

**SPECIAL EDUCATION LAW YEAR IN REVIEW:**  
**KEY COURT DECISIONS IN 2023-24**

40<sup>th</sup> Annual State Superintendents' Conference on  
Special Education & Pupil Services Leadership

Presented by:



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**INTRODUCTION**

This presentation will address twenty of the “hottest” court decisions issued during 2023 and so far in 2024 and featured in the national “CASE Weatherly Review Quarterly Legal Update.” The highlights of “Lessons Learned” from these cases for special educators and their attorneys will be presented.<sup>1</sup>

**APPLICABILITY OF US DOE REGULATIONS AND OTHER FEDERAL GUIDANCE**

Loper Bright Enterprises v. Raimondo, 124 LRP 22422 (2024). On June 28, 2024, the US Supreme Court issued a 6-3 opinion that could have great impact on the world of special education and the applicability of regulations under IDEA, Section 504, and the ADA (and other interpretive guidance potentially). In this case, a group of commercial fishermen participating in the Atlantic herring fishery sued the National Marine Fisheries Service based upon the Service’s promulgation of a rule that required the industry to fund at-sea monitoring programs at approximately \$710 per day. The fishermen argued that the applicable statute did not authorize the Service to create these requirements and that the Service failed to follow proper rulemaking procedures. The federal district court ruled (and the D.C. Circuit affirmed) that the Service’s rule was a reasonable interpretation of its authority and that it was adopted appropriately. The questions presented to the Supreme Court were: 1) whether the applicable statute (the Magnuson-Stevens Act) authorized the Service to promulgate the rule that it did; and 2) whether the Court should overrule the 1984

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<sup>1</sup> **Important Disclaimers:** The information that I will provide today is intended as general information only and the opinions and interpretations are those of only one special education school attorney. You must consult with your agency’s school attorney on specific, local matters and for legal advice. In addition, this information must be analyzed in light of your State DOE’s (and/or your local district’s) guidance on all things related to the provision of educational services to students with disabilities.

case of Chevron v. Natural Resources Council (and the “Chevron doctrine” created by the case) or at least clarify whether statutory silence on controversial powers creates an ambiguity requiring deference to the federal agency. The Loper Bright Court ruled that the Administrative Procedure Act requires courts to exercise “independent judgment” in deciding whether an agency has acted within its statutory authority and that courts may not defer to an agency interpretation of the law simply because a statute is ambiguous. Where Chevron required courts to defer to agency interpretations of ambiguous statutes if those interpretations were reasonable, Chevron was based upon a flawed assumption that Congress intends to delegate interpretive authority to agencies when the law is ambiguous. This assumption does not reflect reality and goes against the traditional role of courts, has been difficult to apply, and has led to confusion in lower courts. Bottom line: It is up to the courts “to decide whether the law means what the agency says.” Courts, not agencies, will decide all relevant questions of law arising on review of agency action, even those involving ambiguous laws. [Note: Currently, there is an OCR administrative federal fund termination hearing pending before the U.S. DOE against the Michigan Department of Education (MDE) regarding an OCR finding that MDE violated Section 504 when it gave incorrect guidance to school districts as to their obligations related to compensatory services to students for services missed during COVID school closures. The Michigan Attorney General’s response brief and motion to dismiss the action states that “Loper casts a long shadow on all of the precedents cited by OCR in its brief and removes any deference this Tribunal should afford to OCR’s interpretation of Section 504” and that “OCR is still operating in a pre-Loper world.” In addition, MDE argues that Section 504 contains no requirement that it has a responsibility under Section 504 to ensure that its districts were compliant with the law and that OCR has no jurisdiction to enforce IDEA].

### **FAPE DURING COVID**

Abigail P. v. Old Forge Sch. Dist., 82 IDELR 227 (M.D. Pa. 2023), aff’d, 124 LRP 21769 (3d Cir. 2024). Hearing officer’s decision that 12 year-old student with autism was provided FAPE during the 2020-21 school year during COVID-necessitated remote learning was upheld by the district court and that decision is affirmed. As the district court noted, the IEP provided was reasonably calculated to enable the student to make progress in light of her circumstances when it was modified to reflect that she would receive virtual instruction. All of the other aspects of the IEP were the same as the pre-pandemic IEP, including the annual goals and related services. In addition, during virtual instruction, the student received 5 sessions per week of specialized instruction, along with optional Google classroom assignments 4 days per week for enrichment and extra practice. In addition, the district funded at-home nursing services, three 30-minute speech sessions per week, three 30-minute OT sessions per week, and one 30-minute PT session per week, along with services of a BCBA. In addition, an evaluation submitted by the parent reflected that the student does well and had a preference for learning on devices/tablets. Where the district was able to implement the student’s IEP services in the virtual setting and the student made progress during school closures, she was provided FAPE. In response to the parent’s argument that the district implemented “drastic changes to the frequency and duration” of the student’s special education and related services, the record does not support this argument. “None of this suggests that Abigail’s remote learning program was ideal; it was inferior to in-person instruction. But Abigail has failed to identify a failure by Old Forge to implement substantial or significant provisions of her IEP. So her challenge to the implementation thereof must fail.” In closing and in response to the assertion made that the district court’s decision suggested the “perverse result” that a school district may provide remote instruction under any circumstances:

Our holding today does not give school districts carte blanche to reduce a disabled student's school day for any reason...or no reason at all. Rather, school officials may do so only if they continue to offer an educational program reasonably calculated to confer meaningful educational benefits in light of the child's circumstances. As counsel acknowledged at oral argument, such circumstances can surely be affected by a global pandemic.

### **EXHAUSTION OF ADMINISTRATIVE REMEDIES**

Z.W. v. Horry Co. Sch. Dist., 68 F.4th 915 (4<sup>th</sup> Cir. 2023). District court's dismissal of student's complaint for failure to exhaust administrative remedies is reversed and remanded. Here, the parent of a student with autism has filed a complaint alleging violations of the ADA and Section 504 for refusing to allow the student to have his private ABA therapist accompany him at school. While the district argues that the claim should be dismissed because ABA services can be available under IDEA, this does not render the claims here FAPE claims that must be exhausted under IDEA. Under the Supreme Court's analysis in the Fry case, the gravamen of the complaint is not FAPE because the "essence" of the student's "beef" with the school district is its refusal to permit him to bring his privately supplied and funded ABA therapist to school with him. The student could file essentially the same claim against a library, a museum, or a summer camp. In addition, a non-student visitor (a friend, sibling, or other relative) could make a largely identical claim against the school district if it refused to permit an ABA therapist to accompany the visitor to the student's school. When a plaintiff sues under ADA and 504, exhaustion is required only if the plaintiff is "seeking relief that is also available under IDEA." Because the parent here requests nothing that would be provided at public expense, this case does not concern a denial of FAPE. "We offer no opinion about whether Z.W. has valid claims under the ADA or the Rehabilitation Act or what defenses the school district may have to them. We hold only that the district court erred in dismissing the complaint because Z.W. failed to exhaust administrative remedies under the IDEA."

### **CLAIMS FOR MONEY DAMAGES UNDER 504/ADA**

Baker v. Bentonville Sch. Dist., 75 F.4<sup>th</sup> 810 (8<sup>th</sup> Cir. 2023). District court's dismissal of disability discrimination claims under Section 504/ADA is affirmed. Where the parents are seeking money damages as a remedy for disability discrimination, they must show that the district's alleged failure to accommodate their child's disability amounted to bad faith or gross misjudgment. Here, the child's visual impairment was mild enough to place her in the normal range of visual acuity, but the district developed a 504 Plan to ensure the student's safety. The Plan included supervision during classroom transitions, a "buddy" assigned for errands and bathroom breaks, and specialized transportation. After some accidents on the playground where she collided with another student on a slide, got a splinter, was kicked in the face by a student crossing the monkey bars, and tripped on a concrete slab, the district amended her 504 Plan three times to include additional safety-related accommodations. The parent agreed to the revisions and the child did not experience any injuries after the third Plan was implemented. While the district refused to provide a 1:1 aide requested by the parent, given that the district took steps to ensure the child's safety, there was no evidence of bad faith or gross misjudgment as required to sustain a cause of action for money damages.

### **CHILD FIND DUTY TO TIMELY EVALUATE**

AAA v. Clark Co. Sch. Dist., 124 LRP 24303 (9<sup>th</sup> Cir. 2024) (unpublished). The district court's granting of the district's motion for summary judgment on the parents' FAPE claims is upheld.

Despite the district's delay in its annual review and revision of the hearing impaired student's IEP for several months and after the receipt of an independent evaluation, FAPE was provided. A procedural violation under IDEA denies FAPE only if the violation 1) impedes the child's right to FAPE; 2) significantly impedes the parents' opportunity to participate in decision-making regarding the provision of FAPE; or 3) deprives the child of educational benefit. Here, although the district concedes that it failed to conduct the annual review of the student's IEP, the child made appropriate progress in the general education setting while receiving the same services under her prior (or "expired") IEP. For example, her skills in handling and overcoming her hearing impairment and her academic skills improved, where she earned a position on the honor roll. Thus, the parents failed to show any of the harms that would support their position that she had been denied FAPE.

### **ELIGIBILITY DISPUTES**

Perez v. Weslaco Indep. Sch. Dist., 123 LRP 27639 (5<sup>th</sup> Cir. 2023) (unpublished). District court's decision in favor of the district's finding of IDEA ineligibility of identified 504 student is affirmed. "Recall that the IDEA is limited only to '*children with disabilities*,' not every student who is struggling with something." Thus, the district is required to provide special education to the student only if the student "(1) had a qualifying disability and (2) 'by reason thereof, need[ed] special education and related services.'" Here, the parent submitted lesser evidence demonstrating the student's disability. Her primary support was a private psychologist's evaluation, which diagnosed the student with ASD and ADHD but noted that the evaluation was not a substitute for a special education evaluation. In addition, the evaluation lacked educational context where the evaluator did not review education records, solicit feedback from the student's teachers, or observe the student in a classroom setting. Thus, her evaluation did not have a "proper foundation." In addition, the private psychologist did not herself recommend special education services but instructed the parent to consult with the district to determine eligibility. In any case and as courts have observed, IDEA does not require school districts to defer to the opinions of private evaluations procured by a parent. In contrast, the district's evaluation was based on more evidence. Though not perfect, it used "diverse tools and information sources" to assess the student's eligibility. Indeed, it solicited reports from a variety of professionals—a diagnostician, a licensed specialist in school psychology, and a speech pathologist—who assessed the student using multiple formal and informal tests, personally observed the student, interviewed the student's teachers, and carefully reviewed his cumulative school records.

G.M. v. Barnes, 124 LRP 32983 (4<sup>th</sup> Cir. 2024). District court's ruling is affirmed that second grader with diagnoses of dyslexia and ADHD who exhibits average performance in reading and math is not eligible for services under IDEA. The parents' assertion that their son is a child with SLD is rejected where the eligibility team, in accordance with Maryland law, considered whether the student exhibited a pattern of strengths and weaknesses in performance, achievement, or both relative to age and state-approved grade-level standards. The fact that the student is strong in math does not turn his reading and writing difficulties into a weakness for purposes of determining SLD eligibility. Rather, the evidence points to the fact that the student maintains average performance in reading and writing, notwithstanding the private evaluations that indicate deficiencies in reading and writing. While it is true that the student's reading and writing assessment scores dropped from the previous year, the scores remained in the average range and the student met grade-level standards while performing in the middle of this class in both areas. Thus, there is no pattern of strengths and weaknesses to support eligibility for SLD. While the court recognizes that the student's ADHD may qualify as OHI, the existence of a disability is not sufficient for eligibility under IDEA. The

parents also must show that the student needs special education because of his ADHD. Given the evidence of the student's solid average performance in the general education classroom and his progression from grade to grade, however, the student does not need special education in order to receive an appropriate education.

### **CONDUCTING INDEPENDENT EDUCATIONAL EVALUATIONS (IEEs)**

Alex W. v. Poudre Sch. Dist. R-1, 94 F.4<sup>th</sup> 1176 (10th Cir. 2024). District court's ruling requiring the district to reimburse the parents for a second IEE is reversed. Under IDEA regulations, a parent is entitled to only one IEE at public expense each time the district conducts an evaluation with which the parent disagrees. If a parent requests such an IEE, a school district must, without unnecessary delay, either file a due process complaint to request a hearing to show that its evaluation is appropriate or ensure that an IEE is provided at public expense. Here, the district conducted a reevaluation in 2017 and reassessed the student's vision and hearing, general intelligence, cognitive and adaptive functioning, academic performance, and social and emotional abilities. Based upon the reevaluation results, the district reduced direct speech-language and OT services. The parents challenged the 2017 reevaluation results, specifically disagreeing with the conclusions concerning speech-language and OT and in February 2018, requested an IEE in those areas. The district agreed to fund the IEE and the IEP team met in April 2018 to discuss the results. In the summer of 2018, the parents continued to challenge the results of the 2017 reevaluation and requested another IEE--this time in the area of neuropsychology. The district refused, and the parents paid \$5,500 for the independent neuropsychological evaluation. The district court and ALJ erred by requiring the district to pay the \$5,500 because the plain text of the regulation supports the district's position. The regulations make it clear that the parents were entitled to "only one" IEE at public expense per school district evaluation. Under these circumstances, where the parents had no right to request or receive a second IEE at public expense, the district also had no obligation to respond to the request either by bearing the cost of the IEE or filing a due process complaint to show that its evaluation was appropriate.

### **WHO IS A PARENT UNDER IDEA**

Q.T. v. Pottsgrove Sch. Dist., 123 LRP 18151 (3d Cir. 2023). In this case of first impression, the student's adult cousin with whom the student lives within the district meets IDEA's definition of "parent" for purposes of bringing a due process action against the district. It does not matter that a 2008 court order grants primary physical and legal custody of the student to the student's grandmother who lives in another district while also preserving the educational rights of the biological father. The adult cousin has been making educational decisions for the student for several years, including providing consent for an evaluation that concluded that the student was not eligible for IDEA services. The cousin also requested an IEE, where it was found that the student qualified as OHI. The district, however, proposed a 504 plan instead of an IEP, and the adult cousin filed for due process on the student's behalf seeking IDEA services. The hearing officer's decision, based upon the court order granting the grandmother custody, follows the language of the IDEA regulations that give priority to biological parents and court-appointed educational decision-makers. The U.S. Supreme Court has ruled that "[w]e must ask whether 'Congress has directly spoken to the precise question at issue.... If we can discern congressional intent using the plain text and traditional tools of statutory construction, our inquiry ends: we give effect to Congress's intent.'" Only if the statute "is silent or ambiguous with respect to the specific issue," will the court look to the regulations. Under IDEA, the term "parent" clearly includes "an individual acting in the place of a natural or adoptive parent (including a grandparent, stepparent,

or other relative) with whom the child lives, or an individual who is legally responsible for the child's welfare." Congress has spoken and there is ample evidence in the record that the cousin was acting in the place of the student's natural parent. The evidence shows that the student has lived with the cousin for two years and that she has been supporting the student and assumed all personal obligations related to school requirements. In addition, the cousin receives Supplement Nutrition Assistance Program payments on behalf of the student and the student is listed on the student's HUD paperwork. Accordingly, under IDEA, the cousin qualifies as a parent for purposes of IDEA as the individual with whom the student lives and who is legally responsible for her welfare.

### **PARENTS BEHAVING BADLY**

Neske v. New York City Dept. of Educ., 123 LRP 37531 (2d Cir. 2023). District court's ruling denying private school tuition reimbursement to the parents is affirmed. When determining whether parents are entitled to tuition reimbursement under IDEA, the Supreme Court has applied what has become known as "the Burlington/Carter test." Under this test, courts must determine (1) whether the district's proposed IEP will provide the child with FAPE; (2) whether the parents' private placement is appropriate to the child's needs; and (3) a consideration of the equities. The district conceded here that it did not propose an appropriate IEP in 2018-2019 and that the International Institute for the Brain (iBrain) was appropriate. Here, however, the district court did not abuse its discretion in denying the parents' request for tuition reimbursement where the parents had been uncooperative in the process of coordinating the student's placement. The record sufficiently supports the district court's determination that the parents did not cooperate with the district and were likely part of a broader campaign to disrupt the IEP creation process to support the migration of students from iHope to iBrain, "which was orchestrated by the founder of iBrain and his related law firm." Specifically, the record shows that dozens of iHope parents, including these parents, insisted on requesting that a physician be present in-person at IEP meetings but then failed to attend themselves. The hearing officers found that DOE physicians could not physically attend all IEP meetings because they received such a large volume of requests from parents. However, when the physicians did attend the IEP meetings at the parents' behest, the parents were often absent or the meetings were cancelled on short notice. The district court determined that these group cancellations were "evidently a delaying tactic designed to stymie the DOE's effort to create IEPs for the students. The Neskes' conduct tracked that obstructive pattern, strongly suggesting that their requests were guided to a relevant degree by the founder of iBrain as part of the campaign to shift students from iHope to iBrain and force the DOE to reimburse tuition costs at the new school without having to go through the normal collaborative process."

### **RIGHT TO RECORD IEP MEETINGS**

Pitta v. Medeiros, 124 LRP 521 (1st Cir. 2024). District court's decision that the district did not violate the First Amendment when it denied the father's request to make a video recording of a virtual IEP meeting held through Google Meet is affirmed. While the First Circuit has recognized a right to record public officials who are performing their job duties in a public space, this does not apply here. Districts do not generally convene and hold IEP meetings in public spaces. Here, the district held the meeting in a password-protected virtual meeting room controlled by the district's special education director and the general public was not "free to walk into a school and enter a meeting of educators." The parent also could not show that the district team qualified as "public officials" for purposes of the First Amendment and recordings of such are only protected when they serve the public interest. It is important that the parent did not plan to share the recording with the general public and specifically stated that he wanted the recording so he could challenge

statements made in the IEP meeting notes. Thus, the recordings that the parent asked to be made did not qualify as protected speech under the First Amendment. [Note: In footnote 11, the Court points out that the father (allegedly relying on a DOE guidance document), argues for the first time in his reply brief that he needed to video record his child’s IEP Team Meeting to meaningfully assert his parent rights protected by IDEA. “In any event, this is not a First Amendment claim and is waived. His belated claim is an administrative claim subject under the IDEA to exhaustion before it may be brought as a civil action in federal court”].

### **EXTENDED SCHOOL DAY**

Osseo Area Schs. v. A.J.T., 124 LRP 9021 (8th Cir. 2024). District court’s finding is affirmed that the school district denied FAPE to the middle school student with a rare form of epilepsy when it refused to provide her with services outside of regular school hours. Here, the student’s seizures are so severe in the morning that she cannot begin school until noon, so her parents asked that she be provided instruction via an extended day up until 6 p.m. so that her length of school day was more like that for other students. As an initial matter, the court rejects “the notion that the IDEA’s reach is limited to the regular hours of the school day. Neither the District nor amici identify anything in the IDEA implying—let alone stating—that a school district is only obligated to provide a FAPE if it can do so between the bells.” Turning to the student’s IEPs and whether the student received FAPE despite the short day, several things convince the court that she did not. First, the student made *de minimis* progress overall. She regressed in toileting and, at one point, the district removed the toileting goal from her IEP because there was not enough time to work on it during the short school day. Indeed, the district’s records clearly reflect that. In addition, the district cites only slight progress in a few areas and one of the district’s experts agreed that the student’s progress was minimal. Progress reports reflect that the student met none of her annual goals in 2016 or 2017 and, by the end of 2018, she had met only a few short-term objectives. Finally, the record contains no progress reports for 2019. The court rejects the district’s additional argument that the district court erred in considering expert testimony that the student would have benefited from evening instruction required the district because it imposes a requirement to “maximize the student’s potential.” Asking whether the student would have made more progress with evening instruction is not about maximizing potential— “it’s about whether the District’s purely administrative decision not to provide evening education caused her *de minimis* progress and regression.” The expert testimony shows that the district’s choice to prioritize its administrative concerns (such as avoiding unfavorable precedent for itself and other districts, state law does not require it, etc.) had a negative impact on the student’s learning. Considering that the student made *de minimis* progress overall, that she regressed in toileting, and that she would have made more progress with evening instruction, the court sees no error in the district court’s conclusion that the district denied FAPE. [Note: On the same day, the 8th Circuit also affirmed the district court’s granting of summary judgment to the district on the parents’ 504/ADA claims for disability discrimination. The court noted that where alleged 504/ADA violations are based on educational service provision, a school district’s “simple failure” to provide a reasonable accommodation is not enough to trigger liability, and a plaintiff must show that school officials acted with either bad faith or gross misjudgment, which requires more than mere non-compliance with federal statutes. While the student may have established a genuine dispute about whether the district was negligent or even deliberately indifferent, “that’s just not enough.” Here, the district did not ignore the student’s needs or delay efforts to address them, even if the efforts were inadequate. Rather, the district met with the parents and updated the student’s IEPs each year, which included a variety of services, such as intensive one-on-one instruction and a 15-minute extension of her school day so that she could safely leave after the halls cleared of other students. In addition, the district offered 16 three-

hour service sessions at home each summer. Regardless of whether these actions were enough to provide meaningful access to education, they do not show wrongful intent].

### **ARTIFICIAL INTELLIGENCE AND ITS IMPACT ON FAPE**

W.A. v. Clarksville-Montgomery Co. Sch. Sys., 124 LRP 16411 (M.D. Tenn. 2024). ALJ's decision that the district denied FAPE to a high schooler with dyslexia is upheld, and the student is entitled to 888 hours of tutoring from a reading interventionist trained in the Wilson Reading System (but not necessarily by a private provider unless the district is unable or unwilling to provide it). The district's argument that the ALJ erred when relying on Tennessee's "Say Dyslexia Act" is rejected where the IDEA defines FAPE as services that are provided in accordance with "state standards." The court acknowledges that although the student was not able to read, he made passing grades, had a 3.4 GPA, and was on track to graduate. However, this success is attributed to the student's use of "work-arounds" via technology, text-to-speech programs, and AI software for reading and writing, as opposed to real improvement in his reading abilities. The IEPs provided to the student fell short of state standards that require districts to provide dyslexia-specific interventions to any student suspected of having dyslexia. It is notable that the student's teachers in 9<sup>th</sup> and 11<sup>th</sup> grade repeatedly expressed concerns about his inability to read or even spell his name consistently, thus putting into question the district's decision to continue the IEP's focus on fluency and expression instead of basic reading concepts like phonetics and letter recognition. The ALJ's decision was appropriately not specific to the student's dyslexia but focused on the district's failure to address the student's individual need for special education services that target foundational skills in reading, guided by an awareness of his dyslexia.

### **UNILATERAL PRIVATE SCHOOL PLACEMENT/SERVICES**

J.H. v. Seattle Pub. Schs., 124 LRP 21369 (W.D. Wash. 2024). Court amends its prior decision reversing the ALJ's decision that the parents' unilateral placement of their son in a residential facility was appropriate and that the district was required to reimburse the parents for the placement. Not only is the ALJ's decision reversed, but the parents must also repay \$445,132 in private school costs to the district that was required to be paid to comply with the ALJ's order. Where the district in seeking review of the ALJ's order asked the court "to reverse the ALJ's award of relief," the district properly sought reimbursement for its tuition payments and was an appropriate request. Note: The district did not seek to recover the \$460,000 in additional tuition payments it made pursuant to IDEA's stay-put provision.

### **TRANSPORTATION**

Pierre-Noel v. Bridges Pub. Charter Sch., 124 LRP 32461 (D.C. Cir. 2024). The district court's decision that the district is not required to carry the medically fragile, non-verbal, 8 year-old boy who uses a wheelchair and weighs approximately 40 pounds up and down the stairs of his non-accessible apartment building is reversed and remanded for further proceedings. The district denied the request based upon its policy that staff will only retrieve students from the outermost door of their dwelling and do not physically lift or carry students to/from their apartment door to the school bus. The term "transportation" under IDEA includes moving a student from their apartment door to the vehicle that will take them to school as a related service needed to benefit from special education services. This is broad enough to include porter services for non-ambulatory students living in inaccessible buildings, and the district's view that "transportation" is limited to using a vehicle to transport students to and from school is rejected. This student clearly needs in-

home transportation to access his school-based program where a narrow interpretation of transportation would “leave some [children] unable to leave their homes and join their classmates at school.” Where it is agreed that the child cannot get to the school bus without someone’s help with getting him up and down the stairs of his building, he needs this service in order to receive FAPE.

### **IEP IMPLEMENTATION FAILURE**

Plotkin v. Montgomery Co. Pub. Schs., 123 LRP 33167 (4<sup>th</sup> Cir. 2023) (unpublished). District court’s affirmation of ALJ’s decision that the failure to implement the IEP for a third grader with autism did not deny FAPE is affirmed. An IEP implementation failure is viewed as a procedural violation of IDEA, for which a parent can obtain relief only by showing that the procedural violation resulted in a loss of educational benefit to the student. Though the district failed to provide “pullout instruction” to the student for math as required by his IEP, it did not cause educational harm. Indeed, the student’s general education teacher and the student’s case manager testified that small group instruction in the general education classroom was a better fit for the student and allowed him to avoid a difficult transition between classrooms, giving him an opportunity to work on social skills. The decision to forgo the pull-out instruction was a conscious decision based on an individualized assessment of the student’s performance and the benefits he would receive in the general education classroom. In addition, the teachers found the student to be proficient in most areas of third-grade math by the end of the school year, and his performance on the math portion of standardized assessments improved significantly. Thus, there was no need for compensatory education services. “On this record, we conclude that the district court did not err in holding that [the student] was not denied a FAPE.”

### **STATUTE OF LIMITATIONS FOR BRINGING DUE PROCESS CLAIMS**

Charlotte-Mecklenburg Bd. of Educ. v. Brady, 66 F.4<sup>th</sup> 205 (4<sup>th</sup> Cir. 2023). District court’s ruling upholding the state review officer’s decision is affirmed finding that the district’s failure to provide PWN and a copy of the notice of IDEA’s procedural safeguards to the parents barred the application of North Carolina’s one-year statute of limitations to due process hearing claims brought in 2018. In 2013, the student’s father provided to the student’s 504 team a copy of an email from the student’s private psychologist seeking help for the student, asking about what resources the district could provide, and mentioning the possibility of the student qualifying for an IEP under IDEA as a student with OHI. The email did more than notify the district of the student’s diagnoses. Specifically, the email said, “We understand that with her specific diagnoses, [A.B.] qualifies as OHI and is eligible for an IEP -- is tutoring covered by an IEP? Is there something that is covered by an IEP that can benefit her?” As such, the email constituted an evaluation request, even though an explicit request for an evaluation was not made. Accordingly, because the district “withheld information” by failing to provide the parents with a copy of the procedural safeguards or a PWN following receipt of the February 2013 email, the withholding exception to the statute of limitations applies and prevents the student’s claims from being time barred.

### **SECTION 504 CHILD FIND**

B.S.M. v. Upper Darby Sch. Dist., 124 LRP 17147 (3d Cir. 2024). The district court’s ruling that the timely evaluation under IDEA established automatic compliance with 504 is reversed and remanded for further proceedings. Where Section 504 defines the term “disability” more broadly than IDEA, students who do not qualify for special education services under IDEA may still be

entitled to services under Section 504. Here, the district evaluated the student's speech and language needs when she was in kindergarten (even though the parents asked that she receive a full psychoeducational evaluation at that time) and provided her with speech and language therapy until April of her second grade year as an SLI student. However, the IDEA evaluation did not necessarily meet the student's needs under 504 where the district did not evaluate the student's emotional needs or develop a 504 Plan to address her symptoms of depression until she was in fourth grade. As such, liability as to whether the district timely conducted a 504 evaluation will turn on whether it was reasonable not to evaluate earlier under the circumstances. There is "significant debate" about when the school was put on notice of the student's emotional struggles and whether the district should have evaluated the student earlier. The district court is directed to consider this on remand.

### **EFFECTIVE COMMUNICATION UNDER ADA**

LePape v. Lower Merion Sch. Dist., 124 LRP 17149 (3d Cir. 2024). While the district did not deny FAPE under IDEA to the former student with autism, it may have discriminated under the ADA when it refused to use Spelling to Communicate (S2C) with the nonverbal student (a communication technique wherein a non-speaker points at letters on a laminated alphabet board (letter board) held by a communication support person)) and have a person trained in S2C to work with the student at school every day. Under the ADA's "effective communication" requirements, a district must ensure that its communication with a student with a disability is as effective as its communication with nondisabled students. In doing so, a district is required to give "primary consideration" to the requests of the student, unless it can demonstrate that another effective means of communication exists. Here, there is a question of fact as to whether the district has denied the student "effective communication," and the district court erred in determining that the parents' prior FAPE claims incorporated and precluded their claims under ADA. Under IDEA, a district is not required to implement parent preferences in methodology as long as the student receives educational benefit. However, under ADA, its requirements impose a greater obligation than IDEA's FAPE requirement. Thus, the district court's granting of summary judgment on all claims is reversed and the ADA and 504 claims are remanded. In addition and under ADA/504, the parents' claims for compensatory damages should be addressed, even if they are based on the same facts as the FAPE-related claim. While the Court need not decide now whether S2C is effective communication, "[t]here is ample evidence from which a reasonable jury could conclude that the School District violated the ADA's effective communication requirement by denying Alex his preferred method of communication without providing an effective alternative. He testified that the letter board is effective for him and remains his preferred communication method. He is a non-speaker who for the first 16 years of his life had "very minimal communication," was able to say only a few words, and was unable to communicate clearly and as he wished. [citation omitted]. By typing, he could transcribe the speech of others but could not communicate his own thoughts. For example, he could not communicate with the school nurse or the guidance counselor about his college plans, course selection, testing, and accommodations; nor could he participate in class, extracurricular activities, or community-based instruction. In addition to Alex's own testimony, seven treating clinicians and Dr. Barry Prizant--a speech pathologist and psycholinguist who has been awarded ASHA's highest honors, has practiced for nearly 50 years, and reviewed approximately 185 minutes of Alex communicating with the letter board and interviewed him--testified that the letter board is effective communication for him. And Alex's treating psychiatrist, Dr. Manley Ghaffari, who is board-certified in child and adolescent psychiatry and focuses her practice on neurodiverse patients, testified that the letter board was 'extremely effective in allowing [Alex] to express his thoughts and feelings.' [citation omitted]. Meanwhile, Vanessa von Hagen,

a board-certified behavior analyst and the lead clinician on Alex’s home team for several years, testified that he cannot orally communicate in sentences and can only type what he hears, not his own thoughts. She also testified that the letter board was effective communication for Alex. Indeed, as the School District’s initial denial of the letter board turned almost exclusively on its concerns about the auxiliary aid’s efficacy, that was the most material fact at issue.” Thus, summary judgment was improper on the “effective communication” issue under ADA/504.

Lartigue v. Northside Indep. Sch. Dist., 100 F.4th 510, 124 LRP 9486 (5<sup>th</sup> Cir. 2024). The majority vacates the district court’s granting of summary judgment on the hearing impaired student’s ADA claims and remands the case to the district court for a ruling on the claims that the district discriminated against her when it failed to provide her with certain CART services, closed captioning for videos shown in class, and other accommodations while attending the district’s Science and Engineering Academy. An IDEA hearing officer’s decision that the district developed an appropriate IEP and provided FAPE does not prevent the student from seeking relief in court for alleged ADA violations based upon the doctrine of “issue preclusion”—a procedural rule that prevents litigants from pursuing the same claim multiple times. The district’s argument that the hearing officer’s unappealed decision resolved the student’s IDEA, Section 504, and ADA claims is rejected. Issue preclusion only applies when the facts and the legal standard used to assess them are identical in both proceedings. The district’s obligations under ADA’s effective communication and equal opportunity provisions are separate from its duty to develop an appropriate IEP for the student. The “yardstick” to measure compliance with IDEA is the provision of FAPE through an IEP. The “yardstick” in an ADA claim is *not* adherence to an IEP plan, but instead is whether the school district “failed to make reasonable accommodations,” specifically accommodations that give a disabled student *equal* access as her non-disabled peers. Note: This opinion was a substitute for a withdrawn earlier opinion by the Fifth Circuit.