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School Law Update: *What's New and Noteworthy for School Administrators*

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PART I: The Education Reform Act and Performance Evaluation Reform Act Update: Administrative Rules, Regulations, and Rights.

How have the rules clarified the relevant implementation dates for performance evaluation?

Each school district shall implement a performance evaluation system for principals and assistant principals by September 1, 2012. 105 ILCS 5/24A-15, 23 Ill. Adm. Code 50.20(a),(b). The student growth component of the performance evaluation plan must compose at least 25% of the evaluation for 2012-2013 and 2013-2014, and thereafter must compose at least 30% of the evaluation.

School districts located outside of the City of Chicago whose student performance ranks in the lowest 20 percent among school districts of their type (i.e., unit, elementary or high school) shall implement a performance evaluation system for teachers by September 1, 2015. (See Section 24A-2.5 of the School Code.) For purposes of this subsection (e), "student performance" shall be determined based upon a school district's overall performance on the spring 2014 administration of the State assessments. 23 Ill. Adm. Code 50.20(e), 105 ILCS 5/2-3.64.

Any school district outside of Chicago, not subject to a federal grant, and not in the lowest 20 percent among school districts of its type shall implement a performance evaluation system for teachers by September 1, 2016. 23 Ill. Adm. Code 50.20(f), 105 ILCS 5/24A-2.5.

For what is the joint committee responsible?

There are two joint committees:

- The SB7 or RIF Joint Committee establishes rules for how teachers' evaluations are categorized for purposes of reductions in forces. The law establishes specific topics for the RIF committee's discussions. The RIF committee's changes must be complete and agreed to by February 1 of any year in which a RIF is to be performed, otherwise the rules from the previous year (or the law if no prior agreement was reached) apply. The RIF committee is not required to meet annually unless otherwise required by agreement.

- The PERA or Evaluation Joint Committee establishes the evaluation components. The evaluation joint committee determines rules for the implementation of the student growth component and for the usage of assessments. If the evaluation joint committee does not come to agreement within 180 days, the student growth model of the state model plan is implemented. The evaluation committee may discuss other components of the plan, but is not necessarily required to do so.

May the two joint committees have the same membership?

Yes. However, because the two committees have separate rights and responsibilities, it should be noted formally (in writing) which committee is meeting and what they are meeting to discuss.

May a district specify a date of implementation earlier than that specified by the law?

Yes. When an earlier implementation date is agreed upon, the school district shall provide to the State Board of Education, within 30 days after an agreement is executed, a dated copy of the written agreement specifying the agreed upon implementation date and signed by the district superintendent and the exclusive bargaining representative or teachers, as applicable. 23 Ill. Adm. Code 50.20(g).

What is an "assessment"?

"Assessment" means any instrument that measures a student's acquisition of specific knowledge and skills. Assessments used in the evaluation of teachers, principals and assistant principals shall be aligned to one or more instructional areas articulated in the Illinois Learning Standards (see 23 Ill. Adm. Code 1.Appendix D) or Illinois Early Learning and Development Standards − Children Age 3 to Kindergarten Enrollment Age (see 23 Ill. Adm. Code 235.Appendix A), as applicable. 23 Ill. Adm. Code 50.30.

There are three types of assessments:

> "**Type I assessment**" means a reliable assessment that measures a certain group or subset of students in the same manner with the same potential assessment items, is scored by a non-district entity, and is administered either statewide or beyond Illinois. Examples include assessments available from the Northwest Evaluation Association (NWEA), Scantron Performance Series, Star Reading

Enterprise, College Board's SAT, Advanced Placement or International Baccalaureate examinations, or ACT's EPAS® (i.e., Educational Planning and Assessment System).

"**Type II assessment**" means any assessment developed or adopted and approved for use by the school district and used on a districtwide basis by all teachers in a given grade or subject area. Examples include collaboratively developed common assessments, curriculum tests and assessments designed by textbook publishers.

"**Type III assessment**" means any assessment that is rigorous, that is aligned to the course's curriculum, and that the qualified evaluator and teacher determine measures student learning in that course. Examples include teacher-created assessments, assessments designed by textbook publishers, student work samples or portfolios, assessments of student performance, and assessments designed by staff who are subject or grade-level experts that are administered commonly across a given grade or subject. A Type I or Type II assessment may qualify as a Type III assessment if it aligns to the curriculum being taught and measures student learning in that subject area.

23 Ill. Adm. Code 50.30. Each plan must contain at least one Type I or II assessment and at least one Type III assessment. *Id*. at 50.110(b)(1).

What is a "qualified evaluator"?

"Qualified Evaluator" shall have the meaning set forth in… the School Code and shall be an individual who has completed the prequalification process required under Section 24A-3 of the School Code or Subpart E of the [administrative code], as applicable, and successfully passed the State-developed assessments specific to evaluation of teachers or principals and assistant principals.

What must a district have completed by September 1?

The District must establish and implement a tool for evaluation of principals and assistant principals which complies with the code, has 4 categories (excellent, proficient,

needs improvement, and unsatisfactory) of rating, and contains a student performance component. 105 ILCS 5/24A-15, 23 Ill. Adm. Code 50.20(a),(b).

No evaluator who has not completed the state-required training by September 1 may perform an evaluation.

There shall be 4 categories (excellent, proficient, needs improvement, and unsatisfactory) of rating on all teacher evaluations. 105 ILCS 5/24A-5(d).

What is a "significant factor" for purposes of establishing a student growth component on an evaluation plan?

Student growth shall represent at least 25 percent of a teacher's performance evaluation rating in the first and second years of a school district's implementation of a performance evaluation system under Section 50.20 of this Part (for example, 2012-13 and 2013-14 school years for a school district with a 2012-13 implementation date). Thereafter, student growth shall represent at least 30 percent of the rating assigned. 23 Ill. Adm. Code 50.110(a).

How must the performance component apply to the evaluation?

The performance evaluation plan shall identify at least two types of assessments for evaluating each category of teacher (e.g., career and technical education, grade 2) and one or more measurement models to be used to determine student growth that are specific to each assessment chosen. The assessments and measurement models identified shall align to the school's and district's school improvement goals.

Each plan shall identify the uniform process (to occur at the midpoint of the evaluation cycle) by which the teacher will collect data specific to student learning. The data to be considered under this subsection (b)(5) shall not be the same data identified for use in the performance evaluation plan to rate the teacher's performance.

Do the regulations limit the number of visitations to a classroom or formal observations that may be performed?

No. 23 Ill. Admin. Code 50.320(c). The Code defines "formal observation" as "a specific window of time that is scheduled with the teacher, principal, or assistant principal for the qualified evaluator, at any point during that window of time, to directly observe professional practices in the classroom or in the school." 23 Ill. Adm. Code 50.30. The

Code requires formal observation, but it does not limit that observation (beyond what is contractually obligated).

The Code *does* require both formal and informal observation. There must be at least two observations for a tenured teacher rated proficient or excellent in the last performance evaluation, at least one of which must be formal. There must be at least three observations for all other teachers at least two of which must be formal. Formal observations must meet one of the following criteria:

1. an observation of the teacher in his or her classroom for a minimum of 45 minutes at a time;

2. or an observation during a complete lesson;

3. or an observation during an entire class period,

and allow the qualified evaluator to acquire evidence of the teacher's planning, instructional delivery, and classroom management skills. 23 Ill. Adm. Code 50.120(c). Formal evaluations must be preceded by a conference with the evaluator. *Id*. at (c)(4).

Must the internal rating scale match the summative rating scale?

No, but there must be 4 categories internally, and those categories must contain definition if they are different than the summative ratings. 23 Ill. Adm. Code 50.120(a)(3).

Whose is responsible for creation of the instructional framework?

The board's. 23 Ill. Adm. Code 50.120(a), See also, *Mayer v. Monroe County Community School Corporation*, 474 F.3d 477 (7th Cir. 2007).

But it is also the board's duty to work with the joint committee regarding certain components of the plan. In other words, the board determines what instruction is required, the joint committee develops rules by which the measurement of that instruction will be evaluated, and the board ultimately adopts or implements the evaluation framework.

How that actually occurs is still not completely clear. The best advice is through bargaining and discussions with the joint committee to determine how implementation will occur and who is responsible for what and commit the agreement to writing *before* discussions on content take place.

According to the Code:

> In order to assess the quality of the teacher's professional practice, the evaluation plan shall include an instructional framework developed or adopted by the school district that is based upon research regarding effective instruction; addresses at least planning, instructional delivery, and classroom management; and aligns to the Illinois Professional Teaching Standards. The instructional framework shall align to the roles and responsibilities of each teacher who is being evaluated.

23 Ill. Adm. Code 50.120(a)(1) (internal citation omitted). The effect of this provision is to require that districts carefully address their evaluation plans so that the evaluation of each teacher reflects the instruction for which they are actually responsible (*e.g.*, so that a P.E. teacher is not evaluated based upon math performance and a math teacher is not evaluated based upon athleticism).

Is self-assessment required for principals?

Yes. No later than February 1 (or June 1 in CPS), each principal and assistant principal must complete a self-assessment aligned to the rubric on professional practice. 23 Ill. Adm. Code 50.320(b).

How does a district deal with a principal who has failed to complete the required evaluation training module?

The employee may not perform an evaluation until they have completed training, and therefore may not perform an essential function of the position. The response should be progressive discipline (the failure is probably remediable).

What type of notice is required for teacher evaluation?

A teacher must be notified at the beginning of the year (or no later than 30 days after contract execution if the teacher is hired after the beginning of the school year) if the teacher will be evaluated that year. The notice must include:

1) a copy of the rubric to be used to rate the teacher against identified standards and goals and other tools to be used to determine a performance evaluation rating;

2) a summary of the manner in which measures of student growth and professional practice to be used in the evaluation relate to the performance evaluation ratings of "excellent", "proficient", "needs improvement", and "unsatisfactory" as set forth in Sections 24A-5(e) and 34-85c of the School Code; and

3) a summary of the district's procedures related to the provision of professional development in the event a teacher receives a "needs improvement" or remediation in the event a teacher receives an "unsatisfactory" rating, to include evaluation tools to be used during the remediation period.

20 Ill. Adm. Code 50.100(c).

How does implementation of the performance plan occur?

A school district, in conjunction with the joint committee established under Section 24A-4(b) of the School Code, shall be required to adopt *those aspects of the State model contained in this Subpart C regarding data and indicators of student growth about which the joint committee is unable to agree* within 180 calendar days after the date on which the joint committee held its first meeting. 23 Ill. Adm. Code 50.200(a) (emphasis added).

According to the Code, the whole State Model plan need not be implemented, but that does not mean the union won't punish a board (read: litigation) for failing to agree on a model (particularly if the union likes the State Model better). This is the prime importance of determining *how implementation will occur* at the outset of meetings or during collective bargaining.

When does the 180-day clock begin to run?

When you decide (through the joint committee) that the 180-day clock may begin to run, not later than 180 days from implementation. 23 Ill. Adm. Code 50.200(b). Nothing prevents the joint committee from meeting early *provided* that there is formal agreement on what day the 180-day clock will begin to run.

Can a district "test" a model before the district "implements" the model?

Yes.

Appendix A

Obligations Checklist[1]

_____ Define the type of meeting

_____ Evaluation Joint Committee

OR

_____ RIF Joint Committee

_____ Define membership (must be equal representation Union and Board selected):

Union: _____ Board: _____

_____ _____

_____ _____

_____ _____

_____ When will 180-day clock for implementation of student growth component begin?

_____, and ending _____.

_____ What will occur when the 180-day clock concludes?

_____

_____

_____

_____.

[1] *This checklist is intended as a reference for commonly missed obligations, but is in no way comprehensive. For review of specific facts and circumstances, specific counsel should be sought.*

_____ Will the state board model for student growth alone be implemented in accordance with 23 Ill. Adm. Code 50.200(a)?

OR

_____ Will something more be implemented?

If so, what? _____

_____

_____

_____ Any and all potential evaluators are listed on the plan with names and certificate identification

_____ Evaluators have all completed training modules before evaluation is conducted by such evaluator

_____ Evaluation notices have been sent to every employee to be evaluated by either the beginning of the year or within 30 days of employment contract execution. Notice contains:

_____ 1) a copy of the rubric to be used to rate the teacher against identified standards and goals and other tools to be used to determine a performance evaluation rating;

_____2) a summary of the manner in which measures of student growth and professional practice to be used in the evaluation relate to the performance evaluation ratings of "excellent", "proficient", "needs improvement", and "unsatisfactory" as set forth in Sections 24A-5(e) and 34-85c of the School Code; and

_____3) a summary of the district's procedures related to the provision of professional development in the event a teacher receives a "needs improvement" or remediation in the event a teacher receives an "unsatisfactory" rating, to include evaluation tools to be used during the remediation period.

_____ Implement a 4 category summative ratings on all evaluations (Excellent, Proficient, Needs Improvement, Unsatisfactory)

_____ Implemented a student performance based evaluation system for principals by or before September 1, 2012

_____ The model accounts for at least 25% of the evaluation

_____ The model will account for at least 30% of the evaluation beginning in 2014-2015

_____ Implement an evaluation system with 4 categories of (well-defined) performance rating in each category – either in line with the summative ratings or otherwise appropriately defined.

_____ The plan has at least one Type I or Type II assessment and at least one Type III assessment

_____ Does your contract require any additional step or component?

_____

_____

_____

Has the contractual component been met or revised by agreement?

_____Yes _____Revised or removed (attach agreement) _____No

Signatures of all participants: Date_____

Union: _____ Board: _____

_____ _____

_____ _____

_____ _____

PART II: GRIEVANCE AND ARBITRATION

NOTES:

PART III: SPECIAL EDUCATION UPDATE

The FAPE Obligation

"The IDEA guarantees disabled children the right to a free appropriate public education in the least restrictive environment."

"A court's inquiry [as to whether or not an IEP provides FAPE]… is twofold. First, has the State complied with the procedures set forth in the Act? And second, if the individualized education program developed though the Act's procedures reasonably calculated to enable the child to receive educational benefits?" *Board of Education of Township High School District No. 211 v. Ross*, 2007 WL 1374919 (7th Cir. 2007), citing *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982). (Emphasis added).

CASE NOTES:

PART C TO PART B TRANSITION. *City of Chicago School District No. 299*, 57 IDELR 266 (ISBE 2011). An Illinois district could have avoided a denial of FAPE claim if it had simply continued a student's IFSP. The 3-year-old student with significant language delays received early intervention services in the district. The student turned 3 in February, 2011. The district failed to honor the parents' and advocates' request to evaluate him for special education before he turned 3; and, on his third birthday, the early intervention services were discontinued. As a result, the student was deprived of educational programming from February until June, 2011 when an IEP team convened. His parents objected to the proposed IEP's failure to provide ESY services and initiated due process requesting compensatory education for the district's failure to timely evaluate the student. An IHO explained that to comply with the IDEIA's child find requirements pursuant to 34 C.F.R. §300.111, a district is required to coordinate with early intervention programs to identify a student who has, or is suspected to have a disability so that an IFSP or IEP can be implemented by the child's third birthday. Illinois law provides that a district and parents may agree to continue a student's IFSP as his IEP. 23 Ill.Admin.Code 226.250. The parents' evidence persuaded the IHO that the student would have made educational progress had the district not caused a lag in his receipt of programming. The parents provided testimony from the student's early intervention service providers explaining that based on his past trajectory, the student could have made greater progress in his language, sensory, and fine motor skills had he received services pursuant to an IEP or his continued IFSP. The IHO noted that the district's failure to provide services resulted in the student making no

progress in his language skills and minimal progress in his fine motor skills, the deficits of which actually presented a safety concern. The IHO determined that the student was deprived of FAPE because the district failed to provide an IEP or IFSP no later than his third birthday. As a result, the student didn't make educational gains and should have been afforded the benefit of compensatory education, the IHO concluded.

CHILD FIND. Pursuant to 34 C.F.R. §300.111 (a), each state must put policies and procedures in place to ensure that:

> (i) All children with disabilities residing in the state, including children with disabilities who are homeless children or are wards of the state, and children with disabilities attending private schools, regardless of the severity of their disability, and who need special education and related services, are identified, located, and evaluated; and
> (ii) A practical method is developed and implemented to determine which children are currently receiving needed special education and related services.

Illinois puts this duty squarely on local school districts. 23 Ill.Admin.Code 226.100.

> **Also note**: *In re: Student with a Disability*, 112 LRP 12493 (MS 2012). An IHO concluded that a Mississippi school district denied FAPE to a student by delaying his initial evaluation for a year, due to the district's reliance on Head Start to schedule a screening. While the district has historically relied upon Head Start to schedule evaluations, the district had an affirmative obligation to ensure the student was evaluated.

Child find must include: "(1) children who are suspected of being a child with a disability under 34 C.F.R. §300.8 and in need of special education, even though they are advancing from grade to grade; and (2) highly mobile children, including migrant children." 34 C.F.R. §300.111(c).

Nothing in the IDEIA requires that children be classified by their disability so long as each child who has a disability that is listed in 34 C.F.R. §300.8 and who, by reason of that disability, needs special education and related services, is regarded as a child with a disability under Part B of the IDEIA. 34 C.F.R. §300.111(d).

Pursuant to 34 C.F.R. §300.131(a), "Each LEA must locate, identify and evaluate all children with disabilities who are enrolled by their parents in private, including religious, elementary schools and secondary schools located in the district served by the LEA, in accordance with 34 C.F.R. §300.131(b) through … (e), 34 C.F.R. §300.111 , and 34 C.F.R. §300.201."

CONSENT FOR EVALUATIONS. *G.J. v. Muscogee County School District*, 704 F.Supp.2d 1299 (M.D. Ga. 2010). The parents of a 7-year-old with autism effectively withheld their approval for a triennial reevaluation by placing numerous restrictions on how the assessment would be conducted, a federal District Court held. However, because they were still interested in obtaining a reevaluation, the parents' nonconsent did not automatically waive their son's right to IDEA services. When the parents signed the district's consent form, they attached an addendum requiring a specific evaluator, parental approval for each instrument, and meetings before and after the evaluation. An ALJ concluded that this did not constitute consent. Thus, the district did not have to provide services. On appeal, the District Court noted that although the parents contended their addendum merely tracked the IDEA's requirements, it was in fact much stricter. Furthermore, they continued to seek significant conditions, including a limitation that the reevaluation "not be used in litigation against [the parents]." "With such restrictions, Plaintiffs' purported consent was not consent at all," U.S. District Judge Clay D. Land wrote. At the same time, the refusal did not automatically waive the right to IDEA services. The court pointed out that this was not a case where the ALJ ordered the parents to consent and the parents refused. Moreover, the parents continued to express an interest in having their son reevaluated. Although the parties were unable to resolve the conditions of the reevaluation, there was no evidence that the parents would have rejected a reevaluation ordered by the ALJ. The court ordered the parents to consent to the reevaluation, observing that they were free to decline services rather than comply with the order.

RESPONSE TO INTERVENTION. *Daniel P. v. Downington Area School District*, 57 IDELR 224 (E.D. Pa. 2011). By closely monitoring the progress of a student in RTI, the school district avoided a child find violation. The court pointed out that although the school district offered the student RTI programming only (and no special education) during first and second grade, the district continued to monitor his progress. When his RTI teacher noted his increasing difficulties at the end of second grade, the district evaluated the student for special education, found him eligible, and promptly developed an IEP. Despite the parents' claim

that the district violated child find by not identifying him earlier, the court stated:

> …[T]here is simply no basis for concluding that the District should have acted sooner than it did in determining that Daniel was eligible for special education services and nothing showing that the District failed to timely act. Daniel's report cards reflected that he was making progress throughout the first and second grades. His [RTI] teacher noted increasing difficulties at the end of second grade and in the first month of third grade the District conducted [an evaluation and developed an IEP].

Harrison, Colorado School District No. 2, 57 IDELR 295 (Colo. SEA 2011). Implementation of RTI strategies did not offset this Colorado school district's failure to timely evaluate a student with ADHD. OCR decided that the school district denied FAPE to the student when it failed to timely evaluate him for special education eligibility, particularly due to the possible OHI eligibility.

RE-EVALUATION. *Moorestown Board of Education v. S.D. and C.D. on behalf of M.D.*, 811 F. Supp. 2d 1057 (D. N.J. 2011). A New Jersey district's refusal to reevaluate a private school student with an SLD just because his parents wouldn't reenroll him first denied the student FAPE. Noting that the parents were requesting the assessment for purposes of deciding whether to return the student to public school, the District Court held that the district had a duty to evaluate the child and propose an IEP. The parents withdrew the child from the district after disagreeing with a proposed IEP. They placed him in private school. The following year, hoping to return the student to public school, they asked the district to conduct a reevaluation. The district insisted that the parents reenroll the child first. The parents refused and filed a due process complaint. An ALJ found that the district denied the student FAPE, and awarded tuition reimbursement. On appeal, the District Court noted that the IDEA requires a reevaluation if a parent requests it for purposes of obtaining an offer of FAPE, regardless of enrollment status. Here, the parents made it clear that they were not seeking equitable services, but that they hoped to return the student to public school. Moreover, the court observed, if it were enrollment, rather than residency, that triggered the duty to offer FAPE, parents of private school children would have to enroll their children in public school without knowing what type of program the district would offer, while risking the loss of the child's spot in private school -- a particularly troubling scenario where, as in this case, the parents initially removed the child from the district because of concerns over its offer of FAPE. "Surely, Congress did not intend to turn special education into

a game of poker, where a school district does not have to show its cards until after the parents have taken the gamble of enrolling their child," U.S. District Judge Renee Marie Bumb wrote. Finding that the district violated the IDEA by failing to evaluate the student, the court affirmed the ALJ's reimbursement award.

ELIGIBILITY AND OUTSIDE EVALUATIONS. *Marshall Joint School District No. 2 v. C.D., by and through his parents, Brian D. and Traci D.*, – F.3d –, 110 LRP 44405 (7th Cir. 8/2/2010). Despite a physician's recommendation that a grade school student with a rare genetic condition could not participate safely in regular PE, the 7th Circuit reversed a lower decision and concluded that the student did not need specialized instruction to receive an educational benefit. The Court, with Circuit Judge Danial A. Manion writing for the majority, criticized the hearing officer's finding that the student's educational performance could be affected if he experienced pain or fatigue at school. "This is an incorrect formulation of the [eligibility] test... It is not whether something, when considered in the abstract, can adversely affect a student's educational performance, but whether in reality it does." The court was also critical of the hearing officer's reliance on the opinion of the private physician because the physician's opinion was based almost entirely on information obtained from the student's mother, evaluated the student for only about 15 minutes, and did not conduct any observation of the student's educational performance. The court noted: "A physician cannot simply prescribe special education; rather the [IDIEA] dictates a full review by an IEP team."

EXCUSAL OF PARTICIPANTS: REQUIREMENTS

Pursuant to 34 CFR §300.321(e), a member of the IEP Team described in paragraphs (a)(2) through (a)(5) of that section is not required to attend an IEP Team meeting, in whole or in part, if the parent and the public agency agree, in writing, that the attendance of the member is not necessary because the member's area of the curriculum or related services is not being modified or discussed in the meeting.

A member of the IEP Team can be excused from attending an IEP Team meeting, in whole or in part, when the meeting involves a modification to or discussion of the member's area of the curriculum or related services, if --

> (i) The parent, in writing, and the public agency consent to the excusal; and

(ii) The member submits, in writing to the parent and the IEP Team, input into the development of the IEP prior to the meeting.

However, note that the excusal of a team member whose area of service is not being modified or discussed requires a written **agreement** between the parent and the district, while the excusal of a team member whose area of service is being modified or discussed requires written **consent**. As the ED explained in its comments on the 2006 Part B regulations, an "agreement" refers to an understanding between the parent and the district. 71 Fed. Reg. 46,673. The requirements for consent, defined at 34 CFR §300.9, are more stringent. They require the district to fully inform the parent of all information relevant to the team member's excusal, in the parent's native language or other mode of communication, and to ensure the parent's understanding that the granting of consent to the team member's absence is voluntary and can be revoked at any time. 71 Fed. Reg. 46,674.

The ED cautioned districts to consider an excusal request carefully before asking parents of a child with a disability to agree or consent to a member's nonattendance at an IEP meeting:

> "We encourage LEAs to carefully consider, based on the individual needs of the child and the issues that need to be addressed at the IEP Team meeting whether it makes sense to offer to hold the IEP Team meeting without a particular IEP Team member in attendance or whether it would be better to reschedule the meeting so that person could attend and participate in the discussion. ... **An LEA that routinely excuses IEP Team members from attending IEP Team meetings would not be in compliance with the requirements of the Act**, and, therefore, would be subject to the State's monitoring and enforcement provisions." 71 Fed. Reg. 46,474 (2006).

PREDETERMINATION. *Berry v. Las Virgenes Unified School District*, 370 F. App'x 843, 54 IDELR 73 (9th Cir. 2010). Despite claiming that it considered a number of factors before deciding on a placement for a student with autism, a California district failed to show that it complied with the IDEA's procedural safeguards. The 9th Circuit affirmed the District Court's decision at 52 IDELR 163 that the district predetermined the student's placement in a special day class. The decision turned on the assistant superintendent's statement at the start of the IEP meeting that the team would discuss the student's transition back to public school. Based on that statement and the evidentiary record as a whole, the District Court found that the district determined the student's placement before the meeting. "It specifically found [the district representatives'] testimony about being open to considering alternative placements incredible, and found credible the mother's testimony that her minimal participation [in the meeting] was due to futility," the 9th Circuit wrote in an unpublished decision. The 9th Circuit observed that the District Court's findings were not clearly erroneous. Concluding that the district violated the IDEA's procedural requirements by predetermining the student's placement, the 9th Circuit upheld the District Court's ruling in the parent's favor.

Ka.D., a minor, by her mother, Ky.D., as her next friend; Ky.D. and B.D., v. Solana Beach School District, 54 IDELR 310 (S.D. Cal. 2010). There was insufficient evidence that a California district decided its placement offer for a 4-year-old girl with autism ahead of time. The fact that its special education director expressed concerns that the district and parent would be unable to reach an agreement was not tantamount to predetermination, a District Court held. The parent rejected the district's offered placement, enrolled the child in private school and sought reimbursement. An ALJ ruled in favor of the parent in part, ordering the district to reimburse the parent for private school costs. However, the parent took the case to federal court, arguing that the ALJ also should have found that the district predetermined its offer. The parents asserted that the special education director decided beforehand that the parties would disagree and thus was dismissive of proposals that included keeping the student in private school. The court pointed out that although the director expressed concerns, and although the parent may have been frustrated by the IEP, neither established that the district decided on a placement before the meeting. In fact, meeting notes showed that the team discussed the conflicting recommendations, including apparently discussing the private school at length. "Indeed, after reading the transcripts, this Court was left with the impression that Student's mother was a welcomed and active participant in the IEP discussions," U.S. District Judge Thomas J. Whelan wrote.

Nor was there any evidence that the district had a policy of rejecting private school placements. The court also affirmed the ALJ's decision rejecting the parent's request that it pay an independent evaluator's $24,000 bill, reasoning that the parent offered no evidence that the district's own evaluation was inappropriate.

Marc M., on behalf of his minor son, Aidan M. v. Department of Education, State of Hawaii, 762 F. Supp. 2d 1235 (D. Haw. 2011). Although the parents of a teen with ADHD waited until the very last moment of an IEP meeting to supply a private school progress report, that was no basis for the team to disregard it. The District Court ruled that the Hawaii ED violated the IDEA procedurally and denied the child FAPE when it declined to review the report, which contained vital information about his present levels of academic achievement and functional performance. The document, which showed the student progressed in his current private school, contradicted the information provided in the IEP. However, the care coordinator who received the document did not share it with the rest of the team, because the team had just completed the new IEP. The IEP called for the student to attend public school for the upcoming school year. The parents reenrolled the student in private school, and sought reimbursement. The court noted that districts must consider evaluations parents obtain independently in any decision with respect to the provision of FAPE. It rejected the coordinator's contention that because the document was provided at the meeting's conclusion, the team could not have considered and incorporated it into the new IEP. The court pointed out that the parents provided the document when implementation of the IEP was still weeks away. Moreover, although the parents delivered the document without explanation at the end of the meeting, the care coordinator reviewed it and concluded it showed progress. As a result, the IEP contained inaccurate information about the student's current performance. The court ruled that the procedural errors "were sufficiently grave" to warrant a finding that the child was denied FAPE.

FAPE AND PROGRESS. *W.R. and K.R. v. Union Beach Board of Education*, 54 IDELR 197 (D. N.J. 2010). The Court held that the hearing officer has turned the FAPE standard on its head by taking a retrospective approach to the adequacy of a student's IEP. The finding by the hearing officer that the student had made slower progress in the school district's program than in the program preferred by the parent was "irrelevant", as the IEP, when developed, was reasonably calculated to provide FAPE.

Klein Independent School District v. Hovem, --F.3d--, 112 LRP 39704 (5th Cir. , August 6, 2012). Noting it was "regrettable" that a Texas district failed to address the

source of a former student's writing difficulties earlier in his educational career, the 5th Circuit nonetheless found that the accommodations set forth in the student's IEPs allowed him to receive FAPE. The 5th Circuit reversed a decision noted above that the district's failure to provide more intensive services amounted to an IDEA violation. The 5th Circuit pointed out that *Rowley* only requires districts to ensure that students with disabilities receive some educational benefit. As such, the District Court erred in focusing on the student's ongoing deficits rather than his overall academic record. "Nowhere in *Rowley* is the educational benefit defined exclusively or even primarily in terms of correcting the child's disability," U.S. Circuit Judge Edith H. Jones wrote for the two-judge majority. Not only were the IEPs customized on the basis of the student's assessments and performance, but they were implemented in the student's LRE -- the general education classroom. The district also ensured that staffers provided the student's services in a collaborative and coordinated manner. Most notably, the 5th Circuit observed, the student earned above-average grades in the general education curriculum by using a spell checker and a computer for written assignments. "Viewed from the holistic *Rowley* perspective, rather than the District Court's narrow perspective of disability remediation, [the student] obtained a high school level education that would have been sufficient for graduation," Judge Jones wrote. The 5th Circuit thus concluded that the district offered the student FAPE. U.S. Circuit Judge Carl E. Stewart dissented from the majority's opinion, contending that the decision could be interpreted as allowing districts to circumvent the IDEA's requirements by promoting students with disabilities from grade to grade without addressing their individual needs.

K.E. v. Independent School District No. 15, St. Francis, Minnesota, 647 F.3d 795 (8th Cir. 2011). In addition to deciding in the school district's favor on procedural issues, the 8th Circuit further held that the student's IEP included all of the IDEA-mandated components. As for the parents' claim that the student was "losing ground" academically, the court explained that it would not compare the student to her nondisabled peers. The key question was whether the student made gains in her areas of need. Noting that the student made significant improvements in reading decoding, reading fluency, spelling, and math, the 8th Circuit held that the IEPs were reasonably calculated to provide some educational benefit. Citing other precedent, the court noted: "An IEP is a snapshot, not a retrospective, and we must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was promulgated." And the court ultimately stated:

> We acknowledge that K.E. did fail to meet some of her IEP goals during the relevant time period. We also recognize that K.E.'s test results do not demonstrate the level of growth that is typical for children of her grade level. But these shortcomings do not in any way negate the substantial progress that she was able to achieve, and furthermore, we have held that an IEP "need not be designed to maximize a student's potential commensurate with the opportunity provided to other children. The requirements are satisfied when a school district provides individualized education and services sufficient to provide disabled children with some educational benefit," and K.E.'s academic progress clearly shows that she did receive that required level of educational benefit.

LEAST RESTRICTIVE ENVIROMENT. *Dear Colleague Letter*, 112 LRP 14029 (OSEP, February 29, 2012). Some districts may need to think outside of the box when it comes to finding a placement for a preschooler that meets the child's needs in the least restrictive environment. A district with limited or no preschool programs is not absolved from its obligation to comply with LRE for all students receiving Part B services, including preschoolers. **OSEP noted that LRE applies to children aged 3 through 5.** The LRE provision represents a strong preference for educating such children alongside their typically developing peers. Moreover, the preference applies **whether or not the LEA operates public preschool programs for children without disabilities**. OSEP pointed out that many LEAs do not offer public preschool programs, or offer only a limited range of such programs. Such LEAs "must explore alternative methods to ensure that the LRE requirements are met for that child," OSEP Director Melody Musgrove wrote. **These methods may include**: 1) providing opportunities for the child to participate in preschool programs operated by other public agencies (such as Head Start or community based child care); 2) enrolling preschool children with disabilities in private programs for nondisabled preschool children; 3) locating classes for preschool children with disabilities in regular elementary schools; or 4) providing home-based services. OSEP also stated that if a public agency determines that placement in a private preschool program is necessary for a child to receive FAPE, the public agency must make that program available at no cost to the parent.

Baron v. South Dakota Board of Regents, 655 F.3d 787 (8th Cir. 2011). The parents of students with deafness and hearing impairments might have preferred that their children attend a state school for the deaf, but that did not preclude the South Dakota Board of Regents from cutting back on programs at the school's campus. The 8th Circuit found no evidence that the board's decision to outsource services

to local school districts would deny the affected students FAPE. The parents did not allege that their children were unable to benefit from the programs in which they currently were enrolled. Rather, they contended that a school for the deaf was the least restrictive environment for students with hearing impairments. Recognizing that the parents' argument had some scholarly support, the 8th Circuit nonetheless observed that the IDEA requires mainstreaming for students with disabilities to the maximum extent appropriate. "The IDEA's integrated classroom preference makes no exception for deaf students," U.S. Circuit Judge Roger L. Wollman wrote for the three-judge panel. Furthermore, the court pointed out that the state was not required to provide the best possible education for students with disabilities. Instead, the state only needed to ensure that students with disabilities had a basic floor of opportunity to receive an educational benefit. Because the parents failed to show that their children needed services in a separate school to receive FAPE, the 8th Circuit found no fault with the board's decision to outsource services rather than provide them on campus. The 8th Circuit thus affirmed the District Court's grant of judgment for the district.

Munir v. Pottsville Area School District, 59 IDELR 35 (M.D. Pa. 2012). Just because a 17-year-old boy with severe depression made progress in a therapeutic residential program did not require a Pennsylvania district had to reimburse the parents for the program's cost. Concluding that the placement stemmed from the student's emotional needs, rather than any deficiencies in his public school education, the District Court upheld an administrative decision in the district's favor. The court recognized that educational and emotional needs may sometimes intertwine. Nonetheless, the court pointed out that a district is not responsible for placements that are unnecessary for educational purposes. In this case, the evidence showed that the student earned above-average grades in school. Testimony showed that the parents placed the student in the residential program because he had threatened to harm himself and they feared for his safety. “Although [the student] undoubtedly benefited from the educational opportunities offered by the residential placements, these educational benefits were subsidiary to the therapeutic and emotional benefits [he] received in an effort to prevent another suicide attempt,” U.S. District Judge Robert D. Mariani wrote. Because the placement was intended to address the student's emotional rather than educational needs, the parents were not entitled to reimbursement.

IEP Implementation

After the IEP is written and an appropriate placement determined, the district is obligated to provide the student with the special education and related services as listed in the IEP. 34 C.F.R. §300.323 (c). That includes all supplementary aids and services and program modifications that the IEP team has identified as necessary for the student to advance appropriately toward the established IEP goals, to be involved in and progress in the general curriculum, and to participate in other school activities.

> *Sumter County School District 17 v. Heffernan*, 56 IDELR 186 (4th Cir. 2011). An IHO's finding that a middle schooler with autism received more than a minimal educational benefit during the 2005-06 school year did not allow a South Carolina district to avoid liability for its failure to provide the full amount of ABA therapy required by the student's IEP. The 4th Circuit held that the district's material implementation failure resulted in a denial of FAPE. The 4th Circuit rejected the notion that it was bound by the IHO's conclusion that the student received an educational benefit. While the court was required to give due weight to the IHO's factual findings, it was free to draw its own conclusions from those findings. The 4th Circuit pointed out that the student was "very aversive" to teaching in the beginning of the school year, and engaged in behaviors such as biting himself and wiping his face until it bled. The board-certified ABA therapist who worked with the student in his autism classroom testified that the teacher and classroom aides did not understand or properly implement ABA techniques. Only by working with the student for several months was the therapist able to correct the problems resulting from staff members' improper implementation of ABA techniques. The 4th Circuit observed that the evidence as a whole supported the District Court's conclusion that the implementation failure resulted in a denial of FAPE. "While there is evidence showing that [the student] made some gains in certain skill areas tested in the spring of 2006, these gains were not so significant as to *require* a conclusion that [the student] received some non-trivial educational benefit from the 2005-06 IEP as implemented by the district," Chief U.S. Circuit Judge William B. Traxler Jr. wrote. The court thus affirmed the District Court's ruling that the district denied the student FAPE.

(d) *Accessibility of child's IEP to teachers and others*. Each public agency must ensure that— (1) The child's IEP is accessible to each regular education teacher, special education teacher, related services provider, and any other service provider who is responsible for its implementation; and (2) Each teacher and provider described in paragraph (d)(1) of

this section is informed of— (i) His or her specific responsibilities related to implementing the child's IEP; and (ii) The specific accommodations, modifications, and supports that must be provided for the child in accordance with the IEP. 34 C.F.R. §300.323(d).

TRANSITION ASSESSMENTS. *Carrie I. v. Department of Education, State of Hawaii*, 59 IDELR 46 (D. Haw. 2012). The court held that the IEP team relied on a prior version of the IDEA when developing the student's transition plan. Instead of merely identifying the agencies responsible for providing transition services, the court explained, the school should have conducted age-appropriate transition assessments, developed appropriate postsecondary goals, and identified the services needed to reach those goals. "***The lack of assessments alone is enough to constitute a lost educational opportunity***," U.S. District Judge J. Michael Seabright wrote. Moreover, because the state's vocational rehabilitation division was likely to be responsible for providing or funding the student's transition services, the school should have invited a representative of that agency to attend the IEP meeting. The District Court held that the school's procedural violation, along with its failure to develop an appropriate postsecondary transition plan, required it to continue the student's private placement.

District of Columbia Public Schools, 57 IDELR 114 (DC SEA 2011). The District of Columbia made a costly mistake when it developed postsecondary transition goals for a teenager with an emotional disturbance **based solely on a 10-minute interest interview**. Determining that the goals were not reasonable, realistic, or attainable, an IHO found that the district's failure to develop an appropriate transition plan entitled the student to compensatory services. The IDEA requires postsecondary goals to be based on "**age-appropriate transition assessments**." Although the IDEA does not define this term, it generally is understood to mean a comprehensive evaluation of the student's interests, strengths, and needs with regard to **education, training, employment, and independent living skills**. The IHO noted that the district in this case did not conduct such assessments. Rather, it had a career exploration teacher conduct a 10-minute guided interview in which the student gave yes or no answers to questions about his interests. Given that the student performed between the second- and fifth-grade level, the IHO observed that his goals of attending college and pursuing a career as a forensic scientist -- both of which were based on the interview -- were not realistic or attainable. "The information gathered from the interview is also somewhat unreliable because of its limited duration and scope, and because the student's career interests readily change," the IHO wrote. Concluding that the district's failure to conduct age-appropriate transition assessments prevented it from

developing an appropriate transition plan, the IHO ordered the district to assess the student, develop appropriate postsecondary goals, and provide the compensatory services he needed to make progress toward those goals.

Family Policy Compliance Office (FPCO) opinion re: FERPA: *Letter to Wolf*, 111 LRP 77092 (FPCO 10/27/2011). The parent alleged that the district violated FERPA by disclosing personally identifiable information from the student's education records without the parent's prior written consent. Specifically, the parent claimed that her friend sat behind a principal at a girls' volleyball game and overheard the principal relate to a teacher various matters concerning the parent's "tort claim notice" that she submitted to the district. The friend also allegedly overheard the principal mention that the parent's son had a disability and discuss the student's grades. The district superintendent advised FPCO that the principal acknowledged she had engaged in a conversation with a teacher at the volleyball game and that it was possible that others who were at the game may have overheard the conversation. Therefore, FPCO found that the district violated FERPA as alleged by the parent. The superintendent indicated that the principal was counseled about FERPA's requirement that information from students' education records may not be disclosed to third parties without parents' prior written consent. FPCO then closed the complaint based on the assurance that the superintendent took corrective action with regard to the incident.

SECTION 504

Broward County (FL) School District, 58 IDELR 292 (OCR 2012). A Florida school district was required to take both district-wide and student-specific action to remedy violations of Section 504, as its practice and policy was to require parents to provide a medical diagnosis of a disability before initiating a 504 review. OCR reminded the school district that the regulations require districts to evaluate students suspected of having disabilities "at no cost to their parents." This school district required parents to provide documentation of a student's disability diagnosis before it would commence the eligibility determination process.

Quoting from *In Re Ansonia (CT) Public Schools*, 56 IDELR 176 (OCR 2010):

> OCR learned that the Board designated two administrators as its Section 504/Title II Compliance Officers. However, OCR found that the Board's designees did not understand the Board's obligations under Section 504 and Title II, such as key differences between a grievance procedure and an impartial due process hearing under Section 504 or that, as

employees of the Board, they could not lawfully serve as, impartial hearing officers to review decisions regarding the identification, evaluation and placement of students with disabilities as required by 34 C.F.R. Section 104.36. Thus, although the Board designated at least two persons to coordinate its compliance with Section 504 and Title II, OCR determined that the Board's designees could not effectively coordinate compliance because they did not understand important regulatory requirements, as is contemplated by Section 504 and Title II at 34 C.F.R. Section 104.7(a) and 28 C.F.R. Section 35.107(a).

Additionally, the Board provided no evidence that it issued and disseminated an appropriate notice to members of the school community that it does not discriminate on the basis of disability in it programs and activities, or any notification indicating the name, office address, and telephone number of the individuals designated as the Board's Section 504 or Title II Coordinators, as expressly required by Section 504 at 34 C.F.R. Sections 104.7(a) and 108, and Title II at 28 C.F.R. Sections 35.107(a) and 35.108.

Celeste v. East Meadow Union Free School District, 54 IDELR 142 (2d Cir. 2010) (unpublished). The student relied on crutches when he was ambulatory and a wheelchair when he was not. Minor architectural barriers on school property forced him to take a 10-minute detour each way to go to and from the athletic fields. The 20-minute total detracted from his participation as manager of the football team and cut in half his participation time in a typical 45-minute PE class. The student sued the District from denying him meaningful access to its programs as provided under Title II of the Americans with Disabilities Act. A jury found the district liable and awarded $115,000. The court upheld the jury's decision on liability, finding that "For each of the physical areas found by the jury to have the effect of denying [the student] access to school programs, [the student] offered plausible, simple remedies, which are [minimal] compared with the corresponding benefits by way of access achieved." However, the court vacated the award as arbitrary and remanded the case for a new trial on the issue of damages.

Ridley School District v. M.R. and J.R., 56 IDELR 74 (E.D. Pa. 2011). The court held that the fact that the student was treated differently than other students did not mean the student was discriminated against. This issue arose in the context of class projects involving food, when the student was given different kinds of food due to allergies. Key Quote:

> While each of these examples may illustrate how E.R.'s daily school routine necessarily had to be different than her classmates, they in no way establish that she was separated or isolated from her classmates.
>
> Moreover, the record in no way reflects that [the student] was deprived of a learning opportunity due to her disability. Parents have not established that [the student] was prevented from meaningful participation in these activities, only that her diet was different than her classmates.

South Lyon (MI) Cmty. Schs. 54 IDELR 204 (OCR 2009). District denied student with ED the opportunity to participate in class field trip when the principal improperly required the parent to accompany him on the trip as a condition of his attendance, rather than providing the student with the related aids and services he needed to participate. (See also, e.g., *Metro Nashville (TN) Sch. Dist.*, 53 IDELR 337 (OCR 2009): Students with disabilities were inappropriately denied participation in class trip to Camp Sycamore and a grade-wide pizza party due to lack of appropriate communication about trip information by special education homeroom teachers to parents.)

Marana (AZ) Unified Sch. Dist., 53 IDELR 201 (OCR 2009). A high school student with a disability who participated in his school's marching band class and the marching band's extracurricular activities participated in home football games by playing his drum in the stands and with other percussionists in front of the field at halftime. However, he was not permitted to participate in "high stakes events" like field show competitions, and during a marching band trip to Disneyland, he did not participate in the band's recording session, parade through the park, or group picture. This amounted to disability discrimination under Section 504.

Wilson County (TN) Sch. Dist., 50 IDELR 230 (OCR 2008). Changing a student's 504 plan to exclude academic accommodations (i.e., extended time on classwork, homework, and routine classroom tests) in his honors classes violated Section 504. (See also *Letter to Anonymous*, 108 LRP 16376 (OCR 12/26/07): If a Section 504-eligible student requires related aids and services to participate in a regular education class or program, then a district may not deny the student such related aids and services in an accelerated class or program. Additionally, condition enrollment in an advanced class or program on the forfeiture of needed special education or related aids and services violate Section 504.)