The Latest Top 40 Chart Topping Decisions that Parent Attorneys and Advocates Should Be Citing

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At the 2008 COPAA Conference in Anaheim, we first presented The Hit Parade's Top Forty Special Education Citations for Parent Attorneys and Advocates. Now, nearly six years later, it is time to revisit the charts and see what "hits" the judiciary has managed to produce since March 2008. In the style of Casey Kasem, we will again be counting down the list of chart-toppers from number 40 through number 1 (as determined by our own highly subjective analysis) for the period since March 2008. The "artists" represented in this new Top 40 tend to be the judges who truly "get it" when it comes to interpreting the IDEA, section 504, Title II of the ADA, and the other laws that affect the education of students with disabilities. We hope you can find a use for these citations in your practices!

No. 40: *Argenyi v. Creighton Univ.,* 703 F.3d 441, 446, 448-449 (8th Cir. 2013) (504/ADA ACCOMMODATION: Medical school student with bilateral cochlear implants seeking CART/interpreters due to hearing impairment)

Quoting DOJ's ADA Technical Assistance Manual: "[I]t is especially important to consider the complainant's testimony carefully because 'the individual with a disability is most familiar with his or her disability and is in the best position to determine what type of aid or service will be effective.'"

Under the "meaningful access" standard, the auxiliary aids and services must afford "equal opportunity" for student with disability to "gain the same benefit" as his nondisabled peers, not merely prevent student from being "effectively excluded" from the medical school program.

No. 39: *Sumter Co. Sch. Dist. 17 v. Heffernan,* 642 F.3d 478, 484, 488 (4th Cir. 2011) (TUITION REIMBURSEMENT: Reimbursement granted for ABA home program provided to student with autism)

"[A] material failure to implement an IEP [here, a failure to provide 15 hours of ABA services per week], or, put another way, a failure to implement a material portion of an IEP, violates the IDEA."

"[W]hile a parental placement is not inappropriate simply because it does not meet the least-restrictive-environment requirement, it is nonetheless proper for a court to consider the restrictiveness of the private placement *as a factor* when determining the appropriateness of the placement."

No. 38: *Safford Unified Sch. Dist. #1 v. Redding,* 557 U.S. 364, 374-375 (2009) (4th AMENDMENT RIGHTS: Despite suspicion, strip search of middle school student by school staff unjustified)

"[B]oth subjective and reasonable societal expectations of personal privacy support the treatment of such a [strip] search as categorically distinct, requiring distinct elements of justification on the part of school authorities for going beyond a search of outer clothing and belongings."

"[W]hen the categorically extreme intrusiveness of a search down to the body of an adolescent requires some justification in suspected facts, general background possibilities fall short; a reasonable search that extensive calls for suspicion that it will pay off. But nondangerous school contraband does not raise the specter of stashes in intimate places . . ."

No. 37: *Eley v. District of Columbia,* -- F. Supp. 2d --, 2013 WL 6092502 (D.D.C. 2013) (ATTORNEY FEE RECOVERY: No reduction in parents' fee award despite failure to prevail on request for future placement)

"[*Hensley v. Eckerhart*] did not state that such a reduction [for partial success] was mandatory and specifically rejected 'a mathematical approach concerning the total number of issues in the case with those actually prevailed upon.'"

"[T]he Court rejects the defendant's position that the plaintiff adopted a 'risk[y]' position by seeking a private school placement for her child when the defendant itself recommended a private school, albeit a different one than the one chosen by plaintiff. . . . .[T]he plaintiff's response was both understandable and appropriate when the school system failed to abide by federal law and provide an alternative placement before the plaintiff initiated this lawsuit. . . . [A] reduction in attorney's fees for lack of success is unwarranted."

No. 36: *R.P. v. Prescott Unified Sch. Dist.,* 630 F.3d 1117, 1126-1127 (9th Cir. 2011) (ATTORNEY FEE RECOVERY: $140,000+ fee/cost award in favor of school district overturned on appeal)

"[T]he parents had a statutory remedy available that would arguably have provided additional educational benefit to C.P., had they prevailed. They made plausible arguments as to why they should prevail; the fact that the arguments were unsuccessful doesn't make them frivolous."

"As a matter of law, a non-frivolous case is never filed for an improper purpose. . . . Anger is an altogether different motive from those listed [in IDEA] as improper. . . . In fact, anger is a legitimate reaction by parties who believe that their rights have been violated or ignored."

No. 35: *Ruben A. v. El Paso Indep. Sch. Dist.,* 657 F. Supp. 2d 778, 791-793 (W.D. Tex. 2009) (ATTORNEY FEE RECOVERY: Fee recovery ordered despite allegation of protracting proceedings by rejecting offer)

Ordered evaluation and new IEP "clearly secured a remedy which fosters the purposes of the IDEA." "[B]ecause the IDEA does not require Ruben A. to enter into a settlement agreement with EPISD if the agreement is not his satisfaction, Ruben A. did not protract litigation by choosing not to enter an agreement with which he was dissatisfied."

"A parent, whose child has suffered as a result of a school district's failings, should not be strong-armed into compromising a valid claim, for which the parent has had to seek legal counsel, because a school district purports to offer all the proposed relief listed in the administrative due process complaint."

No. 34: *Brianna O. v. Sch. Bd. of Chicago,* 2010 WL 4628749 *9 (N.D. Ill. 2010) (ATTORNEY FEE RECOVERY: Parents substantially justified in rejecting settlement offer that provided more relief)

School district failed to respond to parents' post-filing communications seeking IEP Team meeting. "Given the District's failure to respond or take action, Plaintiffs justifiably had concerns about the District's Offer.

Additionally, Plaintiffs expressed concern that the District's offer was 'too vague' and, as a result, would 'likely need to be litigated again.' For these reasons, the Court finds that Plaintiffs were substantially justified in rejecting the District's Offer."

No. 33: *R.B. v. Mastery Charter Sch.,* 762 F. Supp. 2d 745, 759-760 (E.D. Pa. 2010), *aff'd*, 532 Fed. Appx. 136 (3d Cir. 2013) (CHARTER SCHOOL'S DUTY: Charter school's unilateral disenrollment of student violated stay-put provision of IDEA)

"Like a graduation, indefinite suspension, or expulsion, the unilateral disenrollment of a special education student [due to 10 consecutive absences under state law, over which federal IDEA is supreme], which results in the absolute termination of a child's special education program, and purportedly the elimination of a LEA's responsibility to deliver FAPE, is a change of placement."

"If every school was able to rid itself of a problematic special education student or her parent by treating them exactly the same as a non-disabled student, . . . the protections of IDEA would be eviscerated."

No. 32: *Phillip C. v. Jefferson County Bd. of Education,* 701 F.3d 691, 695 (11th Cir. 2012), *cert. denied*, 134 S. Ct. 64 (INDEPENDENT EVALUATION: (IEE regulation does not exceed scope of IDEA)

Rejects school district's argument that 34 CFR § 300.502, authorizing LEA reimbursement of IEE costs incurred by parents, exceeded scope of congressional authority under IDEA. IDEA specifically required Secretary of Education to preserve any IDEA regulation that existed as of 7/20/83 and protected children, which included the right to an IEE at public expense.

The "Supreme Court [in *Schaffer v. Weast*] has recognized that states must reimburse parents for the cost of an IEE in order to ensure that parents can exercise their right to an independent expert opinion, which is an essential procedural safeguard."

No. 31: *Moorestown Township Bd. of Educ. v. S.D.*, 811 F. Supp. 2d 1057, 1069-70 (D.N.J. 2011) (TUITION REIMBURSEMENT: Duty owed to private school student in district when not enrolled in public school)

"[T]he statutory language [of IDEA] makes clear that where parents request reevaluations of their child for purposes of having an offer of a FAPE made for him, and the child is domiciled in the district, the school district must comply. An analysis of the case law in this area supports such a construction, recognizing that residency, rather than enrollment, triggers a district's FAPE obligations."

District's position "is at odds with the 'broad' mission of the Act to ensure that all children with disabilities receive an education that is both appropriate and free."

No. 30: *Barker v. Riverside County Office of Educ.,* 584 F.3d 821, 825, 827 (9th Cir. 2009) (RETALIATION ADA & §504: Special education teacher granted standing so retaliation action allowed to go forward)

Court finds whistleblowing special education teacher, who alleged noncompliance by employer district in written OCR complaint to have standing under section 504, relying on incorporated rights and remedies of Title VI of the 1964 Civil Rights Act: "[W]e find that the anti-retaliation provision of section 504 grants standing to non-disabled people who are retaliated against for attempting to protect the rights of the disabled."

She also had standing under Title II of the ADA because "it appears that in formulating the language in Title II's anti-retaliation provisions, Congress recognized that disabled individuals may require assistance from others to defend their rights."

No. 29: *Reinhardt v. Albuquerque Pub. Sch. Bd. of Educ.,* 595 F.3d 1126, 1132 (10th Cir. 2010) (RETALIATION 1st Am./§504: SL pathologist permitted to proceed with §1983 / §504 retaliation action)

Court reverses grant of summary judgment against SLP who advocated for students with disabilities and filed state complaint, and claimed retaliation under the Free Speech Clause and section 504. "We agree with the Ninth and Third Circuits that attempting to protect the rights of special education students constitutes protected activity under the Rehabilitation Act."

"[U]nder these facts, we think a reasonable employee might have been dissuaded from advocating for special education students knowing that her workload and salary would be reduced."

No. 28: *Dep't of Educ., Hawai'i v. M.F., ex rel. R.F.,* 840 F. Supp. 2d 1214, 1229-1230 (D. Haw. 2011) (CONSENT REVOCATION: Parents' oral withdrawal of student was not revocation of consent for services)

The lack of IEP offer at start of two consecutive academic years violated IDEA. The department argued that parents revoked consent for special education under IDEA, but this was not done in writing: "[T]he State has not cited, and the court has not found, a statutory or regulatory provision that specifically relieves a public agency of a duty to comply with the IEP provisions [of IDEA] where – as here – the student withdraws *orally*, and where the public agency does not then obtain confirmation in writing and assure that the parents are doing so in an informed manner."

"While parents are certainly free to reject public services and choose a private placement, the IDEA's mandate centers on the concept that parents be given proper notice so that their consent (or withdrawal of consent) and corresponding educational decisions are *informed* ones."

Long Distance Dedication #1 (From your friendly federal regulators)

The U.S. Department of Education Regulations re: Parental Revocation of Consent for IDEA Services, *see* 73 Fed. Reg. 73,008 (Dec. 1, 2008).
Basis for the December 2008 Revocation Regulations: "The Secretary strongly believes that a parent also has the authority to revoke that consent, thereby ending the provision of special education and related services to their child. Allowing parents to revoke consent for the continued provision of special education and related services at any time is consistent with the IDEA's emphasis on the role of parents in protecting their child's rights and the Department's goal of enhancing parent involvement and choice in their child's education."

No. 27: *D.F. v. Collingswood Bor. Bd. Of Educ.,* 694 F.3d 488, 497-499 (3d Cir. 2012) (COMPENSATORY EDUCATION: (Student can recover compensatory education services despite out-of-state move)

"To comply with the IDEA, a school district no longer responsible for educating a child must still be held responsible for its past transgressions. Were we to uphold the District Court's ruling, we would create an enormous loophole in that obligation and thereby substantially weaken the IDEA's protections. We therefore hold that a claim for compensatory education is not rendered moot by an out-of-district move, even if that move takes the child out of state."

"One accepted form of compensatory education relief is the establishment of a fund to be spent on the child's education, which Collingswood would certainly be able to provide if FAPE was found to have been denied . . . The District Court also could have ordered Collingswood to pay D.F.'s new district or to contract with a local provider in his new home in order to provide tutoring, counseling, or other support services."

No. 26: *Mathers v. Wright,* 636 F.3d 396, 400-401 (8th Cir. 2011) (QUALIFIED IMMUNITY: Teacher unprotected by qualified immunity from mistreatment of pupil with disability)

Complaint alleged mistreatment of student, on basis of disability, by fifth grade teacher. One claim was a "class-of-one" equal protection claim, alleging intentional treatment different from others similarly situated, without rational basis for the difference in treatment. "By refusing to teach [the student], isolating her during recess and fire drills, and making her crawl on the floor, Wright treated [the

student] differently from other students in her classroom. On the face of the complaint, we discern no rational basis for this disparate treatment, nor can we infer that Wright suffered a lapse in professional judgment. . . . Wright's conduct exceeded the scope of professionally acceptable choices and was not discretionary."

No. 25: *Virginia Office for P&A v. Stewart,* 131 S. Ct. 1632, 1640 (2011) (P&A ACCESS RIGHTS: "Independent state agency" P&A may sue state officials for access to patient records)

Virginia is one of eight states with an "independent state agency" serving as its P&A. VOPA sued Virginia mental hospital officials seeking access to patient records while investigating patient deaths and injuries. The Supreme Court held that the Eleventh Amendment did not bar such an access suit between agencies of state government.

"[W]e do not understand how a State's stature could be diminished to any greater degree when *its own agency* polices its officers' compliance with their federal obligations, than when *a private person*" hales those officers into federal court for the same purpose—something everyone agrees is proper."

No. 24: *E.D. v. Newburyport Public Schools, 6*54 F.3d 140, 143-144 (1st Cir. 2011) (ATTORNEY FEE RECOVERY: Claim for attorney's fee recovery not barred by parents' subsequent move out of district)

"While [the parents' post-hearing] move would obviously affect any claim the Does might make for prospective relief from any failure to provide an IEP covering the period after their removal, it did not moot the claim for fees incurred in seeking the administrative order issued before the move, based on a finding that Newburyport had failed to do its part to produce an adequate IEP."

"If, therefore, the administrative order did make the Does 'prevailing parties' before they moved, they were still prevailing parties when they left town."

No. 23: *G.B. v. Tuxedo Union Free Sch. Dist.,* 751 F. Supp. 2d 552, 581, 582 n.27, 585 (S.D.N.Y. 2010), *aff'd* 486 Fed. Appx. 954 (2d Cir. 2013) (TUITION REIMBURSEMENT: Reimbursement ordered where district's offer failed to meet IDEA's LRE requirement)

"[C]ourts are unlikely to defer to administrative findings that fail to thoroughly address IDEA's mainstreaming requirement."
"Because the Court finds that N.B.'s . . . placements violated IDEA's mainstreaming requirements, it need not determine whether those placements also violated IDEA's more general requirement that each student receive a FAPE."

"So long as the private placement remedies a significant deficiency in the public placement, and the student progresses in the private placement, a court will not fault the parents simply because they chose a school that has other appealing features as well."

No. 22: *Tereance D. v. Sch. Dist. of Philadelphia,* 548 F. Supp. 2d 162 (E.D. Pa. 2008) (SECTION 504 & ADA: Allowing FAPE/discrimination claims of student with autism go forward)

Allegations that "the District failed to provide Tereance with autistic and ESY services required to address his disability, which denied him an appropriate education, even after it suspected autistic spectrum disorders," that he received inappropriate treatment for his behavior due to perception it was based on an emotional disorder, and that the district failed to conduct appropriate evaluation of the student combined to provide sufficient factual predicate for discrimination claims under section 504 and ADA.

No. 21: *E.M. v. Pajaro Valley Unified Sch. Dist.,* 652 F.3d 999, 1004 (9th Cir. 2011) (ELIGIBILITY FOR SERVICES: SLD eligibility found for bilingual student with average or above intelligence)

A "fundamental tension [exists] in special education law . . . between ensuring that all disabled children have access to educational opportunity and ensuring that non-disabled children are not improperly identified as disabled. This tension is particularly salient for minority students, who historically have been over-identified and disproportionately placed in segregated school settings, due in part to biased IQ tests." "[W]e hold that a school district, considering all relevant material available on a pupil, must make a reasonable choice between valid but conflicting test results in determining whether a 'severe discrepancy' exists."

No. 20: *Dracut Sch. Committee v. Bureau of Special Education Appeals, Massachusetts,* 737 F. Supp. 2d 35, 51-52 (D. Mass. 2010) (TRANSITION PLANNING: Failure to provide IEP with appropriate transition goals denied student FAPE)

"Dracut's argument impermissibly conflates enabling [the student's] broad vision statement (i.e., the long term goal of attending college and working with computers) with its statutory obligation to provide appropriate, *measurable* goals developed according to timely transition assessments. In sum, Dracut operated without meaningful assessments for most of the two year period in question and never provided appropriate, measurable goals related to [the student's] needs."

"The student's "pragmatic language deficits are a central component of his disability, affect his ability to transition from high school to other settings in a critical way, and were well known to Dracut as early as 2005, well before the IEPs in question."

No. 19: *Anchorage Sch. Dist. v. M.P.,* 689 F3.d 1047, 1051 (9th Cir. 2012) (FAPE: FAPE denial resulted from failure to update IEP, despite parents' "litigious" approach)

"Neither the IDEA nor its implementing regulations condition this [the duty to review and revise IEPs annually, or any other duty imposed on an SEA or LEA] upon parental cooperation or acquiescence in the agency's preferred course of action. Penalizing [the student's] parents—and consequently [the student]– for exercising the very rights conferred by the IDEA undermines the statute's fundamental purposes."

"[W]e conclude that the ASD deprived [the student] of a substantively adequate FAPE by relying on an outdated IEP to measure [the student's] academic and functional performance and provide educational benefits to [the student]."

No. 18: *K.M. ex rel. Bright v. Tustin Unified Sch. Dist.,* 725 F.3d 1088, 1096, 1101 (9th Cir. 2013) (ADA: Title II's "effective communication" regulation is more demanding than IDEA compliance)

Hearing impaired students claimed ADA right to word-for-word transcription services to understand instruction fully and without undue strain. Title II of the ADA "establishes different substantive requirements that public entities must meet," including the "effective communication regulation" at 28 C.F.R. § 35.160.

"As should be apparent, the IDEA and Title II differ in both ends and means." And there are "material differences" between section 504 and the ADA as well. "[W]e must reject the argument that the success or failure of a student's IDEA claim dictates, as a matter of law, the success or failure of her Title II claim."

No. 17: *Kimble v. Douglas County Sch. Dist. RE-1,* 925 F. Supp. 2d 1176, 1184 (D. Colo. 2013) (REVOCATION OF CONSENT: Revocation of consent for IDEA services does not eliminate section 504/ADA duties)

"Despite Defendant's arguments to the contrary, the Court is not persuaded that a parent's rejection of an IEP, developed under the IDEA, automatically rejects any plan that could be developed under the less-restrictive Section 504 requirements."

"Thus, the Court holds that parental revocation of consent for special education and related services under the IDEA does not eliminate the broader protection of Section

504 and the ADA. For a student with a qualifying disability . . . the student's right to be free from discrimination under those statutes exists without regard to her eligibility, or her parents' consent for, services under the IDEA."

No. 16: *C.B. v. Special Sch. Dist. No. 1, Minneapolis,* 636 F.3d 981, 991 (8th Cir. 2011) (TUITION REIMBURSEMENT: Parents' unilateral private placement need not be LRE to qualify for reimbursement)

"We conclude that the mainstreaming preference of the IDEA does not make Groves an inappropriate private placement under the circumstances."

"[O]nce the School District failed to fashion an IEP that made available a free appropriate public education, it did not frustrate the purposes of the Act for [the student's] parents to enroll him at Groves, where he could receive the educational benefit that was lacking in the public schools." "We thus join the Third and Sixth Circuits in concluding that a private placement need not satisfy a least-restrictive environment requirement to be 'proper' under the Act."

No. 15: *C.B. v. Garden Grove Unified Sch. Dist.,* 635 F.3d 1155, 1159-1160 (9th Cir.), *cert denied*, 132 S. Ct. 500 (2011) (TUITION REIMBURSEMENT: Awarding full reimbursement for private placement of student on autism spectrum)

Adopts Second Circuit's standard for finding a private placement "proper," holding that parents "need only demonstrate that their placement provides educational instruction specially designed to meet the needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction."

Private placement provided "significant educational benefits" to student, so full reimbursement granted even though private school "delivered many, but not all, of the special education services that [the student] needed. . . . [E]quity does not require a reduction in reimbursement just because a parent or guardian cannot afford to give the child everything (or cannot find a program that does)."

Long Distance Dedication #2 (From your friends in Congress)

The ADA Amendments Act of 2008, Public Law 110-325, 122 Stat. 3533

Effective on January 1, 2009, the ADAAA overruled three Supreme Court decisions (*Sutton*, *Toyota Manufacturing,* and *Bradgon*) that had narrowed the coverage of the ADA and, by extension, § 504.

For more information on the ADAAA of 2008, see:
Questions and Answers on the ADA Amendments Act of 2008 for Students with Disabilities Attending Public Elementary and Secondary Schools at http://www2.ed.gov/about/offices/list/ocr/docs/dcl-504faq-201109.html

No. 14: *A.C. v. Shelby County Bd. of Education*, 711 F.3d 687, 698 (6th Cir. 2013) (RETALIATION 504/ADA: Parents met burden of alleging adverse action and causation for retaliation claim)

Parents of second grader with diabetes/peanut allergy brought retaliation claim because their requests to school for accommodation resulted in their being referred by the school principal to the Tennessee Department of Children's Services for alleged "medical abuse" of the child.

Adverse action existed: "Having a government official appear at their door armed not only with the power to take their disabled child away but also with allegations that they were actively and nearly fatally abusing that child would surely be enough to dissuade many reasonable parents from seeking accommodations at school."

No. 13: *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 257 (2009) (SEX HARASSMENT: Title IX not the exclusive mechanism for addressing gender discrimination in school)

Whereas Title IX "has consistently been interpreted as not authorizing suit against school officials, teachers, and other individuals, . . . [t]he Equal Protection Clause reaches [through section 1983] . . . individuals as well as municipalities and certain other state entities." "[W]e conclude that Title IX was not meant to be an exclusive mechanism for addressing gender discrimination in schools, or a substitute for § 1983 suits as a means of enforcing constitutional rights. Accordingly, we hold that § 1983 suits based on the Equal Protection Clause remain available to plaintiffs alleging unconstitutional gender discrimination in schools."

No. 12: *Jefferson County Sch. Dist. R-1 v. Elizabeth E,* 798 F. Supp. 2d 1177, 1187-1189 (D. Colo. 2011), *aff'd*, 702 F.3d 1227 (10th Cir. 2012), *cert denied* 133 S. Ct. 2857 (2013) (TUITION REIMBURSEMENT: Reimbursement for residential treatment)

After reviewing various circuits' tests for whether residential placement is appropriate, the trial court concluded that "no matter which test is employed, the Parents' placement of Elizabeth at Innercept was an appropriate and reimbursable placement under the IDEA." The placement was "necessary for educational purposes" and other problems were not "segregable from the learning process."

"The crucial issue is not the initial motivation behind the placement, but instead 'whether the education provided by the private school is reasonably calculated to enable the child to receive educational benefits.' Thus, a court should instead be focused on the actual services provided by the residential treatment facility to the child throughout the child's stay at the facility."

No. 11: *N.B. v. Hellgate Elementary Sch. Dist.,* 541 F.3d 1202, 1208-1210 (9th Cir. 2008) (FAPE/EVALUATION: Procedural error of failing to evaluate in all areas of suspected disability denies FAPE)

"We conclude that Hellgate's failure to meet its obligation to evaluate [the student] in all areas of suspected disability, including whether he is autistic, was a procedural error that denied [the student] a FAPE. Thus, this court need not reach the question whether the diagnostic IEP was valid."

"Hellgate did not fulfill its statutory obligation by simply referring [the student's] parents to the CDC. Such an action does not 'ensure that the child is assessed,' as required by 20 U.S.C. § 1414(b)(3)(C)." "A school district cannot abdicate its affirmative duties under the IDEA. . . . . The failure to obtain critical medical information about whether a child has autism 'render[s] the accomplishment of the IDEA's goals—and the achievement of a FAPE—impossible.'"

No. 10: *Regional School Unit 51 v. Doe,* 920 F. Supp. 2d 168, 197-198 (D. Me. 2013) (LIMITATIONS EXCEPTIONS: "Withholding" for exception to IDEA 2-year limitations period need not be intentional)

Under the IDEA's "withholding exception" to the limitations period, "what matters is whether the District failed to provide the Parents required safeguards, not whether, as it argues, any failure to do so was based upon its good-faith, reasonable interpretation of less than clear law." "I also reject . . . the District's contention that compensatory education cannot, as a matter of law, take the form of tuition reimbursement. . . . [T]he broad equitable power afforded to hearing officers and courts to remedy IDEA violations counsels against a narrow view of compensatory education as necessarily consisting only of an award of future services."

No. 9: *G.L. v. Ligonier Valley Sch. Dist.* Authority, __ F. Supp. 2d __ (W.D. Pa. 2013) (LIMITATIONS: Correctly interpreting IDEA's two 2-year limitations provisions as complementary)

Accepting plaintiffs' argument that is an error of law to conclude that sections 1415(f)(3)(C) and 1415(b)(6)(B) "create a single 2-year filing limitation that bars any IDEA claim for relief as to any violations prior to two years before the filing date of the due process hearing request." "The plain language of the statute suggests that

§ 1415(f)(3)(C) sets a two year period of time in which a party must request a due process hearing, measured forward from the KOSHK date, and § 1415(b)(6)(B) establishes a two year 'look-back' limit (measured from the KOSHK date) on liability. . . . [T]he court finds that the words of the statute are clear and unambiguous, and a '2+2' construction would not produce an absurd result . . . ."

No. 8: *T.K. v. New York City Dep't of Education,* 779 F. Supp. 2d 289, 317 (E.D.N.Y. 2011) (BULLYING AND FAPE: School deliberately indifferent or did not take reasonable steps to prevent bullying)

Court cites OCR's 2010 "Dear Colleague Letter" about bullying and harassment to establish an IDEA standard: "When responding to bullying incidents, which may affect the opportunities of a special education student to obtain an appropriate education, a school must take prompt and appropriate action. It must investigate if the harassment is reported to have occurred. If harassment is found to have occurred, the school must take appropriate steps to prevent it in the future. These duties of a school exist even if the misconduct is covered by its anti-bullying policy, and regardless of whether the student has complained, asked the school to take action, or identified the harassment as a form of discrimination."

No. 7: *R.E. v. New York City Dep't of Education,* 694 F.3d 167, 185-186 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 2802 (2013) (TUITION REIMBURSEMENT: Adopting "snap-shot" rule for judging appropriateness of school's IEP offer)

"While we decline to adopt a four corners rule, we hold that testimony regarding state-offered services may only explain or justify what is listed in the written IEP. Testimony may not support a modification that is materially different from the IEP, and thus a deficient IEP may not be effectively rehabilitated or amended after the fact through testimony regarding services that do not appear in the IEP." "We now adopt the majority view that the IEP must be evaluated prospectively as of the time of its drafting and therefore hold that retrospective testimony that the school district would have provided additional services beyond those listed in the IEP may not be considered in a *Burlington/Carter* proceeding."

No. 6: *Ferren C. v. School Dist. of Philadelphia,* 612 F.3 712, 719 (3d Cir. 2010) (COMPENSATORY EDUCATION: Court has power to award future private services to aged-out student as remedy)

Affirms award of compensatory educational services at private school for three years after student turned 21 and no longer was eligible for IEP because such an award "furthers the purposes of the Act." In addition, the award required the district to serve as the LEA and continue to provide student with IEPs, not just

provide a "money-only" remedy. "During her time in the School District, Ferren was deprived of a FAPE, and, by extension, an IEP. . . . If an individual was deprived of his or her right to an adequate IEP, prior to the age of twenty-one, it follows that the student could only be fully compensated by an award of compensatory education that contains the elements of a FAPE that she was previously denied."

No. 5: *P.V. ex rel. Valentin v. Philadelphia,* 2013 WL 618540, and *class certification granted at* 289 F.R.D. 227, 234 (E.D. Pa. 2013) (CLASS ACTION: Certifying class of over 1600 students with autism subject to district's transfer policy)

"[C]ommon questions of fact or law include whether the School District upper-levels autistic students without meaningful parental involvement, [and] . . . without providing prior written notice to the parents, whether the School District considers the individual needs of autistic students prior to deciding where to upper-level that student, and whether the School District's 'policy' of upper-leveling deprives putative class members of a free and appropriate public education."

"The physical adjustments accompanied by an upper-level transfer are significant because . . . The students being transferred in this case have autism. . . . An unplanned transition for children with autism is likely to affect their learning rate and learning sequences."

No. 4: *Draper v. Atlanta Indep. Sch. System,* 518 F.3d 1275, 1285-1286 (11th Cir. 2008) (COMPENSATORY RELIEF: Court permitted to award relief in form of placement at private school for five years)

"The district court was free to fashion appropriate relief for Draper regardless of the options in the discussion of the administrative law judge." "A prospective injunction that requires a placement in a private school is appropriate 'beyond cavil' when an educational program 'calling for placement in a public school [is] inappropriate.'" "We do not read the Act as requiring compensatory awards of prospective education to be inferior to awards of reimbursement. . . . Although it ordinarily has a structural preference for special education in public schools, the Act does not foreclose a compensatory award of placement in a private school."

No. 3: *Doug C. v. State of Hawaii Dep't of Educ.,* 720 F.3d 1038 (9th Cir. 2013) (PROCEDURAL VIOLATION: Holding IEP Team meeting without parent willing to participate denied student FAPE)

"Parental participation in the IEP and educational placement process is critical to the organization of the IDEA." "The fact that it may have been frustrating to schedule meetings with or difficult to work with Doug C. (as the Department

repeatedly suggests) does not excuse the Department's failure to include him in [the student's] IEP meeting when he expressed a willingness to participate. We have consistently held that an agency cannot eschew its affirmative duties under the IDEA by blaming the parents. . . . An agency cannot blame a parent for its failure to ensure meaningful procedural compliance with the IDEA because the IDEA's protections are designed to benefit the student, not the parent."

No. 2: *Payne v. Peninsula Sch. Dist.,* 653 F.3d 863, 870-871 (9th Cir. 2011) (en banc), *cert. denied,* 132 S. Ct. 154 (2012) (EXHAUSTION OF REMEDIES: Exhaustion is not jurisdictional and not required for claims seeking non-IDEA relief)

"[W]e hold that the exhaustion requirement in § 1415(l) is not jurisdictional."

"We hold that the IDEA's exhaustion provision applies only in cases where the relief sought by the plaintiff in the pleadings is available under the IDEA. Non-IDEA claims that do not seek relief available under the IDEA are not subject to the exhaustion requirement, even if they allege injuries that could conceivably have been redressed by the IDEA."

Court adopts a "relief-centered" approach to requiring exhaustion. "If the school's conduct constituted a violation of laws other than the IDEA, a plaintiff is entitled to hold the school responsible under those other laws."

And topping the list for 2008-2013 . . .

No. 1: *Forest Grove School District*, 557 U.S. 230, 238-239, 245, 247 (2009) (TUITION REIMBURSEMENT: No bar to reimbursement if student had not received prior public special education)

"[W]hen a child requires special education services, a school district's failure to propose an IEP of any kind is at least as serious a violation of its responsibilities under IDEA as a failure to provide an adequate IEP."

"[B]y immunizing a school district's refusal to find a child eligible for special-education services no matter how compelling the child's need, the School District's interpretation of § 1412(a)(10)(C) would produce a rule bordering on the irrational."

"IDEA authorizes reimbursement for the cost of private special-education services when a school district fails to provide FAPE and the private-school placement is appropriate, regardless of whether the child previously received special education services through the public school."