as one which can be performed in a few minutes by a novice with less than an hour's training.

Since the school district received federal funding under the Education for All Handicapped Children Act, the district was required to provide the child with FAPE, which by the merits of the Act also included the provision of related services. In turn, related services consist of supportive services, including medical services, except that medical services are for diagnostic and evaluation purposes only, as may be required to assist a handicapped child to benefit from special education.

Pursuant to the Act, the school district developed an IEP for the child, but the program made no provision for school personnel to administer CIC. In October 1979, after unsuccessfully pursuing administrative remedies to secure CIC services for the child during school hours, the child’s parents brought an action against the school district and others in Federal District Court, seeking injunctive relief, damages, and attorneys’ fees. The child’s parents invoked the Education For All Handicapped Children Act, arguing that CIC is one of the included related services under the statutory definition, and also invoked section 504 of the Rehabilitation Act of 1973, which forbids a person, by reason
of a handicap, to be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program receiving federal aid. In denying the parents’ request for a preliminary injunction, the District Court concluded that CIC was not a related service under the Education for All Handicapped Children Act because it did not serve a need arising from the effort to educate. It also held that section 504 of the Rehabilitation Act did not require the setting up of governmental health care for people seeking to participate in federally funded programs. The United States Court of Appeals for the Fifth Circuit reversed on the ground that CIC is a related service under the Education for All Handicapped Children Act because without the procedure A.T. could not attend classes and benefit from special education. Further, the refusal to provide CIC excluded the girl from a federally funded educational program in violation of section 504 of the Rehabilitation Act.

On remand, the District Court held that under Texas law a nurse or other qualified person may administer CIC without engaging in the unauthorized practice of medicine, provided that a doctor prescribed and supervised the procedure. *The District Court then held that, because a doctor was not needed to administer CIC, provision of the procedure was not a medical service for purposes of the Education for All Handicapped Children Act.* The District Court ordered the school district and the state board of education to modify the girl's IEP to include provision of CIC during school hours. The District Court also awarded compensatory damages against the school district, and awarded attorneys’ fees against the school district and the state board of education under the Education for All Handicapped Children Act. The United States Court of Appeals for the Fifth Circuit
affirmed the District Court’s decision, accepting the District Court's conclusion that state law permitted qualified persons to administer CIC without the physical presence of a doctor. The Fifth Circuit also affirmed the award of relief under the Education for All Handicapped Children Act and affirmed the award of attorneys’ fees based on a finding of liability under the Rehabilitation Act.

On certiorari, the United States Supreme Court affirmed with respect to the Education for All Handicapped Children Act, but reversed as to the attorneys’ fee award under the Rehabilitation Act. The Supreme Court held that the school district was required to provide CIC services to the child under the Education for All Handicapped Children Act, because CIC is a supportive service required to assist a handicapped child to benefit from special education within the meaning of the Act. Further, the Supreme Court held that CIC is not a medical service which a school is required to perform under the Act only for purposes of diagnosis or evaluation. The Supreme Court also held that attorneys’ fees were not recoverable under the Rehabilitation Act because that statute was not applicable since relief was available under the Education for All Handicapped Children Act to remedy a denial of educational services.

_Tanya v. Cincinnati Board of Education._\(^{290}\) Student T. (plaintiff-appellee) was an eight-year-old girl described by the trial court as “bright, curious and highly motivated.”\(^{291}\) She was born with spina bifida and as a result required the assistance of a tracheostomy tube to breathe. Her tracheostomy tube required suctioning every twenty to

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forty minutes. Initially, Student T. also had a gastrostomy tube through which she was fed and was on a ventilator.

Student T. was identified as “orthopedically or other health impaired” and was entitled to educational services from the Cincinnati Public Schools in accordance with her IEP. Pursuant to her IEP, Student T. received one hour of home instruction per day during her kindergarten and first grade school years. She did not receive physical therapy or speech therapy during that time.

Student T.’s mother requested school placement for her. The Cincinnati Board of Education (CBE) refused school placement, stating that Student T. needed the services of a full-time attendant who was at least a licensed practical nurse (LPN). The CBE viewed the services of a full-time nurse as “medical services,” which the CBE was not required to provide.

A due process hearing was held challenging the IEP. The impartial hearing officer found that substantial due process had occurred and that the CBE had acted in good faith in developing Student T.’s IEP. The hearing officer further found that Student T.’s IEP should be modified to provide for placement of her at a school where the CBE educated a number of children with disabilities. The hearing officer’s decision did not mandate an LPN but did suggest that she be provided with an attendant as a related service, so that Student T. could access her education. The CBE appealed the hearing officer’s decision to the State Superintendent for Public Instruction. The state level review officer (SLRO) issued a decision in line with the hearing officer’s decision in respect to the provision of a
nurse correlating to a “medical service.” Student T.’s mother appealed the SLRO’s decision to the Hamilton County Court of Common Pleas.

At the time of the hearing before the trial court, Student T. no longer needed the gastrostomy tube or the ventilator at school. Only her tracheostomy needs prevented Student T. from obtaining in-school instruction. After hearing additional evidence, the common pleas court held that the failure of the CBE to place Student T. in a school environment with health-care services violated both the IDEA and the Rehabilitation Act. The trial court reversed the SLRO’s decision and reinstated the hearing officer’s decision which placed Student T. in a classroom with appropriate related services provided by the CBE. The CBE appealed to the Court of Appeals of Ohio. Student T. cross-appealed due to the trial court's decision which did not include an award of compensatory education.

Upon reviewing the record, the Court held that the trial court's determination in which Student T.’s IEP, which provided her with one hour of home instruction per day, was inadequate to enable Student T. to receive educational benefits. The Court found that the request for compensatory education was not articulated at trial and that no specific evidence was presented to the Court on this issue. The Court concluded that since the record did not reveal what the claim for compensatory education specifically entailed, it could not say the trial court erred in failing to award compensatory education. The Court upheld the decision of the trial court in awarding $34,520 to cover the cost of a full time aide and ambulance service for the school year in question.
Morton Community Unit School District No. 709 v. J.M. At the time of this case, J.M. was a fourteen-year-old who suffered from severe congenital defects. As a result of his disability, J.M. breathed through a tracheostomy tube, which enabled him to breathe through an opening cut into his windpipe, rather than through his nose or mouth. In addition to the tracheostomy tube, J.M. also required the intermittent aid of a portable ventilator system. The system required continuous monitoring, as well as frequent adjustments and suctioning to maintain a smooth flow of oxygen, clear out plugs of mucous, and keep J.M.’s lungs free from fluid buildups. Because he could not close his eyes, J.M. required the application of an ointment to his eyes every hour to prevent corneal abrasions. His mobility was limited. While normally wheelchair-bound, J.M. could walk some with aid of a walker. His growth had been stunted, and he had learning disabilities, as well as difficulty speaking because of the tube in his neck. In order for J.M. to be able to function in school, he required the accompaniment of either one of his parents, both of whom have been trained to attend to his needs, or by a nurse. The attendant was required to devote her full attention to J.M. And could not assume any other duties. His lungs required checking via a stethoscope every couple of hours and suctioning every hour and a half or so, and the oxygen tank required changing about as often; the rest of the time he must be watched to make sure that the ventilator did not become disconnected.

The issue in this case is J.M.’s parents wanted the school district to pay for a nurse to attend to J.M. while he is in school under the special education program that had

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been designed for him. J.M.’s special education program consisted of his attendance at
school for four hours per day, four days a week, when school was in session. The cost of
a nurse to the district would be about $20,000 a year. J.M. benefits educationally and
psychologically from school, but he cannot attend unless he has an attendant at all times.
Two successive hearing officers held that the nursing care that J.M. required to attend
school was a related service within the meaning of the Act and not an excluded medical
service. The District Court agreed, triggering the appeal to the Seventh Circuit by the
school district.

J.M.’s parents argued that medical services are services rendered by a licensed
physician; any other service that is necessary to enable a disabled child to benefit from
an education is a nonexcluded related service that must be provided free of charge no
matter what the character or expense of the service.

On the other hand, the school district argued that the only health-related services
that are not medical services within the meaning of the Act are services traditionally
provided by the school nurse. The Seventh Circuit noted that the only reason the school
district would not permit the current school nurse to provide the necessary services to
J.M. was that it would take sixteen hours of her work week, leaving her with insufficient
time to perform the other duties of her job. The Seventh Circuit further noted that in
effect, the school district was arguing for a rule that would make the child's entitlement to
in-school health-maintenance services dependent upon the amount of spare time a
particular school’s nurse had in relation to the amount of time required by the school's
disabled students.
The Seventh Circuit hypothesized that what the school district was probing for was a defense of undue burden because the IDEA does not contain an explicit defense of undue burden, as the Americans with Disabilities Act does. But, the Seventh Circuit noted that it can be argued that one is implicit in the statutory concepts of an “appropriate” education and “related” services. The Circuit Court surprisingly went on to state, perhaps at some point the expense of keeping a disabled child alive during the school day is so disproportionate to any plausible educational objective for the child that the expense should not be considered a component of an appropriate education for a severely disabled child or a service reasonably related to such an education. The Seventh Circuit found that the school district had not made an effort to show that the expense of a full-time nurse for J.M. would be undue in relation to the other calls on the district's budget. The Circuit Court noted that the district had more than 3,000 students, so that the annual cost of such a nurse would be less than $7 per student. Nor did the school district attempt a breakdown of the actual cost of the nursing care that J.M. needed between the federal government, which funds IDEA in part, the state of Illinois, which also funds it in part, and the school district itself, which is the only entity complaining about the burden. The Court further found there was evidence that less than 20% of special education expenditures by the school district were funded locally. Using the aforementioned information, the Court determined the financial burden on the district of the class of expenditures represented by the expense of hiring a nurse to attend J.M. would be slight.

In its decision regarding this case, the Court deferred to the view of the hearing officers as to what services a disabled child is entitled to under the IDEA. The services
that J.M. required were time-consuming but did not require a high degree of expertise or any expenses of medical treatment since the cost of the tracheostomy supplies, ventilator system, ointment, wheelchair, walker, and other equipment and drugs that J.M. required were not expenses for which the parents were seeking reimbursement from the school district. The Court further noted that there will come a time when the efforts required to maintain a medically fragile, technology-dependent child in school may cross the blurry line that separates ancillary educational services from purely medical interventions, but, in this case, it was not unreasonable for the hearing officers to conclude that the services that J.M. requires do not cross the line. Thus, the Seventh Circuit affirmed the earlier decisions on this matter.

_Cedar Rapids Community School District v. Garret F._293 At the time of this case, G.F. was a student in the Cedar Rapids Community School District (school district). He was wheelchair-bound and ventilator dependent as a result of a motorcycle accident in which his spinal column was severed when he was four years old. Though paralyzed from the neck down, his mental capacities were unaffected. He was able to speak, to control his motorized wheelchair through use of a puff and suck straw, and to operate a computer with a device that responds to head movements. G.F. attended regular classes in a typical school program, and his academic performance was satisfactory. As a result of G.F.’s ventilator dependency to breath, he required a responsible individual nearby to attend to certain physical needs while he was in school.

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During G.F.’s early years at school his family provided for his physical care during the school day. When he was in kindergarten, his eighteen-year-old aunt attended him; in the next four years, his family used settlement proceeds they received after the accident along with their insurance, and other resources to employ a licensed practical nurse. In 1993, G.F.’s mother requested the school district to accept financial responsibility for the health care services that G.F. required during the school day. The school district denied the request, believing that it was not legally obligated to provide continuous one-on-one nursing services.

Due to the school district’s refusal to provide the requested nursing services, G.F.’s mother asked for a hearing before the Iowa Department of Education. An Administrative Law Judge (ALJ) conducting the hearing concluded that the IDEA required the District to bear financial responsibility for all of the disputed services, finding that most of them were already provided for some other students; that the school district did not contend that only a licensed physician could provide the services; and that applicable federal regulations require the school district to provide school health services, which are provided by a qualified school nurse or other qualified person, but not medical services, which are limited to services provided by a physician. The Federal District Court agreed and the Court of Appeals affirmed, concluding that *Irving Independent School District v. Tatro*,294 provided a two-step analysis of related services which was satisfied in this case. First, the requested services were supportive services because G.F. could not attend school unless they are provided; and second, the services were not

excluded as medical services under Tatro's test. Services provided by a physician (other than for diagnostic and evaluation purposes) are subject to the medical services exclusion, but services that can be provided by a nurse or qualified layperson are not.

The United States Supreme Court agreed with the lower court’s decision. The High Court held that the IDEA required the school district to provide G.F. with the nursing services he required during school hours. The Court noted, the IDEA’s related services definition, Tatro, and previous decisions support the Court of Appeals decision. The related services definition broadly encompasses those supportive services that may be required to assist a child with a disability to benefit from special education, and the school district did not challenge the Court of Appeals' conclusion that the services at issue are supportive services. Furthermore, the Court noted that the definition of related services contains examples of services that are included within the statute's coverage, including medical services if they are for diagnostic and evaluation purposes. The Court noted that although the IDEA itself does not define medical services more specifically, the Court in Tatro concluded that the Secretary of Education had reasonably determined that medical services referred to services that must be performed by a physician, and not to school health services. The Court then found the test proposed by the school district was not supported in the statute's text nor the regulations upheld in Tatro. Since the Court was not persuaded by evidence or argument to move away from the Tatro decision, the Court affirmed the lower court’s decisions.
City of Warwick v. Rhode Island Department of Education.  
The appeal to the Superior Court of Rhode Island centered on an order upholding the Commissioner of Education's decision to order the State of Rhode Island to deduct $54,745.28 from the City of Warwick's (school district) operations aid for the month of September 1993. T.G. was a special education student in the City of Warwick who had profound disabilities. T.G. was deceased at the time of this case.

T.G. was placed at the Tavares Pediatric Center (Tavares). T.G.'s mother, Terry Gaspar, was dissatisfied with T.G.'s IEP because Tavares would not allow T.G. to attend classes if she was off the ventilator. Unhappy with the IEP, Ms. Gaspar filed a complaint requesting a due process hearing. When Warwick prevailed at the due process hearing and a subsequent administrative review, Ms. Gaspar appealed the matter to federal court under the IDEA. Ms. Gaspar voluntarily dismissed the federal court appeal so that the results of the reassessment could be discussed with the Warwick School District during the IEP review process. Notwithstanding the above, after several unsuccessful attempts to review T.G.’s IEP even with the help of a state compliance officer, the Department of Education initiated a compliance proceeding violation against the Warwick School District for its failure to conduct an annual IEP review for T.G.

At the initial compliance hearing, the state compliance officer was authorized to take necessary action to develop a revised IEP for T.G. Thereafter, the school district submitted a proposed service plan for T.G. to the compliance officer who subsequently recommended to the hearing officer that the IEP be approved but only after nursing

services were added to the plan. The compliance officer testified that nursing services were necessary for T.G. in order to provide her with a safe environment in which to receive a FAPE. The Commissioner of Education agreed to accept the compliance officer’s recommendations and the school district agreed to pay for some of T.G.’s educational expenses at a separate facility; however, the district refused to pay for a full-time nurse assigned to T.G. while she was weaned from her ventilator.

Approximately eight months later, the Commissioner of Education ordered that $54,745.28 be deducted from the City of Warwick's operation aid for the following month to pay for the full-time nursing services rendered to T.G. during the previous semester. Thus, funds were withheld from Warwick's (school district) operations aid. Warwick appealed to the Board of Regents (Board) and the Board subsequently denied Warwick's appeal. Warwick then filed a petition for Writ of Certiorari to the Rhode Island Supreme Court; the Court denied Warwick’s petition.

The issue then centered on whether the Commissioner of Education had the authority to order the deduction of funds from the City of Warwick's (school district) operation aid. The Court noted that Rhode Island law authorized the Commissioner of Education to withhold funds of a municipality if there was a “violation or neglect of law or violation or neglect of rules and regulations” by the municipality. The Court determined that the City of Warwick (school district) violated the aforementioned regulation by failing to arrange a timely IEP meeting for T.G. Thus, the failure to arrange the IEP team meeting warranted the withholding of funds by the Commissioner of Education under Rhode Island law.
The second issue to be determined by the Court was whether the full-time nursing services provided to T.G. while she was weaned off her ventilator were “related services” under the IDEA. The Court noted that there was a two-step analysis to determine if requested services fell within the definition of “related services.” The first step was to determine whether the requested services were “supportive services”; the second step was to determine whether the requested services were excluded as “medical services.”

The Court found that the full-time nursing services administered to T.G. were required to maintain her health and safety while she received a public education. Therefore, the Court concluded that the services were characterized as “supportive services.” Furthermore, the Court found that nursing services were not subject to the “medical services” exclusion. Using the bright-line test developed by the High Court in *Cedar Rapids Community School District v. Garret F.*, 296 the Court found that the services of a physician were subject to the medical services exclusion, but the nursing services provided to T.G. while she was at school, could not be excluded as a medical service. *The Court further clarified that because the nursing services were “supportive services” and were not subject to the medical services exclusion, the nursing services fell within the “related services” definition and the City of Warwick was required to pay for the services. Thus, the Court affirmed the decision of the Board of Regents.*

*John A. v. Board of Education For Howard County.* 297 The dispute in this case developed while John A.’s daughter, A.A., was attending Rockburn Elementary in

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Howard County. A.A. suffered from Bi-Polar Disorder, Attention Deficit Hyperactivity Disorder (ADHD), and Sensory Integration Disorder and as a result, qualified for special education services. A.A.’s related services were listed as psychological services and occupational therapy. In addition to the IEP and the IEP meeting summary documents, A.A.’s parents signed a “Request for Records” form consenting to the release of A.A.'s confidential psychiatric records to the school district, conditioned on the parents being informed before the district contacted A.A.’s psychiatrist.

As a result of the IEP team meeting, the team arranged for A.A. to receive her new prescription medications during the school day. In accordance with an agreement with the school district signed by A.A.’s treating psychiatrist, the school nurse administered to A.A. two medications, Geodon and Neurontin, though teachers and “health room” personnel observed A.A. As being lethargic and drowsy, sometimes falling asleep in class and in the health room. Over the summer, prior to the start of the following school year, A.A. was prescribed another medication. Shortly thereafter, a school nurse wrote A.A.’s doctor to inform him that, when A.A. was administered her medications, she was lethargic and would at times fall asleep in class, and that her apical pulse rate was between 110 and 142. The letter went on to describe that during classroom observations, school health personnel noticed that A.A. looked tired and unfocused on her lessons. As a result, the school nurse requested clarification from the doctor concerning the administration of A.A.'s medications. A.A.’s parents received a copy of the letter as well. Soon thereafter, A.A.'s parents informed the doctor that it was their understanding from the nurse's letter that the school district sought discretion to refrain
from administering the child's medications based upon observations of her behavior. The parents expressed their disapproval of such a request and asked their doctor to respect A.A.’s right to privacy and not to provide any further information to the school district regarding A.A.’s medical condition and treatment without their prior consent or in the case of a medical emergency.

One month later, the district’s health services manager wrote to the doctor and also sent a copy of the letter to A.A.’s parents to make clear that neither the nurse nor the district had asked the psychiatrist to change the prescribed medications and emphasized that, in order to ensure the child's safety, the request simply was for clarification and standards for when the medications should be withheld based on symptoms noted at the time of administration. She informed the doctor that she consulted with the Maryland Board of Nursing and that counsel for that Board advised that administration of the medications without the ability to communicate directly with the prescribing psychiatrist would be inappropriate. The health services manager concluded that, based on the symptoms observed by the nursing staff, combined with a lack of guidance from the doctor and, in the absence of the ability to communicate with him directly, the school district’s staff would no longer administer the medication to A.A. The nurse suggested that either of A.A.’s parents would be free to come to the school and administer the medications to their daughter during the school day. In response to the district's letter, A.A.’s parents insisted that the school district abide by the psychiatrist's orders to administer the medications to A.A. during the school day at the prescribed time and in the prescribed dosages. The district refused and reaffirmed to A.A.'s parents that, because the
district and the school staff would not administer the medications under the circumstances, they were welcome to come to A.A.’s school to accomplish the tasks on a daily basis. A.A.’s parents then requested a due process hearing.

The Administrative Law Judge (ALJ) found that the complaint did not allege that there was any dispute as to the proper identification of A.A. As a “child with a disability,” her evaluation, or her educational placement. Further, the ALJ found that the issue presented involved the rights of the parents to control the release of medical information about their child against the right of nurses to speak to the treating physician when administering medication the physician prescribed, rather than the provision of a FAPE. The ALJ determined that the issue raised in this situation was one of medical treatment, rather than a special education one. Therefore, the dispute raised in the parent's complaint fell outside of the scope of the IDEA, depriving the ALJ of subject matter jurisdiction. Thus, the ALJ dismissed the parents' due process complaint.

Upon A.A.’s parents' petition for judicial review, the Circuit Court for Howard County affirmed the ALJ's order dismissing the parents' IDEA claim. The Circuit Court found that the issue was not whether A.A. required medication to participate in her education but rather, whether the school had the right to request additional direction from the child's treating/prescribing physician. The court determined that this issue was not covered by the provisions of the IDEA and, thus, the ALJ correctly dismissed the parents' complaint for lack of subject matter jurisdiction. The parents’ appeal then went to the Court of Appeals for Maryland.
The Court first considered the omission of administration of medication from A.A.’s IEP. The Court concluded that all parties agreed A.A. required these medications in order to have a chance to function more normally in the classroom setting and attain the benefits of her special education. Furthermore, justifying withholding the medications from A.A. because the service was not written in her IEP was contrary to the requirement that a school must provide the services that enable the child to benefit from special education. The Court further noted that A.A.’s medications could be provided by someone other than a trained physician, such as a school nurse, and therefore are not an excluded medical service. Thus, the Court determined the administration of medications to A.A. would be a related service.

The Court clarified that the heart of the parties’ dispute consisted of whether school nurses who administer medications to A.A. should have the ability to communicate directly with the prescribing physician or whether her parents had the ability to restrict access to the doctor until they are contacted and approve of any specific contact with that physician. The Court concluded that the dispute in this case did not pertain to the provision of the administration of medications as a related service, but was instead about an ethical issue, the need for school nurses to consult directly with prescribing doctors, which the Court determined, was only loosely associated with a related service. The Court further noted A.A.’s parents argued that the school district's position infringed upon their right to privacy and their fundamental right and liberty interest in the care, custody, and control of their child. In noting the nature of the
parents’ arguments, the Court concluded this dispute fell outside the scope of the IDEA as a medical treatment issue, and not a special education issue.

As a result of the aforementioned information, the Court affirmed the decision of the ALJ who dismissed the parents’ complaint for lack of subject matter jurisdiction under the IDEA, though the Court held that it was not necessary for the related service to be included in the IEP to form the basis on which parents brought their due process complaint. However, in this case, the disputed question was a medical or ethical issue, rather than a special education issue; therefore, an ALJ had the power under the IDEA to dismiss the complaint for lack of subject matter jurisdiction. Thus, the Court determined that the ALJ did not err in dismissing the parents’ complaint for lack of subject matter jurisdiction.

*C.N. v. Los Angeles Unified School District.*298 This case involved an appeal from an administrative ruling regarding educational and related services that the Los Angeles Unified School District (school district) provided to C.N. And the adequacy of those services under the IDEA. The parties participated in administrative due process hearings which addressed two issues: (1) whether the school district denied C.N. A FAPE; a summer of extended school year (ESY) services and for one full school year (a) by refusing to administer his gastrostomy tube feedings at school using the plunge method or (b) by failing to offer a placement in a nonpublic school that allowed gastrostomy tube feedings by the plunge method or, alternatively a home school

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program; and (2) if the school district denied C.N. a FAPE, whether C.N. was entitled to compensatory education.

The ALJ issued a decision on the aforementioned matters and found for the school district on all issues. C.N. subsequently appealed the ALJ’s decision. Thereafter, the Court received a motion filed by C.N.’s attorney to withdraw as counsel. Several months later, the school district filed its opening brief. C.N. did not file a trial brief. The Court determined that by reviewing the administrative record and the arguments of the school district counsel, it was able to make a decision without oral argument.

C.N.’s disabilities required that he be fed through a gastrostomy tube (G-tube) because he was not capable of swallowing food. Nourishment may be introduced into the G-tube by either the gravity or plunge method. When the gravity method is used, food is placed in an elevated container and enters the patient's stomach through the G-tube via the force of gravity. The plunge method requires that the individual administering the food use a syringe plunger to push the food through the G-tube into the patient's stomach.

Before he entered school, C.N.’s mother used a syringe to feed him, inserting liquids instead of solid foods into his G-tube. Because he was fed in this manner, C.N. allegedly developed a severe reflux disorder. To address this medical condition, C.N.’s mother eliminated liquids from his diet and began using the plunge method to feed him pureed foods. C.N. responded well to this feeding protocol. His mother claimed that physicians encouraged her to use this method exclusively. The California Department of Education (CDE) and the school district had developed guidelines for G-tube feedings
that prescribed use of a liquid diet administered by the gravity method. Neither the CDE
nor the school district permitted use of the plunge method.

As a result of an IEP team meeting to assess C.N.’s school placement and medical
needs, the IEP team recommended placement for C.N. for the remainder of the school
year, ESY, and the following school year at a special education school within the district.
C.N. would be in class only with other students who were afflicted with multiple
disabilities. At the IEP team meeting, C.N.’s mother stated that she wanted C.N. to be fed
the pureed foods she provided. The school nurse advised her that the district required a
doctor's protocol for such a procedure. C.N.’s mother agreed to provide the necessary
paperwork and did not raise any concerns regarding the feeding method offered by the
IEP team (i.e., G-tube feeding via the gravity method).

After a subsequent dispute with the district regarding how to feed her son, C.N.’s
mother filed a due process challenge contesting the school district’s offer of a FAPE. The
ALJ concluded that the student was in fact provided with a FAPE and compensatory
education was not necessary. A short time later, C.N.’s mother appealed the ALJ’s ruling
to the District Court.

In the appeal to the District Court, C.N. Asserted that the school district denied
him a FAPE by refusing to administer his G-tube feeding using the plunge method. He
also asserted that the district denied him a FAPE by failing to offer placement in a
nonpublic school that allowed G-tube feeding by the plunge method, or alternatively, a
home school program.
The District Court concluded that although the school district refused to administer C.N.’s G-tube feedings via the plunge method, the ALJ's conclusion that this did not deny C.N. A FAPE was supported by substantial evidence. The Court noted that the evidence presented at the administrative hearing showed that feeding via the gravity method was adequately meeting C.N.'s needs and providing him with a FAPE. The Court also noted that C.N.'s mother offered no evidence that C.N. required plunge feeding. Therefore, because a FAPE was available to C.N. in a school within the district by administering his G-tube feedings via the gravity method, the District Court agreed with the ALJ's conclusion that C.N. was not entitled to placement in a nonpublic school. Similarly, C.N. had also failed to establish that he was entitled to a home placement. Thus, due to the aforementioned reasons, the District Court denied C.N.’s appeal.

**Putnam County Board of Education v. Beane.** In the matter before the Court, the Putnam County Board of Education (petitioner, school board) asked that the Court enter a writ of prohibition against the respondent, the Honorable J.D. Beane of the Circuit Court of Wood County, to halt the enforcement of two orders requiring the school board to provide and pay for a full-time nurse for a student with special needs. The school board argued that the orders surpassed the Circuit Court's powers because the school board was not a party to the action before the Circuit Court, was not served with notice of the hearing that led to the Circuit Court's orders, and was not given an opportunity to be heard at the hearing.

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The student at the center of this case, C.E.M., suffered from a number of medical problems and was wheelchair bound. Shortly after C.E.M. was born, an abuse and neglect petition was filed against both of his parents in the Circuit Court of Wood County. As a result, the West Virginia Department of Health and Human Resources (DHHR) was given the legal and physical custody of C.E.M. DHHR placed C.E.M. in permanent foster care in Putnam County, and he continuously resided in the same foster care home for thirteen years until the time of this case.

In the matter before the Circuit Court, the Circuit Judge conducted a review hearing in Wood County on the still-pending abuse and neglect petition. Following that hearing, the Circuit Court entered an order requiring the school board to provide and pay for a full-time nurse for C.E.M. while he was at school. As a result, in its petition to the Supreme Court of Appeals of West Virginia, the school board vigorously disputed the claim that C.E.M. needed or had always been provided with a full-time nurse. The school board provided an affidavit providing background on the C.E.M.’s past services, his needs, and his IEPs. Most importantly, the school board noted that C.E.M. had never needed nor been provided with a full-time nurse.

The Supreme Court of Appeals of West Virginia noted that while doing what was in the best interests of the child was the primary goal of the abuse and neglect proceeding, this goal did not excuse the court from complying with due process requirements. The Court noted that the most fundamental due process protections are notice and an opportunity to be heard. The Court further noted that the school board's documents reflecting C.E.M.'s educational and school medical records as well as
testimony of school employees with regard to relevant information on the progress and needs of C.E.M. would have provided necessary information on C.E.M.’s best interests and needs. Therefore, for the aforementioned reasons, the Supreme Court of Appeals of West Virginia held that the circuit court deprived the school board of fundamental due process and exceeded its legitimate powers. Therefore, the Court granted the writ of prohibition but declined to address the school board’s request for attorneys’ fees. Thus, the Court vacated the circuit court’s orders requiring the school board to provide and pay for a full-time nurse for C.E.M.

Speech-Language Pathology Services

*Hooks v. Clark County School District.* At the time of this case, C.H. was a child who received his education at home from his parents. In August 1996, C.H. was deemed to be medically eligible for speech therapy services. The Hooks family requested subsidized services, even though there had been no claim that home education was necessary to treat his disability, and even though C.H. was not enrolled in any school within the school district. The school district, in accordance with its policy, opted not to provide the services.

In Nevada, children taught at home can be excused from Nevada's compulsory attendance law by receiving an exemption under Nevada Revised Statute. Exempted educational environments avoid certain regulatory requirements imposed on institutional private schools in Nevada.

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The Hooks family had applied for and received the home-education exemption since the 1994-1995 school year. For the 1996-1997 school year, the Hooks family requested that C.H. be exempted from Nevada's compulsory attendance law and also that he receive speech therapy services provided in Nevada's schools. As previously noted, the school district refused to provide the services.

In March 1997, the school district explained via letter that the school district's policy provided that, in accordance with Nevada law, students who receive the home-education exemption do not have access to instruction and/or ancillary services with the public schools. The school district suggested that the parents either seek an exception from the Board of Trustees, or enroll C.H. in the school district, where he would have an IEP tailored to his needs. The Hooks family chose neither option.

Instead, in June 1997, the Hooks family filed a complaint with the Nevada Department of Education (NDOE), which the NDOE rejected. The NDOE relied on a policy letter from the United States Office of Special Education Programs (OSEP), which declared that States have discretion to determine whether or not home education qualifies as a private school or facility that implicates IDEA requirements. Because exempted home education does not qualify as a private school under Nevada law, the NDOE upheld the school district's policy.

In January 1998, the parents filed a federal suit alleging that the school district's policy violated the IDEA and the Fourteenth Amendment. The parents sought declaratory relief that C.H. was entitled to receive speech therapy services, reimbursement for the
parents' payments for private speech therapy services, and attorneys' fees. The District Court granted summary judgment in favor of the school district, and the parents appealed.

Of special mention in this case is that after this action began, the Nevada legislature amended state law to provide that the board of trustees of each school district shall provide programs of special education and related services for children who are exempt from compulsory attendance pursuant to the home-education exemption and receive instruction at home. Under the amended Nevada law, related services includes speech-language pathology services.

As a result of this legislation, the school district conceded that it was then required to provide speech therapy to eligible home-educated children, and C.H. was assessed and deemed eligible for speech therapy services. Thus, there was no need for the Ninth Circuit to consider whether the District Court erred by refusing to enter a declaratory judgment. The Ninth Circuit remanded the matter of declaratory judgment back to the District Court for its consideration in light of Nevada's new law.

Additionally, neither the appeal nor the action was found moot, because the new law did not resolve the reimbursement claim for the payments already made by the parents for C.H.'s therapy.

The Ninth Circuit noted that the IDEA and accompanying regulations provide for special services for three categories of children: (1) students in public schools; (2) children placed in private schools by a public agency; and (3) children placed unilaterally in private schools by their parents. The Circuit Court concluded that nothing in the
language of the IDEA provides services for children who are not enrolled in school, however school is defined.

The Hooks family argued that C.H. was a child of the third category, a child placed unilaterally in private school by his parents, and thus qualified for services. The regulations in effect at the time of C.H.'s request provided that where parents chose to place the child in a private school or facility, provision should be made for special education and related services of the private school child, to the extent consistent with their number and location in the state.

The question faced by the Ninth Circuit was whether C.H. qualified as a private school child (i.e., a child placed in a private school or facility). The Court noted that neither the IDEA nor the regulations defined or explained what constituted a private school.

The school district contended, and the District Court held, that state law controls the definition of private school under the IDEA, and that therefore C.H. did not qualify, because exempted home education did not qualify as a private school in Nevada. Private schools, under pre-1999 Nevada law, meant private elementary and secondary educational institutions. The Ninth Circuit concluded that the definition did not include a home in which instruction was provided to a child excused from compulsory attendance. Thus, C.H. did not qualify as a private school child under Nevada law and thereby did not qualify for supplementary services under the school district's policy.

The Hooks family did not dispute the school district's interpretation of Nevada law. Rather, the Hooks contended that Nevada's definition, and by extension the school
district's policy, violated the IDEA. The Ninth Circuit held that the IDEA left discretion to the states to determine that home education that is exempted from the state's compulsory attendance requirement does not constitute an IDEA-qualifying private school or facility. In holding that this matter is left to the states, the Ninth Circuit affirmed the decision of the District Court.

The Hooks family also brought suit under 42 U.S.C. section 1983 and contended that the school district's policy violated equal protection and due process principles associated with the Fourteenth Amendment. The Ninth Circuit rejected these claims as well, because the challenged regulatory scheme did not regard a suspect classification, impinge upon a fundamental right, or fail to bear a rational relationship to a legitimate governmental purpose.

The Ninth Circuit noted that to withstand Fourteenth Amendment scrutiny, a regulation must bear only a rational relation to a legitimate governmental purpose, unless the regulation implicates a fundamental right or an inherently suspect classification. The Circuit Court found that children educated at home do not comprise a suspect class, so they turned their attention to whether the regulatory scheme infringed on a fundamental right or lacked a rational basis.

In addressing the first of the previously mentioned issues, the Ninth Circuit held that the regulatory scheme did not unconstitutionally infringe on the parents' liberty interest in directing C.H.'s education. The Court found that the school district's policy did not prohibit the Hooks family's desired educational option since at the time C.H. legally received his education at home. The Ninth Circuit found that even if C.H.'s parents had a
constitutional right to educate him at home, they did not have a constitutional right to state-funded speech therapy services.

In this case, C.H.’s parents challenged two separate governmental directives: the school district's policy denying services to home-educated children, and the IDEA's delegation to states of the power to make such a denial. Both offer rational bases and thereby survive equal protection challenges.

The Ninth Circuit noted that Nevada and its school districts have a legitimate interest in promoting educational environments that fulfill those qualifications that the state deems important. The Circuit Court found that limiting IDEA services to qualified private schools reasonably advances that interest by steering scarce educational resources toward those qualified educational environments. The Court further noted that school districts also have a legitimate interest in maximizing the utility of scarce funds.

The Ninth Circuit found that state discretion under the IDEA to define private schools has a rational basis. C.H.’s parents contended that even if the school district's policy is constitutional, the IDEA’s deference to states on this matter confronts rationality by which the provision of IDEA benefits varies from state to state. The Circuit Court determined the complexity of regulatory schemes surrounding state education suggests Congress’s intent to leave some definitional matters to the states.

Lastly, the Ninth Circuit noted that the Supreme Court had recognized that education is an area where states have historically been sovereign, and the IDEA advances a legitimate purpose by preserving some of that sovereignty. The Circuit Court
affirmed the District Court’s decision in rejecting C.H.’s parents’ constitutional challenges.

In conclusion, the Ninth Circuit held that, pursuant to the IDEA, states have discretion to determine whether home education constitutes an IDEA-qualifying educational environment. The Ninth Circuit also held that the school district's policy of limiting IDEA funds to institutional schools does not unconstitutionally offend equal protection principles or infringe on the parents' liberty interest in guiding their child's education. The Circuit Court remanded the case back to the District Court so that it could settle this case in accord with the Circuit Court’s opinion and with new Nevada law.

_Veschi v. Northwestern Lehigh School District._ This appeal which was before the Pennsylvania Commonwealth Court stemmed from an order of a Special Education Due Process Appeals Review Panel of the Department of Education (Appeals Panel) which affirmed a hearing officer's decision that the Northwestern Lehigh School District (school district) was not obligated to provide speech and language therapy services to a student enrolled in a nonpublic school.

V.V. was enrolled in a local parochial school, St. Joseph the Worker School (St. Joseph's), for his kindergarten year. At that time, the Carbon Lehigh Intermediate Unit (Carbon Lehigh) provided him with speech and language services. The Carbon Lehigh notified the V.V.’s parents, the Veschis, that it would no longer be providing these services to the Diocesan schools generally and for V.V. specifically. Therefore, in August

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1998, V.V.’s mother wrote to the District’s special education director requesting that the District provide the services that V.V. needed.

Shortly thereafter, a multi-factored evaluation team completed a comprehensive evaluation report concluding that V.V. was eligible for speech and language therapy and developed, with input from the Veschis, an IEP. The IEP proposed speech/language therapy two times per week for thirty minutes each session. However, the school district stated it would only provide these services if V.V. was exclusively enrolled in the district’s public school. The school district’s provision caused the Veschis to refuse the provision and request a due process hearing. The hearing officer issued a decision determining that the school district was not required to provide V.V. with speech and language therapy while he was enrolled at a nonpublic school. The Veschis filed written exceptions under both federal and state law. Following the Veschis filing of written exceptions, the Appeals Panel affirmed the decision of the hearing officer, which led to the appeal before the Pennsylvania Commonwealth Court.

At the time of this case, the somewhat recent amendments to IDEA passed by Congress in 1997 provided that public school agencies were not required to pay for special education and related services at a private school if that agency made a free appropriate public education available to the child. Thus, V.V. And his parents did not have an individual right under IDEA to the special education and related services in question. Though, at the core of the Veschis’ argument, was that they have a constitutionally protected right to decide where V.V. goes to school under Pierce v.

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Society of Sisters\textsuperscript{303} and Wisconsin v. Yoder.\textsuperscript{304} The Pennsylvania Commonwealth Court agreed with the Veschis’ rationale. The Court also agreed that under IDEA and the laws of the Commonwealth of Pennsylvania, V.V. was a student with a disability and was to be afforded “equal opportunity” to participate in specialized educational assistance programs. The Court noted that under the 1997 amendments to the IDEA, Congress did not relieve the school district of its obligation to provide services, but only the obligation to provide services at the nonpublic school. While the Veschis preferred to have services provided to V.V. At St. Joseph’s, they requested provision of services for him at the District while he still attended his parochial school (dual enrollment).

The Court concluded that while the parents of a child with disabilities unilaterally enrolled in a private school must bear the financial burden of tuition where the education agency has offered a FAPE, this does not relieve the public education agency, under either federal or state law, from providing special education and related services to voluntarily placed private school students. Moreover, the Court noted that such services must be comparable to those received by students with disabilities in public schools. The Court determined that when students with disabilities who attend private schools have a right to “comparable” services, school choice decisions should be made on factors other than the “fear of total deprivation of those services.”\textsuperscript{305} Thus, the Court held that V.V. should remain enrolled at St. Joseph’s while simultaneously receiving special education.

\textsuperscript{303} Pierce v. Society of Sisters, Nos. 583, 584, U.S. LEXIS 589 (U.S. 1925).

\textsuperscript{304} Wisconsin v. Yoder, No. 70-110, U.S. LEXIS 144 (U.S. 1972).

services from the school district. Therefore, the Court’s decision reversed the order of the Special Education Due Process Appeals Review Panel.

*Forstrom v. Byrne.* G.F.’s parents sought a declaration that their son was entitled to receive speech and language services and reimbursement for the cost of speech therapy services for a period of time until services were made available to him. G.F. attended preschool at the Fair Lawn Public Schools and was evaluated as needing speech therapy. Subsequent to the evaluation, G.F.’s parents decided to educate him at home and requested that the school district provide speech therapy to G.F. The plaintiffs were willing to bring G.F. to a public school to receive the therapy. However, because G.F. was being educated at home and not at a public or nonpublic school, the school district denied him speech and language services. The school district’s denial of services was based on a directive issued by the New Jersey Department of Education (Department), which intervened in the case. In the first case associated with this appeal, the trial judge found in favor of the Forstroms finding that both the Department and the school district violated G.F.’s equal protection right to receive special education services under the New Jersey Constitution. Thus, the judge ordered the school district to reimburse the Forstroms up to $862.76 for two one-half hour speech therapy sessions per week during the school year to the date of the judgment. An appeal by the school district followed.

Upon appeal, the school district maintained that it acted according to the Department's directive and should not be held to answer for that. Officials also claimed that if home schooling is comparable to attendance at nonpublic schools, G.F. was not

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entitled to speech therapy services under the federal regulations promulgated under the Individuals with Disabilities Education Act.

The New Jersey Superior Court Appellant Division held that under existing state statutes, education at home did not fit within the definition of a “nonpublic school,” nor were speech therapy services mandated for children who were home schooled under federal or state statutes, or regulations. The Court also held that the differentiation between the treatment of nonpublic school students receiving speech therapy benefits and a home-schooled child is not a violation of the equal protection clause of the United States or New Jersey State Constitutions. However, the Court concluded that in this case, the law as applied to the student denied him equal protection.

The Court noted that the IDEA provided funding for special education and related services to children with disabilities in three circumstances: (1) children who are enrolled in public school; (2) children who are placed in private schools by a public agency; and (3) children placed in private schools by their parents. The Court further noted that it was not disputed that G.F. did not fit within either of the first two categories. Although New Jersey statute and the statues of many other states permitted home schooling, the IDEA does not mention or define it. Thus, the Court determined that what defines a private school is determined by state law.

The Court then turned its attention to the relevant New Jersey statutory law on the subject and found that compulsory school attendance law permits home schooling. The Court further noted that the provision divided children into three groups: (1) those

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attending public schools; (2) those attending a day school in which there is given
instruction equivalent to that provided in the public schools; and (3) those who receive
equivalent instruction elsewhere than at school.

The Court noted that federal law requires only that the state make special
education and related services available to public school and private school students.
Thus, the federal law did not include a mandate that every child must receive such
services, though the United States Department of Education’s interpretation of the statute
leaves such a decision up to each state. As a result, the Court concluded that the
legislature intended to differentiate between nonpublic school students who qualified for
such services and children who are home schooled, in the context of where the services
are to be delivered and who receives the federal and state funds for the services.

The Court determined that the appropriate question here in this case was whether
the creation of separate categories for nonpublic school students and those educated at
home was a violation of equal protection. The Court identified the first element to
consider was G.F.’s right to special education and related services. In arguing for this
element, the Forstroms contended that, to the same extent that nonpublic school students
have the right to receive speech therapy services, G.F. should have an equal right. With
respect to the second element, the Court found that defendants had clearly denied G.F. of
such services unless he waived his New Jersey right to be home educated. In sum, G.F.
could only receive the speech-language therapy service if he attended a public school or
he could receive a proportionate share of money for the service if he attended a nonpublic
school. However, he would not receive any money or service if he were to be educated at home.

The Court found that the school district correctly pointed out that the federal regulations provide that private school children have no “individual” right or entitlement to special education and related services. The Court noted in this instance, however, that the plaintiff was not asserting any right to receive speech therapy at home on a one-to-one basis and be treated preferentially over a student enrolled in a nonpublic school. Rather, the plaintiff had agreed to follow the recommended treatment plan: speech therapy in a group not greater than three, twice per week in sessions of not more than one-half hour. The Court concluded that since the recommendation was for G.F. to receive speech therapy in a group no larger than three, it would be more expensive to allow speech therapy at home in his own group of one, than in a school setting with two other children. Thus, the Court agreed with defendants and the court's analysis in Hooks\textsuperscript{308} that the public need for the restriction as to where the services were delivered was appropriately advanced by the differential treatment.

Moreover, the Court clarified that the defendants’ arguments on this matter were based on the incorrect assumption that G.F. sought to receive his speech therapy at home. This was not G.F.’s desire. The Court noted that the trial judge's order reimbursing plaintiff for the cost of speech therapy was entered only because Forstroms incurred the cost when defendants refused to provide it. The Forstroms requested that the Fair Lawn Public Schools provide the recommended speech therapy at the public school, and the

\textsuperscript{308} Hooks v. Clark Cnty. Sch. Dist., No. 98-17271, U.S. App. LEXIS 23570 (9th Cir. 2000).
request was denied. The Court further noted that if the services were provided for G.F.
At the public school, as he had requested, the local school district would receive exactly
the same funding for G.F. As it did for other nonpublic school students who qualified for
speech therapy services, and the services could be delivered at the same cost. In light of
this analysis, the Court held that G.F. was denied equal protection under the law.

Lastly, the school district argued that the trial judge erred in holding it liable
because officials acted on the Department's directive and were bound by it. Both the trial
judge and the New Jersey Superior Court Appellant Division found that defendants had
exactly the type of speech therapy program for public school students that was necessary
for G.F., and the school district invited private school children to participate in the public
school program for this particular service, but excluded G.F. Thus, the Court found the
school district liable for denying speech-language services to G.F.. In light of all of the
aforementioned information, the Court affirmed the trial judge’s decision in this case.

Transportation Services

**Hurry v. Jones.** Appellants are school and transportation officials who
appealed a decision by the United States District Court for the District of Rhode Island
which awarded damages to G.H., a physically and mentally handicapped minor, and to
his parents. The District Court found that appellants' failure to provide G.H. with door-
to-door transportation to and from school violated both the Education for All
Handicapped Children Act of 1975 (EAHCA) and the Rehabilitation Act of 1973. The
court awarded $14,546.00 under the EAHCA and $5,000.00 under section 504 of the

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Rehabilitation Act. The appellants challenged both awards. The Court also indicated that it would award attorneys’ fees and costs, but it subsequently rejected plaintiffs’ fee application. The Hurrys cross-appealed from the denial of attorneys’ fees.

In awarding the Hurrys $14,546.00 under the EAHCA, the District Court made three separate damage awards. First, it reimbursed Mr. and Mrs. Hurry $1,150.00 for the out-of-pocket expense of driving G.H. to school. Since the parties did not contest this portion of the award, the First Circuit did not address this award on appeal. Second, the Court awarded the Hurrys $4,600.00 for their services in driving G.H. to and from school. Third, the Court awarded G.H. $8,796.00 for the period from January 1978 until June 1979 during which he did not attend school at all. The appellants did not challenge the District Court’s method of computing damages; instead, they contended that the award to the Hurrys for contributed services and the award to G.H. were improper.

Per the First Circuit, the $4,600.00 award to the Hurrys required the Court to consider whether they waived their right to reimbursement by engaging in “self-help” rather than seeking court approval for the action that gave rise to their claim for reimbursement. The First Circuit concluded in this case that the Hurrys did not exercise their independent judgment of what school was best for their child; instead, they undertook to transport the child to the school where the school district had placed him. Therefore, the First Circuit determined that the Hurrys' self-help should not prohibit their recovery and affirmed the award of $4,600.00.

The First Circuit then turned its attention to the award of $8,796.00 to G.H. which compensated him for the period during which he was not able to attend school. The First
Circuit went on to state that the purpose of the District Court’s award was to prevent the
school district from being “unjustly enriched” by having denied G.H. the education to
which he was entitled under the EAHCA. The First Circuit was not aware that any other
circuit court had sustained an award for unjust enrichment under the EAHCA and thus
declined to approve such an award.

The District Court also awarded G.H. $5,000.00 under section 504 of the
Rehabilitation Act of 1973 as compensation for the physical and emotional hardships he
endured during the transportation dispute. The First Circuit found that the circumstances
of this case did not support the award of damages under the Rehabilitation Act. The
Circuit Court noted that compensatory and punitive damages were not available under the
EAHCA and held that the plaintiffs could not use the wide-ranging remedy of the
Rehabilitation Act to expand the EAHCA's limited damage remedy.

In sum, the decision of the District Court to award the Hurrys $5,750.00 as
reimbursement for transportation expenses and the decision denying their application for
attorneys’ fees were affirmed by the First Circuit. However, the District Court’s decision
which awarded G.H. $8,796.00 under the EAHCA and $5,000.00 under the
Rehabilitation Act was reversed.

*Cohen v. School Board of Dade County, Florida.* An administrative order
required the Dade County School Board to pay for the education of P.C. At a residential
mental health facility in Georgia. The order directed the school district to fund P.C.’s

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placement in the residential program, including the cost of special education and related services. It is important to note that medical and psychiatric treatment services provided at the facility were not included in the order.

Furthermore, P.C.’s IEP provided for transportation and parent counseling as related services. P.C.’s IEP included an instructional objective associated with improving his relationship with his parents and siblings. As a result of the information provided within his IEP, P.C.’s parents, the Cohens, requested reimbursement from the school district for several therapeutic visits with him; these expenses included airfare for P.C., for his parents, and for his two siblings, as well as hotel, food, and car expenses for the entire family. The school district agreed to pay the expenses for only three of the round trips made by P.C. between Florida and Georgia. The Cohens then requested an administrative hearing to determine the extent of the school district's obligation. While the Cohens stressed that the school board was required to provide such transportation and that such visits were directly related to the goals of his treatment program. The school disagreed and felt it had met its obligation by paying for three round trips for P.C.

Upon reviewing the record, the Court concluded that the hearing officer’s findings were supported by evidence. Furthermore, the Court also agreed with the hearing officer in his finding that by paying for three round trips per year for the handicapped student, the school district had met its obligation to provide funding for transportation as a related service. Thus, the Court affirmed the hearing officer’s decision that the Cohens were not entitled to public funding for any additional trips.
DeLeone v. Susquehanna Community School District. The question associated with this appeal centered on whether a change in the method of transporting a seriously handicapped child to a special education facility could be considered a change in “educational placement” within the meaning of the Education for All Handicapped Children Act (EHA). Additionally, the EHA has a “stay put” provision, which requires that a school district keep a handicapped child in his or her current educational placement while conducting the required “due process” proceedings concerning changes in the child's educational program. Therefore, if the change involved in this case was a change in educational placement, the parents of the child were entitled to a due process hearing before the change could become effective.

The change at issue involved the method by which L.D., a child with a disability, was transported to school. During the 1982-1983 school year, the child had been transported to school by his mother who was compensated by the district for her provision of transportation for her son. The school district modified the student’s transportation so that he was transported along with other children by someone other than his parent, and thereby it increased his travel time home by ten minutes. The DeLeons objected to the modified transportation arrangement as they felt that the increase in transportation time on the trip home would be detrimental to L.D.’s education. However, the school district did not consider the change in the mode of transportation to be a change in “educational placement,” and thus did not feel bound to continue L.D.’s previous mode of transportation pending the outcome of the hearing. As a result of a

hearing, the District Court dismissed the complaint. The Third Circuit concluded that during the District Court proceeding, the plaintiffs failed to establish that the change involved was a change in “educational placement.” The alleged adverse effect on the student’s ability to benefit from his education, which the Third Circuit noted was the critical element in determining whether a change in a “related service” such as transportation should be characterized as a change in educational placement, was speculative. The Third Circuit concluded that the question of what constituted a change in educational placement should be based on specific facts in the case. The Third Circuit noted, in order to determine whether a particular modification in a child's school day should be considered a “change in educational placement,” the Court must focus on the importance of the particular modification in question.

The Court noted that it had taken into account the affidavits of L.D.’s mother as well as an outside expert on students with profound disabilities, both of which, in the Court’s opinion, did not indicate that the changes to transportation would have a substantial, detrimental impact on L.D.’s education. The Third Circuit determined, that the change in L.D.’s transportation to and from school did not amount to a change in “educational placement”. Therefore, the school district did not violate the Act by making the change without prior due process procedures. Thus, the DeLeons did not establish a claim for relief against the school district and the Third Circuit affirmed the District Court’s decision.
**McNair v. Oak Hills Local School District.** In October 1985, the McNairs filed a complaint against the Oak Hills Local School District (Oak Hills), under the Education of the Handicapped Act (EHA). The McNairs sought, among other things, a determination that Oak Hills had to provide their child, K.M., with transportation to and from St. Rita's School for the Deaf, a private school. Subsequent rulings in the case included a summary judgment in favor of Oak Hills by a magistrate, and the District Court’s dismissal of the McNair’s action. The McNair’s appealed to the Sixth Circuit.

The Sixth Circuit noted that the McNairs wanted Oak Hills to provide transportation for their daughter, as a related service under the EHA. In order to succeed under their request, the McNairs were required to establish: (1) that the child was handicapped; (2) that transportation was a related service; (3) that the related service was designed to meet the unique needs of the child caused by the handicap; and (4) the school district was responsible under the EHA and its regulations for providing the related services under the particular circumstances of the case at hand.

In satisfying the first two aforementioned requirements, both parties agreed that K.M. was handicapped under the EHA because of her hearing impairment, and that the related service at issue in this case was transportation to and from school. The Sixth Circuit then found that the third requirement, showing that the related services were designed to meet the unique needs of the child, was not met in this case. The parties had stipulated that K.M.’s handicap did not require any special transportation needs, and therefore, she could utilize the same transportation service as a nonhandicapped child.

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Because the aforementioned third requirement was not satisfied, the Court was not required to reach a conclusion as to the final requirement. Thus, the Act did not require Oak Hills to provide K.M. with transportation to St. Rita's.

In sum, the Sixth Circuit determined that when a child is voluntarily placed in a private school, a public school district need not provide a related service to that child under the EHA if that particular service is not designed to meet the unique needs of the child. In ruling, the Sixth Circuit affirmed the District Court’s decision in favor of the school district.

*North Allegheny School District. v. Gregory P.* The North Allegheny School District (school district) appealed a Special Education Appeals Panel (Panel) order reversing a hearing officer's decision, and required the school district to transport G.P. to and from both his mother's and father's residences. It is important to note that G.P.’s father resided outside of the school district’s boundaries. The Panel also ordered the school district to reimburse G.P.’s father for the transportation that he had already provided. The Commonwealth Court of Pennsylvania was left to determine whether the district was obligated to provide transportation for a special education student to and from the residence of both the student's father and his mother when the father resided outside the boundaries of the school district.

G.P. was a seven-year-old hearing-impaired student, who was a resident of the North Allegheny School District. G.P.’s parents were divorced and his mother, who lived in North Allegheny School District, was granted primary legal custody with respect to his

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education and child care needs. However, the order divided physical custody evenly between his mother and father, a Pittsburgh resident, who arranged for G.P. to live with each of them on alternating weeks. At the IEP team meeting following G.P.’s parents’ divorce, all parties agreed on the contents of the IEP except for transportation. The school district refused to transport G.P. to and from his father’s house in Pittsburgh (outside of the school district) on alternate weeks when his father had custody of him. G.P.’s father filed a request for a due process hearing. The hearing officer ordered that the district did not have an obligation to transport G.P. when he stayed with his father. G.P.’s father filed exceptions with the Special Education Appeals Panel (Panel), which reversed the hearing officer's determination and ordered the school district to reimburse G.P.’s father for the transportation already provided. The school district appealed to the Commonwealth Court of Pennsylvania.

The Court concluded that the additional transportation requested did not address any of G.P.’s special educational needs; rather, the request was to accommodate the arrangements which G.P.’s parents had made. The Court noted that certain transportation problems as a result of shared custody arrangements between parents living apart fell equally on parents whose children did not have special educational needs. Therefore, the Court reversed the Special Education Appeals Panel’s decision and sided with the school district.
Donald B. v. Board of School Commissioners of Mobile County, Alabama.\footnote{Donald B. v. Board of Sch. Commissioners of Mobile County, AL., No. 96-6358, U.S. App. LEXIS 19968 (11th Cir. 1997).}

D.B., by and through his mother, Christine B., appealed the District Court's order granting judgment to the Board of School Commissioners of Mobile County, Alabama (the board), its superintendent, and its members on D.B.'s claim under the IDEA. D.B. contended that the District Court erred in ruling that under the IDEA the board had no obligation either to transport him three blocks between his private school and the public school that offered the speech therapy he needed or to provide such services at his private school.

Undisputed facts of this case established in the matter before the District Court included the following information. On November 5, 1993, the board identified D.B. as a disabled child and that he should receive special education for impaired speech. At the time of the eligibility decision, D.B. was enrolled by his mother in a private, parochial academy, St. Paul's Episcopal School (St.Paul's). St. Paul's was located approximately three blocks from the Mary B. Austin School (public school), a public school that offered speech therapy. The board received funds under the IDEA and thus must extend special education and related services to disabled children in its geographic area. On December 13, 1993, the board agreed to provide speech therapy to D.B. At the public school as part of an IEP developed for him pursuant to the IDEA, but it declined to transport him between St. Paul's and the public school or to send a speech therapist to St. Paul's. An administrative hearing officer upheld the board's decision, and D.B. then filed
the instant action. At the time of the District Court’s order, D.B. was six years old and healthy, apart from his speech impairment.

As was previously stated, the board had acknowledged that D.B. qualified for special education in the form of speech therapy. D.B. brought suit against the board because it proposed to meet his needs by having him come to the public school during the school day to receive the special education to which he was entitled by law. D.B. insisted that under the IDEA the board also must transport him between St. Paul's and the public school or, alternatively, it must provide speech therapy for him at St. Paul's. This litigation arose because the parties could not work out a mutually agreeable arrangement for D.B. to travel three blocks for speech therapy.

The District Court’s ruling determined that although transportation constituted a related service, the board did not have to transport D.B. to and from St. Paul's because that related service did not address the unique needs caused by his particular handicap. Specifically, the District Court reasoned that because D.B. was afflicted with a speech impairment only and not a handicap affecting his ability to walk or move, his handicap did not require any special transportation, and the transportation requested by plaintiffs was not a reasonable and necessary service for meeting D.B.’s unique needs. The Eleventh Circuit agreed that D.B.’s speech-related disability did not directly cause a need for transportation, but it found the portion of the ruling inconsistent with the text of the IDEA.

In evaluating D.B.’s legal claim, the District Court held that he failed to satisfy the test which limited relief to cases in which the sought after related service was designed to
meet the unique needs of the child caused by the handicap. The District Court also
rejected D.B.’s claim of entitlement to speech therapy on St. Paul's premises. Upon
reviewing the facts of the case, the District Court granted judgment as a matter of law in
favor of the Board, its superintendent, and its members.

Upon analysis of the IDEA and previous Circuit and Supreme Court decisions,
the Eleventh Circuit concluded that the IDEA required transportation if that service was
necessary for a disabled child to benefit from special education, even if that child had no
ambulatory impairment that directly caused a unique need for some form of specialized
transport. The Circuit found though that this conclusion did not resolve the matter at
hand. The Eleventh Circuit was tasked with determining whether transportation was
necessary for D.B. to benefit from the special education to which he was entitled. To
answer this question, the Eleventh Circuit reviewed both the Supreme Court's
construction of the IDEA and the Department of Education's regulations implementing
the Act.

In using the U.S. Supreme Court decision from Tatro, the Eleventh Circuit noted
that it could not rely on the inference that the school easily could send a teacher or aide to
accompany D.B. on foot or to carry him by automobile between St. Paul's and the public
school. Instead, the Circuit Court focused on the meaning of the word “necessary” in this
context. The Eleventh Circuit concluded that, based on the implementing regulations for
the IDEA, transportation may be “necessary,” under these or similar circumstances, if
without transportation, a student with a disability attending private school would be
denied an opportunity to participate in a special education program similar to such programming provided for public school students.

The Eleventh Circuit has noted that the board offered D.B. speech therapy pursuant to an IEP, just as it provided for other students at the public school. The only obstacle to D.B.’s full participation in the special education program at the public school was literally three blocks. In the Eleventh Circuit’s view, the factors relevant in determining whether a child in this situation needed transportation as a related service included his or her age; the distance he or she must travel; the nature of the area through which the child must pass; his or her access to private assistance in making the trip; and the availability of other forms of public assistance in route, such as crossing guards or public transit.

The Circuit Court noted that D.B. presented evidence of his age and the distance he must travel. Although he is young, he must cross only a short distance. Further, D.B. did not offer any evidence that these three blocks encompass high crime or high traffic areas that he could not traverse easily. As to the other cited factors, the only possible evidence referred to by D.B. stemmed from the assertion that his mother could not leave her job to assist him. The Eleventh Circuit determined that Donald had failed to present evidence regarding other means, private and public, he might have at his disposal to assist him in covering the three blocks. The Circuit Court found that D.B. had not overcome his burden of showing that he is unable to travel to the public school without the board’s help.
The Eleventh Circuit found that with the previously identified evidence and information, it was not able to conclude that, by refusing to provide transportation for D.B., the board had deprived him of a genuine opportunity for equitable participation in a special education program, or had withheld special education benefits comparable to those it offered to public school students. Therefore, the Court determined that the related service of transportation was not necessary for D.B. to benefit from special education. Similarly, the Court found that D.B. had failed to show that, by offering him speech therapy at the public school rather than at St. Paul's, the board neglected to afford him an adequate opportunity to access IDEA-mandated special education. The Eleventh Circuit affirmed the District Court’s decision that the board need not send a speech therapist to St. Paul's to comply with the IDEA.

Kratisha H. v. Cedar Rapids Community School District. 315 This appeal arose from the District Court’s decision that Cedar Rapids Community School District violated section 504 of the Rehabilitation Act of 1973, when it refused to provide K.H., a special education student, with specialized transportation to a high school outside of her assigned attendance area due to an intra-district transfer program. The transfer program allowed students to attend schools in other attendance areas within the school district with permission from the district; however, the program required parents to provide the transferring student’s transportation to and from school.

K.H. had severe and profound disabilities and attended another high school within the district but not her neighborhood high school. It is important to note that K.H.’s

parents did not dispute that K.H.’s neighborhood school offered her a FAPE. Her parents “preferred” the special education program available at another high school. When K.H. first enrolled in the district, she attended her neighborhood high school and special transportation (i.e., lift bus and special route) was identified as a related service on her IEP. When K.H.’s parents applied on her behalf, for the intra-district transfer program and she was later accepted into the program, her parents were notified that transportation was not provided for intra-district transfer students. K.H.’s parents provided her transportation for the following school year. The Court noted that if the district were required to transport K.H. As an intra-district transfer student, the cost associated with such transport would total $24,000 per year.

In light of the district’s stance, K.H.’s parents filed an appeal with the Iowa Department of Education (IDOE). An administrative law judge (ALJ) for the IDOE ruled in favor of the school district. K.H.’s parents appealed the ALJ’s decision to the District Court. The District Court ruled in favor of K.H. citing the school district for discriminating against K.H. based on her disability and questioning the district’s estimated cost for transportation of $24,000 per year. The District Court ordered the school district to provide specialized transportation for K.H. As long as her IEP specifies such transportation was necessary. The school district appealed to the Eighth Circuit.

The Eighth Circuit noted that to prevail on a Rehabilitation Act claim under the applicable section, a plaintiff must establish that she (1) is a qualified individual with a disability; (2) was denied the benefits of a program or activity of a public entity receiving federal funds; and (3) was discriminated against based on her disability. Since the parties
did not dispute that K.H. was a qualified individual with a disability within the meaning of the Rehabilitation Act, the first element of the aforementioned rubric was satisfied. In regards of the second element, the Court concluded that based on the evidence, K.H. was not denied the benefit of participating in the school district's intra-district transfer program since her application was considered and she was granted participation, subject to the same requirement as all other students, that her parents transport her to her family's school of choice. Therefore, the Court concluded that K.H.'s parents had failed to establish the second element of their Rehabilitation Act claim.

The third element related to K.H.'s Rehabilitation Act claim was whether she was discriminated against based on her disability when the school district required her to provide her own transportation in order to participate in the intra-district transfer program. The Court concluded that K.H.'s claim lacked evidence of overt discrimination within the school district's intra-district transfer program, including its parental-transportation requirement, because the program and its transportation policy were neutral and applicable to all students regardless of disability. Hence, K.H. was not denied access to the transfer program because of her disability, but because her parents did not want to comply with the main requirement of the program applicable to all students who wanted to participate--parental transportation. The Court concluded that the establishment of a special bus route for a single student who admittedly received a FAPE at her neighborhood school, but who wants to go to another school for reasons of parental preference, was an undue burden on the school district. Thus, the Eighth Circuit reversed
the judgment of the District Court in favor of the plaintiffs, and remanded the case to the District Court to enter in to a judgment consistent with the opinion of the Circuit Court.


The issue of contention in this matter was whether the private program in which the parents' child was enrolled constituted a required related service and whether the school district was correctly obligated to provide transportation from that program to the child's home because it provided such transportation for students who attended the school district's own after-school program. The parents contended that the private program, which provided recreation for autistic and developmentally disabled children, delivered a substantial benefit to their child and that the school district must provide, directly or indirectly, after-school programs for disabled students because it provided such programs to nondisabled students and then transported those students to their homes.

The New York Supreme Court noted that the record established that the school district met the child's individualized education needs by placing him in a private school for autistic children during the regular school day. Therefore, it concluded that the State Review Officer correctly determined that the school district met its burden of showing that the child's participation in a nonpublic after-school program was not necessary for him to have the FAPE to which he was entitled under the IDEA. The Court further noted that there was sufficient evidence that the child's IEP was appropriate, the child was making progress toward achieving the goals which the IEP had set for him, and he did

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not require additional services in order to continue to benefit educationally from his IEP. Based on the aforementioned information, the Court dismissed the parents’ cross petition.

The school district contended that its provision of transportation for the parent’s child from the private program to their home was not required under the IDEA. The Court agreed. The Court determined that in the SRO’s decision, he correctly identified the issue as whether transportation home was part of school district’s obligation to afford the child equal access to extracurricular activities and services. Although state and federal regulations required school districts to provide children with disabilities an equal opportunity to participate in offered nonacademic and extracurricular activities, this obligation did not extend to providing equivalent or alternative transportation simply because school district’s existing after-school program, for which transportation home was provided, was not suitable for the child's participation.317

The parents did not ask the school district to provide an after-school program of its own that would be appropriate and beneficial for their child. As the SRO determined, the school district did not exclude the child from its current extracurricular program. Instead, the school district offered to modify its program to accommodate the child. In contrast, the Court found that the SRO incorrectly required the school district to provide transportation home from the private program based on the school district’s provision of transportation home for the children who attended its own after-school program.

The Court found the SRO’s decision to be in error because the additional trip, from the private program to the child's home, resulted not from the child's placement in

another school out of the district, but from the child's participation in the private program at a location different than school district's own after-school program. Thus, the Court ordered that the judgment be modified, without costs, granting the petition and determination of the SRO was annulled to the extent that it required the school district to provide transportation.

_Board of Education of West Windsor-Plainsboro Regional School District v. Board of Education of Township of Delran._[^318] This appeal centered on the financial responsibility entailed in providing transportation, which is a related service under the IDEA. In particular, the appeal required the Court to determine which school district was required to pay the transportation costs for a child with autism, when the child lived in a group home but attended school in another school district, and the parents reside in yet another school district.

In arriving to its conclusion on this particular issue, the Court reviewed applicable New Jersey statutes. The Court noted that when provided for in a student's IEP, transportation was a required related service in providing educational services to the student with a disability. The Court further noted that a provision was made for group homes within the statutory framework. In addition to the group home provision, the Court reported that there was also a provision for the allocation of various costs related to the provision of educational services for children with disabilities. However, the Court did not find a New Jersey statute which had assigned the responsibility for transportation

costs for the students to the districts where their group homes were located. Therefore, the Court concluded that the school district in which the child’s parents reside should pay for such transportation costs.

Fick v. Sioux Falls School District 49-5. At the center of this appeal was whether the Sioux Falls School District (school district) was required to transport S.F. to a day care center after school, rather than to her home, in order to provide a FAPE under the IDEA. Both a state hearing examiner and the District Court held the school district did not violate the IDEA, because transportation to the day care center was not necessary for S.F. to benefit educationally from her IEP.

S.F. suffered from epileptic seizures. When a seizure occurred, S.F. must receive a shot of Valium from a qualified nurse within a short period of time. This condition required the school district to provide S.F. transportation to and from school as a related service under the IDEA. The District met its obligations of this requirement by providing S.F. with a nurse-accompanied taxi ride to school in the morning, and back to her home in the afternoon.

S.F.’s mother, Darlene, had requested a change in her daughter’s designated drop-off address from their home to an after-school day care center. The school district refused to change S.F.’s drop-off point because the day care center was outside the boundaries of S.F.’s elementary school. At the next IEP team meeting, S.F.’s mother again made the request regarding the drop-off point. When that request was denied as well, Darlene filed a complaint with the state Office of Special Education (OSE). After

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investigating the matter, the OSE determined the school district had violated the IDEA by failing to accommodate the transportation request, and ordered the district to pay for S.F.’s transportation to the day care center. The school district then requested a due process hearing and the OSE’s decision was overturned with the hearing officer finding in favor of the district. S.F.’s mother then filed suit in District Court. The District Court agreed with the hearing officer and also ruled in favor of the school district.

In rendering their decision, the Eighth Circuit cited a previous decision it made in *Timothy H. v. Cedar Rapids Community School District.* 320 In *Timothy H,* the Circuit Court concluded that school had met the needs of the child with a disability within the neighborhood boundaries, and the request for transportation to a school outside the boundaries was “for reasons of parental preference” only. Thus, the Court concluded that *Timothy H.* indicated a school district may apply a facially neutral transportation policy to a child with a disability without violating the law when the request for a deviation from the policy was not based on the child's educational needs, but rather, on the parents' convenience or preference. In sum, the Court affirmed the decision of the District Court and found in favor of the school district.

*Andrew S. v. Manchester School District.* 321 The parents of A.S., a student with a disability who attended a Catholic elementary school, appealed the judgment of the District Court. A.S.’s parents asserted that the IDEA was unconstitutional as applied to their son. While he, like other disabled children who go to private schools, received

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320 *Timothy H. v. Cedar Rapids Cmty Sch. Dist., No. 98-2723, U.S. App. (8th Cir. 1999).*

321 *Andrew S. v. Manchester Sch. Dist., No. 03-1211, U.S. App. LEXIS 13593 (1st Cir. 2004).*
some educational services under federal and state law, he was not entitled by law to the wide array of services available to public school students with disabilities under the IDEA, nor the due process hearing provided to public school students. A.S.’s parents argued that the difference in treatment of their disabled son, who attended a religious school, from other disabled students, who attended public schools, violated the Free Exercise Clause of the First Amendment to the Federal Constitution, the Due Process and Equal Protection clauses of the Federal Constitution, and the Federal Religious Freedom Restoration Act (RFRA).

The District Court rejected the appellants’ claims and granted the Manchester School District's motion for summary judgment and denied summary judgment to appellants. Upon appeal to the First Circuit, the appellants reiterated their arguments. Upon consideration of the appellants’ claims, the First Circuit agreed with the District Court and affirmed its judgment.

The First Circuit agreed with the District Court’s assertion that IDEA and its regulations did not target religiously motivated conduct and that it did not selectively burden religious conduct. Thus, the District Court found no violation of the appellants’ free exercise rights. Furthermore, the First Circuit rejected the appellants arguments that by providing students with disabilities who attended private schools with fewer benefits than public school students with disabilities, private school students with disabilities were being excluded as beneficiaries. The Court noted that the benefits the appellants believed they were entitled to under the First Amendment were benefits the federal government allocated solely for public school students. The Court further noted that such benefits
were available for A.S. if he were to attend a public school, though, not vice versa. Similarly, the Court found no cognizable “burden” being imposed in this instance upon the appellants' exercise of their religion, thus, the RFRA was inapplicable.

The First Circuit also agreed with the District Court in that the appellants’ equal protection claim failed. The appellants stressed that IDEA had infringed upon their fundamental right to direct A.S.’s upbringing and education because it deprived him of a FAPE and a due process hearing while offering these benefits to students who receive special education services at public school and, therefore, should be subjected to strict scrutiny. The Court noted that just as the nonfunding of private secular and religious school programs does not “burden” a free exercise of religion, it does not significantly interfere with the appellants' fundamental right to direct the upbringing and education of children under their control. Moreover, in their application of rational basis scrutiny to the IDEA, the First Circuit came to the same conclusion as the District Court in finding that the statutory classification between public and private school students bears a rational relationship to the continuation of a legitimate governmental purpose. Thus, the Circuit Court determined that Congress acted rationally when it chose not to subject local educational authorities to the tremendous responsibility of providing the same services to disabled students who attend private schools.

Lastly, the Circuit Court again agreed with the District Court’s determination that the appellants' due process claim failed since the appellants were not forced to give up their religious beliefs or their right to control their child's education in order to obtain the
desired government benefits. In sum, the First Circuit affirmed the District Court’s judgment in this case.

*L.S. v. Scarborough School Committee.*[^322] L.S. was a student with a severe learning disability. Because of Ms. S.’s (i.e., mother) employment, she was not able to be at home at the end of the school day, and her child care arrangements did not always guarantee that someone would be there when L.S. arrived home from school. Therefore, she had requested, that every other week the Scarborough school bus driver ensure that an adult is present at the bus stop before letting L.S. off the bus in the afternoon and, if no adult is present, arrange for L.S. to be dropped off elsewhere.

The Scarborough School Committee (Scarborough) had agreed to have the bus stop in front of Ms. S.’s house, but did not ensure the presence of an adult or agree to the alternative arrangements. Scarborough has offered to provide that guarantee, however, on its special education bus. Ms. S. was concerned with the amount of time which would be added to her son’s transportation to and from school on the special education bus. She also contended that the LRE provisions of the IDEA and Maine law required Scarborough to accommodate her request on its regular school bus.

After requesting a due process hearing, the hearing officer disagreed, and upon appeal, the United States Magistrate Judge upheld the hearing officer’s decision. Upon appeal to the District Court, the Court heard oral arguments on the issue and also reviewed the magistrate’s decision. After consideration of the facts, the District Court adopted the Magistrate’s decision and upheld the hearing officer’s decision. The Court

found that while Ms. S.'s request addressed her understandably difficult child-care situation, it did not address L.S.'s educational needs. Therefore, the Court concluded that Ms. S.’s request was not covered by the IDEA or Maine's education laws.

Furthermore, in consideration of Ms. S.’s assertion that her child’s LRE rights were violated, the Court concluded that L.S. was included with his same-aged general education peers for a large portion of his day. Thus, the Court found that Scarborough had mainstreamed L.S. to the maximum extent appropriate. The Court further noted that Scarborough had not violated the LRE provision of the IDEA because transport of L.S. on the regular school bus, with the use of supplementary aids and services, could not be achieved satisfactorily and Scarborough had mainstreamed L.S. to the maximum extent appropriate.

*Amy S. v. Danbury Local School District.* 323 A.S. And her grandparents and legal guardians, Mr. and Mrs. S. (plaintiffs) appealed the District Court's grant of summary judgment to the Danbury Local School District (defendants) which was based upon various disputes regarding A.S.’s education. A.S. was identified as a student with a disability and attended an elementary school in the district for several years on a part-time basis due to her emotional state. Mr. and Mrs. S. argued that the school district failed to accommodate A.S.’s needs, and therefore they were entitled to relief under the IDEA as well as other federal statutes and state laws. The school district asserted that the plaintiffs' claims were without merit because Mr. and Mrs. S. signed a mediation agreement settling all issues regarding A.S.’s education.

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323 Amy S. v. Danbury Local Sch. Dist., No. 05-3653, U.S. App. LEXIS 8215 (6th Cir. 2006).
After being out of the district due to her emotional state, A.S. returned and experienced success with the help of a reward system. Toward the end of her first school year back in the district, her grandparents requested that the school provide ESY services for A.S. over the summer. After this request was denied, the grandparents filed a request for a due process hearing. The grandparents and school district agreed to mediate, and ultimately signed a written settlement agreement. The agreement provided that the school would provide A.S. one-and-a-half hours of tutoring per week for eight weeks over the summer. By signing the agreement, A.S.’s grandparents agreed that all issues relating to A.S.’s education were resolved up to the date of the agreement.

During the following school year, A.S.’s emotional state deteriorated, and on the advice of a physician completing a neurological evaluation on A.S., her grandparents removed her from school altogether. Several months later, A.S. returned to school but with mixed results. After additional disputes and an inability to agree upon A.S.’s educational services, another due process hearing occurred. As a result of the hearing, the parties agreed to another mediation, and again signed a settlement agreement. The agreement provided for thirty-six hours of tutoring, amongst other things, and it required that all previous educational issues be resolved with the effective agreement.

Tutoring over the summer was arranged for A.S. But, after the tutor learned that he was not able to transport A.S. due to a lack of certification to do so, a dispute regarding A.S.’s tutoring transportation ensued, and her grandparents discontinued A.S.’s tutoring. A.S.’s grandparents then filed a complaint in District Court. The school district
filed a motion for summary judgment, which was subsequently granted by the Court.

A.S.’s grandparents appealed to the Sixth Circuit.

The Sixth Circuit agreed with the District Court's conclusion that the mediation agreements signed by A.S.’s grandparents prohibited review of their claims. Since the tutor had offered to continue to tutor A.S. if her grandparents would transport her to the location of tutoring, the Court found that the school district did not breach the mediation agreements and that all claims had been settled.

Table 1 presented a summary at the beginning of this chapter. Findings from this chapter will be used to address this study’s research questions (chapter five) and conclusions (chapter six). A particularly relevant conclusion in chapter six will be the emergence of four benchmark decisions from this chapter’s seventy-seven case studies, which will inform stakeholders of four overarching themes in related services.
CHAPTER V
RESPONSES TO QUESTIONS POSED BY THE STUDY

Question One

What was IDEA’s intended purpose specifically regarding related services?

The Individuals with Disabilities Education Act (IDEA) defines related services as developmental, corrective, and other supportive services that are required to assist a child with a disability to benefit from special education. Some children need related services to meet their individually designed special education goals. If related services are required to assist a child with a disability to benefit from special education and receive a free and appropriate public education (FAPE), then those services must be provided.324

The basic rights that the Education for All Handicapped Children Act (EAHCA) gave to students with disabilities included rights to: (1) be provided a FAPE, (2) be educated in a setting that “to the maximum extent appropriate” allows interaction with regular education students (least restrictive environment or LRE), (3) be governed by a written, individualized education program (IEP), and (4) be provided related education and services that are based on a thorough evaluation of the student’s needs.325


When originally passed in 1975, the EAHCA (Public Law 94-142) had four major purposes: “(1) to assure that all children with disabilities have available to them a free appropriate public education which emphasizes special education and related services designed to meet their unique needs; (2) to assure that the rights of children with disabilities and their parents are protected; (3) to assist states and localities to provide for the education of all children with disabilities; and (4) to assess and assure the effectiveness of efforts to educate all children with disabilities.”

Public Law 94-142 provided opportunities for the involvement of physical therapists and other related service providers as these services were not required prior to the law being enacted.

In order to identify what is either included or excluded as a related service, it is important to first understand the standard established by the United States Supreme Court. Public schools are required to provide related services to students that are essential for the child to have access to school. An example is the case of Irving

*Independent School District v. Tatro.* At the heart of the case was a related service necessary for the student to attend school (i.e., catheterization). The school argued that the catheterizations constituted a medical procedure over and above the school’s responsibilities. The basis for the student’s case rested on the idea that catheterization was the only obstacle standing in the way of the child attending public school, which

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326 History: Twenty-Five Years of Progress in Educating Children with Disabilities Through IDEA, Special Education and Rehabilitative Services, United States Department of Education (July 5, 2013), http://www2.ed.gov/policy/speced/leg/idea/history.html

327 Paul R. Surburg, Implications of Public Law 94-142 for Physical Therapists, 61, 2 PTJ. 210, (1981) (history of physical therapy as a related service)

qualified as her least restrictive environment. The Supreme Court established the standard that when a service is necessary or the student will otherwise be barred from receiving an appropriate education, and the service can be provided by someone with less training than a physician, then the school must provide the service.\textsuperscript{329}

Educating students with disabilities is extremely complex due to the thirteen disability categories under which students’ conditions may fall as well as their individual varying degrees of need. Related services are another component of the complex nature of educating students with disabilities. Related services are meant to help students with disabilities benefit from their special education by providing support in needed areas, such as speaking or moving.\textsuperscript{330}

**Question Two**

**Pursuant to IDEA and related services, what are the specific outcomes of case law, and how are related services cases similar and different?**

For the purpose of answering two interrelated questions, questions two and three of this dissertation were combined. Seventy-seven cases involving fifteen related services were summarized in chapter four. Any related services which had only one case associated with the topic will be briefly reviewed. In the matter of a single case, similarities and differences are not applicable and will therefore not be discussed.

\textsuperscript{329} Edwin W. Martin, Reed Martin, Donna L. Terman, The Legislative and Litigation History of Special Education, 6, 1 The Future of Children. 25, 36 (Spring 1996) (Supreme Court standard for schools providing service of catheterization).

\textsuperscript{330} Related Services, National Dissemination Center for Children with Disabilities (July. 5, 2013), http://nichy.org/schoolage/iep/iepcontents/relatedservices
**Assistive Technology**

There were ten cases associated with the topic of assistive technology. Two cases were decided for the plaintiff and ten cases were decided for the defendant.

The following information will explain why the plaintiffs were successful in two cases. One court reasoned that when a hearing impaired student is placed in an outside placement, a school district should continue that placement if the student is receiving an educational benefit (FAPE), regardless of whether the district feels it could offer the student inclusive opportunities with same-aged, typically-developing peers.\(^{331}\) Thus, FAPE comes first, then least restrictive environment (LRE). However, when the district can provide a FAPE in the LRE, theoretically it should do so, but will likely have to go to court. In a second case, a student was making excellent progress without the use of assistive technology. Nonetheless, the school district was required to provide up to eight months of compensatory assistive technology services when it was determined that the district had denied the student a timely assistive technology evaluation and then use of such technology.\(^{332}\) The lesson here is to provide the elements of an appropriate education including technology in a timely manner.

Similarities within the successful cases for plaintiffs center on the appropriateness of a student’s education in their LRE. While a school district was well-meaning in offering an inclusive education with same-aged, typically-developing peers, the student’s success and progress in a more restrictive placement were deemed more important than

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\(^{332}\) Aguiree v. Los Angeles Unif. Sch. Dist., No. 03-57138, U.S. App. LEXIS 22090 (9th Cir. 2006).
Conversely, because the school district did not provide an assistive technology evaluation in a timely manner for the student, the district was required to provide compensatory services to make up for the oversight. A difference noted between the two cases in which plaintiffs prevailed centered on student progress. Both students made progress in their respective environments. While the first student was kept in a more restrictive environment, the second student was provided assistive technology, which could be argued was unnecessary since the student was making excellent progress without the use of such services.

The following information will explain why the defendants were successful in ten of twelve cases. One court determined that in denying a high school student the use of a Texas Instruments TI-92 calculator, a school district correctly provided the student with a FAPE by allowing him to use the TI-92 calculator to check his math problem solving on an as-needed basis. Therefore, a FAPE may be provided when students use assistive technology to check their work, rather than to find the answers. In a second case, even though the school district provided an autistic student with assistive technology software sixty days late, the district was found to have provided the student with a FAPE because the student was making progress on his annual IEPs and the district had offered a variety

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336 Aguiree v. Los Angeles Unif. Sch. Dist., No. 03-57138, U.S. App. LEXIS 22090 (9th Cir. 2006).

of different educational opportunities. Consequently, while it is important to provide agreed upon assistive technology software in a reasonable amount of time, a school district may be found to have provided a FAPE if the student has made progress on his annual IEP goals and objectives and the district offers a variety of educational opportunities. In a third case, when the parent of a child with a disability alleged that the school district violated her daughter’s rights by failing to include the use of assistive technology in her IEP, the Circuit Court refused to address the parent’s allegation since the student had received a FAPE. In a fourth case, when a student did not receive an assistive technology evaluation in a timely manner but demonstrated positive academic and nonacademic achievements, the Court concluded that she had received a FAPE. Hence, when providing a student with a FAPE, courts may side with the defendant even if the district does not include the use of assistive technology in a student’s IEP or provide an assistive technology evaluation in a timely manner.

In a fourth case, due to the 2004 amendments to the IDEA, a school district was required to provide cochlear implant mapping services only until October 13, 2006. Similarly, in a fifth case, when a suit was brought against the United States Department of Education, the D.C. Circuit Court concluded that the phrase, audiology services, as used in the IDEA’s definition of related services does not clearly encompass mapping of

The lesson within the two aforementioned cases is cochlear implant mapping services were no longer required under the 2004 amendments to the IDEA.

In a sixth case, when a dispute arose over the adequacy of a student’s IEP relating to the appropriateness of her FM system, the Court concluded that the school district provided a FAPE, noting that regardless of the kind of FM system (Radium or Phonak) employed, as long as the technology is reasonably calculated to permit the student to received educational benefits, a FAPE is provided. In a seventh case, a school district was found to be in compliance with the IDEA in offering other accommodations rather than a transcription service to hearing impaired students. As a result of the two aforementioned cases, defendants may prevail regardless of the kind of assistive technology provided as long as students are receiving educational benefits from the technology or accommodations.

Similarities within the successful cases for defendants center on the student receiving a FAPE through the education and instruction provided by the district in conjunction with the services provided by the districts. Even when students were not afforded a timely assistive technology evaluation or the inclusion of assistive technology within their IEPs, the school districts were found to be providing a FAPE

to students because of the students’ academic and nonacademic progress. Additionally, the 2004 amendments to the IDEA provided clear direction to school districts and courts as to when districts were no longer required to provide such services.

Differences in defendant-prevailing cases were minimal and were likely covered within the explanation of similarities, however, differences exist between plaintiff-prevailing and defendant-prevailing judicial decisions. It is important to note that in two distinct circuit court cases which occurred in separate circuit courts but in the same calendar year, when assistive technology evaluations were months overdue, opposing decisions occurred in the courts. In one case, a student was provided eight months of compensatory services yet, in another case, the defendant prevailed because the court deemed the student to have received a FAPE anyway.

**Audiology Services**

In a dispute over whether a school district should utilize the parents’ preferred approach in working with a hearing impaired student or employ the district’s current approach, the Court, in siding with the school district, concluded that the IDEA did not permit the parents to challenge an IEP on the grounds that it was not the best or most desirable program for their child. Programs must be appropriate and designed to

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349 Aguiree v. Los Angeles Unif. Sch. Dist., No. 03-57138, U.S. App. LEXIS 22090 (9th Cir. 2006).
provide educational benefit beyond the de minimis level and should be provided in the LRE. They need not be maximizing or the best possible.

Counseling Services

The defendants prevailed in each of the two cases associated with this topic. The reasons for prevailing are as follows. When a student alleged that the discipline provisions of his IEP were violated, one court reasoned that the student should have submitted his complaint through the IDEA’s administrative procedures first.\textsuperscript{352} In a second case, when parents sought reimbursement for costs associated with placing their child in a summer camp for children with Attention Deficit Disorder (ADD) and later at a residential treatment facility, a court denied private facility reimbursement due to the lack of evidence presented by the plaintiffs.\textsuperscript{353} Hence, one court found that the administrative complaint process should be followed, while another court found for the defendants due to a lack of evidence presented by the plaintiffs.

Similarities within the two cases lie with errors made by the plaintiffs. By not following administrative procedures in the first case,\textsuperscript{354} and not providing evidence as to their position, in the second case,\textsuperscript{355} plaintiffs were unsuccessful in their suits. Due to the

\textsuperscript{352} A.F. v. Washoe Cnty. Sch. Dist., No. 03-15090, U.S. App. LEXIS 3761 (9th Cir. 2004).


\textsuperscript{354} A.F. v. Washoe Cnty. Sch. Dist., No. 03-15090, U.S. App. LEXIS 3761 (9th Cir. 2004).

minimal number of cases associated with this topic, differences are not able to be ascertained at this time.

**Interpreting Services**

There were seven cases associated with the topic of interpreting services. The plaintiffs prevailed in three of the seven cases associated with this topic. The reasons for the plaintiffs prevailing are as follows. When parents of a hearing impaired student who attended a parochial high school requested that the school district provide a sign-language interpreter to their son, the High Court held that the establishment of religion clause did not prohibit the district from providing a sign-language interpreter.\(^{356}\) In a second case, the court found that a sign language interpreter was necessary to provide a developmentally delayed and hearing impaired Puerto Rican student with the FAPE. Without a sign language interpreter, the Court determined that the student would suffer irreparable harm.\(^{357}\) In a third case, upon parents’ seeking to reenroll their child in a public school and being denied, a court reasoned that the student should be educated within the district and should be provided with a “Deaf-Blind Coordinator” as well as training for staff in working with him.\(^{358}\) Thus, courts found sign-language interpreters, a “Deaf-Blind Coordinator,” and training for staff may be necessary for students to access a FAPE regardless of whether they attend a public or private school.

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\(^{357}\) Marquez v. Commonwealth of P.R., No. 02-2721, U.S. App. LEXIS 26253 (1st Cir. 2003).

The defendants prevailed in four of the seven cases associated with this topic. The reasons for the defendants prevailing are as follows. In a school district’s appeal of a lower court’s decision to grant a child a full-time interpreter, the United States Supreme Court found that the student received personalized instruction and related services to meet her educational needs, and therefore, an interpreter was not necessary in order to provide her with a FAPE. Similarly, a second court reasoned that a school district was not required to utilize a particular sign language program sought by parents, when student progress indicated that the district-implemented system conferred educational benefits upon the students. Consequently, if students are found to be making progress toward their IEP goals and objectives through the provision personalized instruction and related services, courts may conclude students are receiving a FAPE without a sign-language interpreter or particular sign language program requested by parents. In contrast to the High Court’s opinion in Zobrest, due to the 1997 amendments to the IDEA, a court held that since the school district offered a FAPE to the student, the district was not required to provide an on-site interpreter at a private school. Therefore, due to the 1997 amendments to the IDEA, school districts may not be required to provide sign-language interpreters at the private school via public expense. Likewise, when parents alleged that their son’s educational needs were not being met in the school district, they requested private school placement at public expense. The Court concluded that the school district


had provided the child with a FAPE and the parents chose to place their son in a private school.\textsuperscript{362} Alas, by offering a FAPE, a public school district may not be required to pay for private school placement, but may go to court.

Similarities within the plaintiff-prevailing cases lie with the need to provide students with access to their education through the use of an interpreter whether in a public\textsuperscript{363} or private\textsuperscript{364} school (pre-1997 amendments to the IDEA). Additionally, in the case of a deaf-blind student,\textsuperscript{365} the district was required to provide more than interpreting services in the public school setting. The district also had to provide a “Deaf-Blind Coordinator.”

Similarities within the defendant-prevailing cases centered on the need for interpreting services and placement. A public school student\textsuperscript{366} was found to have received a FAPE and was therefore not in need of interpreting services when in the case of a private school student,\textsuperscript{367} interpreting services at the public school district’s expense were not required per the 1997 amendments to the IDEA. Additionally, a school district was not required to provide a parent-preferred sign language program since the district’s

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363 Marquez v. Commonwealth of P.R., No. 02-2721, U.S. App. LEXIS 26253 (1st Cir. 2003).
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program was affording the student a FAPE. Likewise, private placement was unnecessary in the case of a student who had received a FAPE in the public school.

**Medical Services**

There were two cases associated with the topic of medical services. The plaintiffs and defendants each prevailed in one case.

The following information will explain why the plaintiffs were successful in their case. Due to a child’s multiple disabilities, a court reasoned that a twelve-month school year was required in order for the student to receive a FAPE. However, the court determined that residential placement or the institutionalization of the student was not necessary for educational purposes. Accordingly, year-round schooling may be necessary for a student to receive a FAPE. However, residential placement may not be deemed necessary in order for the student to receive a FAPE.

The following information will explain why the defendants were successful in their case. Upon unilaterally placing their daughter in residential treatment facilities in two separate states, a court reasoned that parents were not entitled to tuition reimbursement or compensatory education for their child to stay in the second private placement. In contrast, the school district admitted to denying the student a FAPE and subsequently reimbursed the parents for their costs and provided compensatory education.

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for the student’s first stay in an out-of-state treatment facility. Consequently, in denying a student a FAPE, a school district may be required to provide reimbursement for a unilateral private, out-of-state residential placement as well as compensatory educational services.

Similarities within the successful cases for both the plaintiffs and defendants center on the Court’s determination that residential placement was not necessary in order to make progress toward IEP goals and objectives. A contrasting difference between the two cases hinges on the parent’s decision in the first case to not unilaterally place her child in a residential setting, and this decision saved the parent a great deal of money which would not have been reimbursed based on the Court’s decision. In the second case, the Court ruled unilateral placement was unnecessary, and thus the school district was not required to reimburse the parents for costs associated with such a placement.

**Music Therapy**

The Circuit Court determined the hearing officer viewed music therapy from the narrow view of the student attending her home school rather than the school proposed by the school district. Because the hearing officer was not aware of the music program at the district-proposed school, and since the District Court would need to revisit the school

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placement issue, the Circuit Court remanded the case back to the District Court to review the matter.\textsuperscript{376}

**Occupational Therapy**

There were seven cases associated with the topic of occupational therapy services. The plaintiffs prevailed on four of the seven cases.

The following information will explain why the plaintiffs were successful in their cases. When a school district came to the conclusion that a student’s handicap was so severe he was not capable of benefitting from an education, and therefore was not entitled to special education and related services, a court found the student met the criteria for special education and related services and must be provided with such an educational program. The court reasoned that the Act required school districts to provide an educational program for every student with a disability in the district, regardless of the severity of handicap.\textsuperscript{377} In answering the question of whether a student with a disability enrolled by his parents in a private school was entitled to occupational therapy (OT) under the IDEA, the Court concluded the student had a right to related services while he attended the private school\textsuperscript{378} and that he required OT to receive educational benefit.\textsuperscript{379}

Thus, courts may find a student to have a right to educational and/or related services regardless of the severity of his disability or his attendance at a private school.

\textsuperscript{376} Carroll v. Metropolitan Gov’t. of Nashville and Davidson Cnty., No. 91-5749, U.S. App. LEXIS 538 (6th Cir. 1992).


Furthermore, upon request of a due process hearing by the school district, a court reasoned that the district was required to provide compensatory OT services because one of their OT staff members had not yet received her certification to provide unsupervised treatment. Consequently, compensatory services may be required if proper certification and supervision are overlooked. In another case, after parents rejected a school district’s offer of a section 504 plan that would have provided OT services, teacher consultations, and accommodations, the parents then enrolled their son in a private school program. They found the student to be dually enrolled in both the private school and public school district, therefore determining that the school district was required to provide the student with related services. Hence, courts may require public school districts to provide related services to students who are dually enrolled in public and private schools.

The following information will explain why the defendants were successful in three of the seven cases under the umbrella of occupational therapy services. In a dispute over what type of OT services a school district was required to provide, the school district was found to predetermine the cancellation of a particular therapy (hippotherapy) but did not exclude all therapy or predetermine the amount of such services. The Court ruled that since the IEP did not specify a particular OT service (i.e., hippotherapy), the district remained in compliance with the IEP. Consequently, courts may find a school district to be in compliance of an IEP if a parent-preferred form of therapy is not specified. In

381 Lower Merion Sch. Dist. v. Doe, No. 75 MAP, LEXIS 1986 (Pa. 2007).
another case, when a student made progress, a court found his OT services were reasonably calculated to confer a meaningful educational benefit. Therefore, his parents were not entitled to reimbursement for tuition and related costs associated with the student’s private placement or private evaluations since the evaluations were not obtained in consultation with the school district or with the intention that their son would return to the district.\(^{383}\) Thus, when a student makes progress, courts may not find grounds for tuition reimbursement for unilateral private placement by parents. Lastly, a court reasoned that an evaluation team correctly determined that a student was no longer in need of a special education because his needs could be met in a regular education setting with some slight modifications for his medical and safety needs, because the student’s performance had substantially improved to the point that his health condition did not have an adverse effect on his educational performance.\(^{384}\) Accordingly, if a student’s disability does not adversely impact his educational performance, the student may no longer qualify for a special education.

Similarities within the plaintiff-prevailing cases centered on the need for students to receive benefits from their education and related services. No student should be denied services, regardless of the severity of his disability.\(^{385}\) If enrolled in a private school\(^{386}\) or dually-enrolled\(^{387}\) in both private and public schools, students were eligible


for IEP and section 504 related services delivered by fully-certified providers or individuals. The fully-certified providers or individuals should be adequately supervised when providing services under a provisional license or compensatory education\(^{388}\) may be awarded.

Similarities within the defendant-prevailing cases centered on evaluation and IEP teams’ abilities to discern which type\(^{389}\) of OT services a student should receive in order to receive educational benefit\(^{390}\) and under what kind of plan–IEP or informal plan\(^{391}\) to address student needs within the general education class.

There were not any significant differences found within the decisions relating to OT services. The only differences associated with the decisions of the courts centered on the particular aspects of each case, rather than subsequent case law.

**Orientation and Mobility Services**

One court determined that a public school district had correctly offered to provide necessary services to a legally-blind student who was also afflicted with cerebral palsy at a neutral site rather than the student’s parochial school. The Third Circuit highlighted that the IDEA entailed that such services “may” be provided to children with disabilities at private schools, rather than “must” be provided.\(^{392}\)

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Parent Counseling and Training Services

A court found that the school district was correct to request the reduction in the number of district-funded trips a student’s parents could take to visit him and receive training at his out-of-state private placement from twelve to six, since the student was making adequate progress and the parents had never taken more than six trips to visit their son in the past. Additionally, the Court reasoned that in order to constitute a violation of IDEA, a procedural flaw must have caused harm to the student. Since the parents of the student did not argue that the student was denied a FAPE, they could not recover for any procedural deficiencies.393

Physical Therapy

Rather than providing a physical therapist (PT) to train a child’s teacher in how to integrate PT with his education, a court determined that the school district had violated the Education of the Handicapped Act (EHA) in refusing to provide direct physical therapy to all students in the district. Therefore, the court required the school district to provide direct physical therapy services to a student with multiple disabilities so that the student could receive more than “trivial progress” since such minimal progress did not provide the student with a FAPE. 394 Accordingly, a court may find a student’s minimal progress to be in violation of statute and require direct services so that the child may receive educational benefit.

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393 Aaron M. v. Yomtoob, No. 00 C 7732, LEXIS 1531 (N.D. Ill. 2003).

Positive Behavior Interventions and Supports

There were seven cases associated with the topic of positive behavior interventions and supports. The defendants prevailed on each of the seven cases.

The following information will explain why the defendants were successful in their cases. In the first case, a court reasoned that an aide need not have prior experience in working with the student to successfully attend to the student’s needs. More importantly, the court found an aide’s education, experience, and favorable references demonstrated that her assignment was reasonably calculated to ensure that the student would receive educational benefit. Consequently, while prior experience with a student is unnecessary, a court may find an aide’s background as a key factor in ensuring the student will benefit from his/her support. In a second case, the Court determined that a mother should not be reimbursed for her unilateral decision to supplement the salaries of certain aides assigned to work with her son because she did not challenge the IEP during the period of time in question. Thus, parents should not unilaterally supplement aides’ salaries and expect reimbursement. In a third case case, after reconvening the IEP team each time a student’s behavior worsened and amending the plan to meet the student’s progressing needs, the district was found to have acted in good faith and had reasonably calculated the student’s IEPs so that he could receive educational benefit. Accordingly, reconvening the IEP team to meet a student’s ever-changing needs provides

395 Gellerman v. Calaveras Uniform Sch. Dist., No. 00-17205, U.S. App. LEXIS 16133 (9th Cir. 2002).
397 Alex R. v. Forrestville Valley Cmty. Unit Sch. Dist. No. 221., No. 03-3858, U.S. App. LEXIS 15946 (7th Cir. 2004).
the student with an opportunity to receive educational benefit. In determining a student’s extended school year (ESY) needs as a result of his behavioral deficiencies, a Court cited *Cordrey v. Euckert*,\(^{398}\) noting that the advocate of ESY services bears the burden of proof in order to “meet the standard of significant skill losses of such degree and duration so as seriously to impede progress toward educational goals.”\(^{399}\) Also, in determining whether a student was required to receive expensive behavioral services in an out-of-district placement, the Court found that the district decided a proper course of action with input from the student’s parents and again cited *Cordrey* in that they could not “condone an imposition of a heavy financial drain upon the public”.\(^{400}\) Thus, courts placed great emphasis on the decisions rendered in *Cordrey*\(^{401}\) relating to the ESY-advocate bearing the burden of providing need for such services and in gaining input from parents for the proper course of action without great expense for services. Moreover, in a dispute over the amount of time a student was to receive Applied Behavioral Analysis (ABA) therapy, verbal behavior instruction, and occupational therapy, a Court concluded that while the proposed IEP may not have offered the best possible education, it is was more than adequate to provide the student with a meaningful educational benefit.\(^{402}\) In another case, when parents were informed of the opportunity to place their son in a charter school via a lottery system but later found that the school did not offer related services, the parents


filed suit. The school’s approach was found to be acceptable since the student’s needs were addressed by the creation of an individualized academic program which included intensive ABA instruction throughout the school day, and the parents requested such placement via participation in the lottery system.\textsuperscript{403} Similarly, in a dispute as to whether the lack of an FBA denied a student a FAPE, a court determined that since the IEP addressed the student’s behavioral needs, a FAPE was offered. Accordingly, it may not be necessary to offer students the best possible education or approach, but their IEPs must be calculated to address the student’s individual needs and confer meaningful educational benefit for a court to rule in favor of the defendant school district. In another case, when parent counseling and training services were denied, the Court referred to the mother’s experience as a special education teacher and the supports in the Behavior Intervention Plan (BIP) which provided adequate assurance that the student’s developmental plan and education would continue at home. Moreover, the Court highlighted that procedural violations warrant tuition reimbursement only if they impede the child’s right to a FAPE, significantly impede the parents’ opportunity to participate in the decision-making process, or cause a deprivation of educational benefits. Parents must also articulate how a procedural violation resulted in an IEP’s substantive inadequacy or affected the decision-making process. Furthermore, a collaborative team teaching approach was found to be the student’s LRE rather than a special education class placement.\textsuperscript{404} Thus, courts may award tuition reimbursement for procedural violations

\textsuperscript{403} J.N. v. New York City Dep’t of Educ., No. 09 Civ. 20 (RJS), LEXIS 33239 (S.D.N.Y. 2010).

\textsuperscript{404} M.W. v. New York City Dep’t of Educ., No. 12-2720, U.S. App. LEXIS 15328 (2\textsuperscript{nd} Cir. 2013).
warrant tuition reimbursement if a child is denied a FAPE or if parent input is not solicited or accepted.

Similarities within the defendant-prevailing cases centered on the FAPE provided to students. In addition, similarities were found across two cases which in one instance, parents were denied reimbursement for supplementing aide salaries, and in another instance, an aide’s background, experience, abilities, and favorable references afforded her assigned student an opportunity to receive educational benefit from her support. Additionally, compliance was achieved since ABA services were embedded in the parent-requested placement in a charter school via a lottery system. Furthermore, in finding that the parents had input in the IEP process and the IEP was expected to provide meaningful educational benefit, then the school districts had met their obligations to the students and families.

Since the defendants prevailed in all of the cases associated with this topic, differences in defendant-prevailing cases were minimal and when applicable, were detailed within the explanation of similarities.

407 Gellerman v. Calaveras Uniform Sch. Dist., No. 00-17205, U.S. App. LEXIS 16133 (9th Cir. 2002).
408 J.N. v. New York City Dep’t of Educ., No. 09 Civ. 20 (RJS), LEXIS 33239 (S.D.N.Y. 2010).
Psychological Services

There were twelve cases associated with the topic of psychological services. The plaintiffs prevailed on six of the twelve cases.

The following information will explain why the plaintiffs were successful in their cases. One court reasoned that due to a student’s diagnosis as severely, emotionally disturbed, schizophrenic process, his behavioral needs necessitated placement in an out-of-state educational treatment facility and regarded psychotherapy not as a medical service, but rather as part of psychological services, an allowable related service.\(^{411}\) Consequently, related services may require out-of-state residential placement at school district expense to accommodate for students’ behavioral needs. In a second case, when a school district erroneously delayed a student’s evaluation for special education services which subsequently delayed the student’s IEP, a court determined that the district denied the student a FAPE and was therefore responsible for the costs associated only with his counseling services while hospitalized.\(^{412}\) Similarly, when a student’s evaluation only considered the previous three months of his current enrollment rather than his previous enrollment in a school district in another state, a court required the school district to reimburse the parents for costs incurred related to the student’s educational and necessary related services.\(^{413}\) Thus, if a student’s evaluation is delayed or based upon recent information and a student is denied a FAPE, defendants may be responsible for costs

\(^{411}\) In re. the “A” Family, No. 14815, LEXIS 189 (Mont. 1979).


associated with student’s educational and related services. In another case, placement of a severely emotionally disturbed child in an out-of-state residential treatment facility which served both as a school and as a psychiatric hospital was found to be a proper placement to meet the student’s educational needs, as opposed to his medical needs. However, the cost of such a placement was shared with various public agencies. A court reasoned that graduating high school does not ensure a student was provided with a FAPE. A district could be found in violation of “Child Find” if a disability was suspected, yet nothing was done about it. Additionally, if a disability is suspected and a team is convened to move forward with the evaluation process, a school district may be liable for costs associated with a student’s subsequent mental health hospitalization. In another case, due to a student’s educational progress while in an out-of-district residential placement, the student was not eligible for compensatory related services which were allegedly not provided during her stay. Nonetheless, the school district was required to reimburse the parents for the student’s two school-year stay at the residential educational facility. Of note was the Third Circuit’s seemingly incorrect reasoning that under the IDEA a student is receiving an inappropriate education if the program is not providing “significant” learning and conferring a meaningful educational benefit.

Similarities within the plaintiff-prevailing cases centered on the requirements of school districts to be responsible for students’ out-of-state placement or hospitalization, though costs for such placement could be shared among various local agencies. In addition, if a district only considers the last three months of a student’s education record, rather than previous years spent being educated in another state, or does not evaluate a student upon suspecting a disability, the school district may be found liable for costs associated with the student’s education and related services.

The defendants prevailed on six of the twelve cases involving psychological services. The following information will explain why the plaintiffs were successful in their cases. Before a child’s school district and the Indiana Department of Education could secure placement in a residential educational facility, the student’s severe emotional and psychological condition forced her parents to have her committed. However, a court denied her parents’ claim for reimbursement because the student’s hospitalization did not result from delays by the state in processing her placement, nor did the hospital care constitute “related services” reimbursable under the IDEA.

\footnote{In re. the “A” Family, No. 14815, LEXIS 189 (Mont. 1979).}

\footnote{L.W. v. Radnor Twp. Sch. Dist., Nos. 05-3774, 05-4008, 05-4009, U.S. App. LEXIS 6620 (3rd Cir. 2007).}


\footnote{Taylor v. Garden Grove Unified Sch. Dist., No. 89-55177, U.S. App. LEXIS 13345 (9th Cir. 1990).}

\footnote{Babb v. Knox Cnty Sch. Sys., No. 91-5500, U.S. App. LEXIS 12117 (6th Cir. 1992).}

\footnote{Department of Educ., State of Haw. v. C.S., No. 00-00212SPK/KSC. LEXIS 11376 (D. Haw. 2001).}

\footnote{Butler v. Evans, No. 99-3135, U.S. App. LEXIS 22356 (7th Cir. 2000).}
Accordingly, residential care for a student’s significant mental health needs may not be a related service under the IDEA. In a second case, since the parents of a student diagnosed with severe depression did not raise any issue in regards to the extent or nature of the psychological counseling services provided in their child’s IEPs until at least eight months after his psychological treatment had ended, the Court concluded that the parents were not entitled to reimbursement for the costs associated with their son’s psychological counseling services. 424 Consequently, courts may side with defendants in situations when plaintiffs were significantly late in their complaint and subsequent request for reimbursement. One court reasoned in its description of a student as an incorrigible truant and lawbreaker that the student’s problems were not educational, since the student was not stricken with a cognitive disability that prevented him from applying his intelligence to the acquisition of an education, even without special assistance. Therefore, the school district was not obligated to pay for his residential placement, which the Court described as a boarding school specializing in juvenile delinquents. 425 Thus, if a student does not have an intellectual disability, defendants may not have to pay for residential placement for students deemed juvenile delinquents. In a fourth case, a court determined that parents were not entitled to reimbursement for the expenses associated with the residential placement of their son, due to: the high cost of residential facilities; the parents' lack of statutorily required notice; the medical, rather than educational, nature of the placement; the school district’s cooperation and willingness to revise the IEP


whenever the parents wished to change the student’s placement; and the parents' unwillingness to consider returning their son to a school within the district. Accordingly, when a student’s placement is for medical rather than educational reasons, among other factors, defendants may not be required to reimburse plaintiffs for residential care. Another court found in a dispute over whether specific teacher training services should be included in an IEP, that although the federal list of related services may not be all inclusive, the scope of the listed services failed to encompass specific teacher training. Thus, specific teacher training may not fall under the definition of related services and may be excluded from an IEP. In a sixth case, a court found that giving a parent a number of opportunities to comment on her son’s proposed IEP and incorporating many of the recommendations made at the IEP team meeting negated the allegation of predetermination by the school district. Additionally, scores from statewide assessments coupled with information from the student’s educational record indicated progress which clearly showed the student had received educational benefits from his IEP. Hence, providing parents opportunities for input in the IEP process may lessen the chance of a defendant proving determination of IEP services. Moreover, progress made by a student may be indicative of the student receiving educational benefit from his special education.


\[428\] Nack v. Orange City Sch. Dist., No. 05-3256, U.S. App. LEXIS 18666 (6th Cir. 2006).
Similarities within the defendant-prevailing cases include that districts were not required to provide payment for a student’s stay in a mental health facility, since the stay was not due to delays in processing her placement\textsuperscript{429} or when a student’s stay in a residential facility was found to not be educational\textsuperscript{430} but medical, in nature.\textsuperscript{431} Additionally, when parents who requested specific teacher training\textsuperscript{432} were given multiple opportunities for input on an IEP,\textsuperscript{433} or when months go by after requesting reimbursement for psychological services,\textsuperscript{434} districts were found to be in compliance when refusing requests for specific teacher training, placement, or reimbursement of costs.

Differences associated with the plaintiff-prevailing cases and defendant-prevailing cases centered on whether districts were required to either reimburse or provide for residential treatment services. Courts distinguished between district-required costs by determining whether the placement was due to educational, medical, related services needs or due to a student’s delinquency. Districts were also required to provide services or cover the costs of placements if they neglected their

\textsuperscript{429} Butler v. Evans, No. 99-3135, U.S. App. LEXIS 22356 (7\textsuperscript{th} Cir. 2000).


\textsuperscript{431} Ashland Sch. Dist. v. Parents of Student E.H., No. 08-35926, U.S. App. LEXIS 26564 (9\textsuperscript{th} Cir. 2009).


\textsuperscript{433} Nack v. Orange City Sch. Dist., No. 05-3256, U.S. App. LEXIS 18666 (6\textsuperscript{th} Cir. 2006).

\textsuperscript{434} M.C. v. Voluntown Bd. of Educ., No. 99-9282, U.S. App. LEXIS 22442 (2\textsuperscript{nd} Cir. 2000).
responsibility to evaluate students in a timely manner or incorporated three months rather than three years of student data.

**School Health Services**

There were nine cases associated with the topic of school health services. The plaintiffs prevailed on six of the nine cases.

The following information will explain why the plaintiffs were successful in their cases. In one case, a court found that in order to provide a student with access to an education in her LRE, a school district was required to provide clean-intermittent catheterization (CIC) as a related service for a student while at school. In a second case, the United States Supreme Court held that CIC is not a medical service which a school is required to perform under the Act only for purposes of diagnosis or evaluation; rather it is a supportive service necessary to assist a handicapped child to benefit from special education. Thus, CIC was clearly found to be an allowable related service under the IDEA. In a third case, a school district was required to provide the parent of a student with orthopedic impairments $34,520 to cover the cost of a full time aide to meet the child’s tracheostomy needs and ambulance service for a school year due to the district’s failure to place the student in her least restrictive educational environment. Another court ruled in a similar fashion in that, when a student’s lungs required checking

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via a stethoscope every couple of hours, suctioning every hour and a half, changing the oxygen tank about as often, and close monitoring at all times to make sure his ventilator did not become disconnected, the Court required the school district to furnish an attendant for the student as the required services were not medical in nature.\footnote{438} Calling on similar cases before it, the United States Supreme Court determined that a quadriplegic student with various needs associated with his condition, required a full-time nurse as his attendant so that his needs were met in his LRE.\footnote{439} In defining the services of a full-time nurse as a student’s attendant, the Court found the services to be supportive in nature rather than medical, and they were thus an allowable related service under the IDEA. The student was required to receive the services of an attending nurse so that her health and safety could be maintained while she received a FAPE.\footnote{440} Accordingly, defendants may have to furnish an attendant, aide, or nurse so that a student can have access to a FAPE.

Similarities within the plaintiff-prevailing cases centered on the need for clean-intermittent catheterization\footnote{441} which was found to be a supportive service\footnote{442} rather


\footnote{441}Tokarcik v. Forest Hills Sch. Dist., No. 80-2844/5, U.S. App. LEXIS 17922 (3rd Cir. 1981).

than a medical service and the need\textsuperscript{443} for a full-time aide\textsuperscript{444} and nurse\textsuperscript{445} so that students had access to their education in their LRE.\textsuperscript{446}

The following information will explain why the defendants were successful in three of the nine cases associated with school health services. In one case, when a parent’s claim for lack of jurisdiction under the IDEA was dismissed, a court noted that at the center of the dispute was whether the school had the right to request additional direction from the child's treating/prescribing physician regarding the administration and effects of medication on the student. Thus, the issue was not covered by the provisions of the IDEA and lacked subject matter jurisdiction.\textsuperscript{447} Hence, the right to request additional direction from a child’s physician is not covered under the IDEA. In a second case, under a parent’s assertion that her son was denied a FAPE by the school district for refusing to administer his G-tube feedings using the plunge method, a court determined that feeding via the gravity method was adequately meeting his needs and providing him with a FAPE. The Court also noted that the student’s mother did not offer any evidence to the IEP team that her son required plunge feeding.\textsuperscript{448} Therefore, as long as a student has access to a FAPE, regardless of the G-tube method of feeding, courts may rule in

\textsuperscript{443} City of Warwick. v. Rhode Island Dep’t. of Educ., No. PC 98-3189, LEXIS 1709 (R.I. Super. 2000).
\textsuperscript{447} John A. v. Board of Educ. for Howard Cnty., 929 A.2d 136, LEXIS (Md. 2007).
\textsuperscript{448} C.N. v. Los Angeles Unified Sch. Dist., No. CV 07-03642 MMM (SSx), LEXIS 80429 (C.D. Cal. 2008).
favors of the defendants. Another court found that in denying a school district its due process protections of notice and an opportunity to be heard, a lower court exceeded its legitimate powers, thus the lower court’s order requiring a school board to provide and pay for a full-time nurse was vacated. As a result, when school districts are not parties to a suit but are affected by the ruling, a higher court may rule in the district’s favor for lack of due process.

Similarities within the defendant-prevailing cases included a lack of jurisdiction under the IDEA, a lack of evidence for the parent-preferred feeding method, and the lack of due process provided to a school district in requiring the district to provide nursing services.

Differences between the plaintiff-prevailing cases and the defendant-prevailing cases centered on the students’ access to education in their LRE and that the services provided were found to be supportive rather than medical. Defendants prevailed when the plaintiffs claim was not under the IDEA, when plaintiffs lacked evidence to support their request, and when defendants were not given their rights afforded through due process.

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Speech-Language Pathology Services

There were three cases associated with the topic of speech-language pathology services. The plaintiffs prevailed on two of the three cases.

The following information will explain why the plaintiffs were successful in their cases. In one case, when a school district refused to continue to provide speech-language services to an eligible student who attended a parochial school, the Court concluded that, while the parents of a child with disabilities unilaterally enrolled in a private school must bear the financial burden of tuition when the school district has offered a FAPE, this did not relieve the public education agency from providing special education and related services to voluntarily placed private school students (dual enrollment). Therefore, even though a student is enrolled in a private school, a public school district may be required to provide special education and related services to the student under dual enrollment. In a third case, when parents made the decision to educate their son at home and requested that the school district provide speech therapy to him at the public school, the school district erroneously denied speech and language services because the child was being educated at home and not at a public or nonpublic school. In denying the student services, the district denied the student equal protection under the law as well. Thus, since home-schooled students are provided equal protection under the law, school districts may be required to provide related services to the student, in a manner similar to the provision of such services for a student with a disability enrolled in a private school.

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Similarities in the plaintiff-prevailing cases center on the school districts’ refusal to provide speech-language services in a parochial school\textsuperscript{455} or when a student was home-schooled.\textsuperscript{456} Courts found the students could be dually enrolled in a private school or in a home schooling situation and still be afforded related services from the public school districts. Specifically, even though parents must provide tuition for students with disabilities enrolled in private schools or a mandated education for those students who are home-schooled, school districts may be required to provide special education and related services to such students under dual enrollment. Students attending private schools or those who are home-schooled are afforded equal protection under the law.

The following information will explain why the defendants were successful in their case. After a change in Nevada law requiring school districts to provide related services to eligible students who were home-schooled, the Court determined that the student fell under the criteria provided by the IDEA as a parentally-placed private school student. Prior to the change in the law, when the parents’ request for reimbursement was denied by the Court, the Court noted that the IDEA left discretion to the states to determine that home education does not constitute an IDEA-qualifying private school or facility.\textsuperscript{457} Consequently, prior to a change in state law, parents could not be reimbursed for related services provided to their home-schooled child.


\textsuperscript{457} Hooks v. Clark Cnty. Sch. Dist., No. 98-17271, U.S. App. LEXIS 23570 (9th Cir. 2000).
Differences between the plaintiff-prevailing cases and the defendant-prevailing case include that while only one year apart, but in different states (Nevada\textsuperscript{458} and New Jersey,\textsuperscript{459} the cases present differences in the services provided for students who were home-schooled. In Nevada, home-schooled students were not\textsuperscript{460} eligible for related services while, New Jersey students were eligible\textsuperscript{461} for related services.

**Transportation Services**

There were twelve cases associated with the topic of transportation services. The plaintiffs prevailed in one of the twelve cases.

The following information will explain why the plaintiffs were successful in their case. In finding that the failure to provide a student with door-to-door transportation to and from school violated the Education for All Handicapped Children Act of 1975, a court awarded damages to the parents and the child for out-of-pocket transportation expenses and for the service of transporting the student to and from school. Although, in negating the District Court’s award of damages under section 504 of the Rehabilitation Act of 1973, the Circuit Court noted that compensatory and punitive damages were not available under the EAHCA and held that the plaintiffs could not use the wide-ranging remedy of the Rehabilitation Act to expand the EAHCA’s limited damage remedy.\textsuperscript{462}

\textsuperscript{458} Hooks v. Clark Cnty. Sch. Dist., No. 98-17271, U.S. App. LEXIS 23570 (9th Cir. 2000).


\textsuperscript{460} Hooks v. Clark Cnty. Sch. Dist., No. 98-17271, U.S. App. LEXIS 23570 (9th Cir. 2000).


a result, while the defendant was required to provide door-to-door transportation to and from school for the plaintiff, parents were not eligible for damages under the EAHCA.

The following information will explain why the defendants were successful in eleven of the twelve cases associated with this topic. One court reasoned in a dispute over the number of school-district-funded round trips for parents to their son’s out-of-state residential placement, that by paying for three round trips per year for the handicapped student, the school district had met its obligation to provide funding for transportation as a related service. Therefore, the provision of three round trips per year may be all that is necessary for a student who is residentially placed out of state. However, a school district may have to go to court to ascertain the amount of trips. In a second case, with regard to whether a change in the method of transporting a seriously handicapped child to a special education facility may be considered a change in “educational placement” within the meaning of the Education of All Handicapped Children Act (EHA), the Court concluded that the change from the parent transporting the student to the school district transporting the student would not have a substantial or detrimental impact on the student and that was therefore not a change in educational placement. Thus, a change from a parent transporting her child to a school district providing the transportation may not fall under a change in educational placement if the student is not substantially impacted by the change. In another case regarding a dispute over whether a school district had to provide a hearing impaired student with


transportation to and from her voluntary placement at a private school for the deaf, the
Court concluded that since the service was not required to meet the unique needs of the
child, the school district was not required to provide the transportation service.\textsuperscript{465} In a
fourth case, when a dispute arose over whether a school district was required to provide
transportation on alternating weeks for a hearing impaired child of divorced parents (to
his father’s house outside of the school district’s boundaries) a court concluded that the
requested transportation did not address any of the student’s special educational needs;
instead, the request was to accommodate the arrangements of the child’s parents.\textsuperscript{466}
Consequently, students may only be eligible for transportation as a related service if the
service is necessary to meet the child’s unique needs. In another case, when a student’s
request either to transport him three blocks between his private school and the public
school that offered the speech therapy he needed or to provide such services at his private
school, the student was not able to show that he was unable to travel to the public school
without the district’s assistance. Additionally, the school district did not deprive the child
of a genuine opportunity for equitable participation in a special education program, nor
did it withhold special education benefits comparable to those it offered to public school
students. Therefore, the Court determined that the related service of transportation was
not necessary for the child to benefit from special education.\textsuperscript{467} Accordingly, a student
may be denied transportation by a defendant yet still provided equal protection if the


\textsuperscript{467} Donald B. v. Board of Sch. Commissioners of Mobile County, AL., No. 96-6358, U.S. App. LEXIS 19968 (11th Cir. 1997).
student fails to show an inability to travel to the public school without the support of the district. In a sixth case, when a school district refused to provide a special education student with specialized transportation to a high school outside her assigned attendance area due to a voluntary intra-district transfer program, the Court concluded that the establishment of a special bus route for a single student who admittedly received a FAPE at her neighborhood school, but who wants to go to another school for reasons of parental preference, was an undue burden on the school district.468 Therefore, by providing a FAPE to a student at a neighborhood school, a district may not be required to bear an undue burden and provide specialized transportation due to the student’s voluntary transfer to another school within the district. In another case, a school district was not required to provide transportation for a student due to the child’s participation in the private program at a location different from the school district's own after-school program, which the student was offered, with accommodations.469 Thus, in offering an after-school program with the necessary accommodations for a student with a disability, a school district may not be required to transport a student to a private program. In an eighth case, which a school district was required to pay the transportation costs for a child with autism when the child lived in a group home in one district, attended school in another school district, and the parents resided in a third district, the Court concluded that the school district in which the child’s parents resided should pay for such transportation.

468 Kratisha H. v. Cedar Rapids Cmty. Sch. Dist., No. 98-2723, LEXIS 9767 (8th Cir. 1999).

469 Roslyn Union Free Sch. Dist. v. University of N.Y., No. 84322, LEXIS 8254 (N.Y. 2000).
Therefore, the school district in which a student resides, regardless of his living with his parents or in a group home, shall bear the costs for transportation. At the center of a dispute of another case was whether the school district was required to transport a student to a day care center after school, rather than to her home, in order to provide a FAPE. The Court concluded that the school had met the needs of the child within the neighborhood boundaries, and the request for transportation to a school outside the boundaries was “for reasons of parental preference” only. Therefore, the request was appropriately denied. Consequently, school districts may not be required to transport students with disabilities outside of the child’s neighborhood boundaries at the request of the parent. In a tenth case, when parents argued that the difference in treatment of their disabled son, who attended a religious school, from other disabled students, who attended public schools, violated various federal laws, a court found the parents to have argued incorrectly in that the benefits they believed they were entitled to under the First Amendment were benefits the federal government had allocated solely for public school students. Moreover, the rights of students with disabilities who attend private schools do not fall under the First Amendment.

In another case, due to a mother’s employment obligations, she was not able to be at home at the end of the school day, and her child care arrangements did not always guarantee that someone would be there when her child arrived home from school.

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Therefore, she had requested that every other week the bus driver ensure that an adult is present at the bus stop before letting her child off the bus in the afternoon and, if no adult was present, arrange for the student to be dropped off elsewhere. The school district had agreed to such a request if the student rode the special education bus. Since the mother’s request did not address her child’s educational needs, her request was denied by the Court.\textsuperscript{473} Therefore, requests regarding special transportation arrangements should be linked to the educational needs of a child or such requests may be denied. In the final case, when a child was offered tutoring due to a mediation agreement between the school district and her grandparents, transportation was initially provided by the tutor. But, after the tutor learned that he was not able to transport the student due to a lack of certification to do so, a dispute regarding the student’s transportation ensued, and her grandparents discontinued the tutoring. Since the tutor had offered to continue to tutor the student if her grandparents would transport her to the location of tutoring, the Court found that the school district did not breach the mediation agreements, and thus as a result of the agreements, all claims had been settled.\textsuperscript{474} Thus, even though a school district did not transport a student to agreed-upon tutoring sessions, the defendant did not breach the agreement since the tutoring was offered at a neutral location in which the student could have been transported to by her grandparents.


\textsuperscript{474} Amy S. v. Danbury Local Sch. Dist., No. 05-3653, U.S. App. LEXIS 8215 (6th Cir. 2006).
Similarities in the defendant-prevailing cases center on disputes over whether a school district had to provide students with transportation to a voluntary private placement, even if the private placement was only three blocks away. School districts did not have to provide transportation to a high school due to a student’s participation in an intra-district transfer program, to a day care center outside of the district’s boundaries after school rather than home, to the home of a student’s father who lived outside the district boundaries, or to a private after school program when districts were willing to meet the child’s needs within their own district.

The only difference noted in the outcomes of cases involving transportation pertains to the only plaintiff-prevailing case in which a district failed to provide door-to-door transportation for a student who required such specialized services. As was previously mentioned, defendants prevailed in all but one case involving transportation. Generally, school districts were willing to cooperate with parents in situations involving intradistrict transportation on public school students, although in the one case in which a district did not cooperate, they were held accountable by the Court.

477 Donald B. v. Board. of Sch. Commissioners. of Mobile County, AL., No. 96-6358, U.S. App. LEXIS 19968 (11th Cir. 1997).
481 Roslyn Union Free Sch. Dist. v. University of N.Y., No. 84322, LEXIS 8254 (N.Y. 2000).
Question Three

What are the current trends in case law pursuant to IDEA and related services?

Chapter four summarized seventy-seven cases in which a suit was filed against an educational agency over a dispute regarding the provision of related services. Several trends within each related service became apparent through the summaries. Trends will be identified within related services which have two or more cases associated with the topic.

- Parents must ensure they follow the administrative complaint process and provide evidence regarding their claims.
- Parents must ensure their child has a right to educational and/or related services regardless of the severity of his disability or his attendance at a private school.
- Parents must ensure their preferred form of therapy is specified within the IEP.
- Parents must not require their child’s aide to have prior experience in working with their student; however, school districts must consider an aide’s background to ensuring the student will benefit from his/her support.
- Parents must not unilaterally supplement aides’ salaries and expect reimbursement.
- Parents must bear the burden of providing need for ESY services.
- Parents must ensure their complaints and request for reimbursement are filed in a timely manner or courts may side with the defendants.
• Parents must ensure their child’s placement is for educational rather than medical reasons, or the school district may not be required to reimburse them for residential care.
• Parents must know that a change from the parent transporting their child to a school district providing the transportation will not fall under a change in educational placement if the student is not substantially impacted by the change.
• Parents must know that their child may be eligible for transportation as a related service only if the service is necessary to meet the child’s unique needs.
• Parents must know that the rights of students with disabilities who attend private schools do not fall under the First Amendment.
• Parents must know that requests regarding special transportation arrangements must be linked to the educational needs of a child or such requests may be denied.
• School districts must provide a FAPE then a LRE. FAPE comes first.
• School districts must provide the elements of an appropriate education including technology, accommodations, and evaluations in a timely manner.
• School districts must ensure that students make progress on IEP annual goals and objectives as well as offer a variety of educational opportunities to ensure a FAPE has been offered.
• School districts must provide the elements of an appropriate education including technology in a timely manner.
• School districts are no longer required to provide cochlear implant mapping services under the 2004 amendments to the IDEA.
• School districts must provide programs which are appropriate for the student and are designed to provide educational benefit beyond the de minimis level and should be provided in the LRE. Such programming need not be maximizing or the best possible.

• School districts must provide sign-language interpreters and training for staff so that students have access to a FAPE regardless of whether they attend a public or private school.

• School districts must ensure students are making progress toward their IEP goals and objectives through the provision personalized instruction and related services so that the students receive a FAPE. However, such personalized instruction may not include a sign-language interpreter or particular sign language program.

• School districts must offer a FAPE and by doing so may not be required to pay for private school placement.

• School districts must offer a FAPE which may include year-round schooling; however, residential placement may not deemed necessary in order for the student to receive a FAPE.

• School districts must provide a FAPE or may be required to provide reimbursement for a unilateral private, out-of-state residential placement as well as compensatory educational services.

• School districts must ensure staff are properly certified and supervised or compensatory services may be required.
• School districts must provide related services to students who are dually enrolled in public and private schools.

• School districts must ensure students are making progress toward their IEP goals and objectives, or they may be liable for tuition reimbursement due to unilateral private placement by parents.

• School districts must ensure a student’s disability does not adversely impact his educational performance in order for the student to no longer qualify for a special education.

• School districts must provide necessary services either at a neutral site or the student’s private school.

• School districts may request a reduction in the number of district-funded trips a student’s parents could take to visit him and receive training at his out-of-state private placement if the student is making adequate progress.

• School districts must ensure students are making more than minimal progress when providing indirect services. If only minimal progress is being made, direct services will be required so that the child may receive educational benefit.

• School districts must reconvene the IEP team to meet a student’s ever-changing needs so that the student is provided with an opportunity to receive educational benefit.

• School districts are not required to offer students the best possible education or approach but must calculate each student’s IEP to address the student’s individual needs and confer meaningful educational benefit.
• School districts must not violate procedures and deny a student a FAPE but must solicit and accept parent input.

• School districts must consider sharing the costs of students’ out-of-state residential placement for students’ behavioral needs between various local agencies.

• School districts must not delay a student’s evaluation (Child Find) or base the assessment upon recent information, or they will deny the student a FAPE.

• School districts must know that graduating high school does not ensure a student was provided with a FAPE.

• School districts must move forward with the evaluation process if they suspect a student has a disability.

• School districts must be wary of a court’s incorrect use of a standard by finding that a student is receiving an inappropriate education if the program is not providing “significant” learning and conferring a meaningful educational benefit.

• School districts and parents must know that residential care for a student’s significant mental health needs may not be a related service under the IDEA.

• School districts must ensure a student who is deemed a juvenile delinquent does not have an intellectual disability in order to not have to pay for residential placement.

• School districts must be aware that specific teacher training does not fall under the definition of related services and may be excluded from an IEP.
• School districts must ensure that parents are provided with opportunities for input in the IEP process so there may be less of a chance that school officials predetermine IEP services.

• School districts must be aware that clean-intermittent catheterization (CIC) is a supportive rather than medical service under the IDEA and is therefore an allowable related service.

• School districts must furnish an attendant, aide, or nurse if necessary for a student to have access to a FAPE in his LRE.

• School districts must know that as long as a student has access to a FAPE, regardless of the G-tube method of feeding, courts may rule in their favor.

• School districts must know that when they are not parties to a suit but are affected by the ruling, they have not been provided their right to due process.

• School districts must provide special education and related services to students enrolled in both public and private schools or home-schooled students under dual enrollment.

• School districts must provide round trip transportation for students who are residentially placed out of state. However, a school district may have to go to court to ascertain the amount of trips.

• School districts are not required to provide specialized transportation due to the student’s voluntary transfer to another school within the district if the district has provided a FAPE to the student at their neighborhood school.
• School districts are not required to transport a student to a private after-school program if it offers an after-school program with the necessary accommodations for a student with a disability.

• School districts must bear the costs for transportation of a student if the student resides in the district regardless of whether the student is living with his parents or in a group home.

• School districts are not required to transport students with disabilities outside of the child’s neighborhood boundaries at the request of the parent.

In closing, the above trends have been provided to summarize the review of seventy-seven cases involving related services. These trends provide the basis for conclusions delivered in chapter six.
CHAPTER VI
PRACTICAL IMPLICATIONS

The final chapter of this dissertation will provide school board members, superintendents, district and building administrators, general and special education teachers, related service providers, the Ohio Department of Education, and Ohio and Federal legislators with guidelines concerning the provision of related services for students with disabilities. This researcher’s hope is that the more the aforementioned stakeholders know about the provision of related services, the better they can work together to improve the education of students and to serve students in an economical manner.

The emergence of four benchmark decisions from chapter four’s seventy-seven case studies will inform stakeholders of four overarching themes in related services. First, the U.S. Supreme Court noted that federal statute did not include a requirement that districts must maximize the potential of handicapped children equal to the opportunity provided to typically-developing children, nor did Congress impose a greater educational standard on states to make access to public education meaningful for students with disabilities.\(^{483}\) Second, the High Court held that the establishment of religion clause did not deny a school district from providing a sign-language interpreter to accompany the student to classes at the parochial high school.\(^ {484}\) This decision would apply to other


related services. Third, the U.S. Supreme Court concluded that the medical services exclusion was designed to spare schools from an obligation to provide a service that might well prove unduly expensive and beyond the range of their competence. However, the High Court held that the school district was required to provide clean-intermittent catheterization (CIC) services because CIC can be provided by someone with less training than a physician and is a supportive service required to assist a handicapped child to benefit from special education within the meaning of the Act.\footnote{Irving Indep. Sch. Dist. v. Tatro, No. 83-558, U.S. LEXIS 152 (U.S. 1984).} Fourth, the South Dakota Supreme Court concluded that although the federal list of related services may not be all inclusive, the scope of the listed services failed to encompass specific teacher training. Therefore, since teacher training is not a related service under federal law, it cannot be required in an IEP.\footnote{Sioux Falls Sch. Dist. v. Koupal, No. 18670-a-JKK, LEXIS 189 (S.D. 1994).} This state-level decision is likely to apply to most other states. Thus, these four benchmark decisions will be integrated into the guidelines that follow.

**School Board Members**

As the elected officials charged with creating a vision, management structure, and advocating on behalf of students, this researcher suggests school board members develop and implement policy that is inclusive of all students and their varying needs. Not only should school boards create policies of inclusivity, but through their actions, boards should also promote a culture of inclusion and acceptance.\footnote{Being a School Board Member. http://www.ohioschoolboards.org/guide-to-being-a-school-board-member (last visited Aug. 23, 2014).}
Through their actions, school boards have the ability and responsibility to keep students as the central focus of a school district, regardless of students’ abilities or disabilities. School boards should adopt a shared vision based on community beliefs to guide the work of the school district administration and staff. Further, school boards should also employ a management structure which enables administration and staff to keep students as the central focus for the district’s many operations. Lastly, school board members should advocate for students and families by encouraging an innovative learning environment with the related services and supports to promote student success. School board members should also ensure that the provision of resources is available for district administration and staff to make such an environment possible.

**Superintendents**

Superintendents are charged with the role of chief executive officer of a school district regardless of enrollment or geographical size. While the superintendent’s role is leading the school district, superintendents also have the critical task of hiring effective administrators. In some cases, superintendents, depending on their leadership style, also take on the role of being the final decision-maker in hiring teaching staff as well.

Superintendents must ensure administrators are hired who are well-versed in the many aspects of law and special education and who believe in inclusive practices as well as educating students in their least restrictive environment. Part of the interview process in hiring administrators should include a structured interview that explores candidates’ beliefs and knowledge of special education. Superintendents should search for building and central office administrators who have experience working within special education
or with students who received a special education. While that pre-administrative experience may not be as a special education intervention specialist in many cases, experiences in special education can range from general education teachers co-teaching with intervention specialists to physical education (PE) teachers providing modified PE to students with disabilities, and to include the important work of being an IEP team member. Superintendents must ensure they hire administrators who value all students regardless of ability and who want to support students with disabilities through the provision of an individualized education program which may also include the provision of related services.

As the chief executive officer, a superintendent must know some of each facet of operating a school district. For example, a superintendent may work with his or her business director and maintenance supervisor to improve the playing surface of an athletic field, enhancing the safety of a field’s participants in preparation for an upcoming season. Or a superintendent may work with his or her special education director to allocate funds thereby ensuring a student has access to his or her education through the provision of, for example, school health services. A superintendent must quickly learn new information relating to a specific task at hand. As was previously stated in regards to hiring quality administrators, superintendents should also possess the background in working with students with disabilities and have an understanding of the law as it relates to students with disabilities. Most importantly, superintendents should have a mindset of including all students through the provision of educational and related services which are
necessary to provide students with disabilities the free and appropriate public education they are entitled to receive.

Lastly, superintendents should consider a more innovative approach to providing students with disabilities educational and related services. While students with disabilities should be educated in their least restrictive environment, some students’ LRE may be a special class or program from which they can benefit but that is not housed in their home school or district. By promoting a practice of shared services to lessen the burden of instituting, for example, a positive behavior program, deaf education program, or career training program, superintendents can maximize opportunities for students with disabilities while sharing the cost of such services with other school districts.

District Administrators

As was previously stated, administrators should be hired who are well-versed in the many aspects of law, and special education, and who believe in inclusive practices as well as educating students in their least restrictive environment. Prior to becoming a district-level administrator, central office administrators should have experience as a building-level administrator. Central office administrators should have prior administrative and teaching experience relating directly or indirectly to special education. While that pre-administrative experience may not be as a special education intervention specialist, experiences in special education can vary from general education teachers co-teaching with intervention specialists to teachers of electives courses providing modified programming to students with disabilities. These experiences include the important work of being an IEP team member or even district representative on an IEP team. Central
office administrators must value all students regardless of ability and should support students with disabilities through their particular roles in personnel, curriculum, data analysis, operations, and special education.

Personnel directors should use a structured interview method in the process of screening candidates for teaching and related service provider positions because specific questions may be structured to target beliefs and knowledge about special education. Personnel directors should also work closely with building administrators and the special education director to ensure the right candidate is hired for the position and most importantly, to ensure that the chosen candidate employs a student-centered decision-making process.

Curriculum directors should work closely with the special education director and building administrators to ensure that all students have access to the same curricular materials. It should not solely be the special education department’s responsibility to provide curricular materials to students with disabilities. Curriculum and special education directors should work together to secure funding so that all students have the same materials with which to learn. The curriculum director should also hold the education and achievement of students with disabilities in an identically high regard as typically-developing students.

Data analysis directors should also work closely with special education directors and building administrators to analyze performance data. After analyzing the data, both the data analysis administrator and special education administrator should present the information to the rest of the administrative team. The data presentation should conclude
with each building administrator having the responsibility to answer probing questions based on their data. Examples of those questions are: After reviewing the data, is there anything that sticks out to you? Compare the elementary level students with disabilities to the middle and high school students with disabilities. What do you notice? What are some successful interventions for students with disabilities at the elementary, middle, and high school levels? Identify three things you can do this year to improve the achievement of students with disabilities.

Operations directors should work closely with special education directors to ensure students with disabilities have access to the necessary services and supports in order to receive a free and appropriate public education. Operations directors oversee the student transportation as well as the maintenance of the grounds and buildings. Operations directors must work with the special education director to ensure students with disabilities are provided with services and supports in a dignified manner. For example, in providing students with disabilities transportation both to and from school each day, operations directors can work with the special education director to ensure students who use an augmentative and alternative communication device to communicate, can continue to do so safely on the bus.

As can be inferred by their title, directors of special education have the largest and most complex role in providing students with disabilities a free and appropriate public education. Directors of special education often oversee a large budget which has been augmented by federal, state, and local funds to support the provision of services to students with disabilities. In addition to the aforementioned ways in which special
education directors work with other central office and building administrators, directors of special education also work closely with intervention specialists, related service providers, parents, and students with disabilities in ensuring student needs are being met.

Part of a special education director’s job should be ensuring that the school district abides by the laws set forth in educating students with disabilities. Special education directors should ensure that blanket statements or policy are not enacted such as, “All physical therapy will be provided via consultative services rather than direct services from a licensed physical therapist.”488 Further, special education directors should be hesitant to request a due process hearing. The writing and implementation of individualized education programs (IEPs) can be so complex that even the most knowledgeable and organized director of special education can commit a technical violation. For example, a pre-certified occupational therapist (OT) could legally work in the school district with the proper supervision, but if that OT is not properly supervised, the district could be ordered to provide compensatory occupational therapy services in addition to the amount already provided for in an IEP.489

In addition, special education directors must have an awareness of and working knowledge in special education law. One of the most important, if not the most important, outcome of case law which directors of special education must have an


awareness is the two-part test created by the United States Supreme Court in *Rowley*.\(^{490}\) First, has the school administration complied with IDEA’s procedures? Secondly, is the IEP reasonably calculated to enable the child to receive educational benefits? In *Rowley*, the Court noted that a reviewing court must base its decision on the “preponderance of the evidence.” The United States Supreme Court found this provision not to be an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities, but rather an opportunity to utilize the two-part test from *Rowley* for a court's inquiry. In providing a rubric to its test, the Court noted that if the aforementioned requirements were met, the State has complied with the obligations imposed by Congress, and the courts can require no more.\(^{491}\)

Another important and more recent decision to consider is *R.P. v. Alamo Heights Independent School District*.\(^{492}\) In *R.P.*, the Fifth Circuit explained that when a parent challenges the appropriateness of an IEP, the Fifth Circuit utilizes the two-part *Rowley* test. The Fifth Circuit identified four factors it believed could serve as indicators of whether an IEP met the requirements. First, is the program individualized on the basis of the student's assessment and performance? Second, is the program administered in the least restrictive environment (LRE)? Third, are the services provided in a coordinated and


collaborative manner by the key stakeholders? Last, are positive academic and nonacademic benefits demonstrated?493

Another important case involving the provision of related services which directors of special education must be aware is the United States Supreme Court case of Irving Independent School District v. Tatro.494 In Tatro, the United States Supreme Court affirmed the District and Circuit Courts’ decisions and held that under Texas law a nurse or other qualified person may administer clean intermittent catheterization (CIC) without engaging in the unauthorized practice of medicine, with the provision that a doctor prescribes and supervises the procedure. The High Court agreed with the District Court in holding that because a doctor was not needed to administer CIC, provision of the procedure was not a medical service for purposes of the Education of the Handicapped Act.495

Another case which special education directors should know is Morton Community Unit School District v. J.M.496 In the case of J.M., a full time nurse was required for the student. However, since the necessary services were time consuming but did not require a high degree of expertise or any expenses of medical treatment, the

Seventh Circuit ruled in favor of the student basing its decision on the *Tatro* case from fourteen years earlier.\(^{497}\)

Additionally, in the United States Supreme Court case of *Cedar Rapids Community School District v. Garret F.*,\(^ {498}\) the federal District Court agreed, and the Circuit Court of Appeals affirmed, concluding that *Tatro* provided a two-step analysis of related services which was satisfied in this case. First, the requested services were supportive services because Garret could not attend school unless they were provided; and second, the services were not excluded as medical services under *Tatro*'s test (i.e., services provided by a physician, other than for diagnostic and evaluation purposes, are subject to the medical services exclusion), but services that can be provided by a nurse or qualified layperson are not. The U.S. Supreme Court held that the IDEA requires the school district to provide Garret with the nursing services he requires during school hours. The Court noted the IDEA's related services definition, *Tatro*, and previous decisions in support of the Court of Appeals' decision. The related services definition broadly encompasses those supportive services that may be required to assist a child with a disability to benefit from special education. The Court noted that although the IDEA itself does not specifically define medical services, the Court in *Tatro* concluded that the Secretary of Education had reasonably determined that medical services referred to services that must be performed by a physician, and not to school health services.\(^ {499}\)


Additional decisions in which directors of special education should be aware are as follows: In *C.M. v. Miami Dade County, Florida School District*,\(^ {500} \) the administrative law judge, District Court, and Eleventh Circuit Court of Appeals all concluded that it is the school district’s prerogative, not the parents', to choose which of the accepted and proven methodologies will be provided at public expense.\(^ {501} \) In *Taylor v. Garden Grove Unified School District*\(^ {502} \) and in *Babb v. Knox County School System*,\(^ {503} \) special education directors should be aware that residence in out-of-state placements have been found to be necessary to provide students with their educational and related service needs.

As the preceding information from cases substantiates, it is of the utmost importance that special education directors should attend legal updates at least annually, preferably multiple times per year, and subsequently should communicate the information gleaned from attending the legal updates to the administrative team and special education staff. Directors of special education should also have regular communication with special education staff members. At the very least, special education staff should receive updates of information prior to the start of each school year. Additional updates are warranted each time procedures and regulations change from the state department of education. Further, it is important that special education

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directors should promote procedural compliance in all staff, document all communication, and always explain the reasoning behind decisions.

Lastly, directors of special education should also attend and participate in meetings held by regional special education affiliates of their state departments of education. Further, it is imperative that directors of special education become members of state and national organizations for special education administrators. This researcher has found the information provided by the Council for Exceptional Children (CEC), Council of Administrators of Special Education (CASE), the Ohio Association of Pupil Services Administrators (OAPSA), and Education Law Association (ELA) to be very timely and helpful beyond measure.

**Building Administrators**

It is not necessary here to restate the aforementioned information which was relevant to principals, assistant principals, and deans of students. Building administrators have the complex job of being the site supervisor for special education staff, they act as district representatives at IEP team meetings, answering questions relating to special education, and attempting to resolve disputes between parents and the school district. Building administrators must also have an awareness of the two-part test from *Rowley*.504 Moreover, building administrators should have working knowledge of the four factors identified in the case of *R.P.*,505 which the Fifth Circuit used to ascertain whether the *Rowley* test was met.

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As the instructional leaders for their respective schools, building administrators must promote inclusive practices, inspire general and special education teachers and special education and related service providers to co-teach, encourage the differentiation of instruction, and ensure that all staff undertake the responsibility to ensure students with disabilities are provided with the services and supports to access their education and receive meaningful educational benefit.

As district representatives, building administrators should be aware of special education law, be familiar with proper and necessary components of IEPs, calculate personalized instruction and related services to meet each child’s individual needs, and understand and be able speak to the information provided within the state’s procedural safeguards. As district representatives, building administrators should, in the matter of a change of placement, always give an explanation as to why the student’s home school is not a proper placement and provide reasoning for the proposed change in placement. Furthermore, building administrators should work with general and special education staff to document all communication between the school district and parents, especially information discussed at an IEP team meeting. Lastly, as district representatives at IEP team meetings, building administrators are charged with ensuring that each stakeholder has an opportunity to discuss specific aspects of the child’s education as it relates to their particular component of the IEP. Disagreements can happen at IEP team meetings. As district representatives, building administrators may need to end an IEP team meeting


early due to the behavior of an IEP team member. In this case, the district representative should work with the IEP team to promptly schedule another IEP team meeting so the child will continue to receive a free and appropriate public education.508

General Education Teachers

As important cogs in educating students with disabilities, general education teachers should be knowledgeable of each student’s IEP and what it requires. If general education teachers do not understand a particular component of the IEP or what is required of them, they should work closely with the special education intervention specialist, related service providers, and if necessary, building administrators to clear up any misconceptions. General education teachers are required to include data-based information in the triennial evaluations and re-evaluations. These data should be objective and measurable. General education teachers should also have the ability to meet the needs of all learners in their classroom through the differentiation of instruction. Similar to the differentiation of instruction, general education teachers should utilize a Response to Intervention (RTI) approach of providing interventions to students who struggle in a particular area. By definition, the RTI process is a method of collecting data, analyzing data, and refining interventions, general education teachers use to promote student success. Additionally, all students can benefit if the general education teacher, special education intervention specialist, and related service providers develop a collaborative relationship which results in co-teaching and/or the incorporation of each other’s suggestions into their teaching or provision of services. An indicator of a

successful co-teaching partnership is that students are not able to tell who the “teacher” of the class might be.

**Special Education Teachers**

Special education teachers or intervention specialists are the most important teachers to a student with a disability. Intervention specialists are charged with being the student’s teacher, unofficial counselor, cheerleader, conduit between special education and general education services, partner with related service providers, and communicator with all members of the IEP team. In addition to the aforementioned information, the intervention specialist is the author of the IEP draft. Intervention specialists must ensure that IEP goals are not formulaic and are designed to meet the individual needs of each learner.\(^509\) In essence, an intervention specialist who oversees the IEP of twelve students should not have twelve IEPs which look similar to each other in regards to the child’s profile, annual goals, and/or objectives.

As had been previously stated for directors of special education and building administrators, intervention specialists must have an awareness of the two-part test from *Rowley*.\(^510\) Furthermore, in order to meet the second, substantive criterion of *Rowley*, an IEP must respond to all significant facets of the student's disability, both academic and behavioral. An IEP that fails to address disability related actions of violence and disruption in the classroom is not reasonably calculated to enable the child to receive

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educational benefits. As is the case for *Rowley*, intervention specialists should have a working knowledge of the four previously identified factors identified by the Fifth Circuit Court of Appeals in *R.P. (2012)*, which they believe can serve as indicators of whether an IEP meets the requirements outlined in *Rowley*.

Furthermore, intervention specialists should be aware that specific teacher training cannot be mandated in a student's IEP. The Supreme Court of South Dakota concluded that although the federal list of related services may not be all inclusive, the scope of the listed services failed to encompass specific teacher training. Therefore, since teacher training is not a related service under federal law, it cannot be required in an IEP. However, an IEP requiring a specific methodology for a student but not mandating specific teacher training will comply with the IDEA if it is reasonably calculated to enable the student to receive educational benefits.

Lastly, in preparing for an IEP team meeting, intervention specialists should also be aware that under federal regulations, not every conversation about a child is a statutorily-defined meeting in which parents must participate. The regulations permit schools to participate in preparatory activities to develop a proposal or response to a parent proposal that will be discussed at a later meeting. However, the intervention specialist should work with the building administrator acting as the district representative.


at an IEP team meeting to be sure the IEP team incorporates reasonable and appropriate IEP changes proposed by a student’s parents or guardians.

**Related Service Providers**

Much of the information already mentioned under the previous sub-headings is also applicable to related service providers. However, related service providers have the difficult task of working with an even larger number of students than intervention specialists. Related service providers should be sure that when evaluations such as assistive technology evaluations and the like are agreed to be conducted by a certain date, such evaluations should be conducted within the state or federal guidelines or within the time-frame established by the IEP team. In addition, once the particular evaluation has been conducted, related service providers should work with the intervention specialist to schedule an IEP team meeting and then present their findings at the meeting. By ensuring that evaluations are conducted on time, and the results are presented to the IEP team and incorporated into the student’s IEP, related service providers and school districts are ensured of meeting the procedural requirements of providing a free and appropriate public education.

Additionally, related service providers should ensure that they are working under a current license. If a related service provider is working with a student with the appropriate supervision under a not-yet-received license, the school district may be responsible for providing compensatory services in addition to the amount already provided for in the IEP.\(^{514}\)

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Lastly, as had been previously stated, related service providers must have an awareness of the two-part test from *Rowley* (1982) and have a working knowledge of the four previously identified factors identified by the Fifth Circuit Court of Appeals in *R.P. (2012)* which they believe can serve as indicators of whether an IEP meets the requirements outlined in *Rowley*.515

**The Ohio Department of Education**

The Ohio Department of Education (ODE) has the complex task of operationalizing federal regulations for use in school districts. While the ODE has multifaceted responsibilities to school districts, students, and parents, all stakeholders could benefit if the department provided specific guidance on what is an “appropriate” education versus what is a “maximizing” education. While the preceding suggestion may be a responsibility of the United States Department of Education (USDOE), the ODE could work with the USDOE to ensure such a definition exists outside of case law.

As the Court stated in the landmark *Rowley*516 case, the primary responsibility for articulating the education which should be available to a child with a disability and for choosing the educational method most suitable to the child's needs was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child. Also in *Rowley*, the Court further noted the Act gave all states the responsibility of acquiring and disseminating information on research-based best practices relating to programs for students with disabilities and of adopting promising educational practices.

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and materials. The Court concluded by stating that once a court determines that the
requirements of the Act have been met, questions of practice are to be determined by the
States.\textsuperscript{517}

As can be garnered from reading a thirty-two year old landmark United States
Supreme Court decision, the Ohio Department of Education has the great responsibility
of working with school districts and parents or guardians of children with disabilities to
articulate the education available to students with disabilities. In meeting its
responsibility, the ODE asks stakeholders to submit opinions through its website on
proposed changes to state regulations. This researcher requests that the Ohio Department
of Education take a more personalized approach and give students, parents, special
education directors, intervention specialists, related service providers, and building
administrators the opportunity to participate in committees whose main goal is the
improvement of state procedures, regulations, and standards. All stakeholders deserve a
voice in the revision process and should have an opportunity to provide substantial
feedback together instead of, or in addition to, an online process.

**Ohio and Federal Legislators**

While this researcher realizes Ohio and federal legislators often intend to improve
public education in the legislative process, this researcher respectfully requests that all
legislators set aside their differences to work together for the common good of all
citizens. While the focus of this dissertation is on the provision of related services for
students with disabilities, it is the sincere hope of the researcher that legislators can

collaborate on examining the original intent of Congress in passing the Education for All Handicapped Children Act of 1975 and the Act’s subsequent revisions to increase funding for school districts in educating students with disabilities. Specifically, the requirements for the use of IDEA funds (i.e., supplanting) should be redesigned so that the general funds of school districts do not incur additional costs due to fiscal procedural requirements. Furthermore, by inserting an undue hardship clause into the IDEA, federal legislators can ensure that the United States Department of Education and the various state departments of education, in concert with governors of each state, will fund the IDEA as had originally been intended. Additionally, the reimbursement for catastrophic costs incurred by public school districts should be increased, and the costs associated with the education and related services for each student should be capped so that districts are not required to use available resources for the education of one student rather than a group of students. Moreover, state and federal funding calculations should be reflective of what this researcher predicts will be the greatest need that public school districts will face over the next several decades--namely, mental health services for students. While mental health needs are not new and unexpected in society or schools, students requiring counseling services, positive behavior interventions and supports, psychological services, and the like, in order to access an “appropriate” education will only continue to grow well in to the future. Furthermore, as costs to educate students rise (i.e., year after year), funding continues to decrease. This trend must reverse and do so quickly in order for school districts to rely less on local taxpayers. In addition, in the hopes of reducing costs associated with legal fees for school districts and parents alike, this researcher strongly
suggests a hearing officer be employed at the local, state, and federal levels so that mediation of disputes between parents and school districts can be resolved amicably and outside of the courtroom. By doing so, scarce financial resources will remain with parents and school districts to support children and students in the district rather than going to legal counsel. Lastly, lawmakers should make it a priority to redefine a frivolous suit. The law as it is currently constructed rewards aggressive plaintiffs who sue to get what they want because they know schools would rather spend taxpayers’ money to educate students rather than to pay large sums of money to attorneys. Through changes to statutes, legislators should emphasize collaboration and mediation rather than conflict which comes at the expense of taxpayers.

Conclusion

Educating students with disabilities is extremely complex due to varying degrees of individual student needs. Related services are another component of the complex nature of educating students with disabilities. Related services are meant to help students with disabilities benefit from their special education by providing support in needed areas, such as speaking or moving.  

Related services can be the forgotten aspect of an Individualized Education Program (IEP), except for the students who need them the most, and for the parents who feel strongly that their child is entitled to such services in order to access a FAPE. Disagreements can occur between parents and school districts on the provision of related services.

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518 Related Services, National Dissemination Center for Children with Disabilities (July. 5, 2013), http://nichy.org/schoolage/iep/iepcontents/relatedservices
services to their children. School districts have operating standards which all states have provided to guide the provision of special education services to students. Parents have a process of administrative remedies which they can use to if a dispute of services continues. Most often, in the case of related services, parents dispute the delivery, frequency, or location in which the services are provided. School leaders are charged with understanding the many complicated facets of special education law, their state’s procedural safeguards, and making the determination of whether they feel the service is necessary for a student to receive an education which confers meaningful educational benefit. On top of the aforementioned information, school leaders must also ensure school districts can meet their financial obligations in the provision of services to all students.

Courts have provided educators and parents with operationalized definitions of statutory language. While this information is not readily available to teachers, related service providers, and school board members, school administrators should be taught these tenets in graduate classes. Further, this information should be available to all individuals who previously did not have access to such information. In order to have collaborative relationships with the best interests of the student at heart, educators and parents should work together to determine what services are necessary to meet the child’s individual needs. The Ohio Department of Education should provide further guidance to all involved in the education of a child with a disability as to articulate the difference between an ‘appropriate’ education and a ‘maximizing’ education. In addition, federal and state legislators should collaborate on a modified dispute resolution process which
would keep disagreements out of the courts and in front of local, state, and federal hearing officers instead. Federal and state legislators should also work together to increase funding for school districts in educating students with disabilities. Moreover, the rules concerning the use of IDEA funds should be redesigned so that the general funds of school districts do not incur additional costs, and an undue hardship clause should be inserted into the IDEA so the Act can be funded as it had originally been intended.

It is the researcher’s hope that with the emergence of four benchmark decisions from chapter four’s seventy-seven case studies, stakeholders can benefit from the four overarching themes with regard to related services: (1) states are not required to maximize the potential of handicapped children equal to the opportunity provided to typically-developing children, nor is there a greater educational standard to make access to public education meaningful for students with disabilities;\(^{519}\) (2) the establishment of religion clause did not deny a school district from providing a sign-language interpreter to accompany the student to classes at a private school;\(^ {520}\) (3) the medical services exclusion was designed to spare schools from an obligation to provide a service that might well prove unduly expensive and beyond the range of their competence, but supportive services which are required to assist a student with a disability to benefit from special education are required;\(^ {521}\) (4) although the federal list of related services may not


be all inclusive, the scope of the listed services does not encompass specific teacher training. Therefore, since teacher training is not a related service under federal law, it cannot be required in an IEP.\textsuperscript{522}

APPENDIX A

Federal Circuit Courts

<table>
<thead>
<tr>
<th>Circuit Court</th>
<th>State or Territory</th>
<th>Circuit Court</th>
<th>State or Territory</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal Circuit</td>
<td>None</td>
<td>Sixth Circuit</td>
<td>Kentucky, Michigan, Ohio, Tennessee</td>
</tr>
<tr>
<td>District of Columbia</td>
<td>None</td>
<td>Seventh Circuit</td>
<td>Illinois, Indiana, Wisconsin</td>
</tr>
<tr>
<td>First Circuit</td>
<td>Maine, Massachusetts, New Hampshire, Rhode Island, Puerto Rico</td>
<td>Eighth Circuit</td>
<td>Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, South Dakota</td>
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<tr>
<td>Third Circuit</td>
<td>Delaware, New Jersey, Pennsylvania, Virgin Islands</td>
<td>Tenth Circuit</td>
<td>Colorado, Kansas, New Mexico, Oklahoma, Utah, Wyoming</td>
</tr>
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<td>Fourth Circuit</td>
<td>Maryland, North Carolina, South Carolina, Virginia, West Virginia</td>
<td>Eleventh Circuit</td>
<td>Alabama, Florida, Georgia</td>
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<tr>
<td>Fifth Circuit</td>
<td>Louisiana, Texas, Mississippi</td>
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