Legal Update: Various Cases on Modern Issues in Special Education Law

by
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ADA claims as an alternate legal claim

The case of ***S.S. v. City of Springfield, Massachusetts*, Civil Action No. 14-30116 (D.C. Mass. 2014).** An interesting facet of the modern intersection of ADA/§504 and the IDEA is found in a class action complaint filed in federal district court in Massachusetts based entirely on ADA claims arising from the placement of disabled students with mental impairments in segregated public day schools. A Statement of Interest in the case filed by the U.S. Department of Justice highlights DOJ's position that plaintiffs with both IDEA and ADA claims can, but are not required, to base LRE-type claims on both laws. "[A] plaintiff's decision, as here, to seek relief under the ADA but not the IDEA in a Federal court is plainly his or her choice." *DOJ Statement of Interest,* p. 8. The plaintiffs here do not pursue a denial of FAPE claim or an LRE claim under the IDEA. "Rather, the theory of the case is that the Defendants have violated the equal opportunity principles fundamental to the ADA," including the claim that they were denied "the opportunity to receive educational programs and services in the most integrated setting appropriate to their needs." Thus, DOJ states that "The Defendants' IDEA FAPE obligations, even if satisfied, do not foreclose the ADA claims in this case." *Id*. at 9.

> *Note*—While the ADA claims may not be foreclosed, are they not flavored by the lack of an IDEA FAPE or LRE claim? It appears that the plaintiffs in *S.S.* argued an IDEA denial of FAPE as part of an IDEA due process hearing, but lost on the claim and did not pursue it on appeal. *DOJ Statement of Interest,* at p. 4, fn *3.* That said, what prevents the defendants from arguing that FAPE was in fact provided under IDEA, and that part of that FAPE is the balancing of educational benefit and LRE? To the extent that LRE is different under the IDEA and ADA (even arguing that is so), which law prevails? What matters is that the issue is now being pursued more frequently in litigation, and will be attempted in other cases as well,

apparently by the U.S. Department of Justice. *See, United States of America v. State of Georgia,* Civil Action_____, U.S. District Court for the Northern District of Georgia, filed August 23, 2016)(alleging that the Georgia Network for Educational and Therapeutic Support violates the ADA by failing to provide services in the most integrated setting appropriate to the needs of qualified individuals with a disability.).

RtI and Child-Find Tension

***Memorandum to State Directors of Special Education, Preschool/619 State Coordinators, Head Start Directors*, 67 IDELR 272 (OSEP 2016)**. After the 2004 IDEA reauthorization allowed the use of response-to-intervention (RtI) strategies and data as a potential component of SLD evaluations, USDOE began to express concern that use of RtI was coming into conflict with LEAs' child-find obligations under the IDEA. Their point was that inflexible application of RtI, particularly when viewed as a strict prerequisite to IDEA evaluation, could result in delays or denials of valid IDEA evaluations and eligibility.

Thus, in a 2011 memorandum, OSEP indicated that "it has come to the attention of the Office of Special Education Programs (OSEP) that, in some instances, local educational agencies (LEAs) may be using Response to Intervention strategies to delay or deny a timely initial evaluation for children suspected of having a disability." *Memorandum to State Directors of Special Education,* 56 IDELR 50 (OSEP—January 21, 2011). The memo states that while OSEP supports RtI initiatives and programs, "the use of RTI strategies cannot be used to delay or deny the provision of a full and individual evaluation, pursuant to 34 CFR §§300.304-311, to a child suspected of having a disability under 34 CFR §300.8." Also, the memo reiterates that the IDEA and its regulations currently only "*allow*" the use of RtI data, as part of the criteria for determining if a child has a specific LD. Thus, the memo concludes that "it would be inconsistent with the evaluation provisions at 34 CFR §§300.301 through 300.111 for an LEA to reject a referral and delay provision of an initial evaluation on the basis that the child has not participated in an RTI framework."

The 2016 Memorandum extends the rationale of the 2011 Memo to referrals from preschool programs and agencies, stating that "[a]n LEA may not decline a child find referral from a preschool program until the program monitors the child's developmental progress using RTI procedures." Indeed, the Memo states that IDEA "does not require, or encourage, an LEA or preschool program to use an RTI approach prior to a referral for evaluation or as part of determining whether a 3-, 4-, or 5-year old is eligible for special education and related services."

Note—While the Department is correct that IDEA allows the use of RtI methodology in SLD assessment, but does not require it, is it accurate to

state that the IDEA 2004's shift away from discrepancy formulations and inclusion of RtI strategies did not "encourage" schools to use RtI to prevent improper identification of students as SLD? Ultimately, in the next reauthorization, the Congress will have to address the existing tension between the traditional child-find formulation and its commitment to the use of RtI as part of SLD assessments.

***Greenwich Bd. of Educ. v. K.M.*, 68 IDELR 8 (D.Conn. 2016).** A Connecticut District that was providing RtI programming to a child with reading deficits declined the parents' request for an IDEA evaluation because it felt that the student had responded to interventions, and thus did not require special education services. A private evaluation, however, indicated the student was functioning below grade level in reading, and although the student entered into the RtI program close to grade level, she actually dropped to below grade level during the first RtI tier. School records indicate it increased the intensity of RtI services as a result. These factors, found the Court, raised a suspicion of disability and need for special education services. It noted that the standard for child-find is not whether the school is *certain* that the student is disabled, just whether there are reasonable grounds to suspect a reading disability. That standard was met here.

Note—The District was not well-served by its decision to decline evaluation on the basis of RtI data. Rather the SLD regulation allows the use of RtI data *as part of* the SLD evaluation. *See* 34 C.F.R. §300.309(a)(2)(i). If it had conducted the evaluation, it could have analyzed the student's response to interventions, perhaps together with assessment data. Moreover, the District could have continued with the interventions in the weeks while the evaluation was pending. Then, the parents would have had to argue a more difficult issue—that the evaluation was inappropriate under the IDEA. A puzzling aspect of the decision, however, is the Court's statement that a child with reading disabilities must be making greater than year-to-year-progress in reading in order to "close the achievement gap" with peers. Given that IDEA does not impose a requirement of progress on par with nondisabled students, why would RtI programs be expected to generate progress beyond that in order to show a good "response"?

The Role of Peer-Reviewed Research Bases

IDEA requires that IEPs include:

[a] statement of the special education and related services and supplementary aids and services, **based on peer-reviewed research to the extent practicable**, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel

that will be provided for the child—

> (aa) to advance appropriately toward attaining the annual goals;
>
> (bb) to be involved in and make progress in the general education curriculum in accordance with subclause (I) and to participate in extracurricular and other nonacademic activities; and
>
> (cc) to be educated and participate with other children with disabilities and nondisabled children in the activities described in this subparagraph;…" 20 U.S.C. §1414(d)(1)(a)(1)(IV) (emphasis supplied).

In turn, the USDOE commentary to the 2006 regulations stated that "we decline to require all IEP team meetings to include a focused discussion on research-based methods or require public agencies to provide prior written notice when an IEP team refuses to provide documentation of research-based methods, as we believe such requirements are unnecessary and would be overly burdensome." Id. Thus, there is no requirement that IEP team meetings discuss the research bases of instructional methods and services. And, there is no requirement to provide prior written notice if the school refuses to provide documentation of any research basis for its special education and other services or methods. 71 Fed. Reg. 46,665 (August 2006). The commentary also states "there is nothing in the Act to suggest that the failure of a public agency to provide services based on peer-reviewed research would automatically result in a denial of FAPE. The final decision about the special education and related services, and supplementary aids and services that are to be provided to a child must be made by the child's IEP team based on the child's individual needs." 71 Fed. Reg. 46,665.

Against this backdrop, we examine the decision in ***L.M.H. v. Arizona Dept. of Educ.*, 68 IDELR 41 (D.Az. 2016)**. There, although a preschooler with speech impairments made some progress under the IEP, the parents and her advocate argued that the school had to provide three to five individual speech therapy sessions per week as recommended by the American Speech-Language Hearing Association (ASHA). The Court rejected that argument, finding that the recommendation was based on a high standard of services that IDEA did not require, and that the ASHA guidelines are premised from a treatment, not educational, perspective. But the Court found the IEP substantively deficient because the amount of services recommended by the school's speech therapist was not based on peer-reviewed research. Rather, the therapist indicated that she relied on her professional knowledge and experience to determine amount of services. The Court held that the school was required "to consider some peer-reviewed recommendations" and found the IEP denied the student a FAPE.

Note—Is the fact that the Court *required* peer-reviewed basis for the therapy services consistent with the "to the extent practicable" qualifier in the statute? Is it not important to examine whether the student made progress with the therapist-recommended services? Does not the recommendation for peer-reviewed research bases apply to the nature of the services rather than the amount, which is normally determined in reference to individual assessment data?

Addressing the needs of profoundly-disabled students

In ***Reyes v. Manor Independent Sch. Dist.*, 67 IDELR 33 (W.D.Tex. 2016)**, a 19-year-old student with severe ID and autism transferred into the district. He had a history of serious behaviors, including self-injurious behaviors, charging and assaulting adults, throwing things, and highly unpredictable aggressive behaviors. A psychiatric evaluation concluded that academic work was foreclosed, and the school should focus on life skills and self-management. The district adopted the behavior intervention plan (BIP) from the previous district. In the new school, the behaviors continued, including serious injury to staff and assaults on peers. In response, the district hired a Board Certified Behavior Analyst (BCBA) for consultation and an FBA. Nevertheless, the student engaged in as many as 20 aggressive incidents per day, requiring as many as 17 hug restraints and 6 ground restraints in one day. After he separated his own shoulder pulling on a cabinet, the school decided to place him alone with the BCBA and two aides with him at all times, to separate him from other students. They documented his behavior every 5-15 minutes.

Moreover, after a parent-initiated placement in the State Hospital, the student returned exhibiting worse behaviors, and previously effective interventions no longer worked. The parent argued that the student did not make sufficient progress on his goals and objectives. The Court countered that "no school can guarantee the success of an IEP," and found that the IEP was properly individualized to the student's needs. The parents' LRE argument was also rejected, in light of the fact that removal from peers was necessary "because his aggressive behaviors threatened others and impeded his learning." Any restraints appeared to be undertaken in compliance with state regulations requiring imminent risk of serious injury, and there was not evidence that the restraints were excessive. Staff worked with the student on his goals and objectives, and the student exhibited slow and inconsistent progress, but "it was progress nonetheless." Given the evidence of the profound nature of the student's disabilities, and evidence of some progress despite unpredictable and highly aggressive behavior, "the Court finds Plaintiff has failed to prove he was denied positive academic and nonacademic benefits."

Note—While the student made limited progress, it is difficult to question the district's extensive commitment of resources to the student. The Court likely felt that expecting more progress under the circumstances was unrealistic. If the district had not devoted the large amount of resources it did to the student, the case would likely have turned out differently. The LRE argument was misplaced in light of the student's unpredictable behaviors (and the fact that he was nevertheless educated in a regular campus setting). The lesson for schools is to never quit continuing to add services and resources and different approaches in highly difficult cases.

A Lesson on Manifestation Determination Reviews (MDRs)

In IDEA 2004, the Congress undertook several reforms to the rules governing discipline of students with disabilities. Part of the changes touched on the requirement for manifestation determination reviews (MDRs) prior to disciplinary changes in placement of IDEA-eligible students. As seen below, the Congress revised and simplified the standard under which schools determine whether a behavior is a manifestation of the student's disability. Although an apparently subtle change, the new formulation was in fact a significant departure from the prior MDR inquiry.

The revised statutory language—Congress tightened the language and structure of the manifestation determination standard, in essence raising the bar of the standard required to show that a behavior is a manifestation of disability. If a school decides to change a student's placement due to a disciplinary offense, "the local educational agency, the parent, and relevant members of the IEP team (as determined by the parent and the local educational agency), shall review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine—

> **if the conduct in question was *caused by, or had a direct and substantial relationship to*, the child's disability; or**
>
> **if the conduct in question was the *direct result* of the local educational agency's failure to implement the IEP."** 20 U.S.C. §1415(k)(1)(E)(i).

Legislative Background—The Conference Committee that addressed the 2004 IDEA reauthorization stated that its intention in reforming the provision was that schools determine whether "the conduct in question was caused by, or has a direct and substantial relationship to, the child's disability, and is not an attenuated association, such as low self-esteem, to the child's disability." *Conference Committee*

Report, at 225. The commentary to the regulations cited and quoted this significant guidance. *See* 71 Fed. Reg. 46,720.

A desire to simplify MDRs—The USDOE also reads the reformed provision as an attempt to simplify the MDR process. The commentary to the regulation states "the revised manifestation determination provisions in section 615 of the Act provide a simplified, common-sense manifestation determination process that could be used by school personnel." 71 Fed. Reg. 46,720 (August 2006)

Guidance on making the determination under the new standard—The Conference Committee report on IDEA 2004 also provides additional guidance that Congress intended that the manifestation determination "analyze the child's behavior as demonstrated across settings and across time when determining whether the conduct in question is the direct result of the disability." *Committee Report*, at 224. The USDOE commentary to the regulations in fact quotes this very language. *See* 71 Fed. Reg. 46,720. This suggests that it is appropriate to examine patterns of behavior, the lack thereof, and the setting where the behaviors take place, in making the determination. The rationale is that if a behavior is caused by or directly related to disability, one should expect to see it exhibited across different settings and times.

Although the last IDEA reauthorization simplified the MDR standard and raised the bar for a finding that a behavior is related to disability, cases continue to probe the outlines of the requirement, as seen in the following case:

In ***Bristol Township Sch. Dist. v. Z.B.*, 67 IDELR 9 (E.D.Pa. 2016)**, a 17-year-old student with ADHD was roughhousing between classes and became involved in an altercation with a teacher that intervened. The teacher indicated that the student had twisted his arm and challenged him to a fight. The teacher was diagnosed with a shoulder sprain, although apparently not too serious (he was arm-wrestling another student two weeks later). A special education supervisor filled out an MDR form prior to the MDR meeting. At the meeting, staff noted that the student's ADHD behavior manifested as off-task behavior with some disengagement from instruction, but that the student had good interpersonal skills and was generally good in the classroom and compliant. He had never exhibited aggressive behavior. The staff, moreover, noted that ADHD, in general, is not associated with aggressive behavior. The Court noted that "the manifestation determination team did not discuss whether Z.B.'s disability included impaired judgment or reasoning…." It also faulted the supervisor for completing the MDR form ahead of time, although she testified that she allowed input from all stakeholders. The Court held that the document was "a prefabricated document that encompassed solely her views and conclusions." Staff testified that they did not look into the specifics of the behavior beyond noting it was an "aggressive

assault behavior." The Court thus agreed with the Hearing Officer's decision to require a second and appropriate MDR.

> *Note*—The 1997 version of the MDR standard required consideration of whether the disability limited the student's ability to understand or control the behavior, but, pointedly, the 2004 version does not. But, the Court faults the district for not discussing whether the student's disability included impaired judgment or reasoning. Moreover, the Conference Committee's Report to the 2004 reauthorization indicated that a key factual factor in MDRs is whether the behavior was exhibited over time, and here, the student had never engaged in aggressive behavior. Also, was it inappropriate for staff to indicate that ADHD is not generally associated with aggressive behavior (as the DSM-V indicates)? Certainly, the supervisor's completion of the MDR form with her view of the findings is problematic. Districts are well-cautioned to avoid such a practice.

OSEP on attorneys at IEP meetings

In ***Letter to Andel*, 67 IDELR 156 (OSEP 2016)**, OSEP was asked whether if a parent showed up with an attorney without providing advance notice, the district was in its right to either inform the parent the meeting could proceed without the attorney, or postpone the meeting until the school's attorney could be present. OSEP stated that "[w]e believe in the spirit of cooperation and working together as partners in the child's education, a parent should provide advance notice to the public agency if he or she intends to bring an attorney to the IEP meeting." But, said OSEP, noting in IDEA would permit the school to require that the attorney not participate. On the postponement option, OSEP stated that "[i]t could be permissible for the public agency to reschedule the meeting to another date and time *if the parent agrees* as long as the postponement does not result in a delay or denial of a FAPE to the child." (Emphasis supplied).

> *Note*—The problematic aspect of this interpretation is that it would allow a parent to bring an attorney to a meeting without advance notice, and then decline to agree to a postponement. In such a situation, the school would be forced to proceed with the meeting without legal representation, while the parent would be advised by counsel. While OSEP's language discourages parents from such a course of action, it plainly would allow such a result.

Preliminary screenings prior to evaluation

In the case of ***Timothy O. v. Paso Robles Unified Sch. Dist.*, 67 IDELR 227, 822 F.3d 1105 (9th Cir. 2016)**, a preschooler appeared to show signs of autism to

staff, and he was referred for IDEA evaluation. After a school psychologist observed the child for 30-40 minutes, he concluded that the student could not qualify as having autism, and that disability was ruled out as an area of suspected disability. A private evaluation, moreover, determined that the student had autism. The Ninth Circuit found the district violated child-find and proper scope of evaluation because at the time of the student's initial evaluation, the district was aware that the student displayed signs of autistic behavior, but did not proceed to evaluate that are. "It chose, however, not to formally assess him for autism because a member of its staff opined, after an informal, unscientific observation of the child, that [he] merely had an expressive language delay…." The court held that once an area of disability is suspected, there is an obligation to assess that area. "If a school district is on notice that a child may have a particular disorder, it must assess that child for that disorder, regardless of the subjective views of its staff members concerning the likely outcome of such an assessment…. A school district cannot disregard a non-frivolous suspicion of which it becomes aware simply because of the subjective views of its staff, nor can it dispel this suspicion through informal observation."

> *Note*—While this case is only controlling authority in states within the Ninth Circuit, schools should be cautious in limiting areas of suspected disability that need to be assessed based on informal observations of evaluation staff. Once school staff suspect an area of disability, it should be evaluated, and individual assessment staff that do not think the child will qualify should not be veto the assessment of that area. The standard for child-find is not whether the student will qualify, but rather whether there is suspicion of disability, which is a lower threshold. Schools that engage in pre-evaluation screenings or observations should do so after consulting with their special education attorneys.

Criteria for Independent Educational Evaluations (IEEs)

The IEE regulation at 34 C.F.R. §300.502(e) states the following:

> (1) If an independent educational evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria that the public agency uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an independent educational evaluation.

In the commentary to the regulations, USDOE takes the position that it is appropriate for district IEE criteria to require that IEEs address the educational findings and decisions that the IEP team must make. In its commentary

accompanying the 2006 regulations, USDOE wrote the following:

> Sec. 300.304(b)(1) provides that an evaluation conducted by a public agency must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining whether the child is a child with a disability under Sec. 300.8, and the content of the child's IEP, including information related to enabling the child to be involved in and progress in the general education curriculum (or for a preschool child to participate in appropriate activities). These requirements also apply to an IEE conducted by an independent evaluator, since these requirements will be a part of the agency's criteria. 71 Fed. Reg. 46,690.

This point can be important when it comes time to consider an IEE provided by the parent. The USDOE emphasizes that the requirement to consider privately-obtained evaluations, "does not mean that the public agency is compelled to consider the parent-initiated evaluation at private expense in its decision regarding the provision of FAPE, if it does not meet agency criteria." Id. Thus, the USDOE takes the position that schools are required to consider IEEs only if they contain the educationally relevant information required by the agency criteria for its own evaluations.

The following case from the Fifth Circuit follows that position and also asserts that IEEs must meet States' substantive criteria applicable to initial evaluations, albeit under a "substantial compliance" standard.

In ***Seth B. v. Orleans Parish Sch. Bd.*, 67 IDELR 2, 810 F.3d 961 (5th Cir. 2016)**, the parents of a child with autism asked for an IEE, which was granted by the school with an agreed cap of $3,000. After obtaining and paying for the IEE, the parents submitted it to the school, and the school notified them that the IEE was not in compliance with State initial evaluation substantive criteria, and offering to discuss the matter with the evaluator. (The evaluator apparently never contacted the school). Months later, the parents submitted an invoice for reimbursement of the IEE for the sum of $8,066.50. The school responded that it would not pay reimbursement for a non-compliant IEE. After preliminary findings that the school was not required to request a due process hearing because it refused to reimburse the parents, the Court found that USDOE guidance indicated that IEEs had to meet State criteria for initial evaluations, and that the school had no duty to pay for an IEE that failed to meet those criteria. Although the 35-pages of criteria were extensive, they were designed to promote quality and usefulness in evaluations. But, the Court found that "substantial compliance" with the criteria

would be sufficient for the IEE to be proper and reimburseable. The parents, in any event, found the Court, would not be able to recover more than the $3,000 cap imposed by the school, as they did not demonstrate unique circumstances that would warrant departure from cost criteria.

> *Note*—Interestingly, the Court noted that IDEA does not address whether funding of IEEs should be paid in advance or as reimbursement. It cited, however, an OSEP letter that stated that "if the parent requests advance funding for IEE-related expenses and the public agency denies that request, the parent could request a due process hearing… if the parent believes that denial of advance funding would effectively deny the parent the right to a publicly-funded IEE." See *Letter to Petska*, 35 IDELR 191 (OSEP 2001). Ostensibly, thus, schools could require IEEs to be reimbursement-based unless parents show evidence of financial hardship, if the school wishes to engage in such a process.

IDEA benefits of Section 504 Plans

In the ADA Amendments Act of 2008, the Congress responded to Supreme Court cases that had narrowed eligibility under ADA and §504 by expanding eligibility under those laws. To do so, for example, the Congress added to the list of major life activities, stated that the beneficial effect of mitigating measures should not be considered in determining eligibility, relaxed the "substantial limitation" requirement, required that episodic or remission conditions be considered as if fully active in determining eligibility, and established a mandate of "maximum eligibility." Thus, the numbers of §504 students have grown as a result. Compliance with §504 and implementation of effective §504 plans, moreover, can impart benefit to special education programs, as seen in the following case:

In ***M.E. v. Brewster Central Sch. Dist.*, 67 IDELR 214 (S.D.N.Y. 2016)**, a student with Tourette's and associated tics was provided a §504 plan that called for modified homework, testing accommodations, preferential seating, and allowance to visit the nurse's office to release tics as needed. While on this plan, the student earned 80's and 90's in all subject and passed all statewide assessments. Unlike alleged by the parents, standardized tests showed he functioned at grade level. The mother in fact expressed satisfaction with his progress and credited the school for "going above and beyond" with its §504 plan. After a private evaluation also diagnosed the student with ADHD and obsessive-compulsive disorder, the school evaluated the student under IDEA and determined him eligible. The parents, however, alleged that the school did not identify the student in a timely fashion under the IDEA. The Court agreed with the hearing officer and review officer that the school did not violate its IDEA child-

find obligation. It pointed to the student's good progress under the §504 plan, and found that the student responded well to the assistance and was performing at grade level. The Court thus denied the parents' request for reimbursement of private school tuition.

> *Note*—Providing the student with an evaluation, eligibility, and a services plan under §504 showed both that the school had complied with §504, and had not failed in its child-find obligation under IDEA. Moreover, when the student was diagnosed with additional conditions, it acted quickly to evaluate him under the IDEA. The effective implementation of the §504 plan, and the student's reponse, showed that the district legitimately had no suspicion that the student needed special education services. In turn, this enabled the school to avoid payment for private school. If the student had exhibited struggles under the §504 program, the school would have been well-advised to increase the §504 plan services, and if that was not effective, to refer him for an IDEA evaluation. The case shows that compliant child-find under both §504 and IDEA relies on good communication and coordination between the two programs.

A notorious bullying case goes on appeal

Various guidance documents issued by USDOE over the years have underscored the dilemma of preventing, addressing, and remedying bullying of students with disabilities, particularly bullying on the basis of disability. Cases seeking FAPE-based or monetary relief for failure to address disability harassment or non-disability harassment have increased in frequency. While plain non-disability harassment can result in a denial of FAPE, and thus, FAPE remedies (including compensatory services, reimbursement for private schooling), failure to properly respond to disability-based harassment is considered a form of discrimination in violation of §504, which opens the door to potential money damages in certain circumstances. The following case is an appeal from a notorious bullying case from New York:

In ***T.K. v. New York Dept. of Educ.*, 67 IDELR 1 (2nd Cir. 2016)**, a third-grader with disabilities was progressing academically, but was bulled so severely that she would come home crying on a near daily basis. One staffperson conceded that the classroom was a hostile environment for the student due to the bullying. The few interactions she had with other students were negative. She was pinched, shunned, pushed, ostracized, laughed at, and called "ugly," "stupid," and "fat." Teachers appear to have done little to help, and ignored special education teachers' reports of bullying. The student continued progressing academically, but began to be tardy, participated less in class, dreaded school, and began to bring a doll for support. At an IEP team meeting, parents attempted to raise the bullying

issue, but the principal, without explanation, flatly refused to have the team consider or address the issue, contending it was an inappropriate topic for IEP team discussion. Ultimately, the parents placed her in a private school and sued for reimbursement. First, the Court held that the bullying of an IDEA student was an appropriate topic for IEP team discussion, noting the guidance of the USDOE. Second, the Court found that the school's refusal to discuss bullying at IEP team meetings seriously infringed on the parents' right to meaningful participation, particularly since the parents alleged that the bullying was impacting their child's education. And, the violation rose to the level of a denial of FAPE. Although part of bullying responses might occur outside the IEP team, the team was required to address the impact of the bullying on the student's education and IEP. The Court thus awarded reimbursement for private placement.

> *Note*—A requirement for a legal claim for failure to address harassment is that the conduct rises to the level of a "hostile environment," which in turn requires that the student's benefit or participation be limited as a result of the bullying. Here, although the student progressed academically, it cannot be argued that she was not limited in her participation and benefit, in light of the facts. This case is premised upon IDEA, seeking reimbursement for private placement. Thus, the parents only had to show a denial of FAPE, which the Court was able to find solely on the school's incomprehensible refusal to discuss the bullying in IEP team meetings, which was clearly the worst mistake. In cases seeking monetary damages under §504, most circuits require that parents show that the school was "deliberately indifferent" to the bullying, which is a standard higher than negligence or violation of IDEA.
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> On the issue of money damages under §504, see the case of *Beam v. Western Wayne Sch. Dist.*, 67 IDELR 88 (M.D.Pa. 2016), where parents survived a motion to dismiss on a claim for money damages based on a failure to implement a §504 plan or modify it despite ongoing struggles. The Court ruled that the failure to implement and modify the plan sufficiently pleaded a denial of access to the district's programs.

Diabetes and Campus Placement

In ***R.K. v. Board of Educ. of Scott County, Kentucky*, 67 IDELR 29 (6th Cir. 2016)**, parents of a child with diabetes claimed that the school discriminated against him on the basis of disability by moving him out of his neighborhood school to a different school that had a full-time nurse on staff. The student needs periodic insulin injections and monitoring of blood sugar and sugar intake during the day. The school took the position that he needed to attend one of two campuses with a full-time nurse, while the parents claimed that he did not need help with

injections, and if he did, a nurse could come from one of the other schools. The school did not agree, and wanted him in a campus with a full-time nurse. School nurses agreed that he needed a level of monitoring and assistance that required that a nurse be present on campus on a full-time basis. The Court rejected the notion that the student was "singled out" due to his disability, and indicated that the parents were required to show that the school acted with deliberate indifference. "This is not a case where a school board ignored a student's request for help. Rather, the student's parents simply disagreed with the school as to whether a nurse was necessary to provide it." It thus affirmed the lower court's grant of summary judgment.

> *Note*—When a school district has limited schools with full-time nurses, they are likely to encounter this type of dispute, as they will generally require that students with diabetes be transferred to the campuses that have a nurse on staff. Neither IDEA nor §504 require that all types of resources and services be available on every campus, as interests of economy of resources may require centralization of certain services. *Barnett v. Fairfax County School Board,* 927 F.2d 146 (4th Cir. 1991), *cert. den'd,* 502 U.S. 859 (1991); *Letter to Anonymous,* 40 IDELR 236 (OSEP 2003).