PROVIDING A LEGALLY-APPROPRIATE SPECIAL EDUCATION FOR STUDENTS WITH BIPOLAR DISORDER: ISSUES AND ANALYSIS

by

KELLY A. SHERRILL

(Under the Direction of John Dayton)

ABSTRACT

To determine what a legally-appropriate special education is for students with bipolar disorder, this study analyzed litigation trends involving students with bipolar disorder who brought cases under the Individuals with Disabilities Education Act (IDEA). Through review of the IDEA, its regulations, the pivotal Supreme Court and Circuit Court decisions interpreting the meaning of a "free, appropriate public education" (FAPE) and "least restrictive environment" (LRE), and cases involving students with bipolar disorder, this study identified patterns, trends, and relevant facts that appeared to influence courts' decisions in favor of school districts and courts' decisions in favor of students. The majority of the cases held in favor of the school district on both questions of eligibility and questions of placement. Furthermore, most of the cases involved the appropriateness of school district-proposed placements versus parentally-proposed private placements. Two courts held that the residential setting was purely for psychiatric purposes and was not educational. In two cases, however, courts held that the psychiatric, emotional, and behavioral services provided to these students in residential facilities were so intertwined with the students' educational services that they were covered under IDEA as "related services."

INDEX WORDS: special education, special education law, bipolar disorder, Individuals with Disabilities Act (or "IDEA"), free appropriate public education (or "FAPE"), least restrictive environment (or "LRE"), manic depression, schizophrenia, mental illness, residential placement, reimbursement, eligibility, emotional disturbance, emotionally disturbed, related services

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DEDICATION

To my mother, Elizabeth Chandler Sherrill – Even the words, “I love you” and “thank you” are not enough to show my love, appreciation, and admiration for you. You’re my rock. You serve as my wings. Without you, nothing I do is possible. Everything I am reflects your love, your encouragement, your support, and your wisdom. I hope to make you proud.

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To all the children and teenagers with bipolar disorder, the parents and caretakers of children who have bipolar disorder, and the educators and administrators tasked with providing a free, appropriate public education to students with bipolar disorder – May the Lord bless you, comfort you, guide you, and provide you strength. Thank you for allowing me to pierce the inner circle. My heart bleeds for you.

To the medical, psychiatric, psychological, and pharmacological community – Please work as hard as you can to find some answers.

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CHAPTER ONE

INTRODUCTION

I. Problem Statement.

Medical and psychological professionals recognize and diagnose more and more students with bipolar (manic-depressive) disorder every year. Commensurate with the increased litigation regarding students with bipolar disorder in the late-2000s is the medical field's publication of diagnostic and descriptive books and articles examining and discussing how bipolar disorder presents in children and teenagers.[1] This study does not debate the appropriate diagnosis of and treatment for students with bipolar disorder; indeed, for purposes of providing special education and related services to students, the diagnosis, while helpful, does not drive such services. Instead, IEP teams are tasked with drafting individualized programs for each student based on her unique educational needs to ensure that the student receives some educational benefit.

Still, a brief summary of childhood- and teenage-onset bipolar disorder assists readers. To be sure, clinicians and physicians have problems and engage in disagreements about diagnosing bipolar disorder in children and teenagers. The DSM-IV-R divides mood disorders into depressive disorders and bipolar disorders.[2] Despite clearly different presentation and symptoms of the illness (patterns "that often bear little resemblance to classical cycles of mania and depression [in] adulthood"),[3] no separate category exists to diagnose children and, instead, the manual requires diagnosis according to the adult criteria.[4]

Young people with bipolar disorder can present with traits of attention deficit disorder with or without hyperactivity (ADD and ADHD),[5] anxiety disorder,[6] obsessive-compulsive disorder (OCD),[7] Tourette's Syndrome,[8] Oppositional Defiant Disorder (ODD) and Conduct Disorder,[9] Bulimia, cutting behavior,[10] Borderline Personality Disorder,[11] Asperger's disorder,[12]

and Schizophrenia (due to psychotic symptoms such as "delusions (fixed irrational beliefs) and hallucinations (voices and visions)") and other schizoaffective disorders.[13] Dr. and Ms. Papolo list "the symptoms and behavior traits that have been consistently observed in children with early-onset bipolar disorder":

VERY COMMON
- Separation anxiety
- Rages and explosive temper tantrums
- Marked irritability
- Oppositional/defiant behavior
- Rapid cycling (frequent mood swings, occurring within an hour, a day, or several days) or mood lability
- Racing thoughts
- Aggressive behavior
- Distractibility
- Hyperactivity
- Impulsivity
- Restlessness/fidgetiness
- Risk-taking behavior
- Elation as represented by periods of extremely silly, giddy, or goofy behavior
- Night terrors
- Difficulty getting to sleep
- Difficulty getting up in the morning (sleep inertia)
- Grandiosity
- Periods of low energy and withdrawal
- Low self-esteem
- Carbohydrate cravings
- Hoarding or avidly collecting objects or food
- Lying to avoid consequences of his or her actions
- Easily humiliated or shamed
- Complaints of body temperature extremes
- Hallucinations and delusions

COMMON
- Rapid or pressured speech
- Hypersexuality
- Obsessive behavior
- Compulsive behavior
- Excessive daydreaming
- Learning disabilities
- Poor working memory
- Lack of organization
- Fascination with gore or blood or morbid topics

Manipulative behavior
Extremely bossy behavior with friends/bullying
Self-mutilating behaviors
Destruction of property
Suicidal thoughts
Paranoia

LESS COMMON
Bed wetting
Bingeing/eating disorders
Motor and vocal tics
Cruelty to animals[14]

The single largest debate and confusion concerning childhood and adolescent bipolar diagnosis is whether the child has ADHD, bipolar disorder, or both.[15] "At first glance, any child who can't sit still, who is impulsive, inattentive, easily distracted, or emotionally labile is more likely to receive a diagnosis of ADHD than bipolar disorder."[16] Dr. Papolos and his wife, Ms. Papolos, performed one survey finding that ninety-three percent of children who had bipolar disorder "met DSM-IV criteria for attention-deficit disorder with hyperactivity."[17] Consequently, physicians often mistakenly diagnose children with ADD or ADHD instead of bipolar disorder.

This misdiagnosis can be tragic. Medical and psychological practitioners summarily conclude that "antidepressant treatment [in children and adolescents] can induce hypomania, mania, rapid cycling, and mixed states – often accompanied by severe aggressive or violent behaviors in those who have as-yet-unexpressed predisposition to bipolar disorder."[18] Accordingly, "it is extremely important that all parents and physicians be alert to the possibility that the child may indeed be bipolar" rather than having ADD or ADHD.[19]

Finally, diagnosticians and practitioners "plea" for early diagnosis and appropriate treatment, including pharmacological treatment, of children and adolescents with bipolar disorder: "Perhaps the most important reason for early intervention and treatment is the fact that

this can be a lethal illness. Suicide rates for bipolar disorder have been estimated to be as high as fifteen percent. Failed suicide attempts are higher still."[20]

The purpose of introducing the traits of childhood- and adolescent- bipolar disorder is not only to educate readers on the disorder and how it presents in young people, but to foreshadow the facts of the cases included in this study. As mentioned at the outset, a student's (correct) diagnosis, along with input from her physicians and therapists, will greatly assist IEP team members in drafting and implementing an appropriate IEP (and in anticipating and understanding moods and behaviors of these students). For instance, if school personnel understand that a child has bipolar disorder and is prone to rapid cycling mania or depression, it can adjust the child's educational program to account for necessary absences related to depression or erratic behavior related to the mania. However, the IDEA tasks IEP team members with drafting an individualized program based on the student's unique behaviors and needs. Whether or not the student has (or does not have) an accurate medical or psychiatric diagnosis is of little consequence when determining how to appropriately meet that student's educational and related needs.

This study examined litigated special education issues related to students with bipolar disorder (i.e., manic-depressive disorder, hereafter "BPD") under the Individuals with Disabilities Education Act (IDEA). The issues discussed herein include evaluation and eligibility; provision of services, programs and accommodations through a student's individualized education program (IEP) to ensure a free appropriate public education (FAPE) in the least restrictive environment (LRE); placement continuums, from education in the regular classroom to private, residential placement; what constitutes a medical placement versus an

educational placement with a medical or therapeutic component; and school districts' responsibility to finance or reimburse parents for a student's private placement.

II. Research Questions.

This study investigated the following research questions:

(1) What is the relevant legal history of special education and related services for students with disabilities and, specifically, for students with bipolar disorder?

(2) What is the current legal status of special education and related services for students with disabilities and, specifically, for students with bipolar disorder?

(3) What predominate issues have parties litigated in the courts regarding students with bipolar disorder or other mood disorders (such as depression) with symptoms similar to bipolar disorder?

(4) How have the courts ruled regarding the aforementioned issues?

III. Procedures.

This study employed legal research methodology.[21] Research included search and review of (i) case law preceding enactment of Public Law 94-142; (ii) Public Law 94-142, its legislative history, and each subsequent revision of the Act; and (iii) IDEA 2004 and its 2006 supporting federal regulations. Research further included review of seminal United States Supreme Court and Circuit Courts of Appeal decisions interpreting and supporting key concepts set forth in Public Law 94-142, EAHCA, and IDEA. Additionally, this study sought and analyzed case law involving students diagnosed with manic depression, bipolar disorder, and other mood disorders with similar symptoms as those found in students with bipolar disorder. The study sets forth the literature review as follows: (i) review of Public Law 94-142, its impetus, and its enactment; (ii) review of IDEA 2004's procedural and substantive requirements; (iii) review of statutory

interpretations and key judicial decisions regarding provision of FAPE in the LRE; and (iv) a chronological review of landmark Supreme Court decisions interpreting the Act, followed by cases involving students with bipolar disorder (*a.k.a.*, manic depression), along with cases involving students with similar mood disorders.

IV. Limitations of the Study.

This study analyzed eligibility and provision of special education and related services for students with bipolar disorder solely under the Individuals with Disabilities Education Act (IDEA). The study did not analyze any of the questions set forth herein under other disabilities statutes, such as Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act of 1990. Importantly, school districts must consider application of these federal statutes when determining whether and how they must provide services or accommodations to students with bipolar disorder.

Next, the study assumed certain characteristics belong to students with bipolar disorder. To be sure, not every student with bipolar disorder will exhibit the same symptoms or behaviors exhibited by students in the cases set forth herein; indeed, some students with bipolar disorder may exhibit additional or different symptoms. A most important legal construct for eligibility and IEP teams to remember is that a student's label – or diagnosis – does not and should not drive the services provided to such student. If a student requires a certain program, service, or accommodation for provision and receipt of FAPE, then the school district should provide it, notwithstanding whether the student's needs are typical (or atypical) of similarly-labeled or similarly-diagnosed students.

Finally, the study is limited to legal analysis of court decisions published or printed in Lexis-Nexis.[22] While administrative bodies must apply applicable, precedential law to their

decisions, if a court in the administrative body's jurisdiction has not addressed the issue, then hearing officers (HOs) and administrative law judges (ALJs) have latitude to interpret and apply relevant statutory, regulatory, and judicially-constructed law. In this same vein, legal conclusions about what services, programs, and accommodations are necessary to provide FAPE in the LRE to students with bipolar disorder are limited to the holdings in and logical extensions of the cited case law. Arguably, students with bipolar disorder may require additional (or fewer) services, programs or accommodations. Furthermore, because of the way bipolar disorder manifests in each individual student, what may be deemed appropriate services, programs and accommodations for one student may be inappropriate or unnecessary for another student. Eligibility teams must apply the eligibility criteria to each student in an individualized, but consistent, manner, and IEP teams similarly must determine IEP services, goals, and objectives in an individualized, but consistent, manner.

CHAPTER TWO

LITERATURE REVIEW

I. Introduction.

This chapter reviews relevant constitutional, statutory, regulatory, and case law related to providing a legally-appropriate public education under the Individuals with Disabilities Act (IDEA)[23] for students with bipolar disorder. The first section of this chapter summarizes enactment of Public Law 94-142 (the Education for All Handicapped Children Act (EAHCA) of 1975), beginning with *Brown v. Board of Education of Topeka*,[24] *Pennsylvania Ass'n for Retarded Children (P.A.R.C.) v. Commonwealth of Pennsylvania*,[25] and *Mills v. Board of Educ. of District of Columbia*.[26] This section also includes a general synopsis of the Act's subsequent reauthorizations and revisions.

The second section highlights evaluation, eligibility, and IEP requirements set forth in the Individuals with Disabilities Education Improvement Act of 2004 (IDEA 2004) and the 2006 regulations promulgated by the United States Department of Education. The third section reviews the statute, regulations, and interpretive case law regarding IDEA's free appropriate public education (FAPE) and least restrictive environment (LRE) mandates.

The fourth and final section of this chapter reviews (i) relevant and dispositive Supreme Court decisions interpreting the EAHCA and IDEA, (ii) case law involving students with bipolar disorder, and (iii) case law involving students whose diagnoses or symptoms are the same or similar to those found in students with bipolar disorder.

II. A Review of Public Law 94-142, Its Impetus, and Its Enactment.

A. Special Education before 1975: *Brown v. Board of Education of Topeka, P.A.R.C. v. Commonwealth of Pennsylvania,* and *Mills v. Board of Education of District of Columbia.*

Prior to 1975, when Congress enacted Public Law 94-142 (the "Education for All Handicapped Children Act"), disabled students received less than adequate education. In some cases, schools instructed disabled students to "stay home," claiming that they were "uneducable." More than one-half of disabled children did not receive appropriate educational services, and one million of the disabled children were excluded from public schools.[27] Indeed, eighty-two of emotionally disturbed students' needs were unmet.[28] School districts segregated disabled students (who were allowed to attend school) from general education classes.

In 1954, the United States Supreme Court issued its landmark equal protection decision, *Brown v. Board of Education of Topeka,*[29] securing equal educational opportunities for students of all races and colors. *Brown* provided the legal theory upon which disability advocates premised their argument that disabled students similarly were entitled to equal education. The *Brown* Court denounced the concept of "separate but equal," and by 1971, a Pennsylvania state association partially responsible for educating and training "retarded children," along with the parents of "thirteen mentally retarded children," petitioned the United States District Court of the Eastern District of Pennsylvania to apply *Brown's* constitutional mandate to disabled children as well.[30] The *P.A.R.C.* plaintiffs entered a consent decree which stated that "every retarded person between the ages of six and twenty one shall be provided access to a free public program of education and training appropriate to his capacities . . . ."[31]

One year later, the U.S. District Court for the District of Columbia decided a case involving denial of educational services to students labeled as having mental retardation,

behavior or emotional disturbances, or hyperactivity.[32] Children with these labels did not receive notice or an opportunity to be heard, and were unilaterally denied access to education because of the labels.[33] The court held that to deny this class a publicly supported education while providing such education to other students violated the federal due process clause.[34] The court found that no child shall be excluded from public education unless he is provided with adequate alternative educational services and receives a constitutionally adequate hearing and review of his status, progress, and adequacy of his educational program.[35] Congress ultimately incorporated these due process procedures into Public Law 94-142, *infra.*, and the United States Supreme Court used these decisions in its landmark case, *Board of Education v. Rowley, infra*,[36] to interpret the congressional intent of the Act.

B. Public Law 94-142 (the EAHCA), and IDEA 1990, 1997, and 2004.

1. Public Law 94-142, or the "Education for All Handicapped Children Act of 1975."

During the pendency of the *P.A.R.C.* and *Mills* cases, federal legislators drafted the Education of the Handicapped Act (EHA) outlining the minimal requirements with which the States and D.C.[37] must comply to receive federal assistance funds for providing education for handicapped students. Thereafter, in 1975, Congress passed Public Law 94-142, the Education for All Handicapped Children Act (EAHCA), which amended the EHA of 1970. At the outset, not every public official embraced the bill. President Ford called the Act "the potentially most expensive piece of legislation for disabled people ever passed by Congress."[38] Congressional debates centered on the large number of disabled students, believed at the time to be approximately twelve percent of children between ages five and seventeen,[39] as well as the misidentification and over-identification of children as having a disability.[40] The Senate Labor and Public Welfare Committee recommended that Congress pass the bill, but stated that

members were "deeply concerned . . . about the practices and procedures which result in classifying children as having handicapping conditions when, in fact, they do not have such conditions."[41] The Committee continued, "At least three major issues are of concern with respect to problems of identification and classification: (1) the misuse of appropriate identification and classification data with the educational process itself; (2) discriminatory treatment as the result of the identification of a handicapping condition; and (3) misuse of identification procedures or methods which results in erroneous classification of a child as having a handicapping condition."[42] Some Congress members were concerned with the "specific learning disabilities" eligibility category (a category added in conference as an amendment to the bill) "believing it to be too expansive and amorphous."[43] In response, Congress clarified that states "should give first priority under the Act to securing an education for those children not currently receiving one, and second to serving the most severely handicapped children within each disability category."[44]

Notwithstanding Congressional and presidential concerns, the final bill "enjoyed widespread bipartisan support and [ ] passed by a large margin."[45] Under the EAHCA, when States received federal special education funding,[46] they were required to implement an individualized education program (IEP) for each student with a disability in order to provide him with a free, appropriate public education (FAPE).[47] The final bill defined the protected class to include "mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with specific learning disabilities,[48] who by reason thereof require special education and related services."[49] In response to the aforementioned Congressional concerns, the Act provided that states shall not identify more than twelve percent of the school age population between ages

five and seventeen as handicapped children for purposes of securing federal funding and "capped the number of children who could be identified as [specific learning disabled, or SLD] at two percent of that amount."[50] The Act further provided for due process hearing rights when parents objected to the student's IEP, as well as rights to file complaints in state or federal court when either the parent or the district disagreed with the due process hearing decision.[51]

2. The EAHCA amendments of 1986.

While the Act "successfully improved educational opportunities and results for students with disabilities, its implementation was sometimes hampered by inefficient methodologies and low expectations regarding the academic potential of disabled children."[52] Furthermore, Congress did not expand applicability of the Act to infants and young toddlers until the amendments of 1986, which added Part H, "giving children between birth and age two who displayed disabilities or developmental delays the ability to receive early intervention services and family assistance."[53] Congress proffered that "expanding eligibility in this way would ultimately 'minimize the need for special education and related services after [handicapped] infants and toddlers . . . reach school age,' 'maximize the potential for individuals with disabilities to live independently,' and 'enhance the capacity of families to meet the special needs' of these children."[54]

3. The EAHCA amendments of 1990, renamed the "Individuals with Disabilities Education Act (IDEA)."

In 1990, Congress renamed the EAHCA the "Individuals with Disabilities Education Act in recognition of the changing dynamics of special education and the emergence of 'people-first' terminology."[55] Rather than using the term "handicapped children," Congress used the term "children with disabilities."[56] Congress "expanded the categorical disabilities identified by the act by adding autism and traumatic brain injury to the list, and changed the language of the

statute to mandate that those seeking eligibility show they 'need' special education and related services rather than that they 'require' the same."[57] With diagnoses for "attention deficit disorder (ADD)" and "attention deficit disorder with hyperactivity (ADHD)" becoming more frequent, Congress sought public comment on "'the appropriate components of an operational definition . . . of 'attention deficit disorder' ('ADD').'"[58] In response, the United States Department of Education issued a "Policy Clarifying Memorandum on Attention Deficit Disorders" declaring that "children with ADD may qualify for services under the disability category of other health impaired (OHI),[59] a position it later codified in the regulations interpreting the IDEA."[60] The expansion of classifying ADD and ADHD as an OHI has resulted in increased eligibility under that category.

4. The IDEA amendments of 1997.

In its most sweeping reauthorization until that time, Congress amended IDEA in 1997.[61] The most significant changes related to disciplinary placements and accountability (which, notably were changed again in the 2004 reauthorized IDEA). Congress also "meaningfully amended the definition of 'child with a disability' by giving states the discretion to include children between the ages of three and nine experiencing 'developmental delays' in the coverage of the statute" (this discretionary provision also changed in the 2004 statute).[62] "By adding the broad category of 'developmental delay' for younger children, [Congress] hoped that states could avoid problems associated with early mislabeling."[63]

Congress further debated eligibility issues prior to the 1997 amendments, with the "Senate Committee on Labor and Human Resources making clear that the eligibility determination must be 'comprehensive' and 'include information on the cognitive, emotional, social and behavioral factors in addition to the physical or developmental factors, if necessary, to

establish that a child is eligible for special education and related services.'"[64] House and Senate Committee reports indicated concerns that "'substantial numbers of children [were] likely to be identified as disabled because they ha[d] not received proper academic support previously,' or because of 'limited English proficiency . . . cultural or environmental factors or by economic disadvantage.'"[65] The House "urged the Department of Education and state agencies to give such considerations 'the utmost emphasis in every evaluation.'"[66] Indeed, the final bill amended the definition of a "child with a disability" to explicitly prohibit eligibility "if the determinant factor for such determination is lack of instruction in reading or math or limited English proficiency."[67] The objectives of the IDEA as amended in 1997 included: "ensuring that all children with disabilities have available to them a free appropriate public education, emphasizing special education and related services designed to meet their unique needs and prepare them for employment and independent living, and ensuring that the rights of children with disabilities and their parents are protected."[68]

Seven years passed until Congress took eligibility and other pressing special education issues up for review, this time more fervently than ever before.

5. The IDEA of 2004 and its supporting 2006 regulations.

On December 3, 2004, President George W. Bush signed the Individuals with Disabilities Education Improvement Act ("IDEA 2004") into law. On July 1, 2005, the reauthorized IDEA 2004 became effective.[69] At the outset, IDEA 2004 directs that States shall not use IDEA funds to fulfill state law mandated funding obligations to local school districts, including funding based on student attendance or enrollment, or inflation. Additionally, State and local officials on state advisory panels must include officials who carry out activities for homeless students. Furthermore, States must adopt policies and procedures designed to prevent the inappropriate

over-identification or disproportionate representation by race and ethnicity of children with disabilities.[70] Finally, school districts may not require a student to obtain a prescription for a controlled substance as a condition for attending school, receiving an evaluation, or receiving services under IDEA.

While Congress made several large and sweeping changes in IDEA 2004, very few affected the issues presented in this study.[71] The remainder of this literature review examines the current provisions of IDEA and its accompanying regulations relevant to identifying students with bipolar disorder as eligible (or ineligible) for special education and related services, and providing eligible students with a free appropriate public education (FAPE) in the least restrictive environment (LRE).

III. Special Education, from Evaluation to IEP.

This section identifies the essential principles of IDEA 2004 and its 2006 regulations related to evaluating, finding eligible (or ineligible), and drafting an IEP for each "child with a disability" requiring special education and related services.

A. Who is a "Child with a Disability" Requiring "Special Education and Related Services"?

Congress enacted the IDEA to promote the education of children with disabilities.[72] The term "child with a disability" means a child with:

> (i) mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as "emotional disturbance"), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and
>
> (ii) who, by reason thereof, needs special education and related services.[73]

The IDEA regulations further define a child, ages three through nine,[74] with a disability to include a child:

(i) Who is experiencing developmental delays, as defined by the State and as measured by appropriate diagnostic instruments and procedures, in one or more of the following areas: Physical development, cognitive development, communication development, social or emotional development, or adaptive development; and

(ii) Who, by reason thereof, needs special education and related services.[75]

The statute and regulations establish disability categories eligible for special education and related services,[76] including autism, deaf-blindness, deafness, emotional disturbance, hearing impairment, mental retardation, multiple disabilities, orthopedic impairment, other health impairment, specific learning disability, speech or language impairment, traumatic brain injury, and visual impairment including blindness. State rules or regulations interpreting and applying the federal regulations often elaborate upon the federal definitions of these disabilities and, in some cases, expand the disability categories eligible for special education services.

B. Eligibility for Special Education Services as a Child with an Emotional Disturbance or Other Health Impairment.

To determine whether a student is eligible as a "child with a disability" entitled to special education and related services, the eligibility team must comply not only with the federal eligibility criteria, but also with its state eligibility criteria.

1. Federal eligibility categories relevant to students with BPD.

34 C.F.R. § 300.8 of the 2006 federal regulations[77] sets forth the categories in which eligibility teams may determine that a student is a "child with a disability." Based on the characteristics and behaviors of students with BPD, the most likely eligibility categories are "Emotional Disturbance" and "Other Health Impairment." After collecting and analyzing the evaluation and assessment information required by the Act (discussed below), eligibility teams must apply the definitions of these eligibility categories to determine whether the student is a "child with a disability" entitled to special education and related services.

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

(A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.

(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.

(C) Inappropriate types of behavior or feelings under normal circumstances.

(D) A general pervasive mood of unhappiness or depression.

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.[78]

"Emotional disturbance includes schizophrenia," but emotional disturbance "does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance" as defined in 34 C.F.R. § 300.8(c)(4)(i), *supra.*[79]

If a child does not meet the duration and degree requirements to qualify for special education as a student with an emotional disturbance, it is possible that the child qualifies as a student with "Other Health Impairment (OHI)." The statute defines OHI as "having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that (i) is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and (ii) adversely affects a child's educational performance."[80]

Finally, a student may be identified as having "multiple disabilities," a term which means "concomitant impairments (such as mental retardation-blindness or mental retardation-

orthopedic impairment), the combination of which causes such severe educational needs that they cannot be accommodated in special education programs solely for one of the impairments," but "does not include deaf-blindness."[81]

2. Evaluation and eligibility determinations.

Evaluation "means procedures used in accordance with §§ 300.304 through 300.311[82] to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs."[83] The IDEA requires that "[c]hildren with disabilities must be evaluated in accordance with [34 C.F.R.] §§ 300.300 through 300.311[84] [of the regulations]."[85] The eligibility team must determine that a child is eligible for special education services on an individual basis.[86]

a. Initial evaluations.

The Act sets forth requirements for conducting initial evaluations of students suspected of special education eligibility. "Each public agency must conduct a full and individual initial evaluation, in accordance with §§ 300.305 and 300.306,[87] before the initial provision of special education and related services to a child with a disability under this part."[88] Either the child's parent or school personnel may request an initial evaluation to determine whether he qualifies as a child with a disability.[89] The Act requires that the initial evaluation "be conducted within sixty days of receiving parental consent for the evaluation" or within the state-established timeframe.[90] Additionally, the initial evaluation must consist of procedures "(i) to determine if the child is a child with a disability under § 300.8; and (ii) to determine the educational needs of the child."[91]

b. Evaluation procedures.

The school district "must provide notice to the parents of a child with a disability, in accordance with § 300.503, that describes any evaluation procedures the agency proposes to conduct."[92] Upon receipt of parental consent, the school district must

> (1) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent that may assist in determining—
>
> (i) Whether the child is a child with a disability under § 300.8; and
>
> (ii) The content of the child's IEP, including information related to enabling the child to be involved in and progress in the general education curriculum (or for a preschool child, to participate in appropriate activities);
>
> (2) Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child; and
>
> (3) Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.[93]

The assessment tools and strategies must be "sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified,"[94] thereby providing "relevant information that directly assists persons in determining the educational needs of the child."[95] In addition to the above evaluation and assessment requirements, the Act provides that assessments and evaluation materials must not be racially or culturally discriminatory.[96] The evaluator must provide and administer the evaluations and assessments "in the child's native language or other mode of communication and in the form most likely to yield accurate information on what the

child knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to so provide or administer."[97]

Importantly, trained and knowledgeable personnel must administer the evaluations and assessments in accordance with any instructions provided by the producers of the assessments. They shall not use the assessments except for the purposes for which they are valid and reliable.[98] "Assessments and other evaluation materials include those tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient."[99] Indeed, the eligibility team must assess the child "in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities."[100] Accordingly, to evaluate students with BPD for special education services, the eligibility team must consider assessments and evaluation materials that assess emotional, behavioral, clinical, and other relevant characteristics of the student. Furthermore, the eligibility team must select and administer assessments "so as best to ensure that . . . the assessment results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (unless those skills are the factors that the test purports to measure)."[101]

In addition to the above evaluation requirements, the IEP Team and other qualified professionals (the "eligibility team"), as appropriate, must "[r]eview[102] existing evaluation data on the child, including: (i) Evaluations and information provided by the parents of the child; (ii) *Current* classroom-based, local, or State assessments, and classroom-based observations; and (iii) Observations by teachers and related services providers."[103] Based on review of this information, as well as input from the child's parents, the evaluation team must "identify what

additional data, if any, are needed to determine whether the child is a child with a disability, as defined in § 300.8, and the educational needs of the child,"[104] along with the "present levels of academic achievement and related developmental needs of the child,"[105] whether the child "needs special education and related services,"[106] and whether "any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general education curriculum."[107] The school district "must administer such assessments and other evaluation measures as may be needed to produce the data" identified above.[108]

c. Eligibility determinations.

The Act provides that, "[i]n interpreting evaluation data for the purpose of determining if a child is a child with a disability under § 300.8, and the educational needs of the child, each public agency must (i) draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior; and (ii) ensure that information obtained from all of these sources is documented and carefully considered."[109] Upon completion of the administration of assessments and other evaluation measures, the eligibility team[110] makes its determination regarding special education eligibility.[111] The school district then provides a copy of the evaluation report and the documentation of determination of eligibility at no cost to the parent.[112]

If the child does not meet the eligibility criteria[113] under § 300.8(a), then the eligibility team must determine that the student is *not* a child with a disability if the determinant factor for that determination is:

(i) Lack of appropriate instruction in reading, including the essential components of reading instruction (as defined in section 1208(3) of the ESEA);

(ii) Lack of appropriate instruction in math; or

(iii) Limited English proficiency.[114]

If the eligibility team determines that the child has a disability and needs special education and related services, the IEP team must develop an IEP for the child in accordance with 34 C.F.R. §§ 300.320 through 300.324 (*infra*).[115]

d. Putting the IEP into effect.

After the initial eligibility determination, the school district "must ensure" that it conducts a meeting within thirty days of such determination to develop the child's IEP. As soon as possible following the IEP's creation, the school district must provide the special education and related services set forth in the child's IEP.[116]

The school district must make the child's IEP accessible to each regular education teacher, special education teacher, and related services provider who is responsible for implementing the IEP.[117] The school district further must inform each teacher and provider of "his or her specific responsibilities related to implementing the child's IEP," and the "specific accommodations, modifications, and supports that must be provided for the child in accordance with the IEP."[118]

e. Re-evaluations.

The IEP team must reevaluate[119] each child with a disability "if the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation, or if the child's parent or teacher requests a reevaluation."[120] The IEP team must reevaluate the child "at least once every [three] years, unless the parent and the public agency agree that a reevaluation is

unnecessary"; however, the reevaluation "[m]ay occur not more than once a year, unless the parent and the public agency agree otherwise."[121]

If the (re)evaluation IEP team concludes that it requires no additional data to determine whether the child continues to be a child with a disability, and to determine the child's educational needs, the school district must notify the child's parents (i) of that determination and the reasons for the determination, and (ii) of the right of the parents to request an assessment to determine whether the child continues to be a child with a disability, and to determine the child's educational needs.[122] If the parents so request, the school district must conduct the assessment.[123]

Unless termination of a student's special education eligibility occurs because of graduation from secondary school with a regular diploma, or due to exceeding the age eligibility for FAPE under State law,[124] then the school district must evaluate[125] the disabled child before determining that the child is no longer a child with a disability.[126] The IEP team must comport with the requirements for evaluations set forth above in 34 C.F.R. §§ 300.304 – 300.306 and the eligibility definitions provided in 34 C.F.R. § 300.8 (and any relevant state law).

C. IEP Provisions.

Under the IDEA, "the particular educational needs of a disabled child and the services required to meet those needs must be set forth at least annually in a written IEP."[127] The IEP is to be developed by "[a] school official qualified in special education, the child's teacher, the child's parents, and, where appropriate, the child."[128] An IEP must state:

(1) the child's present level of educational performance;

(2) the annual goals for the child, including short-term instructional objectives;

(3) the specific educational services to be provided to the child, and the extent to which the child will be able to participate in regular educational programs;

(4) the transition services needed for a child as he or she begins to leave a school setting;

(5) the projected initiation date and duration for proposed services; and

(6) objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.[129]

The IEP sets out annual and short-term objectives for improvements in class performance, and describes the class setting and specially designed instruction[130] that will enable the child to meet those objectives.[131] Further, the IDEA mandates that "each public agency [must take] steps to ensure that its children with disabilities have available to them the variety of educational programs and services available to nondisabled children in the area served by the agency, including art, music, industrial arts, consumer and homemaking education, and vocational education."[132]

In developing each child's IEP, the IEP Team must consider:

(i) The strengths of the child;
(ii) The concerns of the parents for enhancing the education of their child;
(iii) The results of the initial or most recent evaluation of the child; and
(iv) The academic, developmental, and functional needs of the child.[133]

The IEP Team must review and, where necessary, revise the IEP at least once a year to ensure that local agencies tailor instruction to each child's unique needs.[134]

A disabled child's IEP must, to the extent practicable, be based on peer-reviewed research. Additionally, the IEP must account for specially-designed instruction,[135] necessary supplementary aids and services,[136] related services,[137] transition services,[138] and nonacademic services.[139]

1. Peer-reviewed research requirement.

The IDEA federal regulations require that IEPs must include:

> A statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child . . . to enable the child –
>
> (i) To advance appropriately toward attaining the annual goals;
>
> (ii) To be involved in and make progress in the general education curriculum in accordance with paragraph (a)(1) of this section, and to participate in extracurricular and other nonacademic activities; and
>
> (iii) To be educated and participate with other children with disabilities and nondisabled children in the activities described in this section . . . .[140]

Neither the IDEA nor its regulations define "peer-reviewed research." However, the No Child Left Behind Act of 2001 (NCLB) defines "scientifically-based research" as "research that involves the application of rigorous, systematic, and objective procedures to obtain reliable and valid knowledge relevant to education activities and programs," and includes research that:

> (i) Employs systematic, empirical methods that draw on observation or experiment;
>
> (ii) Involves rigorous data analyses that are adequate to test the stated hypothesis and justify the general conclusion drawn;
>
> (iii) Relies on measurements or observational methods that provide reliable and valid data across evaluators and observers, across multiple measurements and observations, and across studies by the same or different investigators;
>
> (iv) Is evaluated using experimental or quasi experimental designs;
>
> (v) Ensures that experimental studies are presented in sufficient detail and clarity to allow for replication; and
>
> (vi) Has been accepted by a peer-reviewed journal or approved by a panel of independent experts through a comparably rigorous, objective, and scientific review.[141]

Because the element of being "peer reviewed" is but one component of "scientifically-based research," it is unclear whether the terms are mutually exclusive or whether "peer-reviewed research" as used in the IDEA is less stringent than "scientifically-based research" in NCLB.[142]

2. Specially-designed instruction.

The IDEA defines "specially designed instruction" as "adapting, as appropriate to the needs of an eligible child . . . the content, methodology, or delivery of instruction –

> (i) to address the unique needs of the child that result from the child's disability; and
>
> (ii) to ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children."[143]

3. Supplementary aids and services.

The IDEA defines "supplementary aids and services" as "aids, services, and other supports that are provided in regular education classes, other education-related settings, and in extracurricular and nonacademic settings, to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate in accordance with §§ 300.114 through 300.116."[144]

4. Related services.

The IDEA defines "related services" as

> transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for *diagnostic or evaluation purposes.*
>
> Related services also include school health services and school nurse services, social work services in schools, and parent counseling and training.[145]

The regulation sets forth some "related services," including counseling, medical, rehabilitation counseling, psychological, school health and school nurse, vocational, and school social work services.

Counseling services are "services provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel."[146]

Medical services are "services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and related services."[147] Notably, medical services are not defined as ongoing medical services for students already found eligible for special education services; indeed, the law specifically states that they are for "diagnostic or evaluation purposes."[148]

Psychological services "include[ ] (i) Administering psychological and educational tests, and other assessment procedures; (ii) Interpreting assessment results; (iii) Obtaining, integrating, and interpreting information about child behavior and conditions relating to learning; (iv) Consulting with other staff members in planning school programs to meet the special educational needs of children as indicated by psychological tests, interviews, direct observation, and behavioral evaluations; (v) Planning and managing a program of psychological services, including psychological counseling for children and parents; and (vi) Assisting in developing positive behavioral intervention strategies."[149]

Rehabilitation counseling services "means services provided by qualified personnel in individual or group sessions that focus specifically on career development, employment preparation, achieving independence, and integration in the workplace and community of a student with a disability. The term also includes vocational rehabilitation services provided to a

student with a disability by vocational rehabilitation programs funded under the Rehabilitation Act of 1973, as amended, 29 U.S.C. 701 *et seq.*"[150]

School health services and school nurse services are "health services that are designed to enable a child with a disability to receive FAPE as described in the child's IEP. School nurse services are services provided by a qualified school nurse. School health services are services that may be provided by either a qualified school nurse or other qualified person."[151]

Social work services in schools "include[ ] (i) Preparing a social or developmental history on a child with a disability; (ii) Group and individual counseling with the child and family; (iii) Working in partnership with parents and others on those problems in a child's living situation (home, school, and community) that affect the child's adjustment in school; (iv) Mobilizing school and community resources to enable the child to learn as effectively as possible in his or her educational program; and (v) Assisting in developing positive behavioral intervention strategies."[152]

Related services also include *parent counseling and training*, which the regulation defines as "(i) assisting parents in understanding the special needs of their child; (ii) Providing parents with information about child development; and (iii) Helping parents to acquire the necessary skills that will allow them to support the implementation of their child's IEP or IFSP."[153]

5. Transition Services

The IDEA mandates that, "[b]eginning not later than the first IEP to be in effect when the child turns 16, or younger if determined appropriate by the IEP Team, and updated annually, thereafter, the IEP must include (1) [a]ppropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where

appropriate, independent living skills; and (2) [t]he transition services (including courses of study) needed to assist the child in reaching those goals."[154]

The IDEA defines "transition services" as follows:

> (a) *Transition services* means a coordinated set of activities for a child with a disability that—
>
> (1) Is designed to be within a results oriented process, that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child's movement from school to post-school activities, including postsecondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation;
>
> (2) Is based on the individual child's needs, taking into account the child's strengths, preferences, and interests; and includes—
>
> (i) Instruction;
> (ii) Related services;
> (iii) Community experiences;
> (iv) The development of employment and other post-school adult living objectives; and
> (v) If appropriate, acquisition of daily living skills and provision of a functional vocational evaluation.
>
> (b) *Transition services* for children with disabilities may be special education, if provided as specially designed instruction, or a related service, if required to assist a child with a disability to benefit from special education.[155]

A school district's failure to include and implement adequate transition goals and services can constitute a violation of the IDEA and failure to provide FAPE.[156]

6. Nonacademic services.

Pursuant to the IDEA, the State "must ensure" the following:

> (a) Each public agency must take steps, including the provision of supplementary aids and services determined appropriate and necessary by the child's IEP Team, to provide nonacademic and extracurricular services and activities in the manner necessary to afford children with disabilities an equal opportunity for participation in those services and activities.

> (b) Nonacademic and extracurricular services and activities may include counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the public agency, referrals to agencies that provide assistance to individuals with disabilities, and employment of students, including both employment by the public agency and assistance in making outside employment available.[157]

The Act further provides that such nonacademic and extracurricular services take place in the least restrictive environment:

> In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in § 300.107, each public agency must ensure that each child with a disability participates with nondisabled children in the extracurricular services and activities to the maximum extent appropriate to the needs of that child. The public agency must ensure that each child with a disability has the supplementary aids and services determined by the child's IEP Team to be appropriate and necessary for the child to participate in nonacademic settings.[158]

IV. Providing a Free, Appropriate Public Education (FAPE) in the Least Restrictive Environment (LRE): The Crux of IDEA.

This study has examined the history of IDEA (formerly EAHCA) and the most recent legislative revisions to the statute. It further reviewed evaluation, eligibility determinations, and IEP provisions for children with disabilities who, by reason thereof, need special education and related services. The upcoming section of the study reviews how the statute, the federal regulations, and the case law interpret school districts' obligation to provide each disabled student with a free, appropriate public education (FAPE) in the least restrictive environment (LRE).

A. The IDEA's Requirement for Provision of FAPE, the *Rowley* Decision, and Its Progeny.

1. IDEA statutory and regulatory requirements for FAPE.

The Individuals with Disabilities Act (IDEA)[159] provides federal funds to states that develop plans to assure "all children with disabilities the right to a free appropriate public education."[160] A free appropriate public education (FAPE) "must be available to all children residing in the State between the ages of three and twenty-one, inclusive, including children with disabilities who have been suspended or expelled from school, as provided for in § 300.530(d)."[161] The determination that a child is eligible for special education services "must be made on an individual basis by the group responsible within the child's local educational agency [*e.g.*, school district] for making eligibility determinations."[162] "Each State must ensure that FAPE is available to any individual child with a disability who needs special education and related services, even though the child has not failed or been retained in a course or grade, and is advancing from grade to grade."[163]

"The 'free appropriate public education,' mandated by federal law must include 'special education and related services' tailored to meet the unique needs of a particular child, . . . and be 'reasonably calculated to enable the child to receive educational benefits.'"[164] The FAPE guaranteed by the IDEA must provide a disabled child with meaningful access to the educational process.[165] To the extent that a child needs only a related service and does not also require special education, the child is not considered to be a "child with a disability" under the statute.[166]

The IDEA requires school districts to provide disabled students with a FAPE as a condition of receiving federal funding.[167] A school district ensures that a disabled student is receiving a free, appropriate public education (FAPE) by providing the student with an appropriate IEP.[168]

2. *Board of Education of Hendrick Hudson Central School District v. Rowley* and its progeny as related to definition of FAPE.[169]

In *Board of Education of Hendrick Hudson Central School District v. Rowley*,[170] the United States Supreme Court mandated that a reviewing court conduct a two-prong inquiry to determine whether a student's IEP fulfils the school district's obligation to provide a FAPE. Under the first prong, the reviewing court must determine whether the state has complied with IDEA's procedural requirements.[171] Under the second prong, the reviewing court must determine whether the IEP is "reasonably calculated to confer *some*[172] educational benefit on a disabled child."[173]

In that regard, the Supreme Court defined a FAPE as providing disabled children with a "basic floor of educational opportunity, ... [which] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child."[174] Yet, it is important to note that the IDEA does not require a school district to provide a child with the best possible education.[175] Nor does the statute require a school district to furnish every special service necessary "to maximize each handicapped child's potential."[176] Instead, the Second Circuit Court of Appeals has held that a school district can satisfy its obligation to provide a disabled child with a FAPE by providing "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction."[177] A school need not "provide the optimal level of services, or even a level that would confer additional benefits."[178] The Eleventh Circuit Court of Appeals has held that "appropriate education" means "making measurable and adequate gains in the classroom. If 'meaningful gains' across settings means more than making measurable and adequate gains in the classroom, they are not required" by the IDEA.[179]

A school district will fulfill its substantive obligations under the IDEA if the student is likely to make progress, not regress, under his IEP, and if the IEP affords the student with an opportunity "greater than mere trivial advancement."[180] Indeed, *Rowley's* "'some educational benefit' prong will not be met by the provision of *de minimis*, trivial learning opportunities."[181]

B. Least Restrictive Environment (LRE): A Statutory and Regulatory Mandate Further Defined and Interpreted by the United States Circuit Courts of Appeal.

1. Statutory and regulatory requirements for LRE.

The IDEA "expresses a strong preference" for the educational mainstreaming of children with disabilities "'to the maximum extent appropriate,'" and therefore "special education and related services must be provided in the least restrictive setting consistent with a child's needs."[182] A fundamental mandate of the IDEA is its "least restrictive environment" (LRE) requirement:

> to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.[183]

The federal regulation implementing the IDEA's LRE provision states that in determining the educational placement of an IDEA-eligible child, the school must ensure that "unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled."[184] Each school district is required to ensure that a continuum of alternative placements, including special classes, itinerant instruction, resource classes, and home instruction, among others, is available to meet the needs of students with disabilities.[185]

Unless the IEP of a child with a disability requires some other arrangement, the child must be educated in the school that he or she would attend if nondisabled, or as close as possible to the home school.[186] In selecting the LRE, the IEP team must give consideration "to any potential harmful effect on the child or on the quality of services that he or she needs."[187] Moreover, the school district must not remove a child with a disability "from education in age appropriate regular classrooms solely because of needed modifications in the general education curriculum."[188]

The IDEA does "not contemplate an all-or-nothing educational system in which [disabled] children attend either regular or special education. Rather, the Act and its regulations require schools to offer a continuum of services."[189] A "continuum of services" requires schools to "take intermediate steps where appropriate, such as placing the child in regular education for some academic classes and in special education for others, mainstreaming the child for nonacademic classes only, or providing interaction with [nondisabled] children during lunch and recess."[190] Each child's individual needs will dictate the "appropriate mix" to be updated "from school year to school year as the child develops. If the school officials have provided the maximum appropriate exposure to [nondisabled] students, they have fulfilled their obligation under the [IDEA]."[191]

2. The Sixth Circuit's LRE test: *Roncker v. Walter* (1983).

In *Roncker v. Walter,*[192] the Sixth Circuit Court of Appeals set forth its LRE test. The *Roncker* court compared the benefits of the more restrictive program to the benefits of the less restrictive program and then determined if the services offered in the more-segregated program can "feasibly" be implemented in the regular classroom. The Fourth and Eighth Circuit Courts

of Appeals also apply the *Roncker* LRE test, and the Second Circuit has followed *Roncker* as well.[193]

3. The Fifth Circuit's LRE test: *Daniel R. R. v. State Board of Education* (1989).

In *Daniel R.R. v. State Board of Education*, the Fifth Circuit established its test for determining what the least restrictive environment is for a special education student.[194] First, the court inquired whether education in the regular classroom with the use of supplementary aids and services can be achieved satisfactorily. If it can not, the court inquired whether the school mainstreamed the child to the maximum extent appropriate. The court considered three factors for determining mainstreaming to the maximum extent appropriate. Factor one compared the educational benefits the child will receive in the regular classroom, with supplementary aids and services, to the benefits the child will receive in a self-contained environment. Factor two inquired what effect, if any, the child will have on the education of other children in the regular classroom.[195] Factor three asked whether integration would *significantly impact* the education of the district's other children (in terms of cost). The Tenth, Third, and Eleventh Circuits also employ the *Daniel R. R.* LRE test.

4. The Ninth Circuit's LRE test: *Sacramento City Unified School District v. Rachel H* (1994).

The Ninth Circuit Court of Appeals blended the aforementioned *Daniel R. R.* and *Roncker* tests. In *Sacramento City Unified Sch. Dist. v. Rachel H.,*[196] the court set forth a four factor test. First, the court assessed the academic benefits of placement full time in the regular classroom. Next, the court assessed the nonacademic benefits of the placement in the regular classroom. Third, the court assessed the student's effect on the teacher and the students in the regular classroom. Finally, the court considered the costs of mainstreaming.

C. Factors to Determine Provision of FAPE in the LRE: The Fifth Circuit's FAPE Test Set Forth in *Cypress-Fairbanks Independent School District v. Michael F.* (1997).

"The 'free appropriate public education,' mandated by federal law must include 'special education and related services' tailored to meet the unique needs of a particular child, . . . and be 'reasonably calculated to enable the child to receive educational benefits.'"[197] The FAPE guaranteed by the IDEA must provide a disabled child with meaningful access to the educational process.[198]

In *Cypress-Fairbanks Independent School District v. Michael F.*, the Fifth Circuit identified four factors[199] that serve as useful indicators of whether an IEP is reasonably calculated to provide a meaningful educational benefit under the IDEA. These are:

(1) the program is individualized[200] on the basis of the student's assessment and performance;[201]

(2) the program is administered in the least restrictive environment;[202]

(3) the services are provided in a coordinated and collaborative manner by the key "stakeholders";[203] and

(4) positive academic and non-academic benefits are demonstrated.[204]

These four factors are derived from and track the federal regulations which implement the IDEA.[205]

1. Individualized program.

Regardless of the specific disability, each child qualified for special education is entitled to receive "specialized instruction and related services which are individually designed to provide educational benefit."[206] The IEP team must honestly consider any parental requests, including the research and expert opinions[207] rendered by the parent in support of the request, and whether the request appropriately promotes the goals of the IEP (including, as discussed

below, transition goals).[208] Special education services must be provided on the basis of the child's individual needs.[209] A district cannot simply deny the student's request because of inconvenience or scheduling difficulties.[210] A blanket policy against a particular service, program, or methodology constitutes "pre-determination" in violation of the requirement that a student's special education and related services be "individualized."[211] However, the parents do not have a right to compel the school district to adopt their proposal or to employ a specific methodology, so long as the district considers the proposal in good faith and determines whether it is necessary to ensure FAPE.[212]

2. Least restrictive environment.

As discussed above, the IDEA requires that a student be educated in the least restrictive environment appropriate to meet his needs.[213] While there is a presumption of mainstreaming in the Act, it is "not an inflexible court mandate."[214]

Using the *Daniel R. R.* test[215] to determine the LRE for a student, IEP teams first ask whether education in the regular classroom with the use of supplementary aids and services can be achieved satisfactorily. Even if the student cannot be educated in the regular classroom with use of supplementary aids and services, the district must determine the maximum extent appropriate for mainstreaming the student.

Applying *Daniel R. R., supra*, the court established three factors for determining mainstreaming to the maximum extent appropriate. Factor One requires comparison of the educational benefits the child will receive in the regular classroom, with supplementary aids and services, to the benefits the child will receive in a more restrictive environment.

In analyzing the maximum extent appropriate for mainstreaming the child, the IEP team must consider Factor Two: what effect, if any, the child will have on the education of other

children in the regular classroom. Compatible to the second inquiry is Factor Three regarding whether integration would *significantly impact* the education of the district's other children (in terms of cost).

The IDEA does not address any circumstance where school districts determine services or placement required for FAPE based on the eligible student's interference with other students. The statute and regulation state that, in considering "special factors," the "IEP Team must . . . [i]n the case of a child whose behavior impedes the child's learning of that or others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior . . . ."[216] Accordingly, unless the behavior of the child "impedes the child's learning of that or others," then the school district has no obligation to use "positive behavioral interventions and supports, or other strategies, to address that behavior."

3. Key stakeholders provide services.

To demonstrate lack of coordination among the key "stakeholders," a party must "show more than a *de minimis* failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP."[217]

This analysis is fact-specific. Once a student's IEP is developed, all members of the IEP team, as well as the student's teachers, assistants, paraprofessionals, and other personnel responsible for implementing the IEP, must do so. As discussed above, the IEP team must involve the statutorily-required persons and such persons must honestly consider a request, including the research and expert opinions[218] rendered by the parent in support of the request, avoiding pre-determination of whether a particular program, service, or methodology does or

does not promote the goals of the IEP (including, as discussed below, transition goals) in order to ensure the student receives FAPE.[219]

4. Positive academic and nonacademic benefits.

To evidence that the student received FAPE, the *Cypress-Fairbanks* court required that the IEP be reasonably calculated to ensure some positive academic and nonacademic benefits, or that the student actually showed some positive academic and nonacademic benefits.[220] It is not necessary for a student to improve in every area to obtain an educational benefit from his IEP.[221] Nor is a school district required to "cure" a disability.[222]

D. Prohibition on Mandatory Medication.

The reauthorized 2004 IDEA and its supporting regulations adamantly prohibit a state or local education agency from mandating that a student take medication. The regulation implementing the prohibition on mandatory medication provides that the state "must prohibit State and [school district] personnel from requiring parents to obtain a prescription for substances identified under schedules I, II, III, IV, or V in section 202(c) of the Controlled Substances Act (21 U.S.C. 812(c)) for a child as a condition of attending school, receiving an evaluation under §§ 300.300 through 300.311, or receiving services under this part."[223] However, the regulation makes it clear that "[n]othing in paragraph (a) of this section shall be construed to create a Federal prohibition against teachers and other school personnel consulting or sharing classroom-based observations with parents or guardians regarding a student's academic and functional performance, or behavior in the classroom or school, or regarding the need for evaluation for special education or related services under § 300.111 (related to child find)."[224]

E. Discipline of Students who are Eligible for Special Education: A Continued Obligation to Provide FAPE.

The study thus far has identified the essential IDEA components related to evaluation, eligibility, IEP development, reevaluation, and provision of FAPE in the LRE for students with disabilities, such as those with BPD. This section reviews the school district's duties and responsibilities under IDEA 2004[225] when it brings a disciplinary action against disabled students and its continued obligation to provide FAPE. It also discusses the Act's requirements when making a "manifestation determination" of whether a disabled student's conduct was caused by or had a direct and substantial relationship to the child's disability, or otherwise was the direct result of failure to implement the IEP.[226]

IDEA 2004 altered the previous test for determining whether a disabled student's behavior was a manifestation of his or her disability in order to discipline or refrain from disciplining the student for the behavior. The Act mandates that school personnel shall not remove a child with a disability for more than ten school days without holding a manifestation determination review (with certain exceptions, *infra,* where a forty-five day removal applies). School personnel may pursue a change of placement in excess of ten school days if the behavior is determined not to be a manifestation of the student's disability; however, the student must continue to receive educational services after the initial ten day removal.[227]

1. Removals for ten or fewer days.

The Act allows school personnel to "remove a child with a disability who violates a code of student conduct from his or her current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than ten consecutive school days (to the extent those alternatives are applied to children without disabilities) and for additional removals of not more than ten consecutive school days in that same school year for separate

incidents of misconduct (as long as those removals do not constitute a change of placement under § 300.536)."[228]

For removals involving separate incidents of misconduct of not more than ten consecutive school days in the school year to constitute a "change in placement," either (a) the removal must be for more than ten consecutive school days, or (b) the school district has subjected the child to a series of removals that constitute a pattern (i) because the series of removals total more than ten school days in a school year, (ii) because the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals, and (iii) because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another."[229] The school district "determines on a case-by-case basis whether a pattern of removals constitutes a change of placement."[230] If the district determines that a "change of placement" has occurred, then the district must convene a manifestation determination review meeting.

2. Manifestation Determination Review (MDR).

Either when a change of placement occurs because of a disciplinary removal, or when a school district removes a child from school for more than ten consecutive days, the school must convene a manifestation determination review (MDR) meeting to determine whether the child's conduct was a manifestation of his disability.

The MDR team consists of the parent and the relevant IEP team members. To make the MDR decision, the team must consider all relevant information to the determination and, with such consideration, answer the following questions:

(1) Whether the conduct in question was caused by or had a direct and substantial relationship to the child's disability(ies); *OR*

(2) Whether the conduct was the direct result of the school division's failure to implement the IEP.[231]

If the MDR team determines that the conduct was *not* a manifestation of the student's disability, thereby changing the placement of the child, the Act requires:

> A child with a disability who is removed from the child's current placement pursuant to paragraphs (c), or (g) of this section must—
>
> (i) Continue to receive educational services, as provided in [34 C.F.R.] § 300.101(a), so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP; and
>
> (ii) Receive, as appropriate, a functional behavioral assessment [FBA], and behavioral intervention services and modifications [pursuant to a BIP], that are designed to address the behavior violation so that it does not recur.[232]

If the MDR team determines either (i) that the conduct was caused by or had a direct and substantial relationship to the child's disability, or (ii) that the conduct was the direct result of the school's failure to implement the IEP, then the school district, through the IEP team, must take immediate steps to remedy those deficiencies.[233] Except when a student's conduct involves behavior subject to a forty-five day removal, discussed below, the school district must "return the child to the placement from which the child was removed, unless the parent and the [IEP team] agree to a change of placement as part of the modification of the behavioral intervention plan."[234] Further, if the student's misconduct is a manifestation of his disability, the IEP team (not the MDR team, unless it is the same) must perform a Functional Behavior Assessment (FBA) and implement a Behavior Intervention Plan (BIP). If these two items already exist, then they should be modified as necessary to address the behavior.[235]

3. Removing the child to an interim alternative education setting (IAES) for forty-five days.

The school district may remove students from school up to forty-five days in cases of:

(i) Carrying or possessing a weapon to or at school, around school premises, or at a school function;

(ii) Knowingly possessing or using illegal drugs, or selling or soliciting the sale of a controlled substance; or

(iii) Inflicting serious bodily injury, which means bodily injury that involves

(a) a substantial risk of death;

(b) extreme physical pain;

(c) protracted and obvious disfigurement; or

(d) protracted loss or impairment of the function of a bodily member, organ, or mental faculty.[236]

Importantly, the MDR team must hold a MDR for these students; if there is no manifestation, the student ordinarily remains in the alternative education program (where she receives special education and related services) pending any appeal or IEP decision to change the student's placement. If the student's conduct involving weapons, drugs, or serious bodily injury is a manifestation of her disability, then the IEP team should amend the IEP in accordance with the student's revised placement. It also should conduct a FBA and revise/implement a BIP for this student.

4. Parental notification.

The Act requires, "On the date on which the decision is made to make a removal that constitutes a change of placement of a child with a disability because of a violation of a code of student conduct, the [school district] must notify the parents of that decision, and provide the parents the procedural safeguards notice described in [34 C.F.R. § 300.504]."[237]

5. Reporting a crime to law enforcement.

Finally, the Act explicitly states that "[n]othing in this part prohibits an agency from reporting a crime committed by a child with a disability to appropriate authorities or prevents State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability."[238] However, the school district "reporting a crime committed by a child with a disability must ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom the agency reports the crime," but only "to the extent that the transmission is permitted by the Family Educational Rights and Privacy Act," (FERPA) 20 U.S.C. § 1232g.[239]

V. A Review of the Case Law Involving Students with Bipolar Disorder.

Parts I, II, and III of this Chapter summarized the statutory and regulatory history of what is now IDEA 2004. These parts elaborated on the two primary policies of the Act: Providing FAPE for all disabled students eligible to receive special education and related services and providing these services in the LRE. Part III highlighted several pivotal decisions where the United States Supreme Court and the various United States Circuit Courts of Appeal interpreted and further defined the FAPE and LRE mandates.

This Part (Part IV) reviews (i) relevant and dispositive United States Supreme Court decisions, confronting legal issues that frequently arise in special education matters concerning students with bipolar disorder, (ii) case law involving students with bipolar disorder, and (iii) case law that further illuminates relevant issues to students with bipolar disorder, but does not specifically involve students with a bipolar disorder diagnosis. Seventeen cases involved students diagnosed with bipolar disorder.[240] Three cases[241] involved (i) students diagnosed with

conditions, such as depression, schizophrenia, obsessive-compulsive disorder, generalized anxiety, and/or attention deficit disorder (with or without hyperactivity), or (ii) students demonstrating behaviors, such as truancy, absenteeism, abuse of drugs and alcohol, grandiosity, psychosis, paranoia, suicidal ideations, anger, rage, violence, inappropriate sexual behavior, hallucinations, and/or perfectionism,[242] each of which can present in students with childhood-onset or teenage bipolar disorder. The remaining five cases are decisions rendered by the United States Supreme Court[243] involving relevant and dispositive legal issues affecting special education and related services for students with bipolar disorder.

Review of the case law appears in chronological order without regard to the specific issues addressed in the cases or the jurisdiction addressing the issues. The review contains published, reported, unreported, and unpublished decisions, but does not contain cases involving relevant issues that have been overruled or overturned. Case summaries are fact-intensive, particularly because judicial application of law heavily depends upon the specific facts in each case. The summaries do not restate legal rules or propositions previously discussed in Chapter Two. Finally, for reader-ease, the summaries use the terms "eligibility team/meeting" and "IEP team/meeting" throughout, even if the individual cases apply different terminology (*e.g.*, PET or ARD).

A. The Essential Supreme Court Cases Interpreting the EAHCA: 1982 through 1999.

1. *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982).

As mentioned above, in the landmark case, *Board of Education of the Hendrick Hudson Central School District v. Rowley,*[244] the United States Supreme Court considered the case of an eight-year-old hearing impaired student named Amy Rowley. The facts of the case indicated

that Amy had "minimal residual hearing and [was] an excellent lipreader."[245] In kindergarten, the school district provided Amy "with an FM hearing aid which would amplify words spoken into a wireless receiver by the teacher or fellow students during certain classroom activities."[246] In first grade, the school district provided Amy with an interpreter, but the interpreter "reported that Amy did not need his services at that time."[247] When the school administration ceased the interpreting services, Amy's family requested and received a hearing before an independent examiner.[248] The examiner found that "'Amy was achieving educationally, academically, and socially'" without the interpreter.[249]

The New York Commissioner of Education affirmed the examiner's decision, and the Rowley family filed an action in the United States District Court for the Southern District of New York.[250] Both the district court and the Second Circuit found that Amy was well-adjusted and performing well in her classes.[251] The district court, however, was concerned about the amount of material and learning Amy missed without having an interpreter and, for this reason, ruled that she had not received a free, appropriate public education (FAPE).[252] A divided panel of the Second Circuit Court of Appeals affirmed the district court's holding.[253] The United States Supreme Court granted certiorari to review the lower courts' interpretation of the Education for All Handicapped Children Act (EAHCA).[254]

The *Rowley* case offered the Supreme Court its first opportunity to interpret the EAHCA.[255] At issue was the meaning of an "appropriate" education within the context of the Act's "free, *appropriate* public education," or "FAPE" mandate.[256] The Court found that the EAHCA expressly defined FAPE as "*special education* and *related services* which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool,

elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under [the Act]."[257] Along with this express definition, the Court cited Congressional findings and the Act's "extensive procedural requirements" to glean "congressional intent to bring previously excluded handicapped children into the public education systems of the States and to require the States to adopt *procedures* which would result in individualized consideration of and instruction for each child."[258]

Notwithstanding congressional intent, the Court found "[n]oticeably absent from the language of the statute [ ] any substantive standard prescribing the level of education to be accorded handicapped children."[259] While it found the definition of FAPE useful, "there remain[ed] the question of whether the legislative history indicate[d] a congressional intent that such education meet some additional substantive standard."[260] From its review of the legislative history, the Court concluded that "Congress sought primarily to make public education available to handicapped children [but] . . . did not impose upon the States any greater substantive educational standard than would be necessary to make such access meaningful."[261] Accordingly, the Court stated that the "intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside."[262] The Court cited the House Report's explanation for enacting the EAHCA, that "'no congressional legislation has required a precise guarantee for handicapped children, i.e., a *basic floor of opportunity* that would bring into compliance all school districts with the constitutional right of equal protection with respect to handicapped children.'"[263] It interpreted this statement as evidence of congressional intent that equal protection meant equal access.[264] Accordingly, the Court held that the lower courts erred "when they held that the Act required

New York to maximize the potential of each handicapped child commensurate with the opportunity provided nonhandicapped children."[265] Instead, "Congress sought primarily to identify and evaluate handicapped children, and to provide them with access to a free public education."[266]

The Court further found that "[i]mplicit in the congressional purpose of providing access to a 'free appropriate public education' is the requirement that the education to which access is provided be sufficient to confer *some* educational benefit upon the handicapped child."[267] With that said, the court ruled that the "'basic floor of opportunity' provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child."[268] The Court cautioned, however, that it did "not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act."[269] It narrowed its holding specifically to Amy Rowley, stating: "Because in this case we are presented with a handicapped child who is receiving substantial specialized instruction and related services, and who is performing above average in the regular classrooms of a public school system, we confine our analysis to that situation."[270] Still, it gave some hints as to measuring a handicapped child's educational benefits. "The grading and achievement system [ ] constitutes an important factor in determining educational benefit."[271]

From its statutory and congressional review and analysis, the Supreme Court held that a school district "satisfies" the FAPE requirement "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction."[272] The court further held that "[s]uch instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the

State's regular education, and must comport with the child's IEP."[273] Finally, the court ruled that the IEP "should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classroom of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade."[274]

The Court emphasized the importance not only of substantively complying with the Act, but also with procedural compliance:

> [W]e think that the importance Congress attached to these procedural safeguards cannot be gainsaid. It seems to us no exaggeration that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage . . . as it did upon the measurement of the resulting IEP against a substantive standard. We think that the congressional emphasis upon full participation of concerned parties throughout the development of the IEP . . . demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.[275]

Against this backdrop, the Court formulated its bullet-proof two-prong inquiry to determine whether a student's IEP fulfills the school district's obligation to provide a FAPE. Under the first prong, the reviewing court must determine whether the state has complied with IDEA's procedural requirements.[276] Under the second prong, the reviewing court must determine whether the procedurally-compliant IEP is "reasonably calculated to confer *some*[277] educational benefit on a disabled child."[278]

The Court warned lower courts "to avoid imposing their view of preferable educational methods upon the States," citing the Act's intent to leave the "primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs" to "state and local educational agencies in cooperation with the parents or guardian of the child."[279] The Court doubted congressional intent for courts "to overturn a State's choice of appropriate educational theories."[280] The Court cited its decision

in *San Antonio Independent School District v. Rodriguez* for the deferential proposition that "courts lack the 'specialized knowledge and experience' necessary to resolve 'persistent and difficult questions of educational policy.'"[281] Accordingly, "once a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the States."[282]

Turning back to the facts of the case, the Court held that neither the Second Circuit nor the district court found that the school district "failed to comply with the procedures of the Act, and the findings of neither court would support a conclusion that Amy's educational program failed to comply with the substantive requirements of the Act."[283] Since the "'evidence firmly establishe[d] that Amy [was] receiving an 'adequate' education, since she perform[ed] better than the average child in her class and [was] advancing from grade to grade,'" along with the "fact that Amy was receiving personalized instruction and related services calculated by the [school district] to meet her educational needs," the school district procedurally and substantively complied with the Act as necessary to provide Amy with a FAPE.[284]

2. *Irving Independent School District v. Tatro* (1984).

Two years later, the Supreme Court decided *Irving Independent School District v. Tatro*.[285] At issue in *Tatro* was whether a medical procedure called "clean intermittent catheterization" for a little girl with spina bifida constituted a "related service" under the EAHCA and, therefore, the financial responsibility of the school district. The Supreme Court held that it was a related service and not subject to the "medical services" exclusion in the Act's federal regulations.

Amber Tatro was born with spina bifida.[286] As a result, she suffered from "orthopedic and speech impairments and a neurogenic bladder, which prevent[ed] her from emptying her

bladder voluntarily."[287] To prevent complications, "she [had to] be catheterized every three or four hours to avoid injury to her kidneys."[288] The acceptable process for catheterizing Amber was "clean intermittent catheterization," or CIC.[289] This process was quite easy and did not require medical personnel to administer; rather, with less than one hour's training, persons such as Amber's babysitter and teenage brother were able to do CIC.[290] When the school district denied Amber's parents' request that it administer CIC to Amber, the Tatros filed for a due process hearing.

The Supreme Court considered whether the Act required the school district to administer CIC services to Amber for provision of FAPE.[291]

The Court reviewed the FAPE requirement and the definition of "related services" under the Act.[292] Of particular interest to the Court was the statute's language that related services include "*supportive services* (*including . . . medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education . . . .*"[293] The Court concluded that, to determine whether CIC was a related service, it must (i) decide whether CIC is a supportive service required to assist a handicapped child to benefit from special education and (ii) determine whether CIC is excluded as a "medical service" that serves purposes other than diagnostic or evaluative.[294]

CIC clearly was a supportive service required to assist Amber to benefit from special education. Without having the CIC procedure throughout her school day, she could not attend school and could not by definition "benefit from special education."[295] Similar to transportation services, a "service that enables a handicapped child to remain at school during the day is an important means of providing the child with the meaningful access to education that Congress envisioned."[296]

Next, the Court considered whether CIC was a non-diagnostic medical service. In concluding that it was not an excluded service under the Act, the Court utilized statutory intent and logic:

> Congress plainly required schools to hire various specially trained personnel to help handicapped children, such as "trained occupational therapists, speech therapists, psychologists, social workers and other appropriately trained personnel."[297] School nurses have long been a part of the educational system, and the Secretary[298] could therefore reasonably conclude that school nursing services are not the sort of burden that Congress intended to exclude as a "medical service." By limiting the "medical services" exclusion to the services of a physician or hospital, both far more expensive, the Secretary has given a permissible construction to the provision.[299]

Furthermore, the Court chided:

> Nurses in petitioner School District are authorized to dispense oral medications and administer emergency injections in accordance with a physician's prescription. This kind of service for nonhandicapped children is difficult to distinguish from the provision of CIC to the handicapped. [FN omitted] It would be strange indeed if Congress, in attempting to extend special services to handicapped children, were unwilling to guarantee them services of a kind that are routinely provided to the nonhandicapped.[300]

To assuage any school district fears of misuse, the Court set forth several examples that *would* constitute nondiagnostic or nonevaluative medical services thereby excluded under the Act:

> First, to be entitled to related services, a child must be handicapped so as to require special education.[301] In the absence of a handicap that requires special education, the need for what otherwise might qualify as a related service does not create an obligation under the Act.[302]
>
> Second, only those services necessary to aid a handicapped child to benefit from special education must be provided, regardless how easily a school nurse or layperson could furnish them. For example, if a particular medication or treatment may appropriately be administered to a handicapped child other than during the school day, a school is not required to provide nursing services to administer it.
>
> Third, the regulations state that school nursing services must be provided only if they can be performed by a nurse or other qualified person, not if they must be performed by a physician.[303] It bears mentioning that here not even the services

> of a nurse are required; as is conceded, a layperson with minimal training is qualified to provide CIC.[304]
>
> Finally, we note that respondents are not asking petitioner to provide equipment that Amber needs for CIC.[305] They seek only the services of a qualified person at the school.[306]

With this rationale, the court concluded that "provision of CIC to Amber is not subject to exclusion as a 'medical service' . . . ."[307] Accordingly, the Court affirmed the Fifth Circuit's holding that CIC is a covered "related service" and that the school district must administer CIC to Amber for provision of FAPE in compliance with the Act.[308]

3. *School Committee of the Town of Burlington v. Department of Education* (1985).

Less than one year after it decided *Tatro*, the Supreme Court decided *School Committee of the Town of Burlington v. Department of Education*.[309] In *Burlington*, the Supreme Court held that trial courts have the authority to reimburse parents for private placement when the school district's placement did not provide FAPE.

In the case, the parents of an elementary school student (Michael Panico) with a severe learning disability rebuked the school district's proposed IEP and, instead, unilaterally placed him in the Carroll School, a state-approved private school for students with special education needs.[310] At the due process hearing, the hearing officer ruled that the school district's placement did not provide FAPE and that the Carroll School was the appropriate placement in the least restrictive environment for Michael.[311] The hearing officer ordered the Town of Burlington to reimburse Michael's father for the Carroll School tuition.[312] The Town sought judicial review of the hearing officer's decision, and the case made it up to the Supreme Court.[313]

Before the Court were two issues: "whether the potential relief available under [the Act] includes reimbursement to parents for private school tuition and related expenses, and whether

[the Act] bars such reimbursement to parents who reject a proposed IEP and place a child in a private school without the consent of the local school authorities."[314]

The Court reviewed the congressional intent of the Act, the meaning of FAPE, the IEP instrument, the Act's procedural safeguards, and the due process hearing and judicial review elements of the Act.[315] It first held that the Act authorizes courts to order school districts to reimburse parents for private placement.[316] The statute "directs the court to 'grant such relief as [it] determines is appropriate.'"[317] Accordingly, so long as the relief designed by the court is "appropriate," the court has met its statutory burden.[318]

Moreover, the Act specifically contemplates private placement at public expense when a district cannot provide the child with an appropriate education in the public schools.[319] The court reasoned that "[i]n a case where a court determines that a private placement desired by the parents was proper under the Act and that an IEP calling for placement in a public school was inappropriate, it seems clear beyond cavil that 'appropriate' relief would include a prospective injunction directing the school officials to develop and implement at public expense an IEP placing the child in a private school."[320] To be sure, "parents who disagree with the proposed IEP are faced with a choice: go along with the IEP to the detriment of their child if it turns out to be inappropriate or pay for what they consider to be the appropriate placement."[321] The Court concluded that "it would be an empty victory to have a court tell them several years later that they were right but that these expenditures could not in a proper case be reimbursed by the school officials."[322] Because Congress did not envision "empty victories," the Court held that "Congress meant to include retroactive reimbursement to parents as an available remedy in a proper case."[323]

Next, the Court held that a parent's removal of the child from the public placement and unilaterally placing her in a private placement does not constitute waiver of the right to obtain reimbursement for the private placement.[324] Still, the Court cautioned that "parents who unilaterally change their child's placement during the pendency of review proceedings, without the consent of state or local school officials, do so at their own financial risk. If the courts ultimately determine that the IEP proposed by the school officials was appropriate, the parents would be barred from obtaining reimbursement . . . ."[325]

4. *Florence County School District v. Carter* (1993).

In 1993, the Supreme Court once again addressed the issue of private placement reimbursement. In *Florence County School District v. Carter*,[326] the Court held that parents may obtain reimbursement for unilateral placement of their special education eligible child even if the private placement is not approved by the State or does not meet state standards.[327] In response to the argument that such a holding could break the school districts' banks, the Court replied:

> There is no doubt that Congress has imposed a significant financial burden on States and school districts that participate in IDEA. Yet public educational authorities who want to avoid reimbursing parents for the private education of a disabled child can do one of two things: give the child a free appropriate public education in a public setting, or place the child in an appropriate private setting of the State's choice. This is IDEA's mandate, and school officials who conform to it need not worry about reimbursement claims.[328]

Reiterating its warning from *Burlington*, "parents who, like Shannon's, 'unilaterally change their child's placement during the pendency of review proceedings, without the consent of state or local school officials, do so at their own financial risk.' They are entitled to reimbursement *only* if a federal court concludes both that the public placement violated IDEA and that the private school placement was proper under the Act."[329]

5. *Cedar Rapids Community School District v. Garret F.* (1999).

Central to the issue of providing services for students with mental illness is the question of whether services are educational and, therefore, the responsibility of the school district, or medical and, therefore, the responsibility of the parent or other agency other than the school district.[330] The Supreme Court confronted this issue in *Cedar Rapids Community School District v. Garret F.*[331]

In *Cedar Rapids v. Garret F.*, the student, Garret, was a quadriplegic and depended on a ventilator for life support.[332] His mother petitioned the school district to pay for his health care services.[333] Adopting its reasoning from *Tatro, supra,* the court found that Garret's ventilator was a necessary "related service" covered by the Act because he required it to go to school.[334] Furthermore, because Garret's medical care could be provided by a school nurse or other school personnel, it did not fall into the medical exclusion (that the only physician services available under the Act were for diagnostic or evaluative purposes).[335]

The school district complained about the high financial burden it would have should the Court require it to pay for services such as Garret's.[336] The court rejected any financial argument:

> The District may have legitimate financial concerns, but our role in this dispute is to interpret existing law. Defining "related services" in a manner that accommodates the cost concerns Congress may have had, *cf. Tatro,* 468 U.S. at 892, is altogether different from using cost itself as the definition. Given that § 1401(a)(17) does not employ cost in its definition of "related services" or excluded "medical services," accepting the District's cost-based standard as the sole test for determining the scope of the provision would require us to engage in judicial lawmaking without any guidance from Congress. It would also create some tension with the purposes of the IDEA. The statute may not require public schools to maximize the potential of disabled students commensurate with the opportunities provided to other children, *see Rowley,* 458 U.S. at 200; and the potential financial burdens imposed on participating States may be relevant to arriving at a sensible construction of the IDEA, *see Tatro,* 468 U.S. at 892. But Congress intended "to open the door of public education" to all qualified children

> and "required participating States to educate handicapped children with nonhandicapped children whenever possible."[337]

The Court summarized that the *Cedar Rapids* decision concerned "whether meaningful access to the public schools will be assured, not the level of education that a school must finance once access is attained. It is undisputed that the services at issue must be provided if Garret is to remain in school."[338] Accordingly, the Court held: "Under the statute, our precedent, and the purposes of the IDEA, the District must fund such 'related services' in order to help guarantee that students like Garret are integrated into the public schools."[339]

B. Cases Involving Students with Bipolar Disorder.

1. The earliest decision: *Doe v. Alabama State Department of Education* (11th Cir. 1990).

The earliest published case concerning a student diagnosed with bipolar disorder (which, at the time, was labeled "manic depression") is *Doe v. Alabama State Department of Education*.[340] Ultimately finding in favor of the school district, the Eleventh Circuit confronted the issue of residential placement reimbursement to the parents of a manic depressive boy ("John Doe"), who was nineteen years old at the time of the decision.[341] Manic depression "caused John substantial academic difficulty, as it create[d] episodes of depression and unmanageable hyperactivity, affect[ed] John's ability to concentrate, and cause[d] him considerable stress when he is confronted by the normal educational environment."[342] When John was fourteen years old, he "experienced severe emotional disturbances and was hospitalized for approximately three months at the Child and Adolescent Psychiatric Unit at Vanderbilt University Hospital," where doctors first diagnosed him with "schizophrenic disorder, paranoid type."[343] John began taking anti-psychotic medication.[344] His parents moved to Auburn, Alabama, where his mother sought special education services for John upon his release from the hospital.[345]

The Auburn City School District ("the district") found John eligible for special education and related services as a child with "emotional conflict" (i.e., "emotional disturbance").[346] John attended special and regular academic classes at Auburn Junior High School, but was not successful.[347] Initially, John experienced "emotional disturbances," was frequently tardy for class, and neglected to turn in his assignments.[348] Before the end of the first semester, the school placed John on in-school suspension.[349] It later suspended him for the final five days of the 1985-86 school year."[350]

In the summer of 1986, John's parents had him hospitalized again.[351] He suffered from severe depression, and his physicians revised his diagnosis from schizophrenia to manic-depressive illness.[352] Accordingly, they treated John with lithium, which proved somewhat helpful, and took him off of anti-psychotic medications.[353] At this point, John's parents – who resided in Alabama – unilaterally enrolled him in Sexton Woods[354] Psychoeducational Center, a public day school for severe emotionally and behaviorally disturbed students located in DeKalb County, Georgia.[355] John attended Sexton Woods for a mere two weeks and then refused to return.[356] The Auburn school district proposed another IEP, which the parents rejected, and allowed the parents to have John independently evaluated by a clinical psychologist, Dr. Jacobs, at school district expense.[357]

Dr. Jacobs recommended residential placement for John, stating that "John's needs would best be served by a combination of tutorial programming and small classes of young people with similar problems."[358] The school district rejected residential placement; nonetheless, John's parents enrolled him in Brandon Hall, a private residential school in suburban Atlanta for students who have difficulty adjusting in a regular school environment.[359] While John

progressed at Brandon Hall, the school expelled him six months into his education for sharing his medication with another student.[360]

John returned to Auburn, Alabama, and from April 1988 through December 1988, John's parents hired private tutors to home-school him.[361] In December 1988, the school district accepted an IEP proposed by John's mother.[362] The IEP reimbursed the parents for tutoring services since August 1988 and provided John with home school tutoring, but did not cover the cost of John's psychiatric therapy and medications.[363]

John's parents filed a due process complaint, alleging that the school's IEP did not provide FAPE, that John required residential schooling, and that the school should reimburse them for expenses associated with private placements.[364]

Applying the *Rowley* standard for determining provision of FAPE, the Eleventh Circuit upheld the district court's (and hearing officer's) decision in favor of the school district, agreeing that John's proposed IEP for the 1987-88 school year "provided more than *de minimis* educational benefits."[365] In support for this holding, the court found that "John had completed a unit of math the summer preceding the program in question, and the program was designed to slowly increase John's time in school to a full school day by the end of the 1987-88 year. . . . [Furthermore], the proposed schedule for the 1987-88 school year would meet John's psychological needs in that it provided for John's school day to begin with a counseling session. Moreover, John's treating physician testified at the hearing that, based on his recommendations, an appropriate program could be developed at Auburn."[366] The court held that John's psychiatrists and psychologists testified that he did not require a residential placement. Indeed, "John's treating physician, Dr. Jenkins, made a recommendation in May 1987 that did not include the possibility of residential school placement, and he testified before the district court

that an appropriate program could be developed at Auburn. Dr. Jenkins found no fault in either the 1987-88 proposed schedule or the 1988-89 schedule, other than a concern that any program must provide a certain amount of consistency. He also admitted that placement in a residential school would not prevent the possibility of future hospitalization."[367]

Regarding reimbursement for private placements, the court found that Brandon Hall "was an inappropriate placement for John because it did not have the facilities to deal with John's psychological and emotional needs. John was expelled from Brandon Hall because of a situation that arose, in part, from Brandon Hall's lack of a program to deal with students who are on drug therapy for mental illness and disorders."[368] Additionally, the court ruled that displacing John from his home, "a fully supportive environment," to Texas, where the closest appropriate residential school was located, "would be counterproductive to his development."[369]

Finally, the Eleventh Circuit determined that the "1988-89 IEP afforded substantial educational benefits in that John received tutoring in several subject matter areas and received passing grades in those areas. John [was] able to receive appropriate public education under the program and [would] not require residential school placement."[370] In summary, the court found that "the educational programs the [school district] offered to John for the 1987-88 and 1988-89 school years were reasonably calculated to provide John with educational benefits."[371]

2. Eight stories: Cases decided from 1999 through 2004.

a. *Sylvie M. v. Board of Education of Dripping Springs* (W.D. Tex. May 5, 1999).

In *Sylvie M. v. Board of Education of Dripping Springs*,[372] a Texas district court addressed whether a student diagnosed with bipolar disorder (BPD), LD, severe emotional disturbance, depression, dysthymia, parent-child conflict and ADHD, was entitled to reimbursement for placement in a residential treatment facility. The court found in favor of the

school district, holding that the district's proposed placement provided FAPE and the residential placement was not appropriate.

At issue in the case was a little girl, Sylvie, who received special education in elementary school for learning disabilities. In middle school, Sylvie's behavior at home became intolerable and dangerous. In March 1995, Sylvie "swallowed a quantity of aspirin." Her mother rushed her to the emergency room where doctors pumped her stomach. "This incident was the first in a series, all of which occurred close in time to report cards or interim reports from schools."[373] Sylvie also threatened to commit suicide if her mother did not leave her new husband. Sylvie's mother informed Sylvie's school counselor, Ms. Cave, about the suicide threat and had Sylvie admitted to Shoal Creek Hospital, where she remained for two weeks.[374] The Shoal Creek doctors diagnosed Sylvie as having major depression, dysthemia, parent-child conflict, and attention deficit hyperactivity disorder (ADHD).[375] The doctors prescribed anti-depressants and Ritalin for Sylvie.[376]

Sylvie sporadically attended out-patient therapy sessions at Shoal Creek, during which she stated that she only threatened and attempted suicide to gain her mother's attention. The Shoal Creek therapists opined that Sylvie was not a suicide risk.[377] Sylvie sparingly took her medications, and ultimately stopped taking them altogether.[378]

In December 1995, Sylvie's doctors diagnosed her "as having a primary disability of emotional disturbance (bipolar disorder) with a secondary disability of learning disability (the ADHD and math disabilities)."[379] The school district independently reevaluated Sylvie for determination of emotional disturbance, but found that she did not have an emotional or behavioral disability.[380] She continued to receive services as a learning disabled student. It received the Shoal Creek diagnosis of bipolar disorder on February 22, 1996.[381] During this

time, Sylvie was failing several classes and refusing to complete her homework. However, her teachers believed that Sylvie was learning despite her grades.[382] On March 1, 1996, the school agreed to provide Sylvie with tutoring.[383]

On March 6, 1996, Sylvie ran away from home.[384] In a highly publicized search, her father found her four days later "on Guadalupe Street in Austin near the University of Texas ('the Drag'). Her head was shaved and she wore black makeup and bizarre clothing. She stated her name was Karma. She was very resistant to going back to her mother's house."[385]

On March 14, 1996, Sylvie's parents enrolled her in Elan School, a residential placement, and notified the school district that they sought "at least partial tuition reimbursement."[386] The Elan School is "a private year-round special education, special purpose school for residential students located in Poland [sic], Maine. Elan specializes in older children who are behaviorally impaired. No mood-altering medications (such as medications for bipolar disorder) are allowed. Elan's program is one of behavioral modification. Elan is highly structured with clearly set goals and levels through which the students progress. Students participate in Elan's program and work in and around the school during the day and attend four hours of academic classes at night. According to evidence at the hearing, Elan uses a 'confrontational' model with verbal assaults by peers on fellow students who refuse or fail to conform."[387] Furthermore, students at Elan "do not have homework. Although some of the staff are licensed teachers, there are few to no professionals in the area of psychology. Elan is not licensed as a residential treatment facility by the state of Maine but rather is licensed as a special purpose private school. Sylvie did not receive any psychological counseling while at Elan and she also did not take any medication."[388]

Sylvie graduated from Elan in December of 1998 and attended college.[389] The total cost of Sylvie's placement, including tuition, related services, board and care, was $113,155.16.[390]

The school district refused to pay for Sylvie's schooling at Elan. Instead, it proposed an IEP "that recommended psychological and orthopedic evaluations (which never occurred because Sylvie was already at Elan) and added a behavior management plan."[391] The school district personnel were concerned about Elan's methodology, particularly that Sylvie was not able to take medication for bipolar disorder despite her doctors' recommendations.[392] The school district opined that:

> Sylvie's placement was non-academic because the placement was primarily to resolve out-of-school family conflicts. The school officials on the [IEP] committee uniformly agreed that the purpose of the placement was to separate Sylvie from her mother and that placement at Elan was unnecessary and not the least restrictive environment for Sylvie. The school district also indicated that it did not feel it had exhausted other in-district alternatives to residential placement, such as additional resource classes, self-contained classes, and day placement under contract. The school district indicated at the hearing that it would not voluntarily pay for a placement in a residential facility such as Elan unless all other academic alternatives had been exhausted.[393]

The court applied the four *Cypress-Fairbanks v. Michael F., supra,*[394] factors to determine whether the school district's IEP was reasonably calculated to provide a meaningful educational benefit under the IDEA:

> (1) the program is individualized on the basis of the student's assessment and performance;
> (2) the program is administered in the least restrictive environment;
> (3) the services are provided in a coordinated and collaborative manner by the key "stakeholders"; and
> (4) positive academic and non-academic benefits are demonstrated.[395]

The court found the program and proposed IEP to be individualized. It determined that Sylvie was a bright and rebellious child with issues that presented at home but did not surface at school. Sylvie's primary academic issue involved her refusal to complete homework. Still, the court opined that the proposed IEP from March 1996 would have adequately curbed this behavior.[396] Further, "Sylvie was receiving a significant amount of psychological services

during this time, which included school services as well as a private psychologist/psychiatrist and even, for a few months, had a child psychologist living in her home. The school was aware of these outside counselors."[397]

The residential placement was the most restrictive placement for Sylvie. The school district "clearly had available multiple setting[s] which would have been less restrictive than Elan. The residential treatment was for personal, not educational, needs."[398] Because Sylvie's parents did not exhaust the continuum of educational settings available before placing her in residential school, the placement itself is not appropriate.[399]

Sylvie and her mother participated in all of Sylvie's IEP meetings, and the school district was responsive to their proposals.[400]

Finally, the court held that Sylvie demonstrated positive academic and non-academic benefits when educated in the school district. The court pointed to Sylvie's achievement test scores remaining "at grade level or higher except for math," and her teachers' beliefs that she was learning despite her grades.[401] The court found that Sylvie's failing grades resulted from her incomplete homework. "While Sylvie's grades at Elan are noticeably higher, there was evidence that the academic standards were somewhat lower and class hours were certainly less. Even if this is not true, there was no homework at Elan. If there had been no true 'homework' [in the public school], Sylvie's grades would doubtless have risen dramatically."[402] The court further held that Sylvie received non-academic benefits in the public school placement. She had friends, enjoyed herself, and had "positive peer relationships."[403]

The court admitted that Elan may have been the "optimal setting" for Sylvie. However, the court applied the *Rowley* proposition that "a school is not required to provide the best setting for its students. . . . All that a school is required to do is ensure that its students are receiving

educational benefit. Sylvie was doing so. No more is required."[404] In so concluding, the court ruled in favor of the school district and denied reimbursement to Sylvie and her parents.

b. *Dixon v. Hamilton City Schools* (S.D. Ohio Nov. 4, 1999).

In *Dixon v. Hamilton City Schools*,[405] an Ohio district court determined that denial of sports eligibility for a student with bipolar disorder and other disabilities was not a denial of FAPE. The case sets forth a nice summary of bipolar disorder as it manifests in children and teenagers, as well as a discussion of the meaning of "related services."

The student in this case (Ryan) had Attention Deficit Hyperactivity Disorder (ADHD), bipolar disorder (BPD), and Oppositional Defiant Disorder (ODD).[406] "Both ADHD and bi-polar disorder are genetic disorders caused by chemical imbalances in the body. . . . Bipolar disorder is characterized by mood swings – periods of depression followed by 'up' periods. Approximately 50% of persons afflicted by bipolar disorder attempt suicide and approximately 15 to 20% of these persons actually commit suicide."[407] In addition to BPD, Ryan suffered from ODD, "a non-organic behavioral disorder characterized by negativistic, hostile, and defiant behavior towards authority figures. A person with ODD may often be argumentative, angry, and irritable. Bipolar disorder will exacerbate ODD."[408]

Ryan received special education and related services as a student with an "emotional disturbance," and his IEP required that Ryan participate in the regular education curriculum.[409] "Although he suffer[ed] from psychological and behavioral disorders, Ryan [excelled] in athletics, particularly football. Athletics serve[d] as a motivator for Ryan to concentrate on his studies. Additionally, the discipline and focus required to play team sports ha[d] a beneficial effect which spill[ed] over into the classroom."[410] Notwithstanding his athletic discipline, during his (first) ninth grade year, 1995-1996,[411] Ryan engaged in many disciplinary incidents and

failed five out of seven courses.[412] Notably, however, the school district did not implement Ryan's IEP during this year.[413] Still, Ryan repeated the ninth grade in 1996-1997, earning the requisite grades for promotion to the tenth grade.[414] Because of his grades, Ryan was academically ineligible (and physically unable, as it turns out) to participate in interscholastic sports during both the 1995-1996 and 1996-1997 school years.[415]

The court found that Ryan has become "depressed and suicidal when he was unable to participate in team sports" and that "Ryan ha[d] fewer behavioral and disciplinary incidents in school when he [was] involved in athletics than when he [was] not involved in athletics."[416] Furthermore, "[p]articipation in interscholastic athletics has been an important factor in helping Ryan overcome his learning and behavioral disabilities."[417]

To determine whether the school district was required to allow Ryan to play sports, the court analyzed two "threshold" questions:

> The first question is whether participation in interscholastic athletics is written into Ryan's IEP as a mandatory element. . . . [I]f interscholastic activities is included in mandatory terms, then Defendants must allow Ryan to participate in interscholastic athletics. The second question is whether interscholastic athletics is a "related service" under the IDEA. . . . [I]f interscholastic activities is a "related service," then Defendants must provide that service to Ryan and cannot bar him from participating on the school teams.[418]

The court first found that "interscholastic activities" was not written into Ryan's IEP.[419] In determining whether interscholastic activities was a "related service," the court quoted *Cedar Rapids v. Garret F., supra:* "'The definition of related services . . . broadly encompasses those supportive services that may be required to assist a child with a disability to benefit from special education . . . and enable a disabled child to remain in school during the day [to] provide the student with the meaningful access to education that Congress envisioned.'"[420] The court recognized that the list of "related services" set forth in IDEA was "non-exhaustive," but noted

the common tie: "[T]hey are all of a general nature which is different from interscholastic athletics. The related services in the statutes are the type that make it possible for a disabled child to attend school and benefit from public education."[421] In determining that interscholastic sports is not a "related service," the court held that the "term 'recreation' [in the IDEA] . . . connotes an activity done for the simple pleasure of engaging in the activity, and would not seem to include the more rigorous and more highly competitive pursuit of interscholastic athletics."[422]

c. *Johnson v. Metro Davidson City School District* (M.D. Tenn. Aug. 10, 2000).

In *Johnson v. Metro Davidson City School District*,[423] a Tennessee district court determined that a school district incorrectly failed[424] to find Tiffiney Johnson eligible as a child with a disability to receive special education and related services. The case reviews Tiffiney's educational and psychological status from birth through the eighth grade, noting that no fewer than six diagnosticians had evaluated Tiffiney and declared her as being or having, among others:

(1) "a learning disability with an emotional overlay . . . [and] considerable physiological correlates of anxiety [as well as] attention deficit disorder" (age seven);[425]

(2) "possible frontal lobe dysfunction" and "Impulse Control Disorder NOS" (age twelve);[426]

(3) "Oppositional Defiant Disorder" and "Parent/Child problem" (age fourteen);[427]

(4) "no evidence of learning disabilities," "average range of intellectual abilities," and "impulsive, manipulative, and inclined to be oppositional to authority figures [behavior]" (age fourteen);[428]

(5) ADD or ADHD (age fifteen);[429]

(6) "possible . . . Generalized Anxiety Disorder [and] possible . . . Personality Disorder" (age fifteen);[430]

(7) ADHD and "a significant behavior disorder" with a possible "diagnosis of reactive attachment disorder," resulting in her meeting the criteria for "seriously emotionally disturbed" (age fifteen);[431]

(8) "several disabilities . . . [such as] some learning disability . . . some neurotransmitter problems that are being expressed as Oppositional Defiant Disorder and Attention Deficit Disorder and Hyperactivity," "inappropriate feelings under normal circumstances . . . [that] impacted her performance at school" (age fifteen);[432]

(9) sociopathic, with her problems not resulting from "a dysfunctional family or inadequate parenting; rather the family's problems resulted from Tiffiney's problems";[433]

(10) "some characteristics that were consistent with borderline personality disorder, but it was difficult to diagnose such a disorder until after Tiffiney matured through adolescence" (age fifteen);[434]

(11) not seriously emotionally disturbed (ages fourteen and fifteen);[435]

(12) "polysubstance abuse [of tobacco, alcohol, and marijuana, with some cocaine use], ADHD (combined type), and anxiety disorder," with average to high average intelligence (age sixteen);[436]

(13) BIPOLAR DISORDER (age sixteen).[437]

Dr. Ramage did not notify the district of her bipolar disorder (BPD) diagnosis until January 1998. The court summarized Dr. Ramage's trial testimony concerning her BPD diagnosis:

> She originally diagnosed Tiffiney with ADHD, but later opined that Tiffiney probably fell within a subset of persons who exhibit ADHD-like symptoms but are actually bipolar. Dr. Ramage said that this diagnosis was verified when she accidentally provided Tiffiney medicine meant to treat her ADHD symptoms but actually precipitated a manic episode. It was one of these manic episodes which resulted in Tiffiney's expulsion from Benton Hall. Dr. Ramage opined that

> Tiffiney met the criteria for a finding of Emotionally Disturbed which entitled her to additional assistance with school and placement. Additionally, Dr. Ramage stated that Tiffiney was the most impulsive person she had ever met. She stated that after Tiffiney was hospitalized for a second time, that Tiffiney was suffering from an inability to learn and that she would require tight supervision, frequent redirection, and a lot of structure.
>
> Dr. Ramage also detailed behavior that supported her diagnosis of bipolar. This includes extremely impulsive behavior, such as sitting in a car at a stop light and striking up a conversation with a man in the next car, chasing a car that cut her off in traffic onto a dark road, running away to Florida with a guy she barely knew, and having a loaded gun at school for no apparent reason.[438]

Importantly, although she lived in the Davidson Metro School District, Tiffiney did not attend public school any time from pre-kindergarten through approximately age sixteen.[439] While Davidson Metro performed evaluations and found her ineligible for special education services when Tiffiney was approximately ages fourteen and fifteen,[440] the case does not suggest that Tiffiney ever attended Davidson Metro schools. The Davidson Metro School District last found Tiffiney ineligible in June 1997, when she was fifteen years old.[441]

The case indicates that, after Benton Hall expelled Tiffiney, "she enrolled in Williamson County's Page High School" in another Tennessee county.[442] Her eligibility team in Williamson County found her eligible for services as an "emotionally disturbed" and learning disabled student.[443] She appears to have attended Page High School for only a brief period of time, as she was hospitalized at Vanderbilt University in January 1998 and, shortly thereafter, admitted to a substance abuse treatment center in June 1998.[444]

The hearing officer found that Tiffiney was not a child with a disability eligible for special education and related services.[445] Importantly, however, the hearing for this matter occurred in July 1996, prior to Tiffiney's diagnosis of BPD. Once it proceeded to trial, the court granted Tiffiney's parents the right to present Dr. Ramage's diagnosis and all that occurred post-July 1996.[446]

It was based on this diagnosis that the district court found Tiffiney to be a child with a disability eligible for special education and related services. The court held that she should have been found eligible in June 1997 by the Davidson City Metro School District at the time that district made its final ineligibility determination.[447] This is in spite of the testimony by Dr. Ramage that she did not notify the district of her BPD diagnosis until January 1998.[448] The court ruled that, "[w]hen considered as a whole – however murky and conflicting – the preponderance of the evidence indicates that Tiffiney then suffered from an Emotional Disturbance as defined under the IDEA."[449]

After reviewing the federal criteria for qualifying as a child with a serious emotional disturbance[450] in light of Dr. Ramage's diagnosis and testimony, the court ruled:

> Dr. Ramage's testimony, however, indicated that Tiffiney's behavior was, indeed, related to an underlying emotional disorder. She testified that Tiffiney had many traits that were consistent with ADHD, but that in actuality she was bipolar. She testified, "There are a subset of children who look very ADHD-like as little kids, who don't respond well to typical ADHD interventions, behavioral, educational, medication, maybe, who if you follow them into adulthood they were not probably ADHD at all. They were probably bipolar."[451]

The court found these "sequence of events [to] aptly describe[ ] Tiffiney's situation," as follows:

> As early as 1989, Dr. Blair indicated that Tiffiney suffered from ADD. In December 1993, Dr. Tramontana characterized Tiffiney as distractible and impulsive, but noted that his findings "were not entirely consistent with ADHD." He concluded, however, that Tiffiney required services in school that "most closely resemble the needs of an ADHD child." By 1997 Dr. Hersh noted that a diagnosis of ADHD was reasonable given Tiffiney's positive, although not, overwhelming response to Ritalin. Dr. Blair also indicated that she thought Tiffiney suffered from ADHD, despite qualifying the diagnosis as mild ADHD in deference to the conflicting evaluations of Tiffiney.[452]

In finding that Tiffiney qualified for special education, the court held:

> Thus, Tiffiney fits the profile described by Dr. Ramage: ADHD-like symptoms which do not respond well (although somewhat positively) to typical treatment such as Ritalin. When the observations of Tiffiney's inappropriate behavior are combined with Dr. Ramage' persuasive diagnosis of bipolar disorder and opinion

> that her behavioral patterns result from this disorder, Tiffiney clearly demonstrates one of the characteristics indicative of an emotional disturbance.[453]

The court next determined whether or not Tiffiney's behavior satisfied the duration and degree requirements of IDEA.[454] Because the parties did not "seriously" contest these requirements, the court did not analyze them, stating simply, "[c]ertainly, the record demonstrates severe behavioral problems over the course of Tiffiney's lifetime."[455]

Finally, the court considered whether Tiffiney *required* special education and related services. It agreed that the evidence indicated her academic progress. Where the court disagreed, however, was with Tiffiney's ability to remain in school. Without acknowledging the limited time Tiffiney spent in public school, the court stated: "She has been expelled from both Goodpasture and Benton Hall. This inability to remain in school while in a regular school environment – or even the more controlled environment of Benton Hall – indicates that Tiffiney's needs were not accommodated within the regular education system."[456]

Based on this determination, the court held that Tiffiney's parents were entitled to tuition reimbursement of $7,000.00 (and $140.00 in transportation) for the 1996-1997 school year.[457] In so awarding, the court reasoned that "[e]quity prevents reimbursement of costs accrued prior to [Davidson] Metro having a chance to evaluate Tiffiney and determine what was best for her – particularly where the record does not indicate that the Johnsons provided [Davidson] Metro with the opportunity to educate Tiffiney."[458]

d. *Butler v. Evans* (7th Cir. Aug. 31, 2000).

In *Butler v. Evans*,[459] the Seventh Circuit distinguished the Supreme Court's holding in *Cedar Rapids v. Garret F., supra,* finding that a schizophrenic student's (Niki's) "hospitalization was not an attempt to give her meaningful access to public education or to address her special educational needs within her regular school environment."[460] The court continued that "[t]his is

not a case in which the disabled student needed medical assistance to remain in regular school; Niki was committed to a psychiatric hospital. . . [E]ducation was not the purpose of her hospitalization."[461] In contrast to the in-school nursing in *Cedar Rapids*, "Niki's inpatient medical care was necessary in itself and was not a special accommodation made necessary only to allow her to attend school or receive education. The IDEA does not require the government to pay for all the additional services made necessary by a child's disability, and it specifically excludes medical services except those 'for diagnostic and evaluation purposes only.'"[462] The court ruled that "Niki's hospitalization was a medical service extending beyond diagnostic and evaluation purposes and thus excluded from reimbursement by 20 U.S.C. § 1401(22)."[463]

e. *Board of Education of Frederick v. J. D.* (4th Cir. Oct. 26, 2000).

In *Board of Education of Frederick County v. J. D.*,[464] the Fourth Circuit agreed with the school district that a student (J. D.) diagnosed with bipolar disorder (BPD), obsessive-compulsive disorder (OCD), ADHD and cannabis abuse was not a "child with a disability" eligible for special education and related services.

J. D. attended high school in Frederick County, Maryland. During his ninth grade year, he took honors courses but received "lackluster" grades.[465] He began smoking marijuana, engaging in "disruptive classroom behavior," fighting, and making "disrespectful comments to teachers."[466] During this school year his doctor diagnosed him with BPD, ADHD, and OCD, and prescribed medication for these conditions.[467] J.D.'s parents did not share his medical diagnoses with the school district either during his ninth or tenth grade years.[468]

At the beginning of his tenth grade year, J. D. "physically attacked his therapist."[469] He was hospitalized for six days in a psychiatric hospital and participated in an outpatient therapeutic program for four weeks.[470] Additionally, he attended a drug program for six

months.[471] He performed well in his honors courses, earning a "most improved student" award.[472]

By May of his tenth grade year, J. D. was using drugs again and "engaging in aggressive, defiant behavior."[473] His grades declined significantly, but he passed all of his honors courses.[474] At no time did the school district evaluate J. D. for special education eligibility.[475]

During the summer before the eleventh grade, police arrested J. D. for assaulting three police officers.[476] He was frequently "truant" during eleventh grade and, on September 19th of that year, he was admitted to a psychiatric hospital.[477] The doctors "acknowledged [J. D.'s] daily marijuana use" and discussed his parents' intent to place him at a "therapeutic boarding school."[478] Thereafter, J. D.'s parents unilaterally removed him from the school district and enrolled him in the Grove School, a therapeutic residential school in Connecticut.[479] Except for a short hiatus when J. D. attended a residential drug treatment program in Utah, J. D. attended his eleventh grade year at Grove School.[480]

J. D. reenrolled in the school district for his senior year, and his parents filed a due process complaint alleging that the district failed to identify J. D. as a disabled child eligible for special education and related services and such failure denied J. D. a FAPE.[481] The district court reversed the administrative law judge's decision, instead upholding the school district's determination that J. D. was not a "child with a disability" eligible for special education and related services under IDEA.[482] "[R]elying upon J. D.'s history of drug involvement, the district court held J. D.'s behavior sprang not from an educational disability but rather from social maladjustment."[483] Without discussion, "on the reasoning of the district court," the Fourth Circuit upheld the district court's decision.[484]

f. *Jennings v. Fairfax County School Board* (4th Cir. July 16, 2002).

In *Jennings v. Fairfax County School Board*,[485] the Fourth Circuit held that Kendall Jennings' parents were not entitled to "reimbursement for the noneducational costs of [her] five-month stay at a private psychiatric facility and three years' tuition at a private boarding school."[486] Kendall attended Fairfax County Public Schools in northern Virginia. She had been diagnosed with many emotional disabilities, including bipolar disorder (BPD), obsessive-compulsive disorder (OCD), and "severe" ADHD and was eligible for special education and related services as a student with an emotional disturbance.[487] Pending development of her IEP, she had an "emotional breakdown" and was admitted to Graydon Manor Psychiatric Hospital in Leesburg, Virginia.[488] The team decided to continue the IEP meeting once doctors discharged Kendall from Graydon Manor.[489] The school district paid for the educational component of Kendall's care at Graydon Manor.[490]

In September 1997, Kendall's parents removed her from Graydon Manor and enrolled her in the Hyde School, a private residential school located in Bath, Maine.[491] "Although geared in many ways toward students with behavior problems, the Hyde School offered no special education program, no on-site clinical personnel, and no certified special education instructors."[492] In was not until November 1997 that Kendall's parents notified the district of her enrollment and requested reimbursement of her approximately $25,000.00 in annual tuition. At that time, the district scheduled another IEP meeting.[493]

The school district proposed an IEP placement at a private day school "offering a full-day, non-residential educational program, smaller class sizes, and on-site clinical personnel" rather than residential placement at the Hyde School.[494] After the meeting, Kendall's parents visited the private day school and objected to it on the grounds that it lacked "the same

opportunities for college-track classes and interscholastic sports" available in regular public high school and that her classes "would be comprised almost entirely, if not exclusively, of special education students."[495] Thereafter, Kendall continued her education at the Hyde School. Her parents filed a due process complaint alleging the district's failure to propose a FAPE and requesting reimbursement for Kendall's noneducational expenses while at Graydon Manor and the cost of her tuition, room, board, and expenses at the Hyde School.[496]

Because Kendall never completed her senior year, the school district convened another IEP meeting where it proposed her placement at the Woodson Center, a program facility "located adjacent to and as part of a local FCPS high school."[497] The parents rejected this IEP, even though the Woodson Center "provided college-track Advanced Placement classes at the high school co-facility, a special education program for students with disabilities, and clinical personnel; the IEP team also felt it would provide an appropriate transition from the residential school to a larger college setting."[498]

The case proceeded to a due process hearing, then to the district court of the eastern district of Virginia, and finally on appeal to the Fourth Circuit. Finding in favor of the school district on all counts, the Fourth Circuit first ruled that "FCPS, with the parents' participation, properly decided to wait until Jennings was stabilized and discharged from Graydon Manor before making a placement decision and that FCPS adequately identified a school placement for Jennings when it proposed in writing a 'private day school' at the December 1997 IEP meeting."[499]

Next, citing the district court's decision, the Fourth Circuit held that "the private day schools offered 'small classes, extensive individual attention, structure and clinical support, experienced staff trained in special education and emotional disabilities, and many advanced

level mathematics, science and foreign language courses.' Similarly, the Woodson Center offered 'clinical support, advanced level college preparatory classes, the opportunity for a smooth transition from a small residential setting to a larger college setting, and a special education program designed for students with emotional disabilities.'"[500]

The court denied reimbursement to the parents. Again citing to the district court decision, the Fourth Circuit concluded that the "[p]arents were not entitled to further reimbursement for the cost of [Kendall's] hospitalization at Graydon Manor because the IDEA requires only reimbursement for appropriate educational services and because 'it is undisputed that FCPS reimbursed the [parents] with $8,440 for the educational services [Kendall] received from Graydon Manor. The [parents] point to no evidence which indicates that Graydon Manor provided [Kendall] with education services which exceeded this amount.'"[501] The court also denied reimbursement for Kendall's tuition at the Hyde School on the grounds that the school district's IEP provided a FAPE.[502]

g. *Arlington County School Board v. Smith* (E.D. Va. Nov. 14, 2002).

In *Arlington County School Board v. Smith*,[503] the district court for the eastern district of Virginia, overturning a hearing officer decision,[504] held that the school district's proposed placement for Jane, a student with bipolar disorder and ADHD, at its Interlude School, discussed *infra*, provided a FAPE. The district court agreed with the hearing officer that Jane was not entitled to reimbursement for her placement at a private, residential school (The Fenster School, also discussed, *infra*) because "no expert psychological testimony attest[ed]"[505] that Jane received educational benefit from such placement.[506]

As with each case discussed herein, Jane's story is quite heartwrenching. At the time of the case, Jane was seventeen years old and a senior in high school.[507] Doctors diagnosed Jane as

having ADD and bipolar disorder (BPD) in 1998, when she was in the seventh grade, at which time Arlington County Public Schools (APS or "the district") initially found her eligible for special education services.[508] "During that year, she made suicidal gestures and was hospitalized for psychiatric treatment. Her bipolar disorder caused her to experience cycles of depression, which made it difficult for her to complete school assignments in a timely manner."[509] Jane's seventh grade IEP required regular academic classes with a "qualified special education monitor." Under this IEP, Jane earned "average to above average grades in her classes."[510] Consequently, her IEP remained the same for both eighth and ninth grade years (1998-1999 and 1999-2000).[511]

In Fall 2000, Jane began the tenth grade at Yorktown High School, where her IEP team reviewed her IEP. "Given her past academic success while receiving no special education services apart from monitoring, the IEP team proposed that Jane continue to attend regular education classes,[512] and, in addition, receive one half hour of special education services per week in the form of an organizational skills class."[513]

Tragically, Jane experienced some "emotional difficulties," attributed somewhat "to her mother's hospitalization for heart surgery, [and mostly] to her traumatic experience as the victim of a sexual assault by a fellow student at school," for which doctor's diagnosed Jane with having post-traumatic stress disorder (PTSD).[514] Even given these tragic experiences, Jane continued to "achieve passing grades in her classes."[515]

During her tenth grade winter break, however, Jane self-mutilated herself by cutting her legs and arms.[516] She attempted suicide twice, leading to a four-week hospitalization at Dominion Hospital, a psychiatric hospital in Virginia, in January 2001.[517] Dominion provided

some class time, so Jane completed a few assignments and her grades were transferred to Yorktown High School,[518] though she was "much behind" in her classes.[519]

When she returned, Jane was frequently absent from school. Her parents "attributed Jane's poor attendance to her medication, which made her sleepy in the morning. . . . They were very concerned about Yorktown's ability to monitor closely Jane's attendance, especially in light of Jane's continued self-mutilation and suicidal thoughts."[520] A few weeks after Jane arrived back at Yorktown, the IEP team revised her IEP to include continued education in general education classes, but added access to APS's "Interlude" program, conveniently located on Yorktown's campus.[521] Per the facts in the case:

> Interlude [was][522] an "intensive alternative education program for students whose serious emotional problems and disruptive behaviors interfere with academic achievement and interpersonal relationships." This program include[ed] a therapeutic component; students receive[d] therapy once a week [with Dr. Eva Lilienthal], and ha[d] access to additional therapists who work[ed] with Interlude full-time. Interlude, APS's only therapeutic program for emotionally disturbed students, ha[d] up to thirty students, with a maximum of ten students in each classroom. A teacher and an assistant [were] assigned to each classroom. The small class size allow[ed] for individualized instruction where students [could] take any general education class, including Advanced Placement classes. Because the general education classes [were] individually tailored to each Interlude student, it [was] possible for Jane to progress faster than the students in the general education setting. Interlude use[d] the same textbooks that [were] used in the general education setting. Finally, Interlude monitor[ed] student attendance more closely than Yorktown usually [did] for its general education students. If an Interlude student [did] not arrive at school, the staff [would] promptly contact her parents to determine her whereabouts. In appropriate circumstances, the staff [would] also contact the police officer assigned to Yorktown to locate the student.[523]

Notwithstanding her revised IEP, Jane's academic performance and attendance declined.[524] She failed to attend make-up sessions, did not seek the available help for missed homework assignments,[525] and began associating herself with other suicidal and depressed students.[526] Her parents believed she needed more intensive interventions,[527] which the school

district opined that she needed to utilize the interventions (namely, Interlude) that were in place.[528] Indeed, because of Jane's refusal to attend, Dr. Lilienthal met with her only three or four times for therapy by May.[529] Dr. Lilienthal's end of year psychotherapy report concluded that Jane was not successful in the Interlude partial-placement.[530]

In May and June, Jane made further "suicidal gestures," self-mutilated her arms, and became "increasingly depressed."[531] Jane did not take her final examinations and, at an IEP meeting in summer 2001, her parents requested residential placement at APS's expense.[532] The school district rejected this request and instead drafted a proposed IEP "which called for twenty-six hours of services in Interlude per week [where] Jane would take all of her academic classes, except electives, in Interlude, and also receive one hour of counseling per week."[533] Disagreeing with APS's proposal, the parents filed a due process complaint.[534]

As discussed above, the hearing officer found the district's proposed placement at Interlude to be inappropriate, but did not find that Jane required residential placement. Instead, he found that she needed a private day placement with structured and intensive services for students with emotional disturbances.[535] After the hearing officer issued his decision, Jane's parents unilaterally enrolled Jane in Fenster School, a residential school in Arizona.[536] The school district believed the parents had assumed funding for her residential education, so it withdrew her from APS enrollment.[537] It also appealed the hearing officer's ruling.[538]

Jane excelled academically at Fenster and improved emotionally and socially as well. The court presumed her completion of high school at Fenster in its decision.[539]

The court applied the *Rowley* standards to determine whether the school district's 1999-2000 and proposed 2000-2001 IEPs provided Jane with a FAPE.[540] In doing so, it determined

that the hearing officer erred and that, instead, the school district's IEPs were the FAPE.[541] Supporting its conclusions were the following important facts:

(1) The hearing officer failed to defer to the school district's educational experts who "uniformly and consistently testified that Jane would receive educational benefit from her placement in the Interlude program";[542]

(2) Jane's parents "presented no testimony that Interlude was an inappropriate placement for Jane";[543]

(3) The hearing officer improperly concluded "that Jane would not be successful in Interlude 'because she has a strong desire not to be in the program' . . . [even though] the record reflects that many students assigned to Interlude begin the program in Jane's frame of mind . . . but then, with the aid of Interlude staff, overcome this aversion over time;"[544]

(4) "The effect of the hearing officer's failure to acknowledge this evidence is to allow the student to dictate the placement, a strategy that is unlikely to lead to an educationally appropriate result;"[545]

(5) The hearing officer erred in finding "that Jane would not succeed in Interlude because 'she has already met and dealt with the personnel and failed both academically and therapeutically'";[546]

(6) The hearing officer improperly found "that Jane's experience with Dr. Lilienthal meant she would not benefit from Interlude therapy, . . . [flying] in the face of the uncontroverted evidence that Interlude's specialized staff, including Dr. Lilienthal, would provide Jane with far more therapeutic support for her emotional problems than she received under her prior IEP";[547] and

(7) Despite "no expert psychological testimony," the hearing officer relied on an unsupported factual finding[548] to legally conclude that "Interlude's many benefits (small class size, structured academic setting, and specialized therapeutic component) could not be outweighed by Jane's 'self esteem problems associated with mixing in the public school environment [that] includes a vast body of regular education students and a small body of special education students.'"[549]

With these factual and legal findings in mind, the court held that "APS's proposed placement of Jane in the Interlude program would provide her with a FAPE because it was 'reasonably calculated to enable [her] to receive educational benefit.'"[550] Accordingly, the court rejected the hearing officer's conclusion that Jane required a private day school placement: "Not only was it the unanimous expert opinion of all the APS witnesses that Jane be placed in Interlude, but the [parents] themselves called no expert witnesses to testify that Jane needed to be in a private, day facility."[551] The court found it "apparent that the hearing officer succumbed to the temptation, which exists for judges and hearing officers alike in IDEA cases, to make his own independent judgment as to the best placement for Jane, instead of relying on the record evidence presented in the hearing."[552]

h. *Arseneault v. Prince William County School Board* (4th Cir. Nov. 26, 2002).

In *Arseneault v. Prince William County School Board*,[553] the Fourth Circuit held that the appropriate placement for a disabled child with "schizoaffective bipolar disorder," panic attacks, OCD, and ADHD was the school district's PACE West psychoeducational day school.[554] Because of his conditions, the student "took nine different medications, causing him often to fall asleep in class on forty-two different days." When he was awake, "he was disruptive and frequently sent to 'reorientation room,' even going there on his own volition." Due to his

excessive drowsiness, the student's IEP team requested his psychiatrist to adjust student's medications. The psychiatrist agreed.

The student attended PACE West but allegedly feared for his safety. Moreover, he continued to sleep and was not making adequate progress. Consequently, his parent removed him from PACE West and requested another IEP meeting.

The IEP team met, developed a new IEP, and concluded that student continued to require a small, public day school with behavioral supports and high degree of structure, as well as counseling to address social and emotional goals. The parents did not agree with the proposed IEP and requested that student be transferred to home school or placed in a private day school at public expense.

In a per curiam, unpublished opinion, the Fourth Circuit upheld both the district court's and the hearing officer's determination that the school district's placement at PACE West was the appropriate placement.

3. Eleven stories: Cases decided from 2005 to 2008.

Cases involving students with bipolar disorder nearly doubled between 2005 and 2008. The increased number of cases in a shorter period of time is commensurate with the increased number of medical and psychiatric books and articles written about childhood- and teenage-onset bipolar disorder.

a. *Township of Bloomfield v. S. C.* (D.N.J. Sept. 22, 2005).

In *Township of Bloomfield v. S. C.*,[555] the district court for New Jersey upheld a hearing officer's determination that the school district must reimburse student T. M.'s mother for residential placement.

Factually, this case involved a severely emotionally disturbed boy (T. M.) whose diagnoses included "Bi-Polar Disorder, Attention Deficit and Hyperactivity Disorder, Combined Type Learning Disorder, Oppositional Defiant Disorder, Intermittent Explosive Disorder, Mood Disorder, and Sleep Apnea. Medical and psychiatric evaluations suggest T. M. may also suffer from Obsessive-Compulsive Disorder, Conduct Disorder, Post Traumatic Stress Disorder, Attachment Disorder, Tourettes Syndrome, and possible Autistic-like behavior."[556] Furthermore, T. M. "required numerous psychiatric hospitalizations and therapeutic services" from "Clara Mass Medical Center, East Orange General Hospital, Mountainside Hospital, Newark Beth Israel Medical Center, St. Mary's Hospital and Summit Hospital."[557] T. M. also "receive[d] outpatient services at the East Orange Hospital Clinic and Adolescent Psychiatric Services since 2001."[558]

T. M. took "several psychotropic medications to address his behavioral and psychological instability."[559] In January 1999, when T. M. was eight years old, he became eligible for special education and related services as a child with an emotional disturbance.[560] Even during elementary school, the school district disciplined and suspended T. M. for threatening, as well as verbally and physically attacking, other students.[561] T. M. (age ten) began middle school in Fall of 2000. T. M.'s disruptive behavior continued, and, in December 2002 (age eleven), the school district suspended him, placing him on home instruction. Even though the district initially refused to reevaluate T. M., it changed its decision and conducted the reevaluation once he was suspended.[562] At the reevaluation meeting, the district proposed T. M.'s placement at Forest Glen School, a school-district run alternative day school. T. M.'s mother rejected the placement, and the matter went to mediation.[563] At mediation, the district and the mother agreed that the district would search for an out-of-state residential placement for T. M.[564] An IEP meeting followed. At that meeting, the district agreed to provide placement at

High Point School (HPS), "a state-approved [day] school for emotionally disturbed children, located in Lodi, New Jersey."[565] T. M.'s mother agreed to allow him to attend HPS and to thwart her legal pursuit to secure residential placement "unless and until" HPS proved to be inappropriate.[566] Accordingly, his mother stayed the due process hearing request and T. M. enrolled in HPS.[567]

HPS indeed proved inappropriate. While there, "T. M. exhibited poor behavior, refused to do school work, threatened students and staff, and was suspended on several occasions."[568] Because of his aggression, the district transported him individually.[569] In October 2003, T. M.'s mother requested, and the district performed, a functional behavior assessment (FBA)[570] of T. M. In early February 2004, before the IEP team could develop a behavior intervention plan (BIP), HPS expelled him for threatening a teacher.[571] T. M. admitted himself into the hospital for ten days.[572] After his release, the IEP team met to determine T. M.'s next placement. Once again the district proposed Forest Glen, and once again T. M.'s mother rejected this placement and instead proposed an out-of-state, residential placement for him.[573] With this disagreement, T. M.'s mother once again filed a due process complaint.[574] The district court rendered this decision in response to T. M.'s mother's second due process hearing request.[575]

From January 2001 through June 2004, T. M. underwent numerous psychological and educational evaluations from both private and district practitioners. All of them testified at the hearing and recommended that T. M. required residential placement in a highly therapeutic and structured environment.[576] They testified that he required a residential setting that would meet both his emotional and his educational needs.[577]

At the time the case arrived to the district court, T. M. was thirteen years old and attended Kids Peace, a "restricted residential facility located in Allentown, Pennsylvania."[578]

The school district contended that the facility did not serve an educational purpose, that it was "simply a psychiatric treatment facility and thus within the medical exclusion."[579] The court rejected this argument, finding that it was "not supported by the record, given the wide scope the courts have given to required 'related services' and the narrow scope they have given the 'medical' exclusion."[580]

The court quoted the IDEA's definition of "related services" as "transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education."[581] "They include psychological services, counseling, health services, social work services, parent counseling and training and medical services for diagnostic and evaluation purposes."[582] The court found:

> [T]he record reflects the extensive efforts [the district and T. M.'s mother] have made to find a less restrictive environment that would provide a FAPE. All failed. In these circumstances "the program, including non-medical care and room and board, must be at no cost to the parents of the child."[583]

> T. M.'s psychiatric stabilization is a necessary part of his educational program. This is a continuing, interrelated process in which his psychological difficulties and his education continue in tandem. While medical doctors and psychiatrists may diagnose and evaluate T. M. and aides may provide continuing counseling and monitoring, it is part of an educational process. Without the diagnosis and evaluation and without the counseling and monitoring the educational process could not take place.[584]

Applying the Supreme Court's decision in *Tatro, supra,* and *Garret F., supra,* the court held that "T. M's residential placement is necessary for educational purposes. He cannot obtain educational benefits unless his educational program is accompanied by therapeutic treatment. [The district] must pay for the costs of the residential facility including diagnostic and evaluative medical services."[585]

The court ruled that the district failed to propose or draft an IEP that was reasonably calculated to provide a FAPE.[586] "His assignment to the High Point School was a failure, and an

assignment to Forest Glen was no better. At this point there is no disagreement that a component of a FAPE must be a residential facility, such as Kids Peace which T. M. now attends."[587] Accordingly, the court ordered the district to finance T. M.'s Kids Peace placement.

b. *Corpus Christi Independent School District v. Christopher N.* (S.D. Tex. Mar. 31, 2006).

Corpus Christi Independent School District v. Christopher N.[588] once again presented the question of private residential placement[589] versus a less restrictive placement in the school district. The district court overruled the hearing officer's decision, finding that the school district's placement for Chris, a student with bipolar disorder,[590] was the LRE and that the residential placement at Meridell Achievement Center ("Meridell")[591] was too restrictive. "While residential placement may be the optimal place for Chris, the IDEA does not guarantee the ideal program."[592]

The court reiterated the precedent regarding provision of FAPE.

> "The free appropriate public education proffered in an IEP need not be the best possible one, nor one that will maximize the child's educational potential; rather, it need only be an education that is specifically designed to meet the child's unique needs, supported by services that will permit him to benefit from the instruction. The IDEA guarantees only a basic floor of opportunity, consisting of specialized instruction and related services which are individually designed to provide educational benefit."[593]

A parent must demonstrate that the school district's failure to implement the IEP was "'more than [ ] *de minimis*" and, instead, "'that [it] failed to implement substantial or significant provisions of the IEP. This approach affords [districts] some flexibility in implementing IEPs, but it still holds those [districts] accountable for material failures and for providing the disabled child a meaningful educational benefit.'"[594]

The court applied the four *Cypress-Fairbanks, supra*,[595] factors to determine whether or not the school district provided Chris with a FAPE.[596] The "key issues" the court considered

were "(1) whether Chris's IEP [in the district] was the least restrictive environment that still allowed Chris to receive an appropriate education, and (2) whether [the school district] demonstrated that Chris received tangible academic and non-academic benefits from the IEP."[597]

The court reviewed the IDEA's LRE mandate,[598] the Texas regulatory requirement to provide LRE through a "continuum of alternative placements,[599] and quoted *Daniel R. R., supra,* regarding the IDEA's LRE requirement:

> The IDEA does "not contemplate an all-or-nothing educational system in which [disabled] children attend either regular or special education. Rather, the Act and its regulations require schools to offer a continuum of services. Thus, the school must take intermediate steps where appropriate, such as placing the child in regular education for some academic classes and in special education for others, mainstreaming the child for nonacademic classes only, or providing interaction with [nondisabled] children during lunch and recess. The appropriate mix will vary from child to child and, it may be hoped, from school year to school year as the child develops. If the school officials have provided the maximum appropriate exposure to [nondisabled] students, they have fulfilled their obligation under the [IDEA]."[600]

Further, "'schools must retain significant flexibility in educational planning if they truly are to address each child's needs.'"[601] The court held that, "[w]hile Chris's behavior at school was certainly disruptive, there is evidence that assigning a one-on-one aide and perhaps transferring Chris to the vocational program . . . would have been successful."[602] Indeed, "[a]ssigning a one-on-one aide or moving Chris to another high school in the area with a program more tailored to his interests and needs [would have met] the 'continuum of services' requirement imposed on school districts under the IDEA."[603]

The court admonished the hearing officer for "chang[ing] Chris's placement from mainstream education to the opposite end of the continuum in one fell swoop."[604] Contrary to the hearing officer's decision,[605] the court held that "the school district did exactly what it was required to do: propose intermediate changes to Chris's IEP that provided maximum exposure

and interaction with nondisabled students."[606] Supporting its conclusion, the court pointed to the record, which "show[ed] that Chris passed all of his classes in the 2002-2003 school year, that Chris passed his classes in the first nine week grading period of 2004, and that Chris began experiencing a significant academic slump in the second nine week grading period."[607] Additionally, "[t]here was still time for the school district to move further down the continuum of services before taking the drastic step of placing Chris in involuntary residential treatment."[608] Accordingly, the "school district's untested intermediate proposals were the least restrictive environment . . . ."

Regarding the academic and nonacademic benefits provided by the school district's placement, the court found that "Chris's IEP, like Michael's IEP in *Cypress-Fairbanks*, involve[d] access to content mastery classes on request, ignore[d] minor infractions, refrain[ed] from negative feedback, and allow[ed] Chris to cool off when upset. Furthermore . . . Chris [made] progress and reap[ed] academic and non-academic benefits."[609]

The court distinguished Chris's behavior outside of school versus his behavior in school:

> The Court understands that outside of school, Chris has a history of violent behavior and a penchant for running away, that Chris was absent many times and behind in many classes, and that Chris had not been regularly attending his counseling or content mastery classes. Chris's mother testified that she was frustrated that the committee would only tell her how wonderful Chris was doing, despite behavioral incidents including throwing a chair out the window. She also testified that the school was not following the behavior management plan, and rewarding Chris for his bad behavior with gift certificates and positive reinforcement.[610]

Even still, while the school district's placement did not provide Chris with "an ideal level of academic benefits . . . [and] Chris had significant behavioral problems at home," it is clear that Chris made some progress and received "tangible academic and nonacademic benefits under the school district's IEP."[611]

To bolster its decision, the court found that the private residential placement was not appropriate.[612] "The Fifth Circuit has held against public funding where the student's benefit from the educational services in residential treatment was 'equivocal' and where the 'focus was on behavior management' rather than schoolwork."[613] While in at Meridell, Chris continued to have "behavioral problems" and "suffered greatly being away from his home and his friends."[614] He received only four hours of daily education at Meridell, a decision "unilaterally imposed" by Meridell and "not an individualized decision based on his needs."[615] Furthermore, "Chris's IEP at Meridell contained no individually designed Behavior Intervention Plan (BIP), only a one-page form entitled 'Facility Behavior Management Plan' with few strategies specific to Chris's needs"[616] Meridell placed Chris in a "sixth grade level math class, despite the fact that he had already passed tenth grade geometry."[617] Even the therapy sessions provided for Chris at Meridell were mostly unsuccessful. "At times, he was not even allowed to go to school because of his behavioral outbursts."[618]

Finally, the court relied on testimony by Chris's psychiatrist and the district's psychologist. **"**Chris's psychiatrist from Padre Behavioral Center [ ] testified that the residential placement appeared to only have made Chris 'even more angry and alienated.' The district psychologist . . . testified that she felt Chris 'was not really buying into the program.'"[619]

With this analysis, the court held in favor of the school district and reversed the hearing officer's decision, instead finding that the district was not obligated to fund Chris's residential placement at Meridell.[620]

c. *A. E. v. Westport Board of Education* (D. Conn. Nov. 30, 2006).

A. E. v. Westport Board of Education[621] considered whether the school district must reimburse a parent for her child's (A. E.'s) private placement. The court found in favor of the

school district, determining that its IEP provided A. E. with a FAPE and that the parents' placement at a private day school was not appropriate.

Doctors, including prominent BPD scholar and practitioner Dr. Demitri Papolos,[622] diagnosed A. E. with Bipolar Disorder NOS,[623] Communication Disorder NOS, LD NOS, ADHD, and ODD.[624] (As discussed below, the outcome in this case turned on a "battle of the experts,"[625] pitting Dr. Papolos against the school district's expert witnesses.) The school district found A. E. eligible for special education and related services as a child with a "serious emotional disturbance" in February 2002.[626] A. E. attended his home middle school, but did not "adjust well."[627] In October 2002, the parents and the district agreed to transfer A. E. to Loraine D. Foster Day School, "a state approved special education day school in Hamden, Connecticut," where he made "substantial progress" in sixth and seventh grade.[628] Thereafter, the parents and the district engaged in discussions regarding the next appropriate placement for A. E. The school district recommended three programs, including the Cooperative Education Services ("CES") therapeutic school run by the state. The parents contended that Woodhouse Academy, a private day school, was the only appropriate placement for A. E.[629] While the parties each agreed that A. E. required a therapeutic day placement,[630] the parties never agreed on the actual school he would attend.[631] "A. E.' s parents sent [him] to Woodhouse Academy for the 2004-2005 school year and requested a due process hearing pursuant to the IDEA to recoup the private school costs."[632]

"Central to the issues presented for review is CES's ability to meet A. E.'s educational needs as defined in A. E.'s IEP."[633] Citing the school district's expert witnesses, the court described CES as a "115-student regional public school dedicated to educating children with emotional and behavioral difficulties and preparing students to return to a public school within

their local school districts."[634] Of the 115 students, twenty-five had BPD.[635] No more than eight students comprised each class and all teachers maintained special education certification.[636] "CES also ha[d] the full complement of necessary personnel, including social workers, psychologists, counselors, physical therapists, occupational therapists, speech and language pathologists, and a school nurse. The psychologists [were] qualified to conduct Functional Behavioral Assessments, and train[ed] the staff in behavioral intervention techniques."[637] Every student received individual and group counseling. Furthermore, "CES ha[d] a specific social skills curriculum and use[d] behavior intervention techniques that [were] specifically tailored to students with [severe emotional disturbances], including the point-and-level feedback systems, physical management techniques, time out areas, 'take space' areas in classrooms, and counseling by experienced staff."[638]

The hearing officer and the court valued the school district's expert witnesses' recommendations about the appropriateness of the CES program over Dr. Papolos' recommendations:

> Dr. Papolos, a psychiatrist and director of research for the Juvenile Bipolar Research Foundation, treat[ed] A. E.'s bipolar condition. Dr. Papolos, however, ha[d] never visited CES and only [knew] about the school through second-hand accounts from patients and from reading the CES brochure. Dr. Papolos testified that he did not think CES' behavioral management policies would [have been] effective because A.E., when challenged, "[would] very likely become more disruptive." He expounded that placing A.E. at CES would lead to "catastrophic behaviors" and that A.E. would "probably refuse to go to school" because he would "be miserable." Moreover, A.E. "wouldn't be able to learn." Dr. Papolos commented that he could "predict easily in advance" that A.E. would not [have] succeed[ed] at CES.[639]

In contrast, the school district witnesses testified that CES could provide an appropriate education for A. E., including "appropriate behavioral intervention and educational programs catered to A. E.'s particularized needs. On that specific point, the Board's experts were far more

knowledgeable."[640] The court did not find the private placement inappropriate; however, because twenty-five of the one hundred fifteen children in CES had BPD, the court held that the school was "capable of educating students who have disorders similar to A. E.'s."[641] Given that CEC would have provided FAPE to A. E., "the Board is not required to reimburse the parents for the cost of what may have been an even better educational opportunity for A. E."[642]

d. *C. G. v. Five Town Community School District* (D. Me. Feb. 12, 2007).

In *C. G. v. Five Town Community School District*,[643] the district court for Maine addressed whether a student (A. S.) with bipolar disorder required residential placement for provision of FAPE. The court found in favor of the district, holding that its proposed IEP provided FAPE and it was not responsible for funding A. S.'s residential placements.

The facts in this case are difficult to read. When A. S. was a toddler, "she was repeatedly sexually, physically and emotionally abused [for nearly six months] by a thirteen-year-old male babysitter. [citation omitted]. After A. S. informed her parents of the abuse in August 1994, they notified authorities and ensured that she received weekly psychological counseling for the next three years."[644] Despite her traumatic early years, A. S. was moderately successful in public elementary and middle school.[645] Academically, while she did not meet her parents' expectations,[646] her work matched her ability as evidenced by standardized test scores.[647]

During the summer of 2003, A. S.'s mother "noticed scratch marks on A. S.'s forearms."[648] A. S. "balked at performing her summer job as a camp counselor and began to fly into rages when interacting with her parents."[649] Still, school district officials had not noticed any of the problems that A. S.'s family experienced with her at home.

In Fall 2003, A. S. entered ninth grade in a district high school. During the first semester, "A. S. became increasingly oppositional and angry. Her mother found evidence that she had

begun smoking cigarettes and marijuana and drinking alcohol. A. S. abruptly quit the swim team, which had been a long-term interest of hers, after just one workout."[650] Sadly, "A. S.'s first suicide attempt (ingesting a half bottle of ibuprofen) occurred in November 2003 . . . . Her first-quarter grades were English, C-, Global Science, C-, Health, D, Integrated Math, F, Latin, D-, Physical Education, C, and World History, C."[651] In December 2003, A. S. began therapy with Dr. Linda Vaughan.[652] "A. S. presented as an agitated, depressed, risk-taking adolescent. She also had symptoms of post-traumatic stress disorder ("PTSD"), including difficulty sleeping, outbursts of anger, difficulty concentrating, poor school performance and significant disruption to the family as a result of her behavior."[653] In contrast, her teachers found her to be happy, engaged, friendly, and a little disorganized – in short, a typical freshman.[654]

Exacerbating her childhood trauma, in December 2003 – when A. S. was in ninth grade – her science teacher announced that her childhood abuser (the teacher's former student) would be a guest speaker in the class the following Monday.[655] The teacher was not aware the guest speaker "had sexually abused A. S. more than ten years earlier. When A. S. learned that her childhood perpetrator was to be a guest speaker in her class, she became hysterical and called her father."[656] While A. S. cried uncontrollably to her parents, her teachers "did not observe her to be in distress, either at the time the incident occurred or after Christmas break."[657]

For two days after the incident, A.S. called a "suicide hotline" on her cell phone.[658] Additionally, "A. S. became oppositional and violent, breaking doors and kicking in walls at home. During this time, she was threatening to kill herself, prompting her parents to hide or secure all the knives, medication and alcohol in the house. Once, A. S. even attacked her mother with a barbecue skewer."[659] Consequently, her parents took A. S. for examination by her

pediatrician, Dr. Susan McKinley. At this time, Dr. McKinley diagnosed A. S. with "PTSD, depression and anxiety and prescribed Prozac for her."[660]

In January 2004, "Dr. Vaughan tentatively diagnosed [A. S.] with PTSD, oppositional defiance disorder ("ODD"), major depressive disorder and rule-out attention deficit hyperactivity disorder ("ADHD") or other learning disorder."[661] Dr. Vaughan recommended that A. S. enroll in a residential therapeutic treatment facility that "specialized in teenagers with similar issues, inasmuch as '[i]t was quite apparent that her parents and her family were not in a position to man[a]ge her behavior and mental health issues[,] and [Dr. Vaughan] did not feel that she could be treated on an outpatient basis.'"[662] Dr. McKinley advised A. S.'s parents not to leave her alone.[663]

A. S. completed the first semester with "very poor" and some failing grades.[664] Moreover, by January 2004 A. S. "routinely refus[ed] to attend school and often would not even get out of bed. Her parents had to physically drag her to the high school on the days she attended that month."[665] In late January, "[f]earing for their safety, the [p]arents stopped physically forcing her to attend school. Thereafter, A. S. attended school for only two or three days within a two-week period."[666] Contrarily, while she had trouble completing her homework, her behavior and emotions at school were otherwise unremarkable.[667]

On January 30, 2004, the local police informed A. S.'s parents that she was "reportedly drunk."[668] The parents took her to the emergency room where A. S. said she had "taken her father's Adderall."[669] Her drug test revealed alcohol and amphetamines in her system.[670]

In summary, during her ninth grade year, doctors diagnosed A. S. with BPD, PTSD, ADHD, mild cognitive dysfunction, mild LD, clinically significant levels of depression, acting-out behavior, potential for drug/alcohol use, inattention, hyperactivity, impulsivity, mood

lability.[671] A. S. took anti-depressants on an irregular basis, sometimes outright refusing to take the medications.[672]

During the end of January, the parents notified the district of A. S.'s recent diagnoses.[673] "As of this point, no one from the [d]istrict had made any mention to the Parents about special-education rights or the potential availability of services under section 504 of the Rehabilitation Act . . . and the [p]arents were not otherwise aware of those rights or services."[674]

In February 2004, the parents inquired about placing A. S. in a residential facility at school district expense.[675] The district explained that A. S. must be eligible for special education services before pursuing placement, to which A. S.'s mother responded that "her daughter was very defiant, but not special education."[676]

The parents and the district first met to discuss special education eligibility on March 3, 2004.[677] The district was uncomfortable deciding eligibility that day because it had not evaluated A. S. itself and because none of her teachers felt she exhibited actions (or inactions) warranting eligibility.[678] The parents consented in writing for the district to contact A. S.'s doctors and therapists, and understood that the district would follow-up with a request for consent to district evaluation.[679] The district did not contact A. S.'s physicians; it proceeded to gain consent for its evaluators to test A. S.[680]

The parents received the consent to evaluate form on March 10, 2004, but the parents were searching for residential placements and did not execute the form.[681] On March 16, 2004, A. S. enrolled at Moonridge, a "small residential program for teenage girls in Utah."[682] The parents did not notify the district of A. S.'s Moonridge placement until March 29, 2004.[683] They did not return the signed consent to evaluate form until March 31, 2004.[684] The school district explained to the parents that it could not evaluate A. S. while she attended school in Utah, but

that it was "eager and ready to move forward with the referral process."[685] The district requested that the parents tell them when A. S. was in Maine and that it would "make every attempt, even during this summer, to have one of our school psychological service providers available to do the required assessments."[686] The court found the parents at fault for failing to make A. S. available to the district for evaluation, and that the district had committed no procedural or substantive error.[687]

When admitted to Moonridge, the intake clinical psychologist noted A. S.'s "feelings of anger and opposition and low expectations for herself," but that she "experienc[ed] very little emotional discomfort" and her "depression was not in the clinically significant range."[688] While at Moonridge, A. S. progressed, becoming more "organized and motivated and earning good grades because she received the structure and support she needed."[689] She became "invested in the therapeutic program," improving in her "counseling . . . academic and social" goals.[690] Upon discharge on December 30, 2004, she had met all of her emotional, behavioral, and academic goals.[691]

From January through April 2005, A. S. attended Kents Hill, a private day school in Maine.[692] A. S. "did well socially" but "did poorly academically because Kents Hill did not offer adequate structure and supervision."[693] Furthermore, Kents Hill did not provide A. S. with special education services.[694] When A. S. became too tired to attend class, her parents withdrew her from Kents Hill.[695] Importantly, the parents never notified the district of A. S.'s discharge from Moonridge or her enrollment and withdrawal from Kents Hill.[696]

Between May and July 2005, Laura Slap-Shelton, Psy.D., evaluated A. S.

> [Dr. Slap-Shelton] diagnosed A. S. as having bipolar disorder and PTSD, and thought that A. S.'s earlier sexual abuse precipitated the decline in her mental health. [citations omitted]. In addition, she assessed A. S. as suffering from ADHD, mild cognitive dysfunction and mild learning difficulties. [citation

> omitted]. She considered A. S. to have clinically significant levels of depression, acting-out behaviors, rebelliousness and potential for drug and alcohol abuse, as well as significant symptoms of inattention, hyperactivity, impulsivity and mood lability. [citation omitted]. In her opinion, A. S. regressed after leaving Moonridge and, without appropriate supports, was at risk for alcohol and substance abuse, suicidal activities, and school failure. [citations omitted]. To avoid further relapse, Dr. Slap-Shelton recommended a structured residential educational and therapeutic placement. [citation omitted]. She felt that A. S. needed a highly structured setting with trained staff and small classes to be successful at school. [citations omitted]. She made seven clinical and eighteen academic recommendations for A. S.[697]

At the end of June 2005, A. S. began receiving therapy from Jennifer Miller, M.D., a "psychiatrist specializing in adolescents, for therapy and psychopharmacology."[698] Dr. Miller similarly diagnosed A. S. with BPD.[699]

On September 2005, the eligibility team met.[700] Drs. Slap-Shelton and Miller participated by teleconference.[701] Notably, on this day, the parents still had not presented A. S. for evaluation by the district, but they ultimately allowed the district's psychologist, Dr. McCabe, to perform a restricted evaluation of A. S.[702]

Dr. McCabe "did not believe A. S. needed a therapeutic residential placement to progress educationally and thought her needs could be met either in the mainstream classroom or in an alternative or day-treatment placement."[703] Further, he counseled that "any program for A. S. [must] have a life-skills component to assist her in coping with and managing her life-stress and mental-health issues and accessing services before she reached crisis stage."[704] Without a life-skills component, Dr. McCabe cautioned that A. S. "'is grossly at risk for developing further problems that will significantly diminish her chances for adequate post secondary opportunities such as college, vocational, and life adjustment.'"[705]

On October 12, 2005, the eligibility team found A. S. eligible for special education services as a child with an emotional disturbance.[706] The IEP team created an IEP for A. S., which included the following components:

> Classroom Modifications: create a non-threatening learning environment where it is safe to ask questions and seek extra help, teachers need to be aware of Bi-Polar symptoms as well as how does [A.S.] manifest her Bi-Polar symptoms, verification of understanding, access to teacher notes, crisis plan if [A.S.] has anxiety at school. It would be useful to include Dr. Miller for this....
>
> Behavior Strategies -- Identify target areas for positive behavior support plan with Jennifer Miller.[707]

The team did not establish A. S.'s placement at this meeting, and agreed to meet again for placement determination.[708] The district believed that the parents agreed with the IEP's components:[709]

> The IEP document provided special-education instruction or support for eighty minutes per day, [citation omitted], or one-quarter of A. S.'s school day, [citation omitted]. A. S. would not have had an educational technician or other support person assigned to her during the remaining three-quarters of the school day; the District did not feel it was necessary. [citations omitted]. The IEP document also provided for psychiatric consultation monthly or "as needed." [citations omitted]. It stated that A. S., along with her psychiatrist, would assist in development of a behavior-support plan. [citations omitted]. The IEP document incorporated many of the specific educational recommendations made by Dr. Slap-Shelton. [citations omitted]. It contained four educational goals: (i) to develop strategies to improve organizational skills in order to maintain passing grades, (ii) to develop a positive support plan with assistance from A. S.'s psychiatrist and school staff so that A. S. could identify stages of her current functioning and acceptable strategies to use for each, (iii) to achieve and maintain passing grades (and address some mild delays noted in Dr. Slap-Shelton's evaluation), and (iv) to comply with the school attendance policy.[710]

Following the October 12, 2005 IEP meeting, A. S.'s father visited the Zenith School, one of the placements proposed by the district.[711] He also visited the F. L. Chamberlain School ("Chamberlain"), a "therapeutic boarding school in Middleboro, Massachusetts that focuse[d] on students with ADHD and bipolar disorder."[712] Comparatively, "Zenith ha[d] twenty-four

students who attend[ed] it for either a full or a half day, some of whom ha[d] attention-deficit problems and at least one of whom ha[d] a significant mental-health diagnosis. It [was] a structured, supportive, nurturing program."[713] Students attended group sessions with a licensed social worker.[714] The Zenith director opined that A. S. "would fit in well there," but her father "was concerned that the program lacked sufficient structure for his daughter."[715]

On October 20, 2005, the IEP team met again to determine A. S.'s placement.[716] "The team did not discuss the proposed IEP at all."[717] Thwarting the process, the parents "continued to insist on a therapeutic boarding school, while the rest of the [eligibility team] felt that A. S. could be educated in a public-school setting and felt that the Zenith program would be a good fit for her. The [p]arents then notified the [district] that they would be seeking a unilateral private residential placement for A. S. and requesting reimbursement from the District for it."[718]

In late October to early November 2005, a hearing officer entertained the parents' complaints and request for reimbursement for residential placement.[719] In December 2005, the hearing officer decided in favor of the school district on all counts, "ruling that the District (i) did not violate its child-find obligation or its obligations to evaluate, identify and place A.S. in special education, (ii) did not err in refusing to find A. S. eligible for special education on March 3, 2004 and (iii) did not fail to provide A. S. a timely offer of a free appropriate public education ('FAPE'), as a result of which the family was not entitled to reimbursement of costs incurred in connection with the unilateral placement at Moonridge."[720] The hearing officer further held "that the family was not entitled to an order placing A. S. in a therapeutic placement going forward."[721]

In reaction to the hearing officer's decision, A. S. "told her parents that she saw herself as a failure who would never amount to anything and be a burden to them. She also informed her

parents that if she had to return to [the district high school], she feared she would commit suicide."[722] Additional evidence presented before the district court revealed that, "[a]fter the hearing, A. S.'s mental health continued to decline. She often refused to take her medications as prescribed. As a result, she cycled between mania and deep depression."[723]

The parents continued to "pursue an appropriate private placement for A. S., eventually choosing Chamberlain. They favored Chamberlain because it featured a trained clinical staff of psychiatrists, therapists and nurses seemingly capable of providing the high level of structure the Parents felt A. S. needed."[724] Chamberlain accepted A. S., and she made arrangements to move into the school. However, "[a]s the day approached, her mood swings intensified, and she became significantly more violent toward her little brother. She refused to go to therapy or take medications, telling her parents they did not help her."[725] In January 2006, A. S.'s diary entries revealed vivid descriptions of her suicide and death.[726] "For example, one of A. S.'s entries discussed what it would be like to hang herself and to see her own blood on the ground."[727] With this revelation, A. S.'s parents admitted her to Spring Harbor Hospital, a psychiatric hospital.

Her physician at Spring Harbor "stated that A. S. was admitted to the hospital because she was 'actively dangerous towards her mother and brother and clearly has not been compliant with medication and has been dysfunctional at home, at school and in the community[.]'"[728] The Spring Harbor doctor diagnosed A. S. with "bipolar disorder, PTSD, ODD, ADHD, poly-substance abuse and self-injurious behaviors."[729] A. S. remained at Spring Harbor for a week and, even upon discharge, was rated as only moderately functioning.[730]

A. S. enrolled at Chamberlain on February 13, 2006.[731] At Chamberlain,

> A.S. participate[d] in both individual and group therapy on a weekly basis. Although she continue[d] to struggle with depression and anxiety, she "[was] highly motivated in her treatment and [was] expected to continue to make gains in her emotional behavioral functioning." She [ ] also recognize[d] the need to take

> her medications. [Her father] describe[d] A. S.'s academic gains at Chamberlain as "phenomenal." The academic program at Chamberlain [was] geared toward students with bipolar disorder and ADHD. A. S. [ ] responded well to this academic environment; she participate[d] in class, [sought] help and show[ed] interest in her courses. Her grades [were] As and Bs except for a C in chemistry.[732]

Notwithstanding her success at Chamberlain, A. S. "decompensate[d] easily when removed from this environment on home visits."[733]

After spending seventy-six pages reviewing the aforementioned facts, the court reviewed the IDEA's mandates and its rules regarding parental reimbursement for private placement when FAPE is at issue. The court paid close attention to its authority to limit reimbursement when parents fail to make their child available for evaluation.[734]

Next, the court considered the law relating to the parents' request for prospective placement of A. S. at Chamberlain at district expense:

> Whereas tuition reimbursement is essentially a backward-looking form of relief, the remedy of compensatory education typically is prospective, "entitl[ing] [the] recipient to further services, in compensation for past deprivations [of the IDEA], even after his or her eligibility for special education services under [the] IDEA has expired."[735]

The court quoted the First Circuit:

> The nature and extent of compensatory education services which federal courts have recognized varies according to the facts and circumstances of a given case. Such an award may include extra assistance in the form of tutoring, or summer school while students are still within the age of entitlement for regular services under the Act, or an extended period of assistance beyond the statutory age of entitlement.[736]

Turning to the merits of the case, the court agreed with the hearing officer's opinion favoring the school district on all counts. First the court denied the parents' request for reimbursement of A. S.'s placement at Moonridge, finding that "[n]o school personnel were made aware of A. S.'s mental-health diagnoses, her increasingly combative behavioral home or

her growing resistance to attending school until the third week in January 2004."[737] As stated above, the court held that the district was not required to travel to Utah to evaluate A. S.[738] "In short, inasmuch as the District had a right to evaluate A. S. using its own evaluators, and the Parents did not make A. S. available for testing until September 2005, the District did not transgress A. S.'s IDEA rights by failing to evaluate her until then."[739]

Next, the court addressed the parents' contention that Chamberlain was the appropriate placement and that the school district could not provide A. S. with a FAPE.[740] The court admonished the parents for their uncooperativeness, holding that "[p]arents cannot brandish the incompleteness of an IEP document as a sword to prove denial of a FAPE to a child when the document is incomplete as a result of the parents' own uncooperativeness."[741] Indeed, the court held that "[o]ne reasonably can infer, as did the Hearing Officer in this case, that [ ] crucial portions of A. S.'s educational plan were left undeveloped not because the District – which itself had restarted the [IEP] process – was unwilling to devise them, but rather because the [IEP] process imploded during the contentious October 20, 2005 meeting."[742] The court agreed with the hearing officer's determination that "the process was derailed as a result of the Parents' insistence on a residential therapeutic placement."[743] The court compared the parents in this case to the parents in the *MM* case, "who would not have accepted any FAPE offered by the school district that did not include their preferred component."[744]

The court held that the district's proposed IEP was FAPE:

> The District's proposed IEP offered significant structure and support, including (i) provision during "mainstream" class time of many of the classroom modifications proposed by Dr. Slap-Shelton (among them, preferential seating, provision of teacher lecture notes when possible, and extra time as needed to complete tests and other skills assessments), (ii) provision during the remaining twenty-five percent of the school day of direct special-education assistance to develop organizational strategies and complete homework, and (iii) development,

> in conjunction with the family and Dr. Miller, of a behavioral-support plan and crisis/safety plan, with ongoing psychiatric consultation as needed.[745]

Furthermore, "with development of the behavioral supports contemplated by the [IEP team] and clarification of the services to be provided via 'psychiatric consultation as needed,' the IEP would have been reasonably calculated to permit A. S. to make educational progress."[746]

Summarizing its holding, the court ruled:

> [I]nasmuch as (i) the District's proposed IEP document was incomplete as a result of a breakdown in the [IEP] process, (ii) the [IEP development] process broke down in the face of the Parents' insistence on a residential therapeutic placement and concomitant refusal to place A. S. in public school, and (iii) the proposed IEP, if developed in the manner envisioned by the District, could have provided a FAPE to A. S. within the public-school setting, the Parents have failed to carry their burden of establishing that the IEP offered by the District in October 2005 was not reasonably calculated to offer A. S. a FAPE. Accordingly, the family is not entitled to reimbursement of tuition and other costs of the unilateral private placement at Chamberlain.[747]

e. *Gagliardo v. Arlington Central School District* (2d Cir. May 30, 2007).

Gagliardo v. Arlington Central School District[748] involved a high school student with depression, superior intellectual ability, social anxiety, inflexibility, poor social perception, and possible Asperger's syndrome.[749] In this case, the parents and the school district agreed that the appropriate placement for student S. G. during his senior year was a private setting.[750] The issue before the court was the location of S. G.'s placement.[751] The court ruled in favor of the school district's placement.

In the fifth grade, S. G. "first exhibited symptoms of depression" and spoke with a therapist "on a weekly basis in the sixth grade . . . ."[752] In spring of the eighth grade, S. G. engaged in more intensive therapy for depression and took antidepressants.[753] Initially, S. G. performed well in the ninth grade, but "after being threatened by another student . . ., he began to

experience anxiety about attending school. Feeling overwhelmed, he found himself skipping classes, and as a result, his grades declined."[754]

By February of his tenth grade year, S. G. "refused to attend school. Soon thereafter, his parents admitted him to the Adolescent Intensive Outpatient Program at St. Francis Hospital where he underwent a mental status examination and problem appraisal."[755] At the recommendation of the hospital's social worker, the school district enabled S. G. to remain home and receive tutoring.[756] In March of S. G.'s tenth grade year (2001), an eligibility team found S. G. eligible to receive special education and related services as a student with an emotional disturbance.[757] The IEP provided that S. G. receive resource room services at his home school; however, by September of his eleventh grade year, S. G. refused to attend.[758] In October of that year, his treating psychiatrist "concluded that S. G. could not attend school due to his severe anxiety and depression."[759] The school district provided home school services.[760]

In November, the Gagliardos withdrew their initial consent to S. G.'s eleventh grade IEP and hired the director of clinical services at NYU's Child Study Center to evaluate S. G.[761] The doctor recommended that S. G. attend a therapeutic school with a smaller teacher-student ratio and a staff experienced in anxiety disorders "that would be able to work with S. G. should issues associated with his emotional disturbance manifest themselves in the course of the school day."[762]

After a series of disappointing visits to various day schools (such as Karafin in Mt. Kisco, New York), an IEP review meeting, and discussions with private evaluators, the Gagliardos requested an IEP meeting.[763] At the same time, the Gagliardos applied for S. G.'s admission to Oakwood Friends School, a Quaker school in Poughkeepsie, New York that was not approved by the New York Department of Education to provide special education services.[764]

The Gagliardos did not notify the school district that it sought S. G.'s admission to Oakwood.[765] In June 2002, the IEP team convened to draft S. G.'s senior year IEP.[766] While the parents expressed dissatisfaction with Karafin, they failed to suggest S. G.'s placement at Oakwood to the team.[767] On July 8, 2002, Oakwood accepted S. G.[768] On July 11, 2002, the IEP team reconvened to finalize S. G.'s placement, recommending that S. G. attend Karafin.[769] After numerous follow-up conversations, on July 29, 2002, the school district furnished a final IEP for the Gagliardos' review.[770] The Gagliardos filed a due process hearing complaint, alleging that the proposed IEP's placement at Karafin did not provide FAPE, and seeking reimbursement for S. G.'s attendance at Oakwood.

Relying on the principles set forth in *Rowley* and *Burlington*, *supra*,[771] the Second Circuit reversed the district court and reinstated the local hearing officer's decision that the school district's proposed placement was the FAPE and that the parents' placement was not appropriate. The circuit court held that the parents' placement at Oakwood was not supported by the recommendation of B. G.'s private therapist, since Oakwood was not a therapeutic environment with trained staff capable of handling S. G.'s particular and special needs.[772] Nor did Oakwood provide special education services individualized to S. G.'s needs.[773] Furthermore, while S. G.'s progress at Oakwood was "relevant to the court's review . . . . [S]uch progress does not itself demonstrate that a private placement was appropriate. . . . 'Evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA.'"[774] The court stated that "even where there is evidence of success, courts should not disturb a state's denial of IDEA reimbursement where, as here, the chief benefits of the chosen school are the kind of educational and environmental advantages and amenities that might be preferred by parents of any child, disabled or not. A unilateral private

placement is only appropriate if it provides 'education instruction *specifically* designed to meet the *unique* needs of a handicapped child."[775] "Because tuition reimbursement is available only for an appropriate private school placement, [the court reversed] the district court's judgment ordering the School District to reimburse the parents for the cost of S. G.'s tuition at Oakwood."[776]

f. *R. B. v. Napa Valley Unified School District* (9th Cir. July 16, 2007).

The *R. B. v. Napa Valley* case[777] involved a question of special education eligibility for a student diagnosed with ADHD, Reactive Attachment Disorder, and Post Traumatic Stress Disorder (PTSD).[778] The court upheld the school district's determination that the student, R. B., was not eligible for special education and related services.

R. B. was born to a mother who abused cocaine, alcohol, and heroin.[779] As an infant, R. B. exhibited signs of fetal alcohol & drug syndrome, including "irritability, delayed visual maturation, and delayed motor skills."[780] At age two, around the time of her adoption by F. B., R. B.'s birth father molested her.[781] Consequently, R. B. engaged in "self-mutilation and inappropriate displays of affection," requiring participation in play therapy for a year.[782] A psychologist diagnosed a preschool-R. B. with ADHD, Reactive Attachment Disorder, and PTSD.[783]

Throughout elementary school, R. B. engaged in frightful and shocking behavior, including "banging" a peer's head against the computer monitor for refusing to relinquish it to R. B. (second grade), "throwing chairs and running off campus until law enforcement restrained her" (third grade), and refusing to take medication while screaming at her teacher, resulting in law enforcement restraint (fourth grade).[784] In fifth grade, she twisted and injured another student's arm and said she "hoped her music teacher would die."[785] Then, she "poked another

student with a mechanical pencil while refusing to turn in her work."[786] The school district revised and implemented another behavior intervention plan, which "largely remedied R. B.'s misconduct."[787] Notably, throughout elementary school, R. B. maintained excellent grades and scored high marks on standardized tests.[788]

When R. B. was eleven years old, an independent consultant – who did not observed R. B. in the classroom – performed a psychological evaluation of R. B. and recommended that R. B. required immediate "treatment in a residential placement program."[789] R. B.'s mother sent a written demand to the district that she would place R. B. in a residential placement at public expense within ten days. When the district did not pay, F. B. filed for a due process hearing.[790] R. B. attended Intermountain, a private residential treatment center, where she continued to engage in physically aggressive behavior toward employees and other students.[791] A school district psychologist traveled to Intermountain to evaluate R. B. and, thereafter, an eligibility team reconvened, once again finding R. B. ineligible for services.[792]

After adverse judgments before a hearing officer and the district court, F. B. appealed to the Ninth Circuit, which found in favor of the school district.[793] It reviewed the eligibility criteria for a student with a "serious emotional disturbance," *discussed supra*, focusing on R. B.'s interpersonal relationships, inappropriate behavior, and pervasive unhappiness or depression.[794]

Notwithstanding R. B.'s abhorrent behavior and subsequent discipline during her fifth and sixth grade years (the years at issue),[795] the evidence showed that implementation of a behavior plan resulted in R. B.'s overcoming "initial hostility toward classmates" and developing "several peer friendships," including one peer as a "best friend." She further developed "strong relationships with adult counselors.[796]

The court questioned whether R. B.'s misbehavior took place under the statutorily requisite "normal circumstances" because much of it occurred when she was refusing to take her medication and during a huge transition to Intermountain.[797] The court held that, even if her behavior took place under normal circumstances, it "was not to a marked degree over a long period of time."[798] The court put great stock in the behavior plan, stating that the "whole point of the plan was that R. B.'s 'habitual history' of 'isolated incidents' of misconduct reached acute levels during that trimester. Once the District implemented the support plan, R. B.'s behavior improved. In other words, while R. B. engaged in inappropriate behavior over several years of school, that behavior was 'to a marked degree' only during one trimester of one grade," not "pervasive and ongoing."[799]

The Ninth Circuit further held that, even if it accepted R. B.'s diagnosis of depression during her sixth grade year, R. B. still failed to establish eligibility because the depression was not "to a marked degree."[800] Finally, the court held that R. B. was not eligible for special education services because her behavior and depression "did not adversely affect her educational performance."[801]

g. *Richardson Independent School District v. Michael Z.* (N.D. Tex. Aug. 21, 2007).

In *Richardson Independent School District v. Michael Z.*,[802] the district court for the northern district of Texas held that the school district must reimburse Leah's parents (Michael Z.) for her placement at a residential school.

Since a very young age, Leah experienced emotional and behavioral problems, leading to diagnoses at age four of ADD and ODD, and at age six of bipolar disorder.[803] "By the time Leah reached the ninth grade – the year most relevant to this action – she had been diagnosed with

bipolar disorder, separation anxiety disorder, oppositional defiant disorder, attention deficit hyperactivity disorder, and pervasive developmental disorder."[804]

She received special education and related services as a "child with a disability" under IDEA.[805] The relevant portion of her ninth grade IEP provided that "school staff 'supervise Leah at all times and . . . require that she stay in the classroom unless she has permission to leave it. This may mean that staff [will be required to] keep the classroom door closed and use physical proximity to keep Leah from departing without permission.'"[806] Notwithstanding her IEP, Leah continued to leave class early and report to class late. Her parents consulted a psychiatrist to work with Leah on these issues, and, in November 2003, the psychiatrist recommended that Leah receive "homebound" services for "six to eight weeks."[807]

In January 2004, Leah returned to the high school. Pursuant to her IEP amendment, the district placed her in the school's "Behavior Adjustment" class.[808] "Although the transition to [the Behavior Adjustment] class initially appeared successful, Leah's behavior quickly deteriorated. By mid- January, she was frequently arriving to class late, leaving class early, and wandering the school halls."[809] Furthermore, Leah had "outbursts" in class on several occasions, turning over chairs, using profanity, and disrupting standardized testing.[810]

"Leah's tardiness and absence from class continued into February 2004, and on February 22, 2004, Leah's parents maintain it was discovered that she was engaging in sexual activities in the boys' bathrooms at Westwood. . . . Leah performed at least one sex act in the boys' bathroom at Westwood, after school."[811]

In March 2004, the district transferred Leah to another high school's[812] "Behavior Adjustment" class, which at the time was taught by a long-term substitute teacher.[813] "Leah's experience at RHS, which lasted two weeks, was consistent with her time at Westwood. She was

absent at least one day, she left class without permission four times, she displayed sexually aggressive behavior, and it was difficult to get her to work on her assignment sheets."[814]

Leah remained at RHS for a mere two weeks. After "Leah became physically aggressive at home, scratching her father and causing him to bleed," her parents sent her to a residential placement, the Texas NeuroRehab Center ("TNRC"). [815] The parents failed to give notice to the district about Leah's removal.[816]

The case summarized the number and extent of Leah's misbehavior while at TNRC:

> Leah's stay at the TNRC was marked by extreme physical and sexual aggression: she groped staff members and other patients, attempted to remove the clothing of several patients, refused to follow directions, refused to attend class, and even engaged in self-mutilation, all of which resulted in her frequently being physically restrained.
>
> A progress report on Leah's stay at the TNRC between May 11, 2004 and June 14, 2004 recorded the following:
>
> 6 instances of gestural threats,
> 3 instances of manipulation of staff,
> 171 instances of oppositional behavior,
> 1 instance of physical assault,
> 57 instances of physical aggression,
> 13 instances of property destruction,
> 3 instances of verbal intrusiveness,
> 3 instances of self-abuse,
> 92 instances of physical or verbal intrusiveness,
> 1 instance of stealing,
> 37 instances of sexual aggression,
> 41 instances of sexualized verbalizations,
> 44 instances of teasing and provoking peers,
> 106 instances of being unaccountable to staff,
> 14 instances of verbal abuse,
> 46 instances of verbal outbursts,
> 3 instances of verbal threats,
> 3 instances of whining,
> 21 instances of physical intrusiveness,
> 94 instances of sexual intrusiveness, and
> 27 instances of therapy refusal.[817]

The TRNC report also noted that its staff had "contained or restrained twenty times during the same period," which TRNC Dr. Mehta "considered very high."[818]

The court applied the *Cypress-Fairbanks, supra,* factors to determine whether the district's placement was FAPE. "It is true, as the District contends, that Leah was able to complete various school assignments at certain points during her ninth-grade year; however, Leah's progress in those instances bears little connection to the goals stated in her IEP, and corresponds strongly to a cyclical pattern of behavioral and academic regress."[819] The court found this "not particularly striking, given the difficulty the District experienced in keeping Leah in the classroom. She routinely came to class late, left without permission, and roamed the halls without supervision."[820] With this said, the court "agree[d] with the Hearing Officer's conclusion that 'the evidence is quite sparse regarding meaningful progress either academically or non-academically for Leah during the 2003-2004 school year.'"[821]

The court stated that, "perhaps more legally significant than the District's failure to provide actual academic or non-academic benefit to Leah is the District's inability to address the causes of that failure."[822] Leah's "behavioral difficulties" resulted in her frequent absences, which contributed to her academic regression.[823] While there is "no doubt that the relevant parties participated in all of Leah's [IEP] meetings, [ ] it is less clear that those actually charged with her education . . . collaborated to provide an appropriate education."[824]

The court held that "the District's proposed placement of Leah at RHS in the IEP of June 2004 was inappropriate."[825] Accordingly, "it is clear that Leah could receive no educational benefit from the proposed placement because the District's IEP was not reasonably calculated to provide any educational benefit to Leah."[826]

The district argued that Leah's frequent outbursts and absences made it impossible to educate Leah. The court rejected this argument: "Undoubtedly, special education provided pursuant to the IDEA often involves accommodating severe behavioral problems that make instruction and testing quite difficult. . . . Rather, the District must provide Leah an appropriate education in spite of her disability."[827]

The court next decided whether the parents were entitled to reimbursement for Leah's unilateral residential placement.[828] "The Court must determine whether Leah's residential placement was appropriate under the IDEA."[829] "'Despite the statutory preference for mainstream placements, the IDEA recognizes that some disabled students need full-time care in order to receive educational benefit.'"[830] When this is the case, "'[a]nalysis must focus . . . on whether full-time placement may be considered necessary for educational purposes, or whether the residential placement is a response to medical, social or emotional problems that are segregable from the learning process.'"[831] Relying on Dr. Mehta's testimony regarding Leah's behaviors and needs, the court agreed with the hearing officer that "Leah's behavioral, educational, and medical problems were so intertwined that placement at a residential facility . . . was necessary for her to have any opportunity to progress educationally."[832] The court acknowledged that Leah made little, if any, progress in the residential placement. Still, "[t]he severity of Leah's conditions precluded educational progress, however, until her behavioral problems could be managed to allow beneficial instruction. Leah's 'main learning problem [was] [her] inability to cooperate with authority. Accordingly, the only appropriate placement for [Leah] [was] one which specifically takes into account and provides for this lack of cooperation.'"[833]

The court further held that Leah's problems were not solely the product of home or out-of-school issues. "Although the precipitating event that led to Leah's withdrawal from the District and interim-placement at the Seay Center was an altercation with her father at home, the overwhelming evidence indicates that Leah's problems at home were minimal compared to her behavioral difficulties at school."[834]

In summary, the court ruled that "the only appropriate placement of Leah in June 2004 was at a residential facility. Any progress in Leah's education during that time was unlikely, but it is clear that only the structured environment of a residential placement could offer her any hope of benefit."[835]

Finally, the court examined what costs the school district must fund as "related services" and what costs are excluded by the act for being "medical." The court reviewed the law defining "related services": "'medical services shall be for diagnostic and evaluation purposes only,' and related services do not include 'a medical device that is surgically implanted, or the replacement of such device.'"[836] It continued:

> Regulations promulgated under the IDEA clarify what costs associated with residential placement are reimbursable: "If placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parents of the child."[837]

The court found that the parties had not briefed this issue and ordered them to brief it so that the court could determine what costs were or were not reimbursable under IDEA.[838]

Finally, the court considered whether it should limit any reimbursement award because the parents failed to give adequate notice under IDEA.[839] The court agreed with the hearing officer's decision:

> [T]he Hearing Officer found that the District had actual notice of [the parents'] desire to place Leah at the TNRC at public expense, by June 2, 2004, and awarded reimbursement for all expenses incurred by [the parents] after June 2,

> 2004, except for those covered by [the parents'] insurance carrier, which provided coverage until July 1, 2004. The result was an order of reimbursement of $56,000. The Court agrees with the Hearing Officer's finding that the District knew by June 2, 2004 of [the parents'] intent to place Leah at the TNRC.[840]

With this discussion, the court found "it appropriate to reimburse the parents for reimbursable expenses incurred" after June 2, 2004.[841]

h. *D. B. v. Houston Independent School District* (S.D. Tex. Sept. 29, 2007).

Also in 2007, the district court for the southern district of Texas considered a case involving a student with bipolar disorder. *D. B. v. Houston Independent School District*[842] involved D. B., a student who "struggled with behavior issues from a very early age."[843] Doctors diagnosed D. B. with Bipolar Disorder, "Attention Deficit Hyperactivity Disorder ('ADHD'), Oppositional Defiance Disorder ('ODD'), Major Depressive Disorder . . . and, most recently, Asperger's Syndrome. He received special education services from HISD under the eligibility category of emotional disturbance."[844]

In this case, the school district identified D. B. in elementary school and provided special education and related services to him in a variety and continuum of alternative placements designed to meet his emotional and behavioral needs.[845] However, once D. B. arrived to middle school, communication about his IEP goals and objectives, as well as his BIP, broke down. His teachers testified that they either did not have a copy of the BIP or did not implement it.[846] Among D. B.'s behaviors included tantrums, outbursts with no apparent provocation, attention problems, defiance with authority, use of profanity, and aggression such as "breaking furniture, throwing school desks, and/or biting, kicking, scratching, and spitting on school personnel."[847]

In May 2005, D. B.'s IEP team met to develop his 2005-2006 IEP. "After conducting an FBA [citation omitted], the committee formulated a behavior IEP to decrease the following

behaviors: being out of an assigned area, using profanity, tantrums (outbursts), screaming, throwing books, turning over desks, kicking, biting, spitting, and pulling objects off the wall."[848] Additionally, the IEP team drafted an "updated counseling IEP with similar goals. The school district recommended the proposed IEP be implemented at ABC East, a more restrictive placement."[849] D. B.'s mother disagreed with the IEP.[850]

Next, the IEP team "discussed compensatory services for the lack of formal counseling and behavior IEPs" in prior years.[851] The district "offered thirty-six hours of compensatory counseling and an unspecified amount of compensatory time in the Extended Summer Program offered at ABC East to compensate for the absence of these IEPs."[852] D. B.'s mother similarly rejected this offer.[853]

At the due process hearing, parties spent the majority of the time litigating whether the district should have found D. B. eligible as a child with autism.[854] The school district's psychologist, Dr. Crossman, testified that D. B. "his behaviors were characteristic of his existing diagnoses, i.e., ADHD, ODD, and Bipolar Disorder."[855]

The court found that, even if the district failed to provide the required services and plans to D. B. in years past, it remedied this possible failure with the IEP and compensatory services offered in May 2005.[856] Accordingly, the court agreed with the hearing officer's decision in favor of the school district.[857]

i. *L. G. v. School Board of Palm Beach County* (11th Cir. Oct. 16, 2007).

In the *L. G. v. School Board* case, B. G. – a "'severely emotionally disturbed' eight-year-old boy" – and his adoptive parents, L. G. and K. G., unsuccessfully appealed a federal district court holding that the Palm Beach County School District provided FAPE to B. G. and that the district was not required to reimburse the parents for the cost of residential placement at Sandy

Pines Hospital.[858] In addition to a Bipolar Disorder (BPD) diagnosis, doctors had diagnosed B. G. with Mood Disorder Not Otherwise Specified (NOS), Impulse Control Disorder NOS, ADHD, and Schizoaffective Disorder.[859] B. G. exhibited severe "emotional, social, and behavioral problems at age three, and [had] already been through many educational institutions and hospitals in New York and Florida during his short life."[860] When B. G. moved from New York to Florida, the Palm Beach County School District reviewed his existing IEP and placed him at Indian Ridge, a therapeutic day school serving severely emotionally disturbed students.[861]

After a "violent episode at home" where B. G. "threw things, tried to smash a mirror over his mother's head, and ran out into the street in traffic," B. G.'s parents had him hospitalized at Columbia Hospital.[862] B. G.'s treating psychologist recommended residential placement at Sandy Pines Hospital, "a residential behavioral health facility," upon which B. G.'s parents enrolled him.[863] During his three months at Sandy Pines, B. G.'s behavior was "uncontrollable" and he did not make progress.[864] Since then, B. G. has been in and out of the hospital and two therapeutic day schools.[865] In January 2005, the IEP team placed him at Tampa Bay Academy, a residential facility.[866]

B. G.'s parents sought reimbursement for his placement at Sandy Pines. They alleged that the school district's placement at Indian Ridge was not a FAPE. The hearing officer and the district court found that B. G. failed to show that placement at Indian Ridge did not provide FAPE and, even if Indian Ridge was not the FAPE, B. G. "could not show that Sandy Pines provided an appropriate education."[867] Citing the principles elaborated in *Rowley* and *Burlington, supra,* the Eleventh Circuit agreed. Relying on its holding in *Devine v. Indian River County School Board,* the court "emphasized" that the "standard for an appropriate education is whether the student is making 'measurable and adequate gains in the classroom,' not whether the

child's progress in a school setting carried over to the home setting."[868] That B. G. exhibited violent and inappropriate behavior at home is not enough to establish that the school district failed to provide FAPE.[869] Even B. G.'s conduct at Sandy Pines occurred outside the classroom.[870] The circuit court upheld the district court, finding that the Palm Beach County School District provided FAPE to B. G. and was not responsible to reimburse B. G.'s parents for his residential placement at Sandy Pines.[871]

j. *Lauren V. v. Colonial School District* (E.D. Pa. Oct. 22, 2007).

In *Lauren V. v. Colonial School District*,[872] the district court for the eastern district of Pennsylvania held that the school district was not required to fund a student's (Lauren's) private residential placement in order to provide FAPE.

Lauren's story is quite similar to those explored earlier in Chapter Two. Doctors diagnosed her with many conditions, including bipolar disorder, ADD, PTSD, Tourette's syndrome, LD, ODD, intermittent explosive disorder.[873] Lauren was first hospitalized for her mental health at age seven.[874] She was in and out of psychiatric hospitals and school, and received various placements by the district, including private, therapeutic placements.[875] Her parents unilaterally placed her in several out-of-state therapeutic residential facilities, but many of these facilities discharged Lauren for lack of progress.[876] Additionally, her parents placed Lauren in two private day schools, The Heritage School and Kennedy Kendrick, a parochial school.[877] The school district did not consent to pay for these placements and, instead, offered different placement options.[878]

Throughout the years, the parents and the district met frequently to discuss Lauren's placement, and they explored many options. Accordingly, the district was quite surprised to learn that, on November 28, 2005, Lauren enrolled at Rancho Valmora, a private residential

facility in New Mexico.[879] Notwithstanding their frequent and open communication, the parents did not provide written notice to the district of their plan to place Lauren at Rancho Valmora at district expense.[880]

On June 28, 2006, Lauren's parents requested a due process hearing, seeking: "(a) tuition for Lauren's final month at The Heritage School in July, 2005; (b) compensatory education for the entire 2005-2006 school year, including the term at Kennedy Kendrick and the term at Rancho Valmora, and (c) funding for an Independent Educational Evaluation."[881]

The Hearing Officer "concluded that the Parents had not shown that the final, one-month placement at Heritage School in July 2005, was reasonable, and that the equities disfavored an award of tuition because the [parents] did not notify the District that they were seeking reimbursement before the June 28, 2006, initiation of the due process procedures."[882] A state appeals panel upheld the hearing officer's determination, reiterating the hearing officer's admonition that the parents failed to give any notice to the district before placing Lauren at Rancho Valmora.[883] For these reasons, the district court agreed with the hearing officer and appeals panel, thereby ruling in favor of the school district and denying reimbursement to the parents.[884]

k. *Hill v. Bradley County Board of Education* (E.D. Tenn. Nov. 19, 2007).

Hill v. Bradley County Board of Education[885] involved the tragic death of Rocky, a student diagnosed with bipolar disorder, ADHD, anxiety, depression, and schizophrenia., who took a substantial number of medications.[886] The parents brought the case under 42 U.S.C. § 1983 (a civil rights statute providing for damages when appropriate) alleging violation of IDEA and Section 504 of the Rehabilitation Act of 1973. At issue was whether the school district was liable for failing to find Rocky eligible for special education and related services before he

jumped out of a school bus window to his death. The court held that, because the district was in the process of determining special education eligibility when the incident occurred, it was not liable.[887] This case is included only to the extent that the facts illuminate the diagnosis, special education eligibility, appropriate accommodation, and behavior of a student with bipolar disorder.

After receiving notice from Rocky's parent that he had been diagnosed with bipolar disorder, the school district began meeting about Rocky's education.[888] The medications prescribed for his conditions caused Rocky to sleep in class and, when reduced, caused him to be extremely irritable and depressed.[889] Doctors reduced Rocky's medications, but reduction caused him to commit a series of behavioral infractions:

> On Thursday, August 26, 2004, Rocky was written up for his sixth tardy; as punishment, he served a one period In School Suspension ("ISS") on Friday, August 27, 2004. On Wednesday, September 1, 2004, Rocky was written-up for Misbehavior in Class after he threw a book at another boy; as punishment, he served a one-day ISS on Thursday, September 2, 2004. On Friday, September 3, 2004, Rocky fought the other boy in a BCHS bathroom; as punishment, they both served three-day out-of-school suspensions from Monday, September 7, 2004 through and including Thursday, September 9, 2004.[890]

After these behavioral incidents, on September 7, 2004, Rocky's mother requested his doctor to "get him back on medication."[891]

On September 14, 2004, Rocky wrote a letter to a female classmate threatening suicide if she did not love him.[892] The classmate showed the letter to the district and the district discussed the letter with Rocky.[893] Rocky assured the district he was okay, and wrote a second letter to the classmate thanking her for caring.[894]

Between August 24, 2004 and September 22, 2004, the district held several "pre-referral" meetings regarding Rocky's eligibility for special education and related services. At these meetings, the team:

> . . . examined and discussed ongoing concerns about: Rocky's academic performance, especially his sleepiness in class; written teacher observations of Rocky over the previous month; Rocky's education records, including his grades and standardized test scores; the results of Rocky's most-recent visual and auditory tests; Rocky's discipline record for August and September 2004; the success of accommodations and interventions that were put in place at the first pre-referral meeting; and the information provided by Drs. Causo and Milliron, including their confirmation of Rocky's psychiatric diagnoses and suggestions--every one of which dealt exclusively with accommodating Rocky's sleepiness by adjusting his academic demands.[895]

The team decided to upon the follow "appropriate accommodations" to address Rocky's drowsiness:

(1) he would be allowed to get up to stand and stretch when he felt drowsy;

(2) he would take more "hands on" classes; and

(3) he was allowed to have a cold drink – including caffeinated drinks – when he felt drowsy.[896] Additionally, "The team decided to refer Rocky for an evaluation of his suspected disabilities (Specific Learning Disability, Emotional Disturbance, and Other Health Impairment) and determination of his eligibility to receive special education services," and completed a referral form to this end.[897]

On October 1, 2004, Rocky jumped out of the window of a school bus to his death.[898]

The remainder of the case involved the parents' claims that the district should be liable for Rocky's death. The court disagreed and ruled entirely in favor of the school district.[899]

CHAPTER THREE

ANALYSIS

I. Introduction.

Since the late 1990s, the medical and psychiatric community has greatly increased its attention to childhood and adolescent bipolar disorder. Commensurate with this increased attention is the elevated number of due process hearing and court cases brought pursuant to IDEA (formerly EACHA) involving students with bipolar disorder.

This Chapter discerns, examines, and analyzes the trends and issues that presented in the relevant case law, and exacts the prominent facts that shifted judicial opinion in favor of the school district or in favor of the student.

II. Case Law Issues and Analysis.

The cases reviewed in Chapter Two revealed several major IDEA issues confronted and decided by the various courts involving students with bipolar disorder. This Chapter explores those issues and discerns patterns, trends, and relevant facts that determine when a court ruled in favor of the school district and when it ruled in favor of a student (and his parents).

Specifically, the cases discussed herein addressed the following issues: (i) eligibility under IDEA for students with bipolar disorder and (ii) appropriate placement, including public versus private and day versus residential. Included in the second group of issues was the courts' analyses of whether a particular placement was strictly medical or psychiatric and did not have an educational component, therefore excluding the placement (or some portion thereof) from coverage under IDEA, or whether the placement provided educational benefit, even if the placement additionally supported the student's mental health, emotional, and behavioral needs.

A. Eligibility for Special Education Services.

1. When eligibility is a "non-issue": Cases in which students received special education and related services prior to litigation.

At the outset, it is important to establish that, in most of the cases,[900] students were found eligible for special education and related services prior to litigation. Furthermore, all of the students were eligible, at least, as students with a "serious emotional disturbance," which the IDEA and its supporting regulations define as:

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

> (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.
>
> (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
>
> (C) Inappropriate types of behavior or feelings under normal circumstances.
>
> (D) A general pervasive mood of unhappiness or depression.
>
> (E) A tendency to develop physical symptoms or fears associated with personal or school problems.[901]

"Emotional disturbance includes schizophrenia," but emotional disturbance "does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance" as defined in 34 C.F.R. § 300.8(c)(4)(i), *supra.*[902]

In these cases, we presume that the eligibility teams believed the students to have met the degree and duration requirements to establish an emotional disturbance. We also can assume that the eligibility teams found that the students' bipolar disorder adversely affected their education and, by reason of their disabilities, they needed special education and related

services.[903] Indeed, in the cases where courts considered the eligibility for a student with BPD, the decision turned on the degree and duration of the disability, whether BPD (and any accompanying disabilities) adversely affected the student's education, and whether, for this reason, the student actually "needed" special education and related services.

2. Cases in which courts found in favor of the school district.

Several cases considered the question of eligibility for students with BPD and upheld the school district's determination that they were not eligible. For instance, in *Hoffman v. East Troy Community School District,*[904] the court agreed with the school district's determination that a student diagnosed with clinical depression was not eligible for special education as a "seriously emotionally disturbed" or otherwise classified student. The *Hoffman* court relied on facts presented that the student's behaviors, including violence, were a result of his drug abuse and not a result of his disability.

Similarly, in *Board of Education v. J. D.*,[905] the Fourth Circuit held that a student diagnosed with BPD was not eligible for special education and related services under IDEA. In this case, the student (J. D.) was violent, disrespectful, profane, truant, and defiant, and had been hospitalized in a psychiatric hospital. He also abused drugs on a regular basis, and had attended a drug rehabilitation center for this reason. It was because of J. D.'s "history of drug involvement" that the court found that "J. D's behavior sprang not from an educational disability but rather from social maladjustment."[906]

While the school district in *C. G. v. Five Town Community School District*[907] ultimately found student A. S. eligible for special education and related services, the question before the court was whether it should have found A. S. eligible earlier than it did. In a lengthy decision, the court described the tragic case of A. S., a child who was physically and sexually abused by a

teenage babysitter as a toddler, and who suffered from BPD diagnosed when she entered high school. A. S.'s outbursts, obstinence, and disobedient behavior occurred mostly at home, however, and her teachers did not perceive A. S. to have a disability that adversely affected her ability to learn. She progressed in class through the eighth grade, and her primary academic problem involved failure to complete homework. Because this problem is not uncommon to regular education students in middle school and high school, the district did not request evaluation of A. S. for special education services.

A. S.'s grades did decline, and she ultimately refused to continue attending ninth grade. She was suicidal and wrote about her plan in a journal. Her parents were at their "wits' end," and inquired whether the district would fund a residential placement for A. S. The district made the parents aware that it must first determine whether she was eligible for services and, only after that, could it hold placement discussions. Despite having received the "parental consent to evaluate" form, the parents placed A. S. in a residential facility in Utah, where she stayed from March to December of 2004.

When she returned, her parents enrolled her in a private day school and, when that placement proved ill-fitted, they contacted the district to determine whether A. S. was eligible for special education and related services. After a series of delays by the parent, the eligibility team, which included the parents, found her eligible on October 12, 2005.

The issue in A. S. was whether the district should have evaluated her and found her eligible earlier,[908] or at least in March 2004, when A. S.'s parents finally returned the consent to evaluate form. The court held that the district was not required to travel to Utah to evaluate A. S.[909] "In short, inasmuch as the District had a right to evaluate A. S. using its own evaluators, and the Parents did not make A. S. available for testing until September 2005, the District did not

transgress A. S.'s IDEA rights by failing to evaluate her until then."[910] The court faulted the parents with failing to cooperate in the process of evaluation, identification, placement and services.

Finally, the *R. B. v. Napa Valley Unified Sch. District* decision[911] involved whether a student "needed" special education services. R. B. had been molested by her biological father as a toddler and diagnosed with ADHD, reactive attachment disorder, and PTSD. As an elementary school student, R. B. was violent against her classmates (including banging a child's head against the computer monitor), threw chairs, ran off campus, and was generally out of control. She wrote messages claiming she hoped that her music teacher would die.

In the fifth grade, the school implemented a behavior intervention plan (BIP). This plan "largely remedied R. B.'s misconduct."[912] Throughout elementary school, she made excellent grades and scored well on standardized tests.[913] Furthermore, upon implementation of the BIP, R. B. overcame her "initial hostility toward classmates" and developed "several peer friendships," including a best friend. She further developed "strong relationships with adult counselors."[914]

Because the BIP was adequate to address R. B.'s behavior, and because she progressed academically and, ultimately, socially, the court found that R. B. was not eligible as a child with a disability. Furthermore, the court found that, when R. B. took her medications, her behaviors did not persist. Still, R. B.'s behavior "was not to a marked degree over a long period of time" and was not "pervasive and ongoing," since most of R. B.'s behavioral history involved isolated incidents.[915] When it became more frequent, the district implemented the BIP, which appropriately and successfully addressed R. B.'s conduct. For these reasons, the district properly

found R. B. ineligible as a "child with a disability" to receive special education and related services.

3. Cases in which courts found in favor of the student.

Only one case involving a student with BPD held that the district improperly found the student ineligible for special education services under IDEA. In *Johnson v. Metro-Davidson Schools*,[916] the parent of a multi-diagnosed student, Tiffiney, finally and affirmatively diagnosed with BPD at age sixteen, petitioned the Metro school district for special education eligibility. At no time did Tiffiney attend public schools. Through the years, various private schools suspended her and expelled her for misconduct. When Tiffiney was approximately fourteen to fifteen years old, the district found her ineligible for special education services.

While the hearing officer in this matter upheld the determination that Tiffiney was not a child with a disability, the court reversed. The court found that she met the definition of a child with an emotional disturbance. Importantly, however, between the hearing and the trial in district court, Tiffiney's doctor diagnosed her with BPD. The court gave great weight to Tiffiney's doctor's testimony and diagnosis. Further, the parties in this action did not dispute whether Tiffiney's behavior met the duration and degree requirements to qualify as a child with an emotional disturbance. Notwithstanding Tiffiney's positive academic performance, the court found that the disability adversely affected Tiffiney's ability to stay in school (due to suspensions and expulsions) which, inevitably, affected her education. For these reasons, the court instructed the district to find Tiffiney eligible for special education and related services as a child with an emotional disturbance.

B. FAPE for Students with Bipolar Disorder.

"The 'free appropriate public education,' mandated by federal law must include 'special education and related services' tailored to meet the unique needs of a particular child, . . . and be 'reasonably calculated to enable the child to receive educational benefits.'"[917] The FAPE guaranteed by the IDEA must provide a disabled child with meaningful access to the educational process.[918] To the extent that a child needs only a related service and does not also require special education, the child is not considered to be a "child with a disability" under the statute.[919]

As noted above, the majority of the cases involved disagreements between the district and the parents over a student's "appropriate" placement. This section explores the decisions that found in favor of the district's proposed placement versus those that found in favor of the parents' proposed placement at private day schools or residential facilities. It further examines the courts' determinations regarding when a placement is strictly medical and, therefore, not covered under IDEA. Finally, this section reviews the cases to discern when courts awarded reimbursement for private placement to the parents and when they denied such reimbursement.

The five Supreme Court cases discussed in Chapter Two lay the foundation for the courts' determining these issues. The *Rowley* decision[920] set forth the seminal two prong test to determine whether a district provided FAPE: Under the first prong, the reviewing court must determine whether the state has complied with IDEA's procedural requirements.[921] Under the second prong, the reviewing court must determine whether the IEP is "reasonably calculated to confer *some* educational benefit on a disabled child."[922]

In that regard, the Supreme Court defined a FAPE as providing disabled children with a "basic floor of educational opportunity, . . . [which] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the

handicapped child."[923] Yet, the IDEA does not require a school district to provide a child with the best possible education.[924] Nor does the statute require a school district to furnish every special service necessary "to maximize each handicapped child's potential."[925]

The *Tatro*[926] and *Cedar Rapids v. Garret F.*,[927] *supra,* decisions confronted the questions of whether services, such as catheterization of a student with spina bifida and provision of a ventilator at school for a quadriplegic child, were "related services" covered by IDEA, or medical services excluded by the Act. In both cases, the Supreme Court ruled that, because the students required these services to access the regular classroom – indeed, to come to school at all – then they were the type of "related services" contemplated by the Act for coverage by the district. The court dismissed arguments by the school districts of the financial burden for providing these services.

In *Burlington*[928] and *Carter*,[929] *supra,* the Supreme Court found that courts have the authority to reimburse parents for unilateral placement of their special education-eligible child in a private setting if the school district's IEP did not provide FAPE and if the private placement was appropriate.

The cases summarized in Chapter Two regarding students with BPD referenced and applied these five U. S. Supreme Court cases to issue their decisions.

1. Public versus private day placements.

a. Cases in which courts found in favor of the school district.

Three cases set forth herein found that the school district's placement provided a FAPE and, accordingly, the district was not required to reimburse the parents for the unilateral placement of their child in a private day school. In *Arseneault*,[930] the Fourth Circuit held that a school district's placement of a child with BPD in its PACE West therapeutic public school,

which provided a high degree of structure and counseling to meet his social and emotional goals, provided FAPE. In *A. E. v. Westport Board of Education*,[931] the Connecticut district court emphasized that the district's proposed placement at CES would provide FAPE. Specific to the court's analysis was that CES already educated twenty-five students (of its one hundred fifteen students) with BPD, and did so in classes comprised of eight or fewer students, with special education certified teachers, and "the full complement of necessary personnel, including social workers, psychologists, counselors, physical therapists, occupational therapists, speech and language pathologists, and a school nurse."[932] The staff was qualified to conduct FBAs and develop appropriate BIPs.

The court further applauded CES's "specific social skills curriculum" and its use of behavior interventions that were "specifically tailored to students" with severe emotional disturbances, including BPD.[933] Finally, the court placed greater value on the school district's experts, who were familiar with the CES, had observed A. E. in the classroom, and were on staff at CES, over Dr. Demitri Papolos, the author and expert in childhood BPD. Dr. Papolos, however, had not observed CES or A. E. in the classroom and could not testify whether it would meet A. E.'s needs except in the abstract. For this reason, the court held that the school district's proposed placement was FAPE, and it did not need to determine whether the parents' proposed placement was appropriate.

Finally, in *Gagliardo*,[934] the Second Circuit considered a related question: Whether the school district's proposed *private day* placement would provide FAPE, or whether the parents' proposed *private day* placement was the appropriate placement. The *Gagliardo* decision involved S. G., a student with severe depression. He was admitted to psychiatric hospitals where his therapists advised that his depression and anxiety prevented him from attending school. The

district provided S. G. with a home school tutor until the Gagliardos unilaterally enrolled S. G. in Oakwood, a Quaker day school that was not approved by New York to provide special education services.

The court held that the district's proposed placement at one of three different private day schools was FAPE. The court found that Oakwood was not appropriate for S. G., finding that it was not supported by S. G.'s private therapists, that it did not provide special education services necessary to meet S. G.'s needs, and that S. G.'s progress at Oakwood did not singularly determine that Oakwood was appropriate. Accordingly, it denied tuition reimbursement to the parents.

These cases emphasize the importance that the proposed placement provide the necessary supports individualized to the student's needs, including educators and support personnel capable of handling the child's behaviors brought on due to the BPD. The courts will not reimburse parents for placements that do not provide these supports, even if the child is successful, unless the district's placement was wholly inappropriate.

b. Cases in which courts found in favor of the student.

None of the cases summarized in Chapter Two held that the districts' placements failed to provide FAPE. Nor did the cases hold that the districts were financially responsible for the parents' unilateral placement of their children in private day schools.

2. Day versus residential placements.

a. Cases in which courts found in favor of the school district.

Eight cases held that school districts were not required to reimburse parents for unilateral placement of their child in a private residential facility.[935] Applying *Rowley, Burlington,* and *Carter, supra,* the courts found that the respective districts provided FAPE through their actual

or proposed IEPs, as evidenced by (i) a student's real or reasonably calculated academic progress in the placement or under the IEP,[936] (ii) a student's real or reasonably calculated social and emotional benefits and progress in the placement or under the IEP,[937] and (iii) a student's education in the least restrictive environment (LRE) as mandated by IDEA.[938]

Additionally, these courts often determined that the residential placements at issue were not appropriate. For instance, when the placement did not have staff, educators, support personnel, facilities, and/or individualized services to address both the academic, nonacademic, and the clinical or therapeutic needs of a student with BPD, the court held that it was inappropriate.[939] This might be the case if, as in *Jennings*, the residential school "offered no special education program, no on-site clinical personnel, and no certified special education instructors."[940] In contrast, the school districts' proposed placements which courts upheld as providing FAPE ordinarily provided special education services with special education certified teachers, appropriate clinical and therapeutic intervention and services, and appropriate academic instruction to enable the students to progress in the general curriculum.[941]

If the residential placement failed to allow students to take necessary medication for their BPD, the courts found it inappropriate.[942] Furthermore, if the court found that the purpose of the residential placement was mostly to accommodate the student's misbehavior, defiance, and outbursts at home and out-of-school, as in *Sylvie* and *L. G.*, then it was similarly inappropriate.[943] If the placement was not academically rigorous, thus explaining a student's progress, the courts would find it inappropriate.[944] And even if the residential placement seemed to be the "optimal setting" for the student, the district was not required to provide optimal benefit.[945]

Additionally, the court employed the IDEA's LRE mandate. Clearly, private residential placement is the most restrictive environment. Courts held that IEP teams should exhaust the

continuum of lesser-restrictive alternative placements before resorting to residential placement.[946] For instance, in *Jennings*, the school district's proposed placement would have provided FAPE in the LRE because not only would it meet Kendall Jennings' advanced placement academic and clinical needs, but it would allow her to participate in interscholastic activities not available at the residential placement.[947] Courts generally frowned upon the altering of a student's placement from a regular public day school to a private residential school without trying lesser restrictive options in between the two extremes.[948]

The courts sometimes found that the children required the support of their families unafforded by residential placements.[949] And courts have found that a student's transition from high school to college would be easier from the school district's proposed less-restrictive placement than from a residential placement.[950] The *Daniel R. R.* court reasoned: "[T]he school must take intermediate steps where appropriate, such as placing the child in regular education for some academic classes and in special education for others, mainstreaming the child for nonacademic classes only, or providing interaction with [nondisabled] children during lunch and recess."[951]

Furthermore, in finding that residential placement was inappropriate, the courts looked to what the expert psychiatrists, psychologists, therapists, doctors, and social workers testified in the case. Often, the courts gave great weight to the school districts' expert witnesses so long as they had worked with the student, observed and evaluated the proposed placement, and reviewed the student's records.[952] The courts sometimes referred to the recommendations made by the student's treating physicians and therapists. If these practitioners did not recommend residential placement, then the court held that it was not appropriate.[953]

Finally, courts have found that parents who do not cooperate with districts will not get what they want. First, parents must give notice to the district that they intend to enroll their child in a private residential placement before seeking tuition reimbursement.[954] Second, courts will not tolerate derailment of the IEP process by parents intent on a residential-only placement. For instance, in *C. G. v. Five Town Community School District*, the court admonished the parents for failing to cooperate with the district to find a middle-ground: "Parents cannot brandish the incompleteness of an IEP document as a sword to prove denial of a FAPE to a child when the document is incomplete as a result of the parents' own uncooperativeness."[955] The court agreed with the hearing officer's determination that "the process was derailed as a result of the Parents' insistence on a residential therapeutic placement."[956] The court believed that A. S.'s parents "would not have accepted any FAPE offered by the school district that did not include their preferred component."[957]

Proportionally, courts found in favor of school districts' actual and proposed placements more than twice as often as they found in favor of the parents' unilateral residential placement. The two cases in which courts favored the student and his/her parents also involved questions regarding whether the residential placement provided an educational benefit or merely provided a medical service.

b. Cases in which courts found in favor of the student.

Two factors determined the outcome in *Town of Bloomfield v. S. C.*[958] First, none of the school district's placements were appropriate. Second, in a spirit of cooperation, S. C.'s parent agreed to try the district's proposed placement prior to unilaterally enrolling S. C. in a residential facility. S. C. failed in this placement, acting violently, refusing to take part in his education, and threatening the staff. Third, all of T. M.'s psychological and educational evaluators and

therapists testified that he required residential placement in a highly therapeutic and structured environment for purposes of meeting his emotional and educational needs.[959]

Similarly, in *Richardson ISD v. Michael Z.*,[960] the court considered whether a school district must reimburse the parents of a BPD student (Leah) for her residential placement. In holding for the parent, the court concluded that Leah failed to make progress *under her IEP*.[961] Instead, her progress simply corresponded with her "good days," or when the BPD was not in full force.[962] Still the court "agree[d] with the Hearing Officer's conclusion that 'the evidence is quite sparse regarding meaningful progress either academically or non-academically for Leah during the 2003-2004 school year.'"[963]

The court stated that, "perhaps more legally significant than the District's failure to provide actual academic or non-academic benefit to Leah [was] the District's inability to address the causes of that failure."[964] Leah's "behavioral difficulties" resulted in her frequent absences, which contributed to her academic regression.[965] The court found it unclear whether her IEP team members, teachers, and service providers "collaborated to provide an appropriate education" for Leah.[966]

The court found that, because of her outbursts, tardies, absences, and general defiance related to her disability, "Leah could receive no educational benefit from the [district's] proposed placement because the District's IEP was not reasonably calculated to provide any educational benefit to Leah."[967] The court further held that Leah's problems were not solely the product of home or out-of-school issues. "Although the precipitating event that led to Leah's withdrawal from the District and interim-placement at the Seay Center was an altercation with her father at home, the overwhelming evidence indicates that Leah's problems at home were minimal compared to her behavioral difficulties at school."[968]

As discussed in the next section, the court further ruled that, while the residential placement supported Leah's emotional, behavioral, and psychiatric needs, it was not subject to the medical exclusion in the IDEA.

3. Medical versus educational placements.

At issue in the *Butler, Jennings, S. C.,* and *Michael Z.* cases were arguments regarding whether the placement and services therein were educational, medical, or an intertwining of both. In *Butler* and *Jennings,* the Seventh and Fourth Circuits held that the placement and services requested for reimbursement were purely medical, were noneducational, and were not the financial responsibility of the school districts. Contrarily, the *S. C.* and *Michael Z.* courts ruled that the cases fell squarely within the *Tatro* and *Cedar Rapids* holdings.

IDEA's supporting regulations define *medical services* as "services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and related services."[969] Notably, medical services are not defined as ongoing medical services for students already found eligible for special education services; indeed, the law specifically states that they are for "diagnostic or evaluation purposes."[970]

The *Tatro* and *Cedar Rapids* Courts interpreted whether these definitions excluded school district provision of a ventilator service for a quadriplegic student and in-school catheterization for a student with spina bifida. The Court held that provision of both of these "related services" were necessary for the children to receive in-school education. Furthermore, the services could be provided by a school nurse or by a layperson. For these reasons, the services did not constitute a "medical exclusion," and the respective school districts were responsible for providing these services while the children were at school.

a. Cases in which courts found in favor of the school district.

In *Butler v. Evans*,[971] the Seventh Circuit ruled that the psychiatric hospitalization of Niki, a student with schizophrenia, "was not an attempt to give her meaningful access to public education or to address her special educational needs within her regular school environment."[972] The court concluded that "[t]his is not a case in which the disabled student needed medical assistance to remain in regular school; Niki was committed to a psychiatric hospital. . . [E]ducation was not the purpose of her hospitalization."[973] Rather,

> Niki's inpatient medical care was necessary in itself and was not a special accommodation made necessary only to allow her to attend school or receive education. The IDEA does not require the government to pay for all the additional services made necessary by a child's disability, and it specifically excludes medical services except those "for diagnostic and evaluation purposes only."[974]

The court ruled that "Niki's hospitalization was a medical service extending beyond diagnostic and evaluation purposes and thus excluded from reimbursement by 20 U.S.C. § 1401(22)."[975]

Similarly, in an unpublished decision,[976] the Fourth Circuit held that the school district was not financially responsible for the hospitalization of a student with BPD. The *Jennings* court denied reimbursement for student Kendall's placement and services while at Graydon Manor, a residential psychiatric treatment center. The court concluded that the "the IDEA requires only reimbursement for appropriate educational services and [ ] 'it is undisputed that [the school district] reimbursed the [parents] with $8,440 for the educational services [Kendall] received from Graydon Manor. The [parents] point to no evidence which indicates that Graydon Manor provided [Kendall] with education services which exceeded this amount.'"[977]

b. Cases in which courts found in favor of the student.

Contrary to the holdings by the Seventh and Fourth Circuits in *Butler* and *Jennings, supra,* the U. S. District Courts for the District of New Jersey and the Northern District of Texas have held that residential placements providing psychiatric services were not excluded by the definition of medical services in IDEA.

In *Town of Bloomfield v. S. C.*,[978] a thirteen year old student with BPD (T. M.) was at Kids Peace, a "restricted residential facility located in Allentown, Pennsylvania."[979] The school district argued that the facility was "simply a psychiatric treatment facility and thus within the medical exclusion."[980] In rejecting this contention, the court found that it was "not supported by the record, given the wide scope the courts have given to required 'related services' and the narrow scope they have given the 'medical' exclusion."[981]

The court reviewed IDEA's explanation of "related services" as "transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education."[982] "They include psychological services, counseling, health services, social work services, parent counseling and training and medical services for diagnostic and evaluation purposes."[983] As discussed above, the court held that T. M.'s parents and the school district implemented all less-restrictive placement options and all of them failed. "In these circumstances 'the program, including non-medical care and room and board, must be at no cost to the parents of the child.'"[984]

The court found that

> T. M.'s psychiatric stabilization is a necessary part of his educational program. This is a continuing, interrelated process in which his psychological difficulties and his education continue in tandem. While medical doctors and psychiatrists may diagnose and evaluate T. M. and aides may provide continuing counseling and monitoring, it is part of an educational process. Without the diagnosis and

> evaluation and without the counseling and monitoring the educational process could not take place.[985]

The court applied the holdings in *Tatro* and *Garret F., supra,* ruling that "T. M's residential placement is necessary for educational purposes. He cannot obtain educational benefits unless his educational program is accompanied by therapeutic treatment. [The district] must pay for the costs of the residential facility including diagnostic and evaluative medical services."[986]

Comparatively, the Texas district court in *Richardson ISD v. Michael Z.*[987] upheld the residential placement of a student (Leah) with BPD. The court examined what costs the school district must fund as "related services" and what costs are excluded by the act for being "medical." The court reviewed the law defining "related services": "'medical services shall be for diagnostic and evaluation purposes only,' and related services do not include 'a medical device that is surgically implanted, or the replacement of such device.'"[988] It continued:

> Regulations promulgated under the IDEA clarify what costs associated with residential placement are reimbursable: "If placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parents of the child."[989]

The court did not reach the issue, instead ruling that the parties had not yet briefed the issue for judicial determination.[990]

The court acknowledged IDEA's "'preference for mainstream placements,'" but "'recognize[d] that some disabled students need full-time care in order to receive educational benefit.'"[991] Accordingly, the court analyzed "'whether full-time placement may be considered necessary for educational purposes, or whether the residential placement is a response to medical, social or emotional problems that are segregable from the learning process.'"[992]

The court relied on Leah's treating psychiatrist's testimony, finding "Leah's behavioral, educational, and medical problems *were so intertwined* that placement at a residential facility . . . was necessary for her to have any opportunity to progress educationally."[993] The court was not deterred that Leah made scant progress in the residential placement, since she may not progress academically "until her behavioral problems could be managed to allow beneficial instruction. Leah's 'main learning problem [was] [her] inability to cooperate with authority. Accordingly, the only appropriate placement for [Leah] [was] one which specifically takes into account and provides for this lack of cooperation.'"[994]

III. Conclusion.

Two major issues surfaced in the cases involving students with BPD. First, the courts tackled questions of special education and related services eligibility for these students. Second, the courts examined placement questions. Sub-issues within the question of placement included whether a school district's proposed placement within the district provided FAPE in the LRE or whether the school district must reimburse parents for the unilateral placement of the student in a private day or private residential setting. Finally, courts confronted questions of whether psychiatric hospitalizations or similar facilities were "related services," thereby the financial responsibility of school districts, or were purely nondiagnostic, nonevaluative, and noneducational "medical" services, thus excluded under IDEA. Chapter Three analyzed the facts from each case that drove the courts' answers to these inquiries. Chapter Four summarizes this study's findings and conclusions about providing a legally-appropriate special education for students with BPD.

CHAPTER FOUR

FINDINGS AND CONCLUSIONS

I. Introduction.

This study used legal research to examine available court cases brought under IDEA involving students with bipolar disorder (BPD). From these cases, the author scrutinized the legal trends and issues involving students with BPD. Accordingly, the statutes, regulations, and cases reviewed addressed the study's research questions, including the relevant legal history of special education and related services for students with disabilities and, specifically, for students with bipolar disorder, and the current legal status of special education and related services for students with disabilities and, specifically, for students with bipolar disorder. Furthermore, the study addressed the predominate issues litigated in the courts regarding students with bipolar disorder or other mood disorders, and how the courts ruled regarding the aforementioned issues. This chapter discusses the findings and conclusions related to the study's research questions.

Medical and psychiatric literature published in the mid- to late-2000s suggests amplified attention to childhood and adolescent bipolar disorder. Corresponding to this increased medical attention is a larger number of court cases involving students with BPD brought in the mid- to late-2000s pursuant to IDEA. The purpose of this legal review was to draw conclusions from the case law about providing a legally-appropriate special education for students with BPD.

II. Findings.

By reviewing the relevant legal history and current legal status of special education and related services specifically pertaining to students with bipolar disorder, this study found the following. The *Rowley* decision established the landmark test for determining whether a school district provided a free, appropriate public education (FAPE) for children with disabilities. First,

the reviewing court must determine whether the state has complied with IDEA's procedural requirements.[995] Second, the reviewing court must determine whether the IEP is "reasonably calculated to confer *some* educational benefit on a disabled child."[996]

The *Burlington* and *Carter* cases ruled that if school districts have not provided a FAPE, they may be required to reimburse parents who unilaterally remove their disabled children from the public schools and place them in private settings. The *Tatro* and *Cedar Rapids* decisions held that certain services, such as catheterization of a child with spina bifida and a ventilator for a quadriplegic child, were permitted "related services" under IDEA and, thus, the financial responsibility of the school district in order to provide the child a FAPE.

The study further reviewed several United States Circuit Courts of Appeal decisions that set forth tests for determining whether a disabled child's placement was in the least restrictive environment (LRE) as mandated by IDEA. Finally, the study reviewed seventeen cases involving students with bipolar and three cases involving students with diagnoses similar to BPD (schizophrenia, depression).

To be eligible for special education, a student must be a child with a disability within the definitions found in the IDEA. A "child with a disability" is a child with, for instance, an emotional disturbance and who, by reason thereof, needs special education and related services. An emotional disturbance is "a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:

> (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.
>
> (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.

(C) Inappropriate types of behavior or feelings under normal circumstances.

(D) A general pervasive mood of unhappiness or depression.

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.[997]

"Emotional disturbance includes schizophrenia," but emotional disturbance "does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance" as defined in 34 C.F.R. § 300.8(c)(4)(i), *supra*.[998]

Next, the study addressed the predominate issues litigated in the courts regarding students with bipolar disorder or other mood disorders, and how the courts ruled regarding the aforementioned issues. Of the twenty cases reviewed, sixteen involved cases where the students were eligible for special education and related services prior to litigation. All of the children in these sixteen cases qualified as children with an "emotional disturbance." Three of the cases reviewed specifically involved questions of eligibility, and the courts found that the children involved were not eligible for IDEA services at the time of the district's evaluation. Only one case found that the school district should have determined the child to be eligible for special education services at an earlier date.

All of the students in the twenty cases held more than one diagnosis at any given time, including (cumulatively) BPD, ADHD, ODD, PTSD, schizophrenia, schizoaffective disorder, anxiety, depression, parent-child conflict, reactive attachment disorder, dysthemia, intermittent explosive disorder, Tourette's disorder, conduct disorder, borderline personality disorder, and mild learning disability. Many of the students attempted suicide, many of the students made suicidal gestures, wrote about suicide, or had suicidal ideations, and many of the students were hospitalized in psychiatric facilities, some on multiple occasions. Several of the students abused drugs and alcohol, two girls engaged in sexually promiscuous behavior, and most of the students

had outbursts and violent rages. Some of the students threatened classmates, parents, or teachers. Many of the students refused to do homework or to attend school; some were too tired to go to school. The majority of the students spent some time in a residential facility. In many cases the students' behavior at home or out-of-school was far more aggressive and defiant than in school.

Twelve cases involved the question of whether a district's proposed placement provided a FAPE and, if not, whether the district must reimburse the parents for their unilateral placement of the disabled student in a private day or private residential school. Of these twelve, the court found in favor of the school district ten times and the student/parents twice.

III. Conclusions.

The purpose of this study was to determine what a legally-appropriate public education is for students with BPD by analyzing the litigation trends involving students with BPD who brought cases under the IDEA. Through review of the IDEA, its regulations, the pivotal Supreme Court and Circuit Court decisions interpreting the meaning of FAPE and LRE (i.e., "the relevant legal history and current legal status"), and cases involving students with BPD, this study exacted patterns, trends, and relevant facts that determined when a court ruled in favor of the school district and when it ruled in favor of a student (and his parents).

The cases identified for this study primarily involved the following legal issues: (i) eligibility under IDEA for students with bipolar disorder and (ii) appropriate placement, including public versus private and day versus residential. Included in the second group of issues was the courts' analyses of whether a particular placement was strictly medical or psychiatric and did not have an educational component, therefore excluding the placement (or some portion thereof) from coverage under IDEA, or whether the placement provided

educational benefit, even if the placement additionally supported the student's mental health, emotional, and behavioral needs.

The majority of the cases held in favor of the school district on both questions of eligibility and questions of placement. At issue in the eligibility cases was (i) whether a student was a "child with a disability," (ii) whether the student qualified as an "emotionally disturbed" child, (iii) whether the student's conduct or behavior was a result of something other than his disability (*e.g.*, drug or alcohol abuse), and (iv) whether the student, who had a disability, "needed" special education and related services.

In the three cases upholding the school districts' determinations that the students were not disabled, one case held that the student's behavior was a result of his drug abuse; one case held that the parents of a student – who the district ultimately found eligible as a child with an emotional disturbance – failed to make her available for evaluation in a timely manner, thus delaying her eligibility determination; and the final case held that the child did not have the disability the required duration and marked degree as necessary to qualify as a child with an emotional disturbance and, furthermore, the district's implementation of an appropriate BIP largely reduced the child's negative behaviors, thus making special education services unnecessary.

In a case holding that the district should have found the student eligible for special education and related services, the court relied on the child's multiple suspensions from private schools and the multiple diagnoses that she had since her toddler years. Despite her academic progress in school, the court found that the student needed special education services because she continued getting expelled from school. This inability to stay in (private) school paired with her BPD diagnosis was reason enough for the district to have found her eligible under IDEA.

The majority of the cases surveyed herein involved the appropriateness of school district-proposed placements versus parentally-proposed private placements. Chapter Three of this study set forth a detailed analysis of the factors involved when the courts held in favor of the district's proposed placement versus finding that the district must reimburse a parent for private day or residential placement. In essence, if the IEP team has not exhausted the continuum of alternative settings between full inclusion and residential schooling, then the courts ordinarily expect the district to try alternative placements before residential. Furthermore, if the child is making some academic and nonacademic progress, especially by passing her classes and making friends/being social, the courts will not disturb the IEP. Additionally, if parents send the child to the private (residential) placement mostly for home or out-of-school behavioral and emotional issues, the courts will not find it to be an educational placement covered under IDEA. Many of the private and residential placements at issue in the cases were not appropriately staffed and serviced by special educators and the students did not have access to the litany of support personnel available at the school districts' proposed placement. Courts deferred to knowledgeable school district experts regarding the districts' proposed programs and the benefits the students would gain from the programs. Furthermore, when a student's treating physician or therapist testified that she did not require residential treatment, or testified about the student's needs, the likes of which would not be satisfied in the private facility, courts would find these private placements to be inappropriate.

In two cases, courts required the school district to reimburse the parents for the private residential placement. The factors that swayed the court were that, foremost, the students were not making any progress in the school districts' proposed placements. Rather than being uncooperative and demanding residential schooling or nothing, the parent in the first of this case

duo agreed to allow the district time to place the child in another day setting prior to her removing him to a residential placement. In the second of this case duo, the parents were similarly cooperative and none of the placements implemented or proposed by the district remedied the child's outrageous behavior. Finally, these students' therapists all testified and wrote in their reports that the students required a structured, therapeutic residential placement.

In several cases, school districts argued that the psychiatric hospitalization was a medical exclusion under the IDEA, since the hospitalizations were not diagnostic or evaluative and required physicians to implement the services. In two cases, the Seventh and the Fourth Circuits agreed, finding that the residential setting was purely for psychiatric purposes and was not educational. In two cases, however, district courts disagreed, finding that the psychiatric, emotional, and behavioral services provided to these students in residential facilities were so intertwined with the students' educational services that they fell in the types of "related services" the *Tatro* and *Cedar Rapids* cases aimed to cover.

IV. Implications.

Implications from the findings and conclusions of this legal research include clinical and educational "best practices." Implicit in the courts' analyses is the preference for community and parent based therapeutic services designed in the LRE. While undoubtedly some students require maximum restriction in residential placements, others can and do benefit from having a host of "wrap-around" services in their community, including home- and family-based psychiatric and pharmacological treatment, counseling, parent training, adjusted educational services, hospital homebound services when needed, and tutoring.

Furthermore, implicit in the courts' opinions was the factor of communication. Certainly, parents and school districts posture against one another for fear of being required to fund an

expensive placement option. However, if parents and school districts were to set the financial discussion aside and strictly concentrate on what a child needs, in and out of school, to meet the child's, parents', and districts' expectations, it would allay the fears and reinstate the trust necessary to fully serve a child. While courts wrestle with whether a service is a medical service, thereby excluded from IDEA coverage, or a related service, thereby covered under IDEA, many of these cases may have been resolved prior to extensive litigation over funding. The school systems will not be able to set a program that will alleviate all of the behavioral, emotional, and academic problems of a child with BPD without assistance from the child and the child's doctors, therapists, community service providers, and her parents. Similarly, the parents can not begin to address the holistic needs of a child with BPD without communicating their out-of-school medical, psychiatric, behavioral, emotional, and academic problems and treatment plans to the school district and other service providers. In summary, before the situation escalates to litigation, it is possible for all of the student's caregivers, educators, and service providers to work together on a community-oriented, "everybody plays a part," systematic plan to assist the child to function within his capabilities while learning to manage his mental illness.

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O'Toole v. Olathe Dist. Schs. Unified Sch. Dist., 144 F.3d 692 (10th Cir. 1998).

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P. J. v. Eagle-Union Cmty. Sch. Corp., 1999 U.S. App. LEXIS 30208, 31 IDELR 108 (7th Cir. Nov. 17, 1999) (unpub'd).

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S. Rep. No. 108-85, at 27 (2003).

Sacramento City Unified Sch. Dist. v. Rachel H., 14 F.3d 1398 (9th Cir. 1994).

Samuel Tyler W. v. Northwest Indep. Sch. Dist., 202 F. Supp. 2d 557 (N.D. Tex. 2002).

Sanford v. Sylvania City Sch. Bd. of Educ., 380 F. Supp. 2d 903 (N.D. Ohio 2005).

Sanford Sch. Comm. v. Mr. and Mrs. L., 34 IDELR 262 (D. Me. 2001).

School Comm. of the Town of Burlington v. Dep't of Educ., 471 U.S. 359, 105 S. Ct. 1996 (1985).

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Socorro Indep. Sch. Dist. v. Angelic Y., 107 F.Supp.2d 761, 33 IDELR 273, 33 LRP 6345 (W.D. Tex. 2000).

Springer v. Fairfax County Sch. Bd., 134 F.3d 659, 663 (4th Cir. 1998).

Sylvie M. v. Board of Educ. of Dripping Springs, 48 F. Supp. 2d 681 (W.D. Tex.1999).

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T. S. v. Indep. Sch. Dist. No. 54, 265 F.3d 1090 (10th Cir. 2001).

Tice v. Botetourt County Sch. Bd., 908 F.2d 1200 (4th Cir. 1990).

Todd v. Duneland Sch. Corp., 299 F.3d 899 (7th Cir. 2002).

Township of Bloomfield v. S. C., 2005 U.S. Dist. LEXIS 21424 (D.N.J. Sept. 22, 2005) (unpub'd).

Veazey v. Ascension Parish Sch. Bd., 42 IDELR 140 (5th Cir. 2005) (unpub'd).

W. G. v. Board of Trustees, 960 F.2d 1479 (9th Cir. 1992).

Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119 (1998).

Wendy F. Hensel, *Symposium: Sharing the Short Bus: Eligibility and Identity Under the IDEA,* 58 HASTINGS L. J. 1147 (June 2007).

White v. Ascension Parish Sch. Bd., 39 IDELR 182 (5th Cir. 2003).

END NOTES

CHAPTER ONE END NOTES:

[1] For a complete medical and psychological review of childhood and teenage bipolar disorder, *see, e.g.*, the following: Rosalie Greenberg, BIPOLAR KIDS (2d ed. 2007); David Miklowitz & Elizabeth George, THE BIPOLAR TEEN (2007); Demitri Papolos & Janice Papolos, THE BIPOLAR CHILD: THE DEFINITIVE AND REASSURING GUIDE TO CHILDHOOD'S MOST MISUNDERSTOOD DISORDER (3d ed. 2006); Barbara Geller & Melissa P. DelBello, BIPOLAR DISORDER IN CHILDHOOD AND EARLY ADOLESCENCE (2003); Margot Andersen, *et al.*, UNDERSTANDING AND EDUCATING CHILDREN AND ADOLESCENTS WITH BIPOLAR DISORDER (2003); Robert L. Findling, Robert A. Kowatch, & Robert M. Post, PEDIATRIC BIPOLAR DISORDER (1st ed. 2002); Ross W. Greene, THE EXPLOSIVE CHILD (1998); David. G. Fassler & Lynne S. Dumas, "HELP ME, I'M SAD": RECOGNIZING, TREATING AND PREVENTING CHILDHOOD AND ADOLESCENT DEPRESSION (1997); Frederick K. Goodwin & Kay Redfield Jamison, MANIC DEPRESSION (1st ed. 1990).

For memoirs by parents of children and extraordinary and courageous persons with bipolar disorder, *see, e.g.*, the following: Marya Hornbacher, MADNESS: A BIPOLAR LIFE (2008); Terri Cheney, MANIC: A MEMOIR (2008); Tracy Anglada, INTENSE MINDS: THROUGH THE EYES OF YOUNG PEOPLE WITH BIPOLAR DISORDER (2006); Patrick Jamieson & Moira Rynn, MIND RACE: YOUNG, BIPOLAR & THRIVING (2006); Paul Raeburn, ACQUAINTED WITH NIGHT (2004); Lizzie Simon, DETOUR: MY BIPOLAR ROAD TRIP IN 4-D (2002); Trudy Carlson, THE LIFE OF A BIPOLAR CHILD (1999); Carol Stock Kranowitz, THE OUT-OF-SYNC CHILD (1998); Danielle Steel, HIS BRIGHT LIGHT: THE STORY OF NICK TRAINA (1998); Kay Redfield Jamison, AN UNQUIET MIND (1990); Patty Duke & Kenneth Turan, CALL ME ANNA (1990).

[2] Demitri Papolos & Janice Papolos, THE BIPOLAR CHILD: THE DEFINITIVE AND REASSURING GUIDE TO CHILDHOOD'S MOST MISUNDERSTOOD DISORDER 29 (3d ed. 2006).

[3] Id. at 32.

[4] Id. at 29-33. The Papolos note that the American Psychological Association, publisher of the DSM, "has no plans to publish a revision [including separate criteria for diagnosing children with bipolar disorder] until 2012." *Id.* at 33. The Papolos set forth the DSM-IV criteria for adult major depressive episodes and manic episodes. *Id.* at 29-32.

[5] Id. at 37-41.

[6] Id. at 41-43.

[7] Id. at 43-44.

[8] Id. at 45. Tourette's Syndrome

> is almost certainly a physical disorder of the brain that causes involuntary movements (motor tics) and involuntary vocalizations (vocal tics). A child with motor tics may exhibit eye blinking, facial grimacing, nose scrunching, shoulder shrugging, head jerking, and hand movements. Common vocal tics include throat clearing, grunting, sniffing, making loud sounds, or saying words. A much smaller group of children exhibit copralalia – they use obscene or other socially inappropriate words.

Id. at 45.

[9] Id. at 45-47. DSM-IV defines "Oppositional Defiant Disorder," or ODD, as:

> A recurrent pattern of negativistic, disobedient, and hostile behavior toward authority figures that persists at least six months and is characterized by frequent occurrence of at least four of the following behaviors: arguing with adults, actively defying or refusing to comply with requests or rules of adults, deliberately doing things that will annoy other people, blaming others for his or her own mistakes or misbehavior, being touchy or easily annoyed by others, being angry or resentful, or being spiteful and vindictive.

Id. at 45.

[10] Id. at 47-48. The Papolos write:

> A subgroup of young women with bipolar disorder are diagnosed with co-morbid eating disorders, particularly bulimia, a condition in which one binges and then purges what one has eaten. . . [A] fair number of these adolescent girls have a history of cutting or scratching themselves with knives or razors.
>
> These girls commonly report periods of unbearable agitation and irritability. Some of them attempt to calm themselves by using alcohol and drugs – they self-medicate; others attempt to stop this continuous state of depression and agitation by cutting or scratching their arms or legs with razors or knives, or burning their thighs with lighted cigarettes.
>
> ***
>
> One theory about these self-mutilating behaviors is that a powerful impulse to discharge aggression is counterpoised against the individual's attempt to inhibit that impulse. The tension created by these conflicting forces builds to an unbearable pitch, and the tension is relieved by physical pain directed toward self. This discharge of aggression and the concomitant activation of the pain pathways could act as a cathartic release, but no one really understand what exactly is happening and why hurting oneself resolves the problem temporarily.

Id. at 47-48.

[11] Id. at 48. The Papolos state:

> Many doctors, upon hearing of self-mutilating behavior, begin to suspect a diagnosis of borderline personality disorder. Someone given this diagnosis typically has a history of unstable and tempestuous interpersonal relationships, impulsive behaviors, frequent displays of temper, marked shifts of mood with the moods lasting hours or days, identity confusion, feelings of emptiness, and "frantic efforts to avoid real or imagined abandonment."

Id. at 48.

[12] Id. at 48-50.

[13] Id. at 51-53.

[14] Id. at 54-55.

[15] Id. at 37-41.

[16] Id. at 37. The Papolos set forth the DSM-IV criteria for ADHD. *Id.* at 37-39.

[17] Id.

[18] Id. at 35-36.

[19] Id. at 36.

[20] Id. at 56.

[21] As is customary for legal research publications, this study utilizes THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (18th ed. 2005-2007), compiled by the editors of the Columbia Law Review, the Harvard Law Review, the University of Pennsylvania Law Review, and the Yale Law Journal, and published and distributed by the Harvard Law Review Association, Gannett House, Cambridge, Mass., available at www.legalbluebook.com, for citation and formatting. The study does not utilize APA style.

[22] The author did not have access to Westlaw, so if a case was printed only in Westlaw, it does not appear in this study. It is rare for a case to be printed solely by one service; ordinarily, cases, whether "published," "unpublished," "reported," or "unreported" by the court, appear in both Lexis-Nexis and Westlaw online databases.

CHAPTER TWO END NOTES:

[23] As previously stated, this study does not consider provision of services to students with bipolar disorder under Section 504 of the Rehabilitation Act of 1974 or under the Americans with Disabilities Act of 1990.

[24] 347 U.S. 483 (1954).

[25] 334 F. Supp. 1257 (E.D. Pa. 1971), final consent agreement, 343 F. Supp. 279 (E.D. Pa. 1972).

[26] 348 F. Supp. 866 (D.D.C. 1972).

[27] Kristy A. Mount, *Student Comment: Children's Mental Health Disabilities and Discipline: Protecting Children's Rights While Maintaining Safe Schools*, 3 BARRY L. REV. 103, 105 (Fall 2002) (*citing* 20 U.S.C. § 1400(c)(2)(B)-(C) (2001)).

[28] Id. (*citing* Honig v. Doe, 484 U.S. 305, 309 (1988)).

[29] 347 U.S. 483 (1954).

[30] Pennsylvania Ass'n for Retarded Children (P.A.R.C.) v. Commonwealth of Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971), final consent agreement, 343 F. Supp. 279 (E.D. Pa. 1972).

[31] P.A.R.C., 343 F. Supp. 279, 287.

[32] Mills v. Board of Educ. of District of Columbia, 348 F. Supp. 866 (D.D.C. 1972).

[33] Mills at 869-870.

[34] Mills at 875. The federal due process clause was at issue because the students were educated in the District of Columbia, an area of the United States that is subject to federal provisions and not subject to the Fourteenth Amendment *per se* because it is not a state.

[35] Mills at 878. ("No child eligible for a publicly supported education in the District of Columbia public schools shall be excluded from a regular public school assignment by a rule, policy, or practice of the board of education or its agents unless the child is provided with an adequate alternative suited to the child's needs, which may include special education.").

[36] Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 192-194, 199, 102 S.Ct. 3034, 3043-3045, 3047 (1982).

[37] Hereafter "States" refers to all 50 states, the District of Columbia, and the provinces and territories subject to federal law.

[38] Wendy F. Hensel, *Symposium: Sharing the Short Bus: Eligibility and Identity Under the IDEA*, 58 HASTINGS L. J. 1147, 1153 (June 2007) (*citing* Salvatore Pizzuro, THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT AND THE NATURE OF AMERICAN POLITICS: A HANDBOOK ON PUBLIC POLICY 42-43 (2001) Hensel notes "President Ford reportedly only signed the bill because Congress had sufficient support to override his veto. He nevertheless indicated upon signing that he believed it 'was a mistake for the nation, and that he looked forward to its eventual repeal.'" Hensel, *supra*, at n.32 (*quoting* Pizzuro at 44, 46).

[39] Hensel at 1153 (*citing* 121 Cong. Rec. 25526, 25541 (1975) (statement of Rep. Harkin) (*citing* statistics from the Bureau of Education for the Handicapped); *also citing* 121 Cong .Rec. 25526, 25531 (1975) (statement of Rep. Lehman (citing evidence that "about 1 to 3 percent [of students] have so far been able to be identified as learning disabilities [sic]"); *also citing* Jo An Engelhardt, *The Education for All Handicapped Children Act: Opening the Schoolhouse Door*, 6 N.Y.U. REV. L. & SOC. CHANGE 43, 47-48 (1975) ("noting that at the time EAHCA was passed, 'a conservative estimate' would count 'one out of ten school-age children [as] handicapped.'")).

[40] Hensel at 1153 (*citing, e.g.,* 121 Cong. Rec. 23701, 23703 (1975); 121 Cong. Rec. 25526, 25537 (1975) (statement of Rep. McKay) ("This funding level encourages States to classify children as handicapped who are not handicapped . . . . This would be harmful to those children who are misclassified.")).

[41] Hensel at 1153 (quoting S. Rep. No. 94-168, at 26-27 (1975), as reprinted in 1975 U.S.C.C.A.N. 1425, 1450).

[42] Id. at 1153-54. Hensel notes that "[s]ome of Congress' concerns were based on the belief that some of the tests used to identify disabilities were biased and discriminatory." (*citing* 121 Cong. Rec. 25526, 25539 (1975) (statement of Rep. Miller).

[43] Hensel at 1154 (*citing* 121 Cong. Rec. 25526, 25531 (1975) (statement of Rep. Quie).

[44] Hensel at 1154 (*citing* 20 U.S.C. § 1412(3) (Supp. V 1975). Hensel cited the Conference Report, which noted that "the Conferees wish to make very clear that, with respect to the second priority; it is not intended that any one or two categories of disabilities be recognized . . . as the 'most severe' categories, but rather than an attempt must be made to reach and provide appropriate services to children with the most severe handicaps without regard to disability category.'" Id. (quoting S. Rep. No. 94-455, at 37 (1975) (Conf. Rep.), as reprinted in 1975 U.S.C.C.A.N. 1480, 1491).

[45] Hensel at 1155 (*citing* Tyce Palmaffy, THE EVOLUTION OF THE FEDERAL ROLE IN RETHINKING SPECIAL EDUCATION FOR A NEW CENTURY at 6).

[46] Because education is not a federal right, Congress enacted Public Law 94-142, 89 Stat. 773 (1975), under its Spending Power, which provides that, if States elect to contract with the federal government in exchange for federal money, the states must comply with the terms of the contract, i.e., the statutory basis for receiving the federal money. 20 U.S.C. § 1412 (Supp. V 1975). Public Law 94-142 (EAHCA) set forth the contractual requirements. At this time, all states receive federal special education money under IDEA 2004 and must comply with its statutory and regulatory mandates. *See also,* Hensel at 1155 ("Although states [ ] were free to either accept or reject federal funding pursuant to the statute, virtually every state moved quickly to accept the financial support and the legal ramifications attached thereto. All but one state, New Mexico, had elected to participate through receipt of federal funds by 1979." *See* Rosalie Levinson, *The Right to a Minimally Adequate Education for Learning Disabled Children,* 12 VAL. U. L. REV. 253, 277 n.135 (1978)).

To qualify for federal funds, the state educational agency must submit an annual program plan setting out how it intends to provide education to children with disabilities within the state. 20 U.S.C. § 1412 (a). Details of the plan include what services the state will provide and what procedural safeguards to state will put in place to ensure that schools are providing programming. *Id.* The services must include not only the education itself but also a system for identifying, evaluating, and locating children in need of special education. *Id.* at (a)(3). The statute sets forth a formula for the amount of funding each state receives, established by a count of the age-eligible children with

disabilities in the state. 20 U.S.C. § 1411(a). That number is then multiplied by 40 percent of the average per pupil expenditure in public elementary and secondary schools in the United States. *Id.* at (a)(2). "Problems regarding IDEA funding formula include difficulty in finding and counting every disabled child, the reality that educating students with severe disabilities actually costs much more than educating students with milder disabilities, and consistency between local school systems in determining who is, or is not, 'disabled.'" Laura F. Rothstein, SPECIAL EDUCATION LAW 38 (2000).

[47] These requirements are the foundation of the law and can be found in the Individuals with Disabilities Improvement Act of 2004 (IDEA 2004) and its accompanying regulations at 20 U.S.C. §§ 1400 *et seq.* (2004) and 34 Part 300 (2006).

[48] Hensel at 1154-1155 ("To further alleviate concerns with the SLD category, Congress revised the bill to provide that the category specifically excluded children who have 'learning problems that [are] primarily the result of . . . environmental, cultural or economic disadvantage.'" 20 U.S.C. § 1401(30(C) (2000)). Hensel states that the "Senate Report clarified that the 'term does not include children who may be slow learners.'" Hensel at 1155, n.44 (*quoting* S. Rep. No. 94-168, at 10 (1975), reprinted in 1975 U.S.C.C.A.N. 1425, 1434). Hensel continued that, "[h]oping to develop additional clarification on the issue, Congress also directed the Commissioner of Education to develop regulations within one year that 'establish specific criteria for determining whether a particular disorder or condition may be considered a specific learning disability,' and to 'describe diagnostic procedures which shall be used in determining whether a particular child has a disorder or condition which places such child in the category of children with specific learning disabilities.'" Hensel at 1155, n.44 (*quoting* Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, § 620(b)(1), 89 Stat. 773, 794 (1975); *also quoting* 20 U.S.C. § 1411 (2000) (detailing prior provision in section)).

[49] 20 U.S.C. § 1401(1) (Supp. V 1975).

[50] Hensel at 1154 (*citing* 20 U.S.C. § 1411(a)(5)(A)(i)-(ii) (Supp. V 1975); *also citing* 121 Cong. Rec. 23701, 23703, 23705 ("This cap would not allow States to define everyone in the State as sort of handicapped so they could get more aid and share in the educational funds.")).

[51] 20 U.S.C. § 1415 (2004) (originally enacted as Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, Stat. 173 (1975)).

[52] Katherine May, *Note and Comment: By Reason Thereof: Causation and Eligibility Under the Individuals with Disabilities Education Act*, 2009 BYU EDUC. & L. J. 173, 175 (2009) (*citing* 20 U.S.C. § 1400(c)(3)-(4) (2004)).

[53] Hensel at 1155 (*citing* Education of All Handicapped Children Act of 1986, Pub. L. No. 99-457, 100 Stat. 1145 (1986) (noting that Part H became Part C in the 1997 reauthorization of IDEA, 20 U.S.C. §§ 1431-1445 (2000)).

[54] Hensel at 1155-56 (*quoting* 20 U.S.C. § 1471(a)(1)-(4) (1986), amended by 20 U.S.C. § 1431(a)(1)-(4) (2000)).

[55] Hensel at 1156 (*citing* Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, § 901(b), 104 Stat. 1103 (1990)).

[56] Id. (*quoting* 20 U.S.C. § 1401(3) (2000)).

[57] Id. (*quoting* 20 U.S.C. § 1401(3)(A)(ii) (2000)).

[58] Id. (*quoting* Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, § 102(a)-(b), 104 Stat. 1103 (1990)).

[59] Id. (*citing* 18 IDELR 116 (U.S. DOE 1991); *citing also* Tyce Palmaffy, *supra* at 2, "noting that a 280% increase in the category occurred over approximately ten years.").

[60] Hensel at 1156 (*citing* Assistance for the Education of Children with Disabilities, 71 Fed. Reg. 46540 (Aug. 14, 2006) (codified at 34 C.F.R. Part 300)).

[61] Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, 111 Stat. 37 (1997).

[62] Hensel at 1157 (*citing* 20 U.S.C. § 1401(3)(B) (1997)).

[63] Id.

[64] Id. (*quoting* S. Rep. No. 104-275, at 48 (1996)).

[65] Hensley at 1158 (*quoting* S. Rep. No. 105-17, at 5 (1997) (identifying concern with "the continued inappropriate placement of children from minority backgrounds and children with limited English proficiency in special education"); *citing* H.R. Rep. No. 104-614, at 13 (1996)).

[66] Id. (*quoting* H. R. Rep. No. 104-614, at 14 (1996)).

[67] Pub. L. No. 105-17, § 614(b)(5), 111 Stat. 37, 82 (codified as amended at 42 U.S.C. § 1414(b)(5) (1997)).

[68] Lucy W. Shum, *Note: Educationally Related Mental Health Services for Children with Serious Emotional Disturbance: Addressing Barriers to Access Through the IDEA*, 5 J. HEALTH CARE L. & POL'Y 233, 236-37 (2002) (*citing* 20 U.S.C. § 1400(d)(1)(B)-(C)).

IDEA 2004, *infra*, sets forth the purposes of IDEA:

> The purposes of this part are—
>
> (a) To ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living;
>
> (b) To ensure that the rights of children with disabilities and their parents are protected;
>
> (c) To assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities; and
>
> (d) To assess and ensure the effectiveness of efforts to educate children with disabilities.

20 U.S.C. 1400(d); 34 C.F.R. § 300.1 (2006).

[69] Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. § 1400 *et seq.* (2004).

[70] Hensel states:

> The House Committee on Education and the Workforce alone held at least three hearings specifically relating to these issues (H. R. Rep. no. 108-77, 79-80 (2003)), concluding that 'the overidentification of children as disabled and placing them in special education where they do not belong hinders the academic development of these students . . . [and] takes valuable resources away from students who truly are disabled.' H.R. Rep. No. 108-77, at 84 (2003); S. Rep. No. 108-185, at 22 (2003). Congress reaffirmed its earlier finding that this problem had arisen 'largely because the children do not have appropriate reading skills' and concluded that it could be alleviated by making funds more generally available to help

struggling children. H.R. Rep. No. 108-77, at 106 (2003). Congress thus amended the statute to permit local education agencies to use up to 15% of their funding for 'early intervening services' for students 'who have not been identified as needing special education or related services but who need additional academic and behavioral support to succeed in a general education environment.' 20 U.S.C. § 1413(f)(1) (2004); H.R. Rep. No. 108-77, at 84 (2003). Congress believed these changes would 'help differentiate between students who have different learning styles and students that have disabilities, especially learning disabilities' (H.R. Rep. No. 108-77, at 104 (203), reduce referrals to special education, and 'benefit[ ] . . . the regular education environment . . . by reducing academic and behavioral problems.' S. Rep. No. 108-185, at 22-23 (2003).

Hensel at 1159.

[71] For a summary of IDEA 2004 and federal regulatory changes, *see* Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. § 1400 *et seq.* (2004); 34 C.F.R. Part 300 (2006); *see also* Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, Final Rule, 71 Fed. Reg. 46540 (Apr. 14, 2006).

[72] *See, e.g., Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 122 (2d Cir. 1998).

[73] 20 U.S.C. § 1401(3); *see also* 34 C.F.R. § 300.8(a)(1).

[74] "Or any subset of that age range, including ages three through five." 34 C.F.R. § 300.8(b).

[75] 20 U.S.C. § 1401(3); *see also* 34 C.F.R. § 300.8(b).

[76] 34 C.F.R. § 300.8(c).

[77] States may have regulations that alter or go beyond the federal regulations, so long as they are not more restrictive than federal regulations.

[78] 34 C.F.R. § 300.8(c)(4)(i).

[79] 34 C.F.R. § 300.8(c)(4)(ii).

[80] 34 C.F.R. § 300.8(c)(9).

[81] 34 C.F.R. § 300.8(c)(7).

[82] 34 C.F.R. §§ 300.304 (Evaluation procedures); 300.305 (Additional requirements for evaluations and reevaluations); 300.306 (Determination of eligibility); 300.310 (Observation). 34 C.F.R. §§ 300.8(c)(10); 300.307; 300.308; 300.309; 300.310; and 300.311 relate to evaluation and eligibility for students suspected of having a Specific Learning Disability and are not relevant to this paper.

[83] 34 C.F.R. § 300.15; 20 U.S.C. § 1414(a)-(c).

[84] 34 C.F.R. §§ 300.300 (Parent consent); 300.301 (Initial evaluations); 300.302 (Screening for instructional purposes is not evaluation); 300.303 (Reevaluations); 300.304 (Evaluation procedures); 300.305 (Additional requirements for evaluations and reevaluations); 300.306 (Determination of eligibility); 300.310 (Observation).

[85] 34 C.F.R. § 300.122; 20 U.S.C. § 1412(a)(7).

[86] 20 U.S.C. § 1412(a)(1)(A); 34 C.F.R. § 300.101(c)(2).

[87] 34 C.F.R. §§ 300.305 (Additional requirements for evaluations and reevaluations); 300.306 (Determination of eligibility).

[88] 34 C.F.R. § 300.301(a); 20 U.S.C. § 1414(a).

[89] 34 C.F.R. § 300.301(b); 20 U.S.C. § 1414(a). The district must comply with parental consent requirements set forth in 34 C.F.R. § 300.300.

[90] 34 C.F.R. § 300.301(c)(1); 20 U.S.C. § 1414(a).

For instance, the Georgia Rule provides: "Once a child is referred for an evaluation by a parent or Student Support Team (SST) to determine if the child is a child with a disability, the initial evaluation: (1) Must be completed within 60 calendar days of receiving parental consent for evaluation." GaDOE Rule 160-4-7-.04 (1)(b). Under the Georgia Rule, "Holiday periods and other circumstances when children are not in attendance for five (5) consecutive SCHOOL days shall not be counted toward the 60 calendar day timeline" and "[d]uring the summer vacation period, beginning thirty calendar days prior to the last day that children attend school, the evaluation must be conducted within 90 calendar days of receiving parental consent for evaluation." *Id.*

The IDEA regulation further states that "[t]he timeframe described in paragraph (c)(1) of this section does not apply to a public agency if— (1) The parent of a child repeatedly fails or refuses to produce the child for the evaluation; or (2) A child enrolls in a school of another public agency after the relevant timeframe in paragraph (c)(1) of this section has begun, and prior to a determination by the child's previous public agency as to whether the child is a child with a disability under § 300.8." 34 C.F.R. § 300.301(d). However, this "exception" to the timeframes established by the Act "applies only if the subsequent public agency is making sufficient progress to ensure a prompt completion of the evaluation, and the parent and subsequent public agency agree to a specific time when the evaluation will be completed." 34 C.F.R. § 300.301(e).

[91] 34 C.F.R. § 300.301(c)(2); 20 U.S.C. § 1414(a).

[92] 34 C.F.R. § 300.304(a). "Assessments of children with disabilities who transfer from one public agency to another public agency in the same school year are coordinated with those children's prior and subsequent schools, as necessary and as expeditiously as possible, consistent with § 300.301(d)(2) and (e), to ensure prompt completion of full evaluations." 34 C.F.R. § 300.304(c)(5).

[93] 34 C.F.R. § 300.304(b).

[94] 34 C.F.R. § 300.304(c)(6).

[95] 34 C.F.R. § 300.304(c)(7).

[96] 34 C.F.R. § 300.304(c)(1)(i) (or be applied on a racially or culturally discriminatory basis).

[97] 34 C.F.R. § 300.304(c)(1)(ii).

[98] 34 C.F.R. § 300.304(c)(1)(iii)-(v).

[99] 34 C.F.R. § 300.304(c)(2).

[100] 34 C.F.R. § 300.304(c)(4).

[101] 34 C.F.R. § 300.304(c)(3).

[102] This review may take place without a meeting. 34 C.F.R. § 300.305(b).

[103] 34 C.F.R. § 300.305(a)(1); *see* 20 U.S.C. § 1414(c).

[104] 34 C.F.R. § 300.305(a)(2)(i)(A). In case of a reevaluation of a child, the evaluation team must determine whether the child continues to have such a disability, and the educational needs of the child. 34 C.F.R. § 300.305(a)(2)(i)(B).

[105] 34 C.F.R. § 300.305(a)(2)(ii).

[106] 34 C.F.R. § 300.305(a)(2)(iii)(A). In the case of a reevaluation of a child, the evaluation team must determine whether the child continues to need special education and related services. 34 C.F.R. § 300.305(a)(2)(iii)(B).

[107] 34 C.F.R. § 300.305(a)(2)(iv).

[108] 34 C.F.R. § 300.305(c).

[109] 34 C.F.R. § 300.306(c)(1); *See* 20 U.S.C. § 1414(b)(4) and (5).

[110] The eligibility team consists of "a group of qualified professionals and the parent of the child." 34 C.F.R. § 300.306(a)(1).

[111] 34 C.F.R. § 300.306(a)(1).

[112] 34 C.F.R. § 300.306(a)(2).

[113] The eligibility criteria referenced herein is the criteria established under 34 C.F.R. § 300.8 and under the applicable state regulations to determine, for instance, whether a child qualifies as a child with emotional disturbance (ED, or EBD) or Other Health Impairment (OHI).

[114] 34 C.F.R. § 300.306(b).

[115] 34 C.F.R. § 300.306(c)(2).

[116] 34 C.F.R. § 300.323(c). *See* 20 U.S.C. § 1414(d)(2)(A)–(C).

[117] 34 C.F.R. § 300.323(d)(1).

[118] 34 C.F.R. § 300.323(d)(2).

[119] The reevaluation must comply with the requirements set forth in 34 C.F.R. §§ 300.304 through 300.311.

[120] 34 C.F.R. § 300.303(a). *See* 20 U.S.C. § 1414(a)(2).

[121] 34 C.F.R. § 300.303(b).

[122] 34 C.F.R. § 300.305(d)(1).

[123] 34 C.F.R. § 300.305(d)(2).

[124] For a child whose eligibility terminates under these circumstances, a school district "must provide the child with a summary of the child's academic achievement and functional performance, which shall include recommendations on how to assist the child in meeting the child's postsecondary goals." 34 C.F.R. § 300.305(e)(3).

[125] The evaluation must comply with 34 C.F.R. §§ 300.304 through 300.311. 34 C.F.R. § 300.305(e).

[126] 34 C.F.R. § 300.305(e).

[127] *Walczak*, 142 F.3d at 122 (citing 20 U.S.C. § 1414(a)(5)); *see also* 20 U.S.C. § 1412(a)(4); 34 C.F.R. § 300.112 ("The State must ensure that an IEP, or an IFSP that meets the requirements of section 636(d) of the Act, is developed, reviewed, and revised for each child with a disability in accordance with §§ 300.320 through 300.324, except as provided in § 300.300(b)(3)(ii)."); 34 C.F.R. § 300.320 (definition of IEP).

[128] Id. *(citing* 20 U.S.C. § 1401(a)(20)).

[129] *Walczak*, 142 F.3d at 122 (*citing* 20 U.S.C. § 1401(a)(20)); *see also* 20 U.S.C. § 1401(19).

The federal regulation sets forth the mandatory IEP components, in relevant part, as follows:

(a) *General.* As used in this part, the term individualized education program or IEP means a written statement for each child with a disability that is developed, reviewed, and revised in a meeting in accordance with §§ 300.320 through 300.324, and that must include—

(1) A statement of the child's present levels of academic achievement and functional performance, including—
(i) How the child's disability affects the child's involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children); or
(ii) For preschool children, as appropriate, how the disability affects the child's participation in appropriate activities;

(2) (i) A statement of measurable annual goals, including academic and functional goals designed to—

(A) Meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and
(B) Meet each of the child's other educational needs that result from the child's disability;

(ii) For children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives;

(3) A description of—

(i) How the child's progress toward meeting the annual goals described in paragraph (2) of this section will be measured; and
(ii) When periodic reports on the progress the child is making toward meeting the annual goals (such as through the *use of quarterly or other periodic reports*, concurrent with the issuance of report cards) will be provided;

(4) A statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child—

(i) To advance appropriately toward attaining the annual goals;
(ii) To be involved in and make progress in the general education curriculum in accordance with paragraph (a)(1) of this section, and to participate in extracurricular and other nonacademic activities; and
(iii) To be educated and participate with other children with disabilities and nondisabled children in the activities described in this section;

(5) An explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in paragraph (a)(4) of this section;

(6) (i) A statement of any individual appropriate accommodations [NOTE: *these are different than modifications*] that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments consistent with section 612(a)(16) of the Act; and

(ii) If the IEP Team determines that the child must take an alternate assessment instead of a particular regular State or districtwide assessment of student achievement, a statement of why—

(A) The child cannot participate in the regular assessment; and
(B) The particular alternate assessment selected is appropriate for the child; and

(7) The projected date for the beginning of the services and modifications described in paragraph (a)(4) of this section, and the anticipated frequency, location, and duration of those services and modifications.

20 U.S.C. § 1414(d)(1)(A) and (d)(6); 34 C.F.R. § 300.320(b).

[130] 20 U.S.C. § 1401(29) and 34 C.F.R. § 300.39 define "specially designed instruction" as "adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction— (i) to address the unique needs of the child that result from the child's disability; and (ii) to ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.

[131] 20 U.S.C. § 1401(19).

[132] 20 U.S.C. §§ 1412(a)(2), 1413(a)(1); 34 C.F.R. § 300.110.

[133] 34 C.F.R. § 300.324(a)(1), *referencing* 20 U.S.C. §§ 1412(a)(1); 1412(a)(12)(A)(i); 1414(d)(3), (4)(B), and (7); and 1414(e).

[134] 20 U.S.C. § 1414(a)(5).

[135] 20 U.S.C. § 1401(29); 34 C.F.R. § 300.39(b)(3).

[136] 20 U.S.C. § 1401(33); 34 C.F.R. § 300.42.

[137] 20 U.S.C. § 1401(26); 34 C.F.R. § 300.34(a)

[138] 20 U.S.C. § 1414(d)(1)(A) and (d)(6); 34 C.F.R. § 300.320(b); 20 U.S.C. § 1401(34) and 34 C.F.R. § 300.43.

[139] 20 U.S.C. § 1412(a)(1) and 34 C.F.R. § 300.107; 20 U.S.C. § 1412(a)(5) and 34 C.F.R. § 300.117.

[140] 34 C.F.R. §300.320(a)(4) (emphasis supplied); *see also* 20 U.S.C. 1411(e)(2)(C)(xi) and 34 C.F.R. § 300.35 (scientifically based research) ('Scientifically based research has the meaning given the term in section 9101(37) of the ESEA.") While the IDEA does not require that IEPs be developed pursuant to "scientifically-based research" (a component of Response to Intervention, or RTI), the ESEA/NCLB definition of "scientifically-based research" is useful. However, arguably, had the drafters intended for IEPs to be developed considering "scientifically-based research" – a term used in other sections of the IDEA and a term defined by the IDEA regulations – it would not, instead, have used the term "peer-reviewed research." It is unclear whether the drafters intended for these terms to be mutually-exclusive; the IDEA does not define "peer reviewed research."

[141] NCLB, 20 U.S.C. § 7801 (37) (emphasis supplied).

[142] Arguably, if Congress had intended for the IEP to be based on scientifically-based research as defined in the NCLB, it would have used that term. Indeed, the IDEA regulations define "scientifically-based research" as

having the same definition set forth in NCLB. Yet IDEA does not use this term and, instead, uses the term "peer-reviewed research."

[143] 20 U.S.C. § 1401(29); 34 C.F.R. § 300.39(b)(3). Courts vary in their opinions regarding whether IEP teams must write specific methodologies into children's IEPs. Most school attorneys advise school personnel not to include specific methodologies in the IEP, but instead to write appropriate, measurable goals and objectives, thereby leaving methodology up to the educators.

[144] 20 U.S.C. § 1401(33); 34 C.F.R. § 300.42.

[145] 20 U.S.C. § 1401(26); 34 C.F.R. § 300.34(a).

[146] 34 C.F.R. § 300.34(c)(3).

[147] 34 C.F.R. § 300.34(c)(5).

[148] 34 C.F.R. § 300.34(a).

[149] 34 C.F.R. § 300.34(c)(10).

[150] 34 C.F.R. § 300.34(c)(12).

[151] 34 C.F.R. § 300.34(c)(13).

[152] 34 C.F.R. § 300.34(c)(14).

[153] 34 C.F.R. § 300.34(c)(8).

[154] 20 U.S.C. § 1414(d)(1)(A) and (d)(6); 34 C.F.R. § 300.320(b).

[155] 20 U.S.C. § 1401(34); 34 C.F.R. § 300.43.

[156] *See T. H. v. Board of Educ. of Palatine Comm. Consolidated Sch. Dist.*, 30 IDELR 764 (N.D. Ill. 1999) (district's program was inappropriate because it provided no transition services).

[157] 20 U.S.C. § 1412(a)(1); 34 C.F.R. § 300.107.

[158] 20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.117.

[159] 20 U.S.C. §§ 1400 *et seq.* (2004).

[160] 20 U.S.C. § 1400(d)(1)(A); 34 C.F.R. § 300.1(a).

[161] 20 U.S.C. § 1412(a)(1)(A); 34 C.F.R. § 300.101(a).

[162] 20 U.S.C. § 1412(a)(1)(A); 34 C.F.R. § 300.101(c)(2).

[163] 20 U.S.C. § 1412(a)(1)(A); 34 C.F.R. § 300.101(c)(1).

[164] Id. (citations omitted) (*quoting* 20 U.S.C. § 1401(a)(18), and Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176, 207, 102 S. Ct. 3034 (1982)); *see also* 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.

[165] *See* Rowley, 458 U.S. at 192 (1982).

[166] 34 C.F.R. § 300.8(a)(2)(i), *referencing* 20 U.S.C. §§ 1401(3); 1401(30).

[167] See 20 U.S.C. § 1412(a)(1).

[168] See 20 U.S.C. § 1414(d).

[169] This study more fully summarizes the *Rowley* decision in part IV of Chapter 2.

[170] 458 U.S. 176, 102 S. Ct. 3034 (1982).

[171] *See* Rowley, 458 U.S. 176, 206-07, 102 S. Ct. 3034 (1982). Procedural flaws alone do not automatically require a court to find that a school district denied a student a FAPE. *See, e.g.,* Adam J. v. Keller Indep. Sch. Dist., 328 F.3d 804, 812 (5th Cir. 2003); T.S. v. Indep. Sch. Dist. No. 54, 265 F.3d 1090, 1095 (10th Cir. 2001); DiBuo v. Bd. of Educ., 309 F.3d 184, 190 (4th Cir. 2002) (explaining that "under our circuit precedent, a violation of a procedural requirement of the IDEA (or one of its implementing regulations) must actually interfere with the provision of a FAPE"); Knable v. Bexley City Sch. Dist., 238 F.3d 755, 765 (6th Cir. 2001) ("[A] procedural violation of the IDEA is not a per se denial of a FAPE; rather, a school district's failure to comply with the procedural requirements of the Act will constitute a denial of a FAPE only if such violation causes substantive harm to the child or his parents."); W.G. v. Bd. of Trustees, 960 F.2d 1479, 1484 (9th Cir. 1992) ("Procedural flaws do not automatically require a finding of a denial of a FAPE. However, procedural inadequacies that result in the loss of an educational opportunity, or seriously infringe the parents' opportunity to participate in the IEP formulation process, clearly result in the denial of a FAPE.") (internal citations omitted). Procedural flaws that result in the loss of educational opportunity, or that seriously infringe the parents' opportunity to participate in the IEP formulation process**,** however, "clearly result in the denial of a FAPE." W. A. v. Pascarella, 153 F. Supp. 2d 144, 153 (D. Conn. 2001).

This study, however, does not address procedural errors by the school district.

[172] Courts are divided regarding whether FAPE requires "some" educational benefit or "meaningful" educational benefit. The D.C., First, Fourth, Seventh, Eighth, Tenth, and Eleventh Circuits have interpreted *Rowley* to require "some" (but more than trivial or *de minimus*) educational benefit. Reid v. District of Columbia, 401 F.3d 516 (D.C. Cir. 2005); Maine Sch. Admin. Dist. No. 35 v. Mr. & Mrs. R., 321 F.3d 9 (1st Cir. 2003); A. B. v. Lawson, 354 F.3d 315 (4th Cir. 2004); Todd v. Duneland Sch. Corp., 299 F.3d 899 (7th Cir. 2002); Missouri Dep't of Elem. & Secondary Educ. v. Springfield R-12 Sch. Dist., 358 F.3d 992 (8th Cir. 2004); O'Toole v. Olathe Dist. Schs. Unified Sch. Dist., 144 F.3d 692 (10th Cir. 1998); J. S. K. v. Hendry County Sch. Bd., 941 F.2d 1563 (11th Cir. 1991).

However, the Second, Third, Fifth, Sixth and Ninth Circuits read *Rowley* to require an IEP to confer "meaningful educational benefit." Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114 (2d Cir. 1997); Shore Reg'l High Sch. Bd. of Educ. v. P. S., 381 F.3d 194 (3d Cir. 2004); Adam J. v. Keller Indep. Sch. Dist., 328 F.3d 804 (5th Cir. 2003); Deal v. Hamilton County Bd. of Educ., 392 F.3d 840 (6th Cir. 2004), *cert. denied* 126 S. Ct. 422 (2005) (finding that "the legislative history cited in *Rowley* provides strong support for a higher standard in a case such as this, where the difference in level of education provided can mean the difference between self-sufficiency and a life of dependence"); Adams v. Oregon, 195 F.3d 1141 (9th Cir. 1999).

[173] Rowley, 458 U.S. at 206-07 (emphasis supplied).

[174] Rowley, 458 U.S. at 200-201.

[175] *See* M. M. v. School District of Greenville County, 303 F.3d 523, 526 (4th Cir. 2002) (*citing* Rowley, 458 U.S. at 207); *see also* Adam J. v. Keller Indep. Sch. Dist., 328 F.3d 804, 808 (5th Cir. 2003) ("The free appropriate public education proffered in an IEP need not be the best possible one, nor one that will maximize the child's educational potential; rather, it need only be an education that is specifically designed to meet the child's unique needs, supported by services that will permit him to benefit from the instruction. The IDEA guarantees only a basic floor of opportunity, consisting of specialized instruction and related services which are individually designed to provide educational benefit.") (internal citations and quotations omitted).

[176] Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 195 (2d Cir. 2005).

[177] Rowley, 458 U.S. at 203.

[178] Cerra, 427 F.3d at 195.

[179] JSK v. Hendry County Sch. Bd., 941 F.2d 1563, 1573 (11th Cir. 1991), *quoted by* L. G. v. School Bd. of Palm Beach County, 2007 U.S. App. LEXIS 24349 (11th Cir. Oct. 16, 2007) (per curiam) (unpub'd) (no page numbers).

[180] *Cerra*, 427 F.3d at 195.

[181] Reusch v. Fountain, 872 F. Supp. 1421, 1425 (D. Md. 1994) (*quoting* Hall v. Vance County Bd. of Educ., 774 F.2d 629, 635 (4th Cir. 1985)).

[182] Id. (*quoting* 20 U.S.C. § 1412(5)); *see also* Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 379 (2d Cir. 2003). Nevertheless, the IDEA permits education in more segregated settings such as dedicated special education classrooms, the home, hospitals and private institutions "'when the nature or severity' of a child's disability is such 'that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.'" Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 122 (*quoting* 20 U.S.C. § 1401(a)(16)).

[183] 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2).

[184] 34 C.F.R. § 300.552(c).

[185] 20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.115.

[186] 20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.116(b)(3), (c). Note, however, that no appellate court has found that the student has a right to attend her neighborhood school. *See, e.g.*, Kevin G. v. Cranston Sch. Comm., 130 F.3d 481 (1st Cir. 1997) (location appropriately based on student's need for nursing services); Barnett v. Fairfax County Sch. Bd., 927 F.2d 146 (4th Cir. 1991) (upheld centralized services for students with hearing impairments); Veazey v. Ascension Parish Sch. Bd., 42 IDELR 140 (5th Cir. 2005) (unpub'd opinion) (relocation of program from one school to another did not trigger notice requirements under IDEA because it did not constitute a "change in placement"); White v. Ascension Parish Sch. Bd., 39 IDELR 182 (5th Cir. 2003) (parents have no right to input on "site selection"); McLaughlin v. Holt Pub. Sch. Bd. of Educ., 320 F.3d 663 (6th Cir. 2003) (Parties agreed to half-day mainstreamed kindergarten but disagreed on location of the self-contained portion. Parents desired a resource-room placement in the neighborhood school. School district wanted a "categorical placement" away from the neighborhood school. Because both proposals were mutually-restrictive, the court deferred to the state hearing officer that upheld the school district's selection.); Murray v. Montrose County Sch. Dist., 51 F.3d 921 (10th Cir. 1995) (Where the parties did not dispute the amount of inclusion the student should receive, but rather the services' location, the court upheld the school district's decision to implement the inclusion services at a more accessible building where more intensive services were offered.)

[187] 20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.116(d).

[188] 20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.116(e).

[189] Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1050 (5th Cir. 1989) (internal citations omitted) (interpreting the LRE provision in the Education of the Handicapped Act, the IDEA's predecessor).

[190] Id.

[191] Id.

[192] 700 F.2d 1058 (6th Cir. 1983).

[193] *See* Pachl v. Seagren, 453 F.3d 1064 (8th Cir. 2006); Devries v. Fairfax County Sch. Bd., 882 F.2d 876 (4th Cir. 1989); A. W. v. Northwest R-1 Sch. Dist., 813 F.2d 158 (8th Cir. 1987); Briggs v. Bd. of Educ. of Connecticut, 882 F.2d 688 (2d Cir. 1989).

[194] 874 F.2d 1036 (5th Cir. 1989). The Tenth, Third, and Eleventh Circuits also employ the test set forth in Daniel R. R.. See L. B. v. Nebo Sch. Dist., 379 F.3d 966 (10th Cir. 2004); Oberti v. Board of Educ., 995 F.2d 1204 (3d Cir. 1993); Greer v. Rome City Sch. Dist., 967 F.2d 470 (11th Cir. 1992).

[195] As discussed below, neither the IDEA nor its supporting regulations require the school district to determine FAPE with regard to the disabled child's impact on other students. However, through courts' analysis of LRE, the Third, Fifth, Ninth, Tenth and Eleventh Circuits explicitly consider the effect the child will have on the education of other children in the regular classroom and whether integration would *significantly impact* the education of the district's other children. The Second, Fourth, Sixth, and Eighth Circuits implicitly consider this factor.

[196] 14 F.3d 1398 (9th Cir. 1994).

[197] Id. (citations omitted) (*quoting* 20 U.S.C. § 1401(a)(18), and Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176, 207, 102 S. Ct. 3034 (1982)); *see also* 20 U.S.C. § 1400(c); 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.

[198] *See* Rowley, 458 U.S. at 192 (1982).

[199] Cypress-Fairbanks I.S.D. v. Michael F., 118 F.3d 245, 253 (5th Cir. 1997), *cert. denied*, 522 U.S. 1047, 118 S. Ct. 690 (1998) (citing with approval the District Court record); *see also* Adam J. v. Keller Indep. Sch. Dist., 328 F.3d 804, 810 (5th Cir. 2003) (*citing* Cypress-Fairbanks).

[200] *See* 34 C.F.R. § 300.22 (individualized education program); § 300.34 (related services); § 300.39 (special education); § 300.112 (individualized education programs); § 300.320 (definition of individualized education program); § 300.323 (when IEPs must be in effect); § 300.324 (development, review, and revision of IEP).

[201] *See* 34 C.F.R. § 300.122 (evaluation); § 300.300 (parental consent); § 300.301 (initial evaluation); § 300.303 (reevaluations); § 300.304 (evaluation procedures); § 300.305 (additional requirements for evaluations and reevaluations); § 300.306 (determination of eligibility); § 300.307 (specific learning disabilities); § 300.309 (determining the existence of a specific learning disability); § 300.310 (observation); § 300.311 (specific documentation for the eligibility determination); § 300.324 (development, review, and revision of IEP); § 300.502 (independent educational evaluation).

[202] *See* 34 C.F.R. § 300.104 (residential placement); § 300.107 (nonacademic services); § 300.108 (physical education); § 300.109 (full educational opportunity goal); § 300.110 (program option); § 300.114 (LRE requirements); § 300.115 (continuum of alternative placements); § 300.117 (nonacademic settings); § 300.172 (access to instructional materials); § 300.325 (private school placements by public agencies); § 300.518 (child's status during proceedings); § 300.530 (authority of school personnel); § 300.531 (determination of setting); § 300.532 (placement during appeals); § 300.536 (change of placement because of disciplinary removals).

[203] *See* 34 C.F.R. § 300.116 (placements); § 300.307 (specific learning disabilities); § 300.308 (additional group members); § 300.321 (IEP team); § 300.322 (parent participation); § 300.324 (development, review, and revision of IEP); § 300.327 (educational placements); § 300.328 (alternative means of meeting participation); § 300.501 (opportunity to examine records; parent participation in meetings); § 300.505 (electronic mail); § 300.519 (surrogate parents); § 300.520 (transfer of parental rights at age of majority); § 300.530 (authority of school personnel); § 300.531 (determination of setting); § 300.532 (appeal).

[204] Cypress-Fairbanks I.S.D. v. Michael F., 118 F.3d 245, 253 (5th Cir. 1997), *cert. denied*, 522 U.S. 1047, 118 S. Ct. 690 (1998) (citing with approval the District Court record).

[205] Id. at 253 n.29 (citing regulations from pre-1997 amendments to IDEA).

[206] Cypress-Fairbanks, 118 F.3d at 248 (*quoting* Rowley, 458 U.S. at 201, 102 S. Ct. 3034). However, simply because another plan might have worked as well or even better does not mean that the student did not receive a FAPE. *See, e.g.*, Samuel Tyler W. v. Northwest Indep. Sch. Dist., 202 F. Supp. 2d 557, 560 (N.D. Tex. 2002).

[207] *But see* Burilovich v. Board of Educ. of Lincoln Consolidated Schs., 208 F.3d 560 (6th Cir. 2000) (while IEP meeting must involve a person knowledgeable about the student's disability, the school district was not required to involve an expert in the parent's chosen methodology).

[208] *See* Amanda J. v. Clark County Sch. Dist., 267 F.3d 877 (9th Cir. 2001) (district failed to provide parents copies of evaluation and possible diagnosis of autism; this violation "made it impossible to design an IEP that addresses Amanda's unique needs as an autistic child, thereby denying Amanda a FAPE"; district ordered to reimburse parents cost of Lovaas therapy, citing extensive research on importance of early intervention therapy); Doyle v. Arlington County Sch. Dist., 806 F. Supp. 1253 (E.D. Va. 1992) (school officials must come to the IEP table with an open mind, but not a "blank mind"); *see also*, Deal, *infra.*

[209] *See* Sanford Sch. Comm. v. Mr. and Mrs. L., 34 IDELR 262 (D. Me. 2001) (school district's proposed placement was not based on evaluative information or individualized consideration of student's needs; instead, the district's proposal was based on administrative convenience and staff difficulties); T. H. v. Board of Educ. of Palatine Comm. Consol. Sch. Dist., 30 IDELR 764 (N.D. Ill. 1999) (district recommended placement based on availability of services, not based on child's needs).

[210] Id.

[211] *See* Deal v. Hamilton County Bd. of Educ., 392 F.3d 840, 42 IDELR 840 (6th Cir. 2004), *cert. denied*, 126 S. Ct. 422 (2005) (the court determined that the school district pre-determined the student's special education program; based upon an "unofficial policy" of refusing to provide one-to-one ABA programs and, instead, investing in another methodology designed for students with ASD, the "school system personnel [ ] did not have open minds and were not willing to consider the provision of such a program"; although parents were present at the meeting, their participation was a formality since the district had already pre-determined the student's program.); *see also* Letter to Helmuth, 16 IDELR 503 (OSEP 1990) (a district may author a draft IEP but the document may not constitute, nor be represented as, a complete IEP).

[212] *See* Lachman v. Illinois State Bd. of Educ., 852 F.2d 290 (7th Cir. 1988) (the *Rowley* decisions clearly determine that parents do not have a right under the Act to compel a school district to provide a specific program or employ a specific methodology in the child's special education program);

[213] 20 U.S.C. §1421(a)(5)(B).

[214] *See* Hartmann v. Loudoun County Bd. of Educ., 118 F.3d 996 (4th. Cir. 1997).

[215] 874 F.2d 1036, 1050 (5th Cir. 1989).

[216] 20 U.S.C. § 1414 and 34 C.F.R. § 300.321(a)(2)(i) (emphasis supplied). In the Comments and Discussion of the current federal regulations, the Department of Education found,

> Comment: Many commenters expressed concern that the consideration of special factors in § 300.324(a)(2)(i) is not sufficient to address the behavioral needs of children with disabilities in the IEP process and recommended strengthening the regulations by encouraging school districts to utilize research-based positive behavioral supports and systematic and individual research based interventions. One commenter recommended training teachers regarding the use of positive behavioral interventions and supports.

Discussion: We do not believe that the changes recommended by the commenters need to be made to § 300.324(a)(2)(i). Whether a child needs positive behavioral interventions and supports is an individual determination that is made by each child's IEP Team. Section 300.321(a)(2)(i) requires the IEP Team, in the case of a child whose behavior impedes the child's learning or that of others, to consider the use of positive behavioral supports, and other strategies to address that behavior. We believe that this requirement emphasizes and encourages school personnel to use positive behavioral interventions and supports.

71 Fed. Reg. 46540 at 46683 (Aug. 14, 2006); *see also* id. at 46721.

[217] Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 (5th Cir. 2000).

[218] *But see* Burilovich v. Board of Educ. of Lincoln Consolidated Schs., 208 F.3d 560 (6th Cir. 2000), *supra*; *see also* Benjamin G. v. Special Educ. Hearing Office, 44 IDELR 7 (Cal. Ct. App. 2005) (under California law, expert representing parents of autistic student was entitled to observe the school district's proposed program before due process hearing involving placement), *but see* Letter to Mamas, 42 IDELR 10 (OSEP 2004) (IDEA does not provide a general entitlement to parents or their professional representatives to observe the child in a classroom or a proposed educational placement; however, school district and parents should work together to meet the parents', student's, and school's needs, including opportunities for parents (or their representatives) to observe the child).

[219] *See* Amanda J. v. Clark County Sch. Dist., 267 F.3d 877, *supra*; *see also* Doyle v. Arlington County Sch. Dist., 806 F. Supp. 1253, *supra*, and Deal, *supra*.

[220] Cypress-Fairbanks I.S.D. v. Michael F., 118 F.3d 245, 253 (5th Cir. 1997), *cert. denied*, 522 U.S. 1047, 118 S. Ct. 690 (1998).

[221] *See* Bobby R. at 350.

[222] *See* Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1047 (5th Cir. 1989).

[223] 20 U.S.C. 1412(a)(25); 34 C.F.R. § 300.174.

[224] Id.

[225] *See* 20 U.S.C. § 1415(k) (2004); 34 CFR §§ 300.530 – 300.536 (2006).

[226] 20 U.S.C. § 1415(k)(1)(E); 34 CFR § 300.530(e)(1) and (2).

The study does not examine issues involving discipline of students with bipolar disorder because this issue does not present in the case law examined herein. (*Kacsmarski v. Wheaton Community Unit School District*, 2004 U.S. Dist. LEXIS 7823 (N.D. Ill. May 4, 2004) (unpub'd), involved a manifestation determination and a forty-five day interim alternative educational placement for a fifth grader with bipolar disorder who threatened two children with a letter opener, but the court never reached the issue because the parents failed to exhaust their administrative remedies prior to filing an action in federal court.) Accordingly, follow-up research on application of the IDEA to students with bipolar disorder may involve review of hearing officer or administrative decisions concerning discipline of these students.

[227] The Act provides:

> (c) *Additional Authority.* For disciplinary changes in placement that would exceed 10 consecutive school days, if the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability pursuant to paragraph (e) of this section, school personnel may apply the relevant disciplinary procedures to children with disabilities in the same manner and for the same duration as the procedures would be applied to children without disabilities, except as provided in paragraph (d) of this section.

(d) *Services.*

(1) A child with a disability who is removed from the child's current placement pursuant to paragraphs (c), or (g) of this section must—

(i) Continue to receive educational services, as provided in § 300.101(a), so as to enable the child to continue to participate in the general education curriculum, <u>although in another setting</u>, and to progress toward meeting the goals set out in the child's IEP; <u>a d</u>

(ii) Receive, as appropriate, a functional behavioral assessment [FBA], and behavioral intervention services and modifications [pursuant to a BIP], that are designed to address the behavior violation so that it does not recur.

(2) The services required by paragraph (d)(1), (d)(3), (d)(4), and (d)(5) of this section may be provided in an interim alternative educational setting.

(3) A public agency is only required to provide services during periods of removal to a child with a disability who has been removed from his or her current placement for 10 school days or <u>less</u> in that school year, <u>if</u> it provides services to a *child <u>without</u> disabilities* who is similarly removed.

(4) After a child with a disability has been removed from his or her current placement <u>for 10 school days</u> in the same school year, <u>if</u> the current removal is <u>for not more than 10 consecutive school days</u> AND <u>is not a change of placement</u> under § 300.536, school personnel, in consultation with at least one of the child's teachers, determine the extent to which services are needed, as provided in § 300.101(a), so as to enable the child to continue to participate in the general education curriculum, although <u>in another setting</u>, and to progress toward meeting the goals set out in the child's IEP.

(5) <u>If</u> the removal is a change of placement under § 300.536, the child's IEP Team determines appropriate services under paragraph (d)(1) of this section.

34 C.F.R. § 300.530(b), (c), (d) (emphasis supplied).

[228] 34 C.F.R. § 530(b).

[229] 34 C.F.R. § 300.536(a).

[230] 34 C.F.R. § 300.536(b)(1).

[231] The Act provides:

(e) *<u>Manifestation determination.</u>*

(1) <u>Within 10 SCHOOL days</u> of any decision to change the placement of a child with a disability because of a violation of a code of student conduct,

- the LEA, the parent, and <u>relevant</u> members of the child's IEP Team (as determined by the parent and the LEA)

- <u>must review</u> ALL <u>relevant information</u> in the student's file, including
  ⇒ the child's IEP,
  ⇒ any teacher observations, and
  ⇒ any *relevant* information provided by the parents to determine—

(i) If the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; OR

(ii) If the conduct in question was the DIRECT result of the LEA's failure to implement the IEP.

(2) The conduct must be determined to be a manifestation of the child's disability if the LEA, the parent, and relevant members of the child's IEP Team determine that a condition in either paragraph (e)(1)(i) or (1)(ii) of this section was met.

(3) If the LEA, the parent, and relevant members of the child's IEP Team determine the condition described in paragraph (e)(1)(ii) of this section was met, the LEA must take immediate steps to remedy those deficiencies.

34 C.F.R. § 300.530(e) (emphasis supplied).

[232] 34 C.F.R. § 300.530(d)(emphasis supplied).

[233] 34 C.F.R. § 300.530(e)(3).

[234] 34 C.F.R. § 300.530(f)(2).

[235] The Act provides:

(f) *Determination that behavior was a manifestation.* If the LEA, the parent, and relevant members of the IEP Team make the determination that the conduct WAS a manifestation of the child's disability, the IEP Team must—

(1) Either—

(i) Conduct a functional behavioral assessment, *unless* the LEA had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, AND implement a behavioral intervention plan for the child; or

(ii) If a behavioral intervention plan already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior; and

(2) Except as provided in paragraph (g) of this section, return the child to the placement from which the child was removed, unless the parent and the LEA agree to a change of placement as part of the modification of the behavioral intervention plan.

34 C.F.R. § 300.530(f) (emphasis supplied).

[236] The Act provides:

(g) *Special circumstances.* School personnel may remove a student to an interim alternative educational setting for not more than 45 SCHOOL days *without regard* to *whether* the behavior is determined to be a manifestation of the child's disability, if the child—

(1) Carries a weapon to or possesses a weapon at school, on school premises, or to or at a school function under the jurisdiction of an SEA or an LEA;

(2) Knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of an SEA or an LEA; OR

(3) Has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of an SEA or an LEA.

34 C.F.R. § 300.530(g) (emphasis supplied).

[NOTE: This "serious bodily injury upon another person" standard is different than the standard set out in 34 C.F.R. § 300.532, which states that, in an appeal of a disciplinary proceeding, a HEARING OFFICER (not the school district) can send the student to an alternative educational setting if the Hearing Officer believes that the student is "substantially likely to injure himself or others" if he/she returned to the original educational setting.]

The Act further provides:

(i) *Definitions.* For purposes of this section, the following definitions apply:

(1) *Controlled substance* means a drug or other substance identified under schedules I, II, III, IV, or V in section 202(c) of the Controlled Substances Act (21 U.S.C. § 812(c)).

(2) *Illegal drug* means a controlled substance; but does not include a controlled substance that is legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed or used under any other authority under that Act or under any other provision of Federal law.

(3) *Serious bodily injury* has the meaning given the term ''serious bodily injury'' under paragraph (3) of subsection (h) of section 1365 of title 18, United States Code.

(4) *Weapon* has the meaning given the term ''dangerous weapon'' under paragraph (2) of the first subsection (g) of section 930 of title 18, United States Code.

34 C.F.R. § 300.530(i) (emphasis supplied).

[237] 34 C.F.R. § 300.530(h).

[238] 34 C.F.R. § 300.535(a).

[239] 34 C.F.R. § 300.535(b).

[240] *See* Doe v. Alabama State Dep't of Educ., 915 F.2d 651 (11th Cir. 1990); Sylvie M. v. Board of Educ. of Dripping Springs, 48 F. Supp. 2d 681 (W.D. Tex.1999); Dixon v. Hamilton City Schs., 1999 U.S. Dist. LEXIS 21388 (S.D. Ohio Nov. 4, 1999); Johnson v. Metro Davidson City Sch. Dist., 108 F. Supp. 2d 906 (M.D. Tenn. 2000); Board of Educ. of Frederick v. J. D., 2000 U.S. App. LEXIS 26902 (4th Cir. Oct. 26, 2000) (unpub'd); Jennings v. Fairfax County Sch. Bd., 39 F. App'x 921, 2002 U.S. App. LEXIS 14372 (4th Cir. July 16, 2002) (per curiam) (unpub'd); Arlington County Sch. Bd. v. Smith, 230 F. Supp. 2d 704 (E.D. Va. 2002); Arseneault v. Prince William County Sch. Bd., 51 F. App'x 412, 2002 U.S. App. LEXIS 24131 (4th Cir. Nov. 26, 2002) (per curiam) (unpub'd); Township of Bloomfield v. S. C., 2005 U.S. Dist. LEXIS 21424 (D.N.J. Sept. 22, 2005); Corpus Christi Indep. Sch. Dist. v. Christopher N., 2006 U.S. Dist. LEXIS 23568 (S.D. Tex. Mar. 31, 2006); A. E. v. Westport Bd. of Educ., 463 F. Supp. 2d 208 (D. Conn. 2006); C. G. v. Five Town Cmty. Sch. Dist., 2007 U.S. Dist. LEXIS 10310 (D. Me. Feb. 12, 2007); Richardson Indep. Sch. Dist. v. Michael Z., 561 F. Supp. 2d 589 (N.D. Tex. 2007); D. B. v. Houston Indep. Sch. Dist., 2007 U.S. Dist. LEXIS 73911 (S.D. Tex. Sept. 29, 2007); L. G. v. School Bd. of Palm Beach County, 2007 U.S. App. LEXIS 24349 (11th Cir. Oct. 16, 2007) (per curiam) (unpub'd); Lauren V. v. Colonial Sch. Dist., 2007 U.S. Dist. LEXIS 78361 (E.D. Pa. Oct. 22, 2007); Hill v. Bradley County Bd. of Educ., 2007 U.S. Dist. LEXIS 85394 (E.D. Tenn. Nov. 19, 2007).

The following cases were excluded from the literature review because (i) their facts and/or holdings were unoriginal, (ii) the student's bipolar diagnosis was not the source of their eligibility or program design, or (iii) the student's bipolar diagnosis was tenuous: S. R. v. Board of Educ. of Rye Sch. Dist., 345 F. Supp. 2d 386 (S.D.N.Y.

2004); Heather D. Northhampton Area Sch. Dist., 511 F. Supp. 2d 549 (E.D. Pa. 2007); L. T. v. Mansfield Twp. Sch. Dist., 2007 U.S. Dist. LEXIS 58924 (D.N.J. Aug. 10, 2007); Ringwood Bd. of Educ. v. K. H. J., 2007 U.S. App. LEXIS 28876 (3d Cir. Dec. 17, 2007) (unpub'd).

[241] These cases were included to the extent that federal circuit courts of appeal offered different legal analysis of the same or different legal issues presented in the cases involving students with bipolar disorder. Butler v. Evans, 225 F.3d 887 (7th Cir. 2000); Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105 (2d Cir. 2007); R. B. v. Napa Valley Unified Sch. Dist., 496 F.3d 932 (9th Cir. 2007).

The following cases involving students with mental illness were included only as footnotes because the issues addressed therein were identical to issues addressed in cases involving students with bipolar disorder. *See* McKenzie v. Jefferson, 566 F. Supp. 404 (D.C.D.C. 1983); Antkowiak v. Ambach, 638 F. Supp. 1564 (W.D.N.Y. 1986); Doe v. Anrig, 651 F. Supp. 424 (D. Mass. 1987); Tice v. Botetourt County Sch. Bd., 908 F.2d 1200 (4th Cir. 1990); Doe v. Board of Educ. of Connecticut, 753 F. Supp. 65 (D. Conn. 1990); Muller v. Comm. on Special Educ. of the East Islip Sch. Dist., 145 F.3d 95 (2d Cir. 1998); Hoffman v. East Troy Cmty Sch. Dist., 38 F. Supp. 2d 750 (E.D. Wis. 1999).

[242] A fine line exists between a diagnosis (by a medical doctor, clinical psychologist, psychiatrist, or clinical social worker) and the traits, behaviors, and conditions demonstrated by the person to determine a diagnosis. For purposes of special education services, the diagnosis is helpful to determine the label, but a diagnosis is not necessary for a student to be deemed eligible for special education and related services. Furthermore, the eligibility determination – or "label" – does not drive the services provided to the student. As discussed in Parts II and III, each student's IEP must be individually and reasonably calculated to ensure educational benefit for provision of FAPE in the LRE. The student's eligibility, or label, does not determine his services; rather, his individual educational and related needs determine the services necessary. Chapter Three will reiterate this important point.

For cases holding that the student's eligibility, or label, does not drive his services, see, e.g., J. K. v. Metropolitan Sch. Dist. Southwest Allen County, 2005 WL 2406046 at *16 (N.D. Ind. Sept. 27, 2005); Eric H. v. Judson Indep. Sch. Dist., 2002 WL 31396140 (W.D. Tex. Sept. 30, 2002) (unrep'd); School Dist. of Wisconsin Dells v. Z. S., 184 F. Supp.2d 860, 876 (W.D. Wis. 2001); Socorro Indep. Sch. Dist. v. Angelic Y., 107 F.Supp.2d 761 (W.D. Tex. 2000); Corey H. v. Board of Educ. of City of Chicago, 995 F. Supp. 900, 908 (N.D. Ill. 1998); Laughlin v. Central Bucks Sch. Dist., 1994 WL 8114 at *31 (E.D. Pa. Jan. 12, 1994); Sherri A.D. v. W. N. Kirby, 975 F.2d 193 at n.20 (5th Cir. 1992); Chris C. v. Gwinnett County Sch. Dist., 780 F. Supp. 804, 816 (N.D. Ga. 1991); Angela I. v. Pasadena Indep. Sch. Dist., 918 F.2d 1188, 1195 (5th Cir. 1990); Doe v. Alabama State Dep't of Educ., 915 F.2d 651, 664 (11th Cir. 1990); Andersen v. District of Columbia, 877 F.2d 1018, 1020-1021 (D.C. Cir. 1989).

[243] Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 102 S. Ct. 3034 (June 28, 1982); Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883, 104 S. Ct. 3371 (1984); School Comm. of the Town of Burlington v. Dep't of Educ., 471 U.S. 359, 105 S. Ct. 1996 (Apr. 29, 1985); Florence County Sch. Dist. v. Carter, 510 U.S. 7, 114 S. Ct. 361 (Nov. 9, 1993); Cedar Rapids Cmty. Sch. Dist. v. Garret F., 526 U.S. 66, 119 S. Ct. 992 (1999).

[244] 458 U.S. 176, 102 S. Ct. 3034 (1982).

[245] Id. at 184.

[246] Id.

[247] Id.

[248] Id. at 185.

[249] Id.

[250] Id.

[251] Id.

[252] Id. at 185-186.

[253] Id. at 186.

[254] Id.

[255] Id. at 187.

[256] Id.

[257] Id., *quoting* 20 U.S.C. § 1401(18) (emphasis in original, supplied by Court).

[258] Id. at 189, *citing* Congress's finding "that of the roughly eight million handicapped children in the United States at the time of enactment, one million were 'excluded entirely from the public school system' and more than half were receiving an inappropriate education." *Id.* (*quoting* 89 Stat. 774, note following § 1401); *see also* id. at 179, 191 (*citing* H.R.Rep. No. 94-332 at 2 (1975) (H.R.Rep.); S.Rep. No. 94-168 at 8 (1975) (S.Rep.); *also citing* 121 Cong.Rec. 19486 (1975) (remarks of Sen. Williams) ("The most recent statistics provided by the Bureau of Education for the Handicapped estimate that . . . 1.75 million handicapped children do not receive any educational services, and 2.5 million handicapped children are not receiving an appropriate education.")); *see also* id. at 192, n.13 (citing congressional testimony); id. at 195-197.

[259] Id. at 189. The court continued that, "Certainly the language of the statute contains no requirement like the one imposed by the lower courts – that States maximize the potential of handicapped children 'commensurate with the opportunity provided to other children.'" *Id.* at 189-190 (*quoting Rowley*, 483 F. Supp. 528, 534 (S.D.N.Y. 1980)).

[260] Id. at 190.

[261] Id. at 192.

[262] Id.

[263] Id. at 200, *quoting* H.R.Rep. at 14 (emphasis supplied).

[264] Id. at 200.

[265] Id.

[266] Id.

[267] Id.

[268] Id. at 201 (emphasis supplied). The court stated that this "view is supported by the congressional intention, frequently expressed in the legislative history, that handicapped children be enabled to achieve a reasonable degree of self-sufficiency." *Id.* at n.23.

[269] Id. at 202.

[270] Id.

[271] Id. at 203.

[272] Id.

[273] Id.

[274] Id. at 203-204, 207 n.28.

[275] Id. at 205-206.

[276] Id. at 206-207. As noted above, procedural flaws alone do not automatically require a court to find that a school district denied a student a FAPE. *See, e.g.*, Adam J. v. Keller Indep. Sch. Dist., 328 F.3d 804, 812 (5th Cir. 2003); T.S. v. Indep. Sch. Dist. No. 54, 265 F.3d 1090, 1095 (10th Cir. 2001); DiBuo v. Bd. of Educ., 309 F.3d 184, 190 (4th Cir. 2002) (explaining that "under our circuit precedent, a violation of a procedural requirement of the IDEA (or one of its implementing regulations) must actually interfere with the provision of a FAPE"); Knable v. Bexley City Sch. Dist., 238 F.3d 755, 765 (6th Cir. 2001) ("[A] procedural violation of the IDEA is not a per se denial of a FAPE; rather, a school district's failure to comply with the procedural requirements of the Act will constitute a denial of a FAPE only if such violation causes substantive harm to the child or his parents."); W.G. v. Bd. of Trustees, 960 F.2d 1479, 1484 (9th Cir. 1992) ("Procedural flaws do not automatically require a finding of a denial of a FAPE. However, procedural inadequacies that result in the loss of an educational opportunity, or seriously infringe the parents' opportunity to participate in the IEP formulation process, clearly result in the denial of a FAPE.") (internal citations omitted). Procedural flaws that result in the loss of educational opportunity, or that seriously infringe the parents' opportunity to participate in the IEP formulation process**,** however, "clearly result in the denial of a FAPE." W. A. v. Pascarella, 153 F. Supp. 2d 144, 153 (D. Conn. 2001).

As noted, however, this study does not address procedural errors by the school district.

[277] As noted above, courts are divided regarding whether FAPE requires "some" educational benefit or "meaningful" educational benefit. The D.C., First, Fourth, Seventh, Eighth, Tenth, and Eleventh Circuits have interpreted *Rowley* to require "some" (but more than trivial or *de minimus*) educational benefit. Reid v. District of Columbia, 401 F.3d 516 (D.C. Cir. 2005); Maine Sch. Admin. Dist. No. 35 v. Mr. & Mrs. R., 321 F.3d 9 (1st Cir. 2003); A. B. v. Lawson, 354 F.3d 315 (4th Cir. 2004); Todd v. Duneland Sch. Corp., 299 F.3d 899 (7th Cir. 2002); Missouri Dep't of Elem. & Secondary Educ. v. Springfield R-12 Sch. Dist., 358 F.3d 992 (8th Cir. 2004); O'Toole v. Olathe Dist. Schs. Unified Sch. Dist., 144 F.3d 692 (10th Cir. 1998); J. S. K. v. Hendry County Sch. Bd., 941 F.2d 1563 (11th Cir. 1991).

However, also noted above, the Second, Third, Fifth, Sixth and Ninth Circuits read *Rowley* to require an IEP to confer "meaningful educational benefit." Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114 (2d Cir. 1997); Shore Reg'l High Sch. Bd. of Educ. v. P. S., 381 F.3d 194 (3d Cir. 2004); Adam J. v. Keller Indep. Sch. Dist., 328 F.3d 804 (5th Cir. 2003); Deal v. Hamilton County Bd. of Educ., 392 F.3d 840 (6th Cir. 2004), *cert. denied* 126 S. Ct. 422 (2005) (finding that "the legislative history cited in *Rowley* provides strong support for a higher standard in a case such as this, where the difference in level of education provided can mean the difference between self-sufficiency and a life of dependence"); Adams v. Oregon, 195 F.3d 1141 (9th Cir. 1999).

[278] Id. at 206-207 (emphasis supplied).

[279] Id. at 207.

[280] Id. The Court found that the lower courts in this case substituted their own judgment regarding best methodology for the judgment of the educators and school district. *Id.* at n.29.

[281] Id. at 208, *quoting* Rodriguez, 411 U.S. 1, 42, 93 S.Ct. 1278, 1301 (1973).

[282] Id.

[283] Id. at 209.

[284] Id. at 209-210. Justice Rehnquist delivered the opinion of the court. Justice Blackmun concurred in the judgment (id. at 210-212), while Justices White, Brennan, and Marshall dissented (id. at 212-218) (White, J., writing for the dissent).

[285] 468 U.S. 883, 104 S. Ct. 3371 (1984).

[286] Id. at 885.

[287] Id.

[288] Id.

[289] Id.

[290] Id.

[291] Id. at 888-889.

[292] Id. at 889.

[293] Id. at 889-890, *quoting* 20 U.S.C. § 1401 (17) (emphasis supplied by the Court).

The current statute and accompanying federal regulation now read:

> Related services means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, orientation and mobility services, and *medical services for diagnostic or evaluation purposes.*
>
> Related services also include school health services and school nurse services, social work services in schools, and parent counseling and training.

20 U.S.C. § 1401(26); 34 C.F.R. § 300.34(a) (emphasis supplied). Additionally, *medical services* are "services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and related services." 34 C.F.R. § 300.34(c)(5).

[294] Id. at 890.

[295] Id.

[296] Id. at 891.

[297] *Quoting* S. Rep. No. 94-168 at 33.

[298] Referring to the Secretary of Education, whose department promulgated the regulations supporting the EAHCA.

[299] Id. at 893.

[300] Id. at 893-894.

[301] Id. at 894, *citing* 20 U. S. C. § 1401(1); 34 CFR § 300.5 (1983).

[302] Id., *citing* 34 CFR § 300.14, Comment (1) (1983).

[303] Id., *citing* 34 CFR §§ 300.13(a), (b)(4), (b)(10) (1983).

[304] Id., *citing, e.g.*, Department of Education of Hawaii v. Katherine D., 727 F.2d 809 (9th Cir. 1983).

[305] Id. at 895, *citing* Tr. of Oral Arg. 18-19.

[306] Id. at 894-895.

[307] Id. at 895.

[308] Id.

[309] 471 U.S. 359, 105 S. Ct. 1996 (1985).

[310] Id. at 362.

[311] Id. at 363.

[312] Id.

[313] Id. at 363-367.

[314] Id. at 367.

[315] Id. at 367-369.

[316] Id. at 369.

[317] Id.

[318] Id.

[319] Id.

[320] Id. at 370.

[321] Id.

[322] Id.

[323] Id.

[324] Id. at 372.

[325] Id. at 373-374.

[326] 510 U.S. 7, 114 S. Ct. 361 (1993).

[327] Id. at 13-14.

[328] Id. at 15.

[329] Id. at 15, *quoting* Burlington, *supra*, at 373-374.

[330] *See, e.g.*, McKenzie v. Jefferson, 566 F. Supp. 404 (D.C.D.C. 1983) (holding that the school district was not responsible for the cost of the attendance by student with schizophrenia, psychotic behavior, and depression at day school and residential placement on campus of psychiatric hospital); Antkowiak v. Ambach, 638 F. Supp. 1564 (W.D.N.Y. 1986) (remanding case for determination of whether residential placement for student with depression and anxiety was required to meet the child's medical and educational needs before determining whether school district must fund the placement); Doe v. Anrig, 651 F. Supp. 424 (D. Mass. 1987) (holding that school district was not required to reimburse parent for room and board at psychiatric hospital and two other therapeutic placements for schizophrenic child who abused drugs); Tice v. Botetourt County Sch. Bd., 908 F.2d 1200 (4th Cir. 1990) (remanding the case to district court to determine whether placement of child with depression, paranoia and anxiety at psychiatric hospital was an excluded "medical service" under the EACHA (for which the district would not be responsible) or a permitted related "psychological" or "counseling" service).

[331] 526 U.S. 66, 119 S. Ct. 992 (1999).

[332] Id. at 69-70.

[333] Id. at 70.

[334] Id. at 74-75.

[335] Id. at 75.

[336] Id. at 76-78.

[337] Id. at 77-78, *quoting and citing* Rowley, 458 U.S. at 192, 202; *see* id. at 179-181; *see also* Honig v. Doe, 484 U.S. 305, 310-311, 324, 108 S. Ct. 592 (1988); §§ 1412(1), (2)(C), (5)(B).

[338] Id. at 79.

[339] Id. at 79.

[340] 915 F.2d 651 (11th Cir. 1990).

[341] Id. at 655.

[342] Id.

[343] Id.

[344] Id. at 656.

[345] Id. at 655.

[346] Id.

[347] Id.

[348] Id. at 655-656.

[349] Id. at 656.

[350] Id.

[351] Id.

[352] Id.

[353] Id.

[354] Sexton Woods is now called “Eagle Woods.”

[355] Id.

[356] Id.

[357] Id.

[358] Id.

[359] Id.

[360] Id.

[361] Id. at 657.

[362] Id.

[363] Id.

[364] Id. at 664-66.

[365] Id. at 665.

[366] Id.

[367] Id.

[368] Id. at 665-66.

[369] Id. at 666.

[370] Id.

[371] Id.

[372] 48 F. Supp. 2d 681 (W.D. Tex. May 5, 1999).

[373] Id. at 684.

[374] Id. at 684-685.

[375] Id. at 685.

[376] Id.

[377] Id.

[378] Id.

[379] Id. at 686.

[380] Id.

[381] Id. at 687-688.

[382] Id. at 688, 690-691. The court found:

> In contrast, Sylvie's parents viewed her as a clinically depressed and disruptive child who threatened and attempted suicide, habitually lied, had trouble making friends, had screaming arguments at home, and regularly failed to complete school work. Sylvie's behavior at school (other than her failure to complete assignments) far exceeded her behavior at home. Sylvie's intelligence apparently allowed her to "present" excellently when she wished to, which masked her serious emotional disturbance. Sylvie also had deep rooted conflicts with her mother and stepfather, as she did not with school counselors, teachers, or officials.

Id. at 691.

[383] Id. at 687-688.

[384] Id. at 688.

[385] Id.

[386] Id. at 688-689.

[387] Id. at 689.

[388] Id. at 689-690.

[389] Id. at 690.

[390] Id.

[391] Id.

[392] Id.

[393] Id.

[394] Discussed herein at 37-41.

[395] Id. at 696, *quoting* Cypress-Fairbanks I.S.D. v. Michael F., 118 F.3d 245, 253 (5th Cir. 1997), *cert. denied*, 522 U.S. 1047, 118 S. Ct. 690, 139 L. Ed. 2d 636 (1998).

[396] Id. at 697. The court continued:

> The [court] doubts, however, if anything other than time and/or distance could have resolved the parent/child conflicts which plagued Sylvie and her parents. There was abundant evidence that Sylvie's problems during her ninth grade year were not unique but were, in fact, common for this traumatic age. There is no evidence that Sylvie would not have progressed quite well at Dripping Springs High School if she had been in a placement other than with her mother. There is also no evidence that she would not have outgrown her problems over time and been able to return to her

mother's home. . . . However, the [court] does not see any *educational needs* Sylvie had that were not being met by Dripping Springs I.S.D."

Id. (emphasis in original).

397 Id. at 697.

398 Id.

399 Id. at 698-699. The court elaborated:

The hearing officer found that Elan was not the least restrictive environment for Sylvie. The [court] agrees. The fact that Sylvie did well at Elan does not satisfy the mandate of IDEA with respect to least restrictive environment. There were numerous less restrictive alternatives than Elan at Dripping Springs I.S.D. that Sylvie's parents refused to try. All of these intermediate, less restrictive alternatives were skipped over in Sylvie's move from [the public school] to Elan. As such, Plaintiff fails this prong.

Id.

400 Id. The court stated:

Sylvie and her mother actively participated in the ARD meetings. The [court] can find no evidence that Sylvie's well-being was not of primary concern not only to her parents but also to the school. Despite the fact that Sylvie was failing some of her classes, she appeared relatively happy and well-adjusted while at school and she regularly attended school and counseling. The conflict was homework and Sylvie's unwillingness to do it. The modified IEP, formulated prior to Sylvie's running away, would have solved the homework issue. The school was consistently responsive to Sylvie's needs. While Sylvie should perhaps have been diagnosed earlier as emotionally disturbed, she was receiving counseling during the majority of this time.

Id.

401 Id. at 697.

402 Id.

403 Id. at 698. The court found:

With respect to non-academic benefits, there was evidence that Sylvie made friends at [the public school] and in general had positive peer relationships. One fellow student appeared to have been verbally harassing her. Even though the school was told of this conduct, the school was unable to correct this misbehavior because Sylvie's mother could not supply the school with the offender's full name and Sylvie's mother refused to allow school officials to question Sylvie about the harassment. Other than this one incident, Sylvie appeared to also gain non-academic benefits from [the public school].

Id.

404 Id. at 698.

405 1999 U.S. Dist. LEXIS 21388 (S.D. Ohio Nov. 4, 1999). For a related discussion, *see* Doe v. Eagle-Union Cmty. Sch. Corp., 101 F. Supp. 2d 707 (S.D. Ind. 2000), *vacated and remanded,* 2 F. App'x 567, 2001 U.S. App. LEXIS 4334 (7th Cir. March 9, 2001) (unpub'd) (holding that the case was moot because the student had graduated), *reh'g denied,* 2001 U.S. App. LEXIS 7652 (7th Cir. April 23, 2001), *cert. denied,* 2001 U.S. LEXIS 10659 (Nov. 26, 2001); *see also,* P. J. v. Eagle-Union Cmty. Sch. Corp., 1999 U.S. App. LEXIS 30208 (7th Cir. Nov. 17, 1999), *cert. denied,* 2000 U.S. LEXIS 4210 (June 19, 2000).

406 Id. at *4.

407 Id. at *4-5.

408 Id. at *5.

409 Id. at *5, 6.

410 Id. at *6, 7-8.

411 Due to failure, Ryan repeated the ninth grade in 1996-1997. *See id.* at *7.

412 Id. at *7.

413 Id.

414 Id.

415 Id.

416 Id. at *14.

417 Id. at *15.

418 Id. at *19.

419 Id. at *19-20. The court reasoned:

> Defendants argue that because the IEP states that Ryan's participation in interscholastic athletics is conditioned on a ruling from the OHSAA that he is eligible to play, participation in athletics cannot be a mandatory part of his IEP. In other words, the OHSAA's finding Ryan eligible is a condition precedent which must be satisfied before Defendants must provide him with the opportunity to play interscholastic sports. On the other hand, the Court notes that Ryan's 12th grade IEP states that "participation in practice sessions and athletic events is essential in achieving [Ryan's] behavioral and academic goals" - a phrase that is certainly couched in mandatory terms. This phrase, however, cannot be viewed in isolation. The IEP is replete with statements that condition participation on not only the OHSAA ruling Ryan eligible to play, but on his making the teams through the normal try-out process. The Court also notes that Mrs. Dixon objected to the IEP to the extent that it contains language conditioning participation on the OHSAA ruling in Ryan's favor. Had interscholastic sports been written into the IEP as a mandatory item, there would have been no need to object to it. These facts lead to the conclusion that participation in interscholastic sports is not written into Ryan's IEP as a mandatory part of his educational program.
>
> *Id.* at *19-20.

420 Id. at *22, *quoting* Cedar Rapids Cmty. Sch. Dist. v. Garret F., 526 U.S. 66, 119 S. Ct. 992, 997 (1999).

421 Id. at *23.

422 Id. at *23-24.

423 108 F. Supp. 2d 906 (M.D. Tenn. Aug. 10, 2000).

[424] *See, also,* Muller v. Committee on Special Educ. of the East Islip Union Free Sch. Dist., 145 F.3d 95 (2d Cir. 1998) (ordering school district to find student with depression eligible for special education and related services as a child with a disability).

But see Doe v. Board of Educ. of State of Connecticut, 753 F. Supp. 65 (D. Conn. 1990) (upholding school district's determination that violent student with major depression who required hospitalization was not eligible for special education services as a "seriously emotionally disturbed" or otherwise classified student); Hoffman v. East Troy Cmty. Sch. Dist., 38 F. Supp. 2d 750 (upholding school district's determination that student diagnosed with clinical depression (who also abuse drugs) was not eligible for special education as a "seriously emotionally disturbed" or otherwise classified student).

[425] Id. at 908 (evaluation of Gillian Blair, Ph.D.).

[426] Id. at 908 (evaluation of Michael G. Tramontana, Ph.D.). Importantly, Dr. Tramontana noted that Tiffiney seemed "atypical" for ADHD, but "'the type of programming that she will require in school will most closely resemble the needs of an ADHD child.'" *Id.*

[427] Id. at 909 (evaluation of Elizabeth Hoover, M.D., a psychiatrist; *see also,* evaluation of Dr. Thompson, May 1996); id. at 910 (evaluation of Dr. Hersh, psychiatrist, noting "ODD" and "Parent-Child Problem"). Notably, Dr. Hoover "did not feel that medication therapy was warranted nor did she feel that the available data supported certification as Seriously Emotionally Disturbed." *Id.* at 909. Additionally, Dr. Hersh noted that "Tiffiney did not need medication at that time [and] she did not fit the definition of SED." *Id.* at 910. Dr. Hersh "though that the parental problems contributed more to Tiffiney's acting out than they did to her poor performance in school, although they contributed to the latter issue as well." *Id.* In her testimony, Dr. Hersh stated that she was "absolutely positive" that Tiffiney was ODD and Parent-Child Problem. *See also* id. at 911 (evaluation by Dr. Pamela Auble, Ph.D., concluding that Tiffiney [age fifteen] suffered "from an attention deficit/hyperactivity disorder, an oppositional defiant disorder, and a parent/child problem").

[428] Id. at 909 (evaluation of Dr. Thompson). Notably, initially Dr. Thompson told the eligibility committee that it should consider finding Tiffiney eligible as either a child with a serious emotional disturbance or other health impairment (March 1996). He altered his opinion after evaluating her, instead stating that she was *not* SED. *Id.*

[429] Id. at 910 (evaluation of Dr. Hersh). "Dr. Hersh acknowledged that her assessment had changed since June 1996 when she did not believe Tiffiney's history was consistent with a diagnosis of ADD or ADHD. By May 1997, Dr. Hersh had concluded that ADD or ADHD was a reasonable diagnosis." *Id.* Dr. Hersh stated that her diagnostic change "resulted from Tiffiney's positive (if not overwhelming) response to Ritalin treatment." *Id.*; *see also id.* at 911 (evaluation by Dr. Pamela Auble, Ph.D., concluding that Tiffiney suffered "from an attention deficit/hyperactivity disorder, an oppositional defiant disorder, and a parent/child problem"). Note that at the hearing, Dr. Auble "stated that Tiffiney's ADHD would have to be classified as mild due to the extent of the disagreement over the diagnosis." *Id.* at 911 (Drs. Thompson and Tramontanta did not diagnose it and Drs. Blair and Hersh did not offer "firm diagnoses").

[430] Id. at 910 (evaluation by and testimony of Dr. Hersh).

[431] Id. at 910 (evaluation of Dr. Judith Kaas Weiss). Dr. Auble disagreed with the conclusion that Tiffiney had "Reactive Attachment Disorder" and opined that Tiffiney did not have SED. *Id.* at 911.

[432] Id. at 910-911 (testimony of Dr. Judith Kaas Weis at the July 1997 hearing). Dr. Auble disagreed that Tiffiney had a learning disability. *Id.* at 911.

[433] Id. at 911 (testimony of Dr. Weiss). Dr. Auble noted "that Tiffiney exhibited some traits that would support Dr. Weiss's diagnosis that Tiffiney was a sociopath, but that such a determination was premature given Tiffiney's age and the fact that her personality was still forming." *Id.* at 911-912.

[434] Id. at 911 (evaluation by Dr. Pamela Auble, Ph.D.). Dr. Auble opined that Tiffiney "did not meet the criterion for certification as Seriously Emotionally Disturbed." *Id.* Indeed, she "acknowledged that Tiffiney had a history of and continued to engage in inappropriate behavior, but that she did not believe that Tiffiney's behavior was a manifestation of a disturbing internal emotional state or a misperception of the environment." *Id.*

[435] Id. at 909 (evaluations of Dr. Hoover and Dr. Thompson); id. at 911 (testimony of Dr. Pamela Auble).

[436] Id. at 912 (evaluation at New Life Lodge for substance abuse treatment by Mary Kathryn Black, Ph.D.).

[437] Id. at 912 (evaluation by Dr. Phyleen Ramage, M.D.) (emphasis supplied). Notably, Dr. Ramage made her diagnosis of BPD after the due process hearing but before trial in the district court. *Id.*

[438] Id. at 912.

[439] The case indicates that Tiffiney attended Goodpasture Christian School until the eighth grade, when she was expelled, and then attended Benton Hall until late 1997 to June 1998. *Id.* at 907-908, 912 (testimony of Dr. Phyleen Ramage, M.D., that Tiffiney was expelled from Benton Hall when suffering a manic episode).

[440] Id. at 908-909.

[441] Id. at 917.

[442] Id. at 912.

[443] Id.

[444] Id.

[445] Id. at 917.

[446] Id.

[447] Id.

[448] Id. at 912.

[449] Id. at 917.

[450] Id.

[451] Id. at 918.

[452] Id.

[453] Id.

[454] Id. "To qualify as Emotionally Disturbed, however, Tiffiney must have exhibited such inappropriate behavior over an extended period of time to a marked degree and such behavior must have adversely affected her educational performance." Id. (*citing* 34 C.F.R. § 300.7(c)(4)).

[455] Id. at 918.

[456] Id. at 918-919.

[457] Id. at 919.

458 Id.

459 225 F.3d 887 (7th Cir. 2000).

460 Id. at 894.

461 Id.

462 Id. at 894-895 (*citing* 20 U.S.C. § 1401(22)).

463 Id. at 895.

464 2000 U.S. App. LEXIS 26902 (4th Cir. Oct. 26, 2000) (unpub'd).

465 Id. at *1.

466 Id. at *1-2.

467 Id. at *2.

468 Id. at *3.

469 Id. at *2.

470 Id.

471 Id.

472 Id.

473 Id.

474 Id.

475 Id. at *3.

476 Id.

477 Id.

478 Id.

479 Id. at *4.

480 Id.

481 Id.

482 Id. at *5-6.

483 Id. at *5.

484 Id. at *6.

[485] 39 F. App'x 921, 2002 U.S. App. LEXIS 14372 (4th Cir. July 16, 2002) (per curiam) (unpub'd).

[486] Id. at 921-922.

[487] Id. at 922.

[488] Id.

[489] Id.

[490] Id.

[491] Id.

[492] Id.

[493] Id. It is unclear from the case whether Kendall's parents ever had an IEP meeting with the district. Presumably they did not, since the IEP team was scheduled to meet when Kendall was discharged from the hospital, but her parents removed her from the hospital and immediately enrolled her in the Hyde School.

[494] Id. at 923.

[495] Id.

[496] Id.

[497] Id.

[498] Id. at 923-924.

[499] Id. at 924.

[500] Id. at 925, *quoting* Jennings v. Fairfax County Sch. Bd., No. 00-1898 at 18 (E.D. Va. Aug. 14, 2001).

[501] Id. at 925, *quoting* Jennings., No. 00-1898 at 19 (*citing* 20 U.S.C. § 1412(a)(10)(C)).

[502] Id. at 925 ("a court, in its discretion, can award reimbursement only if the school district has denied the student a 'free and appropriate education' and the parents' chosen placement is otherwise appropriate"), *citing* 20 U.S.C. § 1412(a)(10) (C); Florence County Sch. Dist. v. Carter, 510 U.S. 7, 15, 114 S. Ct. 361 (1993)). Having properly found that the school district's IEP provided a FAPE, the district court never reached the second inquiry. The Fourth Circuit found that "even as to the period preceding FCPS's proposed placement at a private day school, a court may deny 'reimbursement to parents who unilaterally place their child in private programs' if the parents fail to give notice of ''their intent to enroll their child in a private school at public expense.''" Id., *quoting* Jennings v. Fairfax County Sch. Bd., No. 00-1898 at 19-20 (*quoting* 20 U.S.C. § 1412(a)(10)(C)(iii)(I)). Because the parents failed to provide the requisite notice, the district court denied reimbursement of those expenses as well. Id., *citing* Jennings at 19-20.

[503] 230 F. Supp. 2d 704 (E.D. Va. Nov. 14, 2002).

[504] Id. at 710. The hearing officer held "that the Interlude placement was not 'reasonably calculated to enable [Jane] to receive educational benefit.'" *Id.* The hearing officer "based this conclusion on several factual findings":

> First, he found that Jane had a strong desire not to participate in Interlude, and was "intelligent enough to manipulate her situation and sabotage any attempt to place her in the program." Second, the hearing officer concluded that because of Jane's part-time placement in Interlude, she had

> already met and worked with its staff, and she had "failed both academically and therapeutically" with this staff. While acknowledging that many Interlude features made the program appear appropriate for Jane, namely its small class size, highly structured program, and greater monitoring of attendance, HO nonetheless found that these beneficial features were "unlikely to overcome [Jane's] fears and self-esteem problems associated with mixing in a public school environment," in which special education students were a small percentage of the student population. This, coupled with the failure of Interlude's therapeutic component to address Jane's emotional needs, led the hearing officer to conclude that Interlude was not an appropriate placement for Jane.

Id.

The hearing officer "concluded that a proper placement for Jane required the following features: (i) a highly structured program, including closely monitored, small classes; and, (ii) a program that specializes in educating emotionally disturbed children, and provides therapeutic services, as well as a wide range of outside activities." *Id.* The hearing officer ruled that "the appropriate placement for Jane was a private, therapeutic day school, and he suggested certain schools." *Id.*

505 Id. at 714.

506 Id. at 710.

507 Id. at 706.

508 Id.

509 Id.

510 Id. "Jane's special education monitor in the ninth grade, Ms. Roberta Steinberg, stated that Jane's achievement during this period was 'mostly in the superior range.' Her grades during the ninth grade year were mostly Bs, and an A and a C." *Id.*

511 Id.

512 "Jane's guidance counselor stated that she had a 'pretty rigorous schedule,' which included an Advanced Placement European history course." *Id.* at 707.

513 Id. at 706-707.

514 Id. at 707.

515 Id.

516 Id.

517 Id.

518 Id. "She received all As for participation, and earned favorable reports concerning her work habits and behavior. Dominion's staff also noted that 'in general, Jane responded favorably to a highly structured environment and small class size. Her participation and involvement in the educational/ therapeutic activities varied daily.'" *Id.* at 707.

519 Id. Jane returned to Yorktown High School on February 7, 2001:

> While Jane was behind in much of her school work, her counselors did not want to overwhelm her with too much after-school extra help because it would make her school day too long. Instead,

> Jane's counselors determined that she should attend Instructional Studies, which was a structured study hall class during which students do homework or receive extra help from teachers. Jane's counselors and teachers held a follow-up meeting with Jane's parents on February 16, 2001, to discuss additional ways to help Jane complete her missed school work. Jane's teachers had offered her extra help during lunch time and after school, but Jane did not take advantage of these opportunities.

Id. at 707.

[520] Id. "They also believed that Jane's absences resulted from her fear of attending the same school where she had been sexually assaulted by a student the previous semester. While that student was expelled, the Smiths believed he was still able to gain access to the school." *Id.* at 707.

[521] Id. at 708.

> The new IEP called for Jane to remain in the general education setting for her classes, while having access to services in the Interlude program when needed for relief from the general education environment. For example, if she could not cope with going to class, she could go instead to an Interlude classroom rather than simply cutting class or going home. The new IEP also gave Jane an hour per week of Interlude therapy from Dr. Eva Lilienthal, and provided for her to be monitored by an Interlude teacher, Ms. Orpha Durgin. The Interlude staff was available to help coordinate Jane's extra-help sessions during her lunch time and after school to enable her to catch up with her missed school work. In fashioning the new IEP, the team considered and rejected a full-time placement in Interlude because the team members believed that Jane could catch up with her missed homework without such a placement.

Id. at 708.

[522] Interlude may still exist and be the same as described in the case. However, the author uses past tense as used in the rest of Chapter 2.

[523] Id. at 707-708.

[524] Id. at 708-709. "On April 27, 2001, a student study committee was convened to discuss Jane's poor attendance and declining grades. At this time, the Smiths were made aware that Jane's attendance problem was quite severe. The Smiths requested that Yorktown take disciplinary action against Jane when this occurred." *Id.* at 709.

[525] Id. at 708.

[526] Id. at 709. "Jane's guidance counselor at Yorktown felt that Jane's association with this group kept her from making progress, both emotionally and academically. The Smiths contend that Jane associated with them because she was still fearful at school, and this group of students, which included a physically-imposing football player, promised to provide her protection." *Id.*

[527] Id. at 708. "Moreover, the Smiths believed that it was difficult for Jane to attend the after-school sessions because she was afraid of walking home by herself due to her assault the previous semester; the late bus route did not stop near her home." *Id.* at 708.

[528] Id. at 708-709.

[529] Id. at 708-709. The court found:

> Jane . . . succeeded in avoiding most of the counseling sessions with Dr. Lilienthal. First, she skipped the Instructional Studies class, which was the time scheduled for her therapy sessions. Dr. Lilienthal then scheduled their meetings for another period, but Jane skipped those meetings as well. When Jane did not appear, Dr. Lilienthal attempted, usually unsuccessfully, to find her in the building. It appears that Dr. Lilienthal never succeeded in having more than three or four therapy

> sessions with Jane, and those sessions occurred only when Dr. Lilienthal was able to locate her; Jane never went to Dr. Lilienthal's office on her own. . . . She told Dr. Lilienthal about a meeting between herself, her mother, and her private therapist, where they had agreed that she no longer should meet with Dr. Lilienthal. This was a fabrication; there had been no such meeting.

Id. at 708-709.

530 Id. at 709.

531 Id.

532 Id.

533 Id.

534 Id.

535 Id. at 710.

536 Id.

537 Id. at 711.

538 Id. at 710.

539 Id. at 711.

540 Id. at 711-715.

541 Id.

542 Id. at 713. To support this holding, the court found:

> First, Ms. Durgin, an English teacher in Interlude and Jane's special education monitor during her part-time placement in that program, testified that placing Jane in Interlude for all of her academic classes would curtail her ability to skip classes and "hang out," and help prevent Jane from falling further behind in her classes. Ms. Durgin reasoned that the small size of Interlude, and the close contact the Interlude teachers have with one another, would enable the staff to monitor Jane and her progress very closely. Next, Ms. Veldran, a special education coordinator at APS, also echoed these views, testifying that Interlude's small classes and structured environment would allow Jane to be more closely supervised, and concluded that the proposed IEP would allow Jane to make educational progress. She also explained that Jane's increased hours in Interlude meant that "the majority of her day would be spent with specialists who could address [her] emotional concerns as they came up." Finally, Dr. Lilienthal, Jane's Interlude therapist, also testified that Jane would benefit from the individualized attention and more careful monitoring of attendance that students receive in Interlude.

Id. at 713 (citing *Springer v. Fairfax County Sch. Bd.*, 134 F.3d 659, 663 (4th Cir. 1998) (holding that "[a]bsent some statutory infraction, the task of education belongs to the educators who have been charged by society with that critical task") (citing *Hartmann v. Loudoun County*, 118 F.3d 996, 1000 (4th Cir. 1997)); *Board of Educ. of Montgomery County v. Brett Y.*, 155 F.3d 557, 1998 WL 390553, *13-14 (4th Cir. 1998) (Table) (emphasizing the value of consistent witness testimony at due process hearings)).

543 Id.

[544] Id. at 713-714. The court pointed out that "the hearing officer asked Ms. Veldran, a special education coordinator, whether Jane could be successful in Interlude if she did not want to be there. Ms. Veldran responded that 'many students don't want to go [to Interlude] .... it is the role of the team to work through that.'" *Id.* at 713.

[545] Id. at 714.

[546] Id. The court held that,

> While Jane did have an Interlude staff member as her special education monitor, this was the only aspect of Interlude's academic program in which Jane had participated prior to the hearing. At that time, she was still taking classes in the general education setting, and the additional help she was offered also took place in that setting. The fact is Jane had never participated in the complete Interlude experience; she had not interacted with Interlude teachers in the Interlude classroom setting, which is completely different from the general education setting she was experiencing.

Id.

[547] Id. at 714. Supporting this contention, the court wrote:

> Dr. Lilienthal's end-of-the-year psychotherapy progress report noted that she found it difficult to establish a therapeutic relationship with Jane because Jane consistently failed to appear for the sessions. In the Interlude program, Jane would presumedly [sic] not have this option. Several teachers and specialists, including Ms. Durgin, testified that Jane would be more closely monitored in Interlude, which would curtail Jane's ability to leave class and skip her sessions with Dr. Lilienthal. . . . As Ms. Veldran testified, "These [Interlude] teachers know how to deal with [emotional problems] right away. The therapist is right there. . . . if there is a crisis. . . . If a student comes in not ready to learn, they deal with it right away, [and] get them to a place where they are ready to learn. . . . That can't happen in a general ed setting."

Id.

[548] "[T]hat Jane could never be successful in Interlude because she would be too self-conscious about being different from the students in the general education population . . . ." *Id.* at 714.

[549] Id. at 714.

[550] Id. at 715, *quoting* Rowley, *supra*, 458 U.S. at 206-07. "The hearing officer's contrary conclusion that Jane would not benefit from the Interlude program finds no support in the record, as no expert testified to this effect, and Jane had not yet fully experienced the program." *Id.* at 715.

[551] Id. at 715.

[552] Id. The court sympathized:

> This is not to say that the hearing officer is wrong in his opinion that Jane would benefit more or even most from placement in a private, therapeutic day school. She might well do so. Indeed, Jane's parents, in the exercise of their sovereign, parental judgment, ultimately elected to place Jane in a private, Arizona boarding school, a decision vindicated by the fact that, happily, Jane is apparently succeeding and thriving there. There might well be many other placements where this result would obtain. But the point is that, on this record, an Interlude placement would have provided Jane with a FAPE, and that is all the law requires.

Id. at 715, n.15.

[553] 51 F. App'x 412, 2002 U.S. App. LEXIS 24131 (4th Cir. Nov. 26, 2002) (per curiam) (unpub'd).

[554] The author's copy of the case did not contain page numbers. Accordingly, all discussion of this case references its citation at 51 F. App'x 412, 2002 U.S. App. LEXIS 24131 (4th Cir. Nov. 26, 2002) (per curiam) (unpub'd), but does not contain pin-cites.

[555] 2005 U.S. Dist. LEXIS 21424 (D.N.J. Sept. 22, 2005).

[556] Id. at *5 n.2.

[557] Id. at *4-5 and n.3.

[558] Id.

[559] Id. at *4.

[560] Id. at *5.

[561] Id.

[562] Id. at *6.

[563] Id. at *8-9.

[564] Id. at *9.

[565] Id. at *9-10.

[566] Id. at *11.

[567] Id. at *11-12.

[568] Id. at *11.

[569] Id.

[570] Id. Under the IDEA and its supporting regulations, districts perform FBAs for students in order to determine the "function of" (or reason for) their behavior. After gathering this data, the IEP team produces a written behavior intervention plan, or BIP, to implement with expectation that the plan will decrease the negative behaviors and increase positive behaviors.

[571] Id. at *11-12.

[572] Id. at *12 n.8.

[573] Id. at *12.

[574] Id. at *12.

[575] Id. at *10, 12-20 (summarizing the administrative law judge's, or ALJ's, decision in favor of T. M. requiring the school district to fund T. M.'s placement in an out-of-state residential setting).

[576] Id. at *7-8, 13-15.

[577] Id.

[578] Id. at *19.

[579] Id. at *30.

[580] Id.

[581] Id., *quoting* 20 U.S.C. § 1401(22); 34 C.F.R. 300.24(a).

[582] Id., *quoting* 20 U.S.C. § 1401(22); 34 C.F.R. § 300.24(a).

[583] Id. at *31, *quoting* 34 C.F.R. § 300.302.

[584] Id. at *31.

[585] Id. at *31-33.

[586] Id. at *29-30.

[587] Id. at *30.

[588] 2006 U.S. Dist. LEXIS 23568 (S.D. Tex. Mar. 31, 2006). The facts in this case are as follows:

> During the 2002-2003 school year, the school district provided Chris with a full mainstream program. Chris earned all attempted credits and he was promoted to the eleventh grade. In the 2003-2004 school year, Chris passed all his classes in the first nine week grading period. At times, however, he skipped classes, used profanity, became upset, and left the classroom without permission.
>
> Chris's parents reported other behavior, including aggression toward his siblings, running away to his girlfriend's house, taking the family car without permission, stealing his parent's jewelry, and generally disobeying parental expectations and rules.
>
> On December 5, 2003, school staff determined that Chris had distributed a few of his mother's Xanax pills to other students at school. That evening, Chris's mother admitted him into Methodist Hospital in San Antonio. Chris was discharged by Dr. Gundlapalli Surya one week later. Chris was discharged by Dr. Gundlapalli Surya one week later. Dr. Surya recommended that Chris receive outpatient treatment in Corpus Christi, administration of various medications, and a return to normal activities. Dr. Surya noted that Chris was less depressed, less anxious, and exhibiting no aggressive or assaultive behavior. Chris's mother wrote on the discharge plan that she did not agree with Dr. Surya's conclusions.
>
> . . . There was no evidence that Chris used drugs, or that he had ever committed any other drug related offenses.

Id. at *2-3.

[589] Id. at *10. A court may order reimbursement if "in such situations only if the parents or guardians establish that (1) an IEP calling for placement in a public school was inappropriate under the IDEA, and (2) the private school placement by the parents was proper under the Act." *Id.* (quoting *Cypress-Fairbanks* at 249).

[590] Id. at *1. In addition to bipolar disorder, doctors had diagnosed Chris with ADHD, conduct disorder, major depressive disorder, and Asperger's disorder. *Id.*

[591] Meridell was a residential facility in Liberty Hill, Texas. *Id.* at *6.

[592] Id. at *13 (*citing* Rowley, 102 S. Ct. at 3049).

[593] Id. at *11 (*quoting* Adam J., 328 F.3d at 808 (internal citations and quotations omitted)).

[594] Id. at *11 (*quoting* Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 (5th Cir. 2000)).

[595] Discussed herein at *37-41.

[596] Id. at *9, 18-20 (reviewing facts of *Cypress-Fairbanks* as they relate to positive academic and nonacademic benefits). In *Cypress-Fairbanks*, the Fifth Circuit developed a test to determine whether a district provided a student with FAPE:

> There are "four factors that can serve as indicators of whether an IEP is reasonably calculated to provide a meaningful educational benefit under the IDEA." They are:
> (1) the program is individualized on the basis of the student's assessment and performance;
> (2) the program is administered in the least restrictive environment;
> (3) the services are provided in a coordinated and collaborative manner by the key "stakeholders"; and
> (4) positive academic and non-academic benefits are demonstrated.

Id. at *10 (*quoting* Cypress-Fairbanks, 118 F.3d at 249 (*quoting* Rowley, 458 U.S. 176, 102 S.Ct. 3034, 3048, (1982))).

[597] Id. at *12-13.

[598] Id. at *13-14.

[599] Id. at *14-15.

[600] Id. at *15-16 (*quoting* Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1050 (5th Cir. 1989) (internal citations omitted) (interpreting the LRE provision in the Education of the Handicapped Act, the IDEA's predecessor)).

[601] Id. at *17 (*quoting* Daniel R.R., 874 F.2d at 1044).

[602] Id. at *17. "At the January 7, 2004 ARD meeting, a teacher reported that Chris had worked harder and improved significantly when the last ARD meeting mentioned the possibility of moving to the vocational program . . . The committee thought that a more restrictive environment . . . would lead to improvement and increased motivation." *Id.*

[603] Id.

[604] Id. at *16.

[605] Id. at *16. ("The hearing officer concluded that although a one-on-one aide with counseling and other services within the public school would be a prudent and legally supportable position, the school district's proposed changes came too late.").

[606] Id.

[607] Id.

[608] Id. at *18.

[609] Id. at *20.

[610] Id. at *22-23.

[611] Id. at *23.

[612] Id. at *23. "Parents of IDEA-eligible students seeking public funding for a residential placement must not only prove that the student cannot receive an appropriate education in any placement on the school's continuum of services, but must also show that the proposed private placement is appropriate and can confer an appropriate education." Id. (*citing* Burlington, *supra*., 105 S. Ct. 1996, 2002-03 (1985)).

[613] Id. at *24 (*quoting* Teague ISD, 999 F.2d at 132).

[614] Id. at *24.

[615] Id.

[616] Id. at *24-25.

[617] Id. at *25.

[618] Id.

[619] Id.

[620] Id. at *23, 25.

[621] 463 F. Supp. 2d 208 (D. Conn. 2006).

[622] *See* Demitri Papolos & Janice Papolos, THE BIPOLAR CHILD: THE DEFINITIVE AND REASSURING GUIDE TO CHILDHOOD'S MOST MISUNDERSTOOD DISORDER (3d ed. 2006).

[623] "Not otherwise specified."

[624] Id. at 213.

[625] Id. at 220.

[626] Id. at 212.

[627] Id.

[628] Id.

[629] Id.

[630] Id. at 212.

[631] Id. at 213.

[632] Id. at 213-214.

[633] Id. at 214.

[634] Id.

[635] Id.

[636] Id.

[637] Id.

[638] Id.

[639] Id. at 219.

[640] Id. at 221 ("the primary area of disagreement between the respective experts was not the diagnosis of the child's condition, but instead was the degree to which CES was sufficiently flexible to provide appropriate behavioral intervention and educational programs catered to A. E's particularized needs.").

[641] Id.

[642] Id.

[643] 2007 U.S. Dist. LEXIS 10310 (D. Me. Feb. 12, 2007).

[644] Id. at *3-4.

[645] Id. at *5-9.

[646] Her parents both practiced medicine. The case suggests that her parents were very active in her academic life.

[647] Id. The case provides the following facts:

> Through third grade [A. S.] consistently earned As and Bs, and her teachers reported no concerns about her learning or achievement. [citation omitted, hereafter "c.o."]. Nonetheless, after A. S. earned what her parents viewed as disappointing and discrepant results on a standardized achievement test administered in third grade, they sent her to Robert Dodge, Ph.D., for a psychoeducational evaluation in the fall of 1998, the beginning other fourth-grade year. [c.o.] At the time, A.S. reportedly loved school and was "quite diligent about completing her work." [c.o.] Dr. Dodge found no evidence of any psychological problems. [c.o.]. He administered the Wechsler Individual Achievement Test ("WIAT") and Kaufman Brief Intelligence Test ("K-BIT"), finding that A. S.'s WIAT scores were commensurate with her ability as measured by the K-BIT, which was squarely in the average range. [c.o.]. He noted no concerns about A. S. either psychologically or educationally. [c.o.]. In fourth grade, A. S. took the Maine Educational Assessment ("MEA") examination; she was scored as not meeting standards in math and science and partially meeting standards in reading, social studies and writing. [c.o.].
>
> In December 2000, when A. S. was in sixth grade, her parents again arranged for private testing, bringing her to Christine Fink, Ph.D., for a neuropsychological evaluation. [c.o.]. The Parents expressed concern about A. S.'s attention, concentration, ability to complete homework, and argumentativeness. [c.o.]. Dr. Fink noted that school was a major source of stress between A. S. and her parents and that A. S. described herself as a procrastinator, preferring to engage in activities other than her homework. [c.o.]. A. S. had been earning good grades and had made the honor roll during her first quarter in sixth grade. [c.o.].
>
> Dr. Fink administered the Wechsler Intelligence Scale for Children ("WISC-III"), the results of which placed A. S. in the solid average range, with a verbal IQ score of 101, a performance IQ score of 103 and a full-scale IQ score of 102. [c.o.]. Dr. Fink noted that although the school reported that A. S. behaved well and paid more attention than most of her peers, at home she was inattentive and noncompliant with chores and homework completion. [c.o.]. Dr. Fink observed

> that A. S.'s behavior varied "quite significantly" between home and school, noting that she "apparently maintains her behavior quite well at school[.]" [c.o.]. Dr. Fink did not conclude that A. S. had any disabilities, but gave her strategies for addressing her problems. [c.o.]. Dr. Fink did note a "pattern of very subtle difficulties with motor regulation, visual-motor planning, and initial inflexibility with novel tasks of problem solving," suggesting "the possible presence of very mild frontal lobe inefficiency." [c.o.].
>
> During sixth grade, the Parents provided A.S. with private psychological counseling to address homework and organizational issues. [c.o.]. A. S. had great difficulty completing homework throughout middle school. [c.o.]. In seventh grade, A. S.'s grades were a rather even mix of As, Bs and Cs. [c.o.]. There were issues with missing assignments, but her behavior was consistently good in all areas, according to her report card. [c.o.]. The following year, in eighth grade, A. S.'s grades began to decline. [c.o.]. A. S. continued to get mostly Bs and Cs, with an occasional A or D. [c.o.]. During the second quarter of eighth grade she failed science as a result of non-completion of projects and homework. [c.o.]. Some of her teachers noted that she needed to try harder and that she did not turn in assignments. [c.o.]. At about the same time she began socializing with a new group of friends, and her attitude toward school declined. [c.o.]. She dropped out of band, began to wear inappropriate clothing and spoke of hating school. [c.o.].
>
> During A. S.'s eighth-grade year her parents grew markedly more concerned about her declining performance. [c.o.]. Concerned about A. S.'s ability to succeed in high school, the Parents asked MSAD # 28 to retain her in eighth grade for another year or to provide tutoring services, but the school district denied their requests. [c.o.].

Id. at *4-9.

[648] Id. at *9.

[649] Id.

[650] Id. at *11-12.

[651] Id. at *12.

[652] Id. at *14.

[653] Id.

[654] Id.

[655] Id. at *14-15.

[656] Id. "A. S. also called her mother, who was in Washington, D.C., on business. [citation omitted]. [A. S.'s mother] spoke with assistant principal Don Palmer, who assured her that he would not allow the guest speaker in the class. [c.o.]. Palmer then told Lovell that the guest speaker was not allowed in class. [c.o.]. The individual never attended A. S.'s class." *Id.* at *15.

[657] Id. at *16.

[658] Id. at *16-17.

[659] Id. at *16.

[660] Id.

[661] Id. at *17.

[662] Id.

[663] Id.

[664] Id. at *20. A. S.'s first semester grades were: "Freshman English, D+, Global Science, D+, Health, D, Integrated Math, F, Latin, W/F, Physical Education, C-, and World History, F." *Id.* at *22.

[665] Id. at *17-18.

[666] Id. at *20.

[667] Id. at *18.

[668] Id. at *20.

[669] Id.

[670] Id.

[671] Id. at *17, 27-28, 42, 46-47.

[672] Id. at *27-28.

[673] Id. at *19.

[674] Id. The case provides:

> [The parents] first learned about the "PET" [eligibility] process in discussions with staff at Midcoast Mental Health Center, but even then they did not know that the acronym signified "Pupil Evaluation Team." [citations omitted]. At the end of January, after A.S. had missed a few consecutive days of school, [father] B. S. called [high school counselor] Vohringer, who suggested that A. S. might be eligible for help under Section 504. [c.o.]. Vohringer offered to schedule a Section 504 meeting, and set one up for February 6, 2004. [c.o.].

Id. at *25. "On or about February, [mother] C. G. called Foreman to ask for an explanation of the 'PET' acronym. [c.o.]. Foreman explained the referral, testing and eligibility process." *Id.* at *26.

[675] Id. at *22.

[676] Id.

[677] Id. at *26-31.

[678] Id. at *28-31.

[679] Id. at *30-31.

[680] Id. at *31-33.

[681] Id. at *34.

[682] Id. at *34-35.

[683] Id. at 35.

[684] Id.

[685] Id. at *36.

[686] Id. The parents expected that the district could send an evaluator to Utah. *Id.* at *36-37. The hearing officer and the court held that this was unreasonable. *Id.* at *95, 102, 103-106.

[687] Id.

[688] Id. at *41.

[689] Id. at *40.

[690] Id.

[691] Id. at *44. The parents "incurred expenses for A. S.'s placement at Moonridge from March 18, 2004 through her program graduation on December 30, 2004 of $72,370.00 for tuition and $9,995.30 for transportation and related costs." *Id.* at *46.

[692] Id. at *45-46.

[693] Id. at *45.

[694] Id.

[695] Id.

[696] Id.

[697] Id. at *46-47.

[698] Id. at *47.

[699] Id.

[700] Id. at *49.

[701] Id. at *49-50.

[702] Id. at *51-53. "Dr. McCabe evaluated A.S. by reviewing prior evaluations, communications from healthcare providers and documents from Moonridge and interviewing the Parents, individuals at Camden Rockport Middle School, CHRHS, Moonridge and Kents Hill, Drs. Slap-Shelton and Miller, and A.S. [c.o.]. In addition, A.S. and her parents completed several rating scales." *Id.* at *51-52.

[703] Id. at *52.

[704] Id.

[705] Id. "McCabe also found that A.S. needed (i) a positive behavioral support plan that was monitored systematically as part of her IEP and (ii) access to support, such as social workers or guidance counselors." *Id.* (citation omitted). His October 2005 report provided: "'A positive behavioral support plan that is systematically monitored as part of an individual education plan is essential,'" emphasizing the importance of "keying into A. S.'s

assets and developing her interests." *Id.* (citations omitted). Dr. McCabe "recommended that, outside of school, she continue her psychiatric treatment." *Id.* (citation omitted).

706 Id. at *54.

707 Id. at *55, n.22.

708 Id. at *56.

709 Id.

710 Id. at *56-57. The IEP further provided:

> With regard to the first goal, improvement of organizational skills, the IEP document called for A. S. to be given direct instruction in the resource room with short-term objectives of (i) using a daily planner and reviewing the planner with assigned staff daily ninety percent of the time, (ii) developing study-skills strategies and a list of ways to make course expectations more manageable, such as chunking and prioritizing, and using those strategies ninety percent of the time, and (iii) developing and using time-management techniques (such as prioritizing and organizing work time in fifteen-minute chunks). [c.o.]. With regard to the second goal, development of a positive support plan, the IEP document called for A. S., given the opportunity to identify the state of her functioning, to "choose an appropriate strategy from the attached behavior plan"; however, no behavior plan was attached. [c.o.]. With regard to the third goal, achievement of passing grades, the IEP document called for A. S. to be given a tutorial study hall in the resource room and support to prepare for her regular class assignments on a daily basis ninety percent of the time. [c.o.]. Finally, with regard to the final goal, attendance, the IEP document provided that, given a daily check-in with the special-education teacher, A. S. would fill out the attendance form for the day, keeping track of her own attendance on a daily basis. [c.o.]. The IEP document did not provide for direct social-work or therapeutic services for A. S. [c.o.]. The District envisioned the family continuing the clinical counseling it had set up with Dr. Miller, with the District contracting with Dr. Miller to craft appropriate crisis/safety and behavior-support plans and consulting on an ongoing basis with her as needed.

Id. at *59-61.

711 Id. at *62.

712 Id.

713 Id.

714 Id.

715 Id.

716 Id. at *64.

717 Id.

718 Id.

719 Id. at *66.

720 Id. at *67.

[721] Id. For a full summary of the hearing officer's decision, *see id.* at *67-70.

[722] Id. at *72.

[723] Id. at *70-71 (citations omitted).

[724] Id. at *71 (citations omitted).

[725] Id. at *72 (citations omitted).

[726] Id.

[727] Id. When admitted to the hospital, A. S. conceded her suicidal ideations. *Id.* at *73.

[728] Id. at *73.

[729] Id. at *74.

[730] Id.

[731] Id. at *75.

[732] Id. at *75-76.

[733] Id. at *76.

[734] Id. at *83-84. The court wrote:

> Congress has recognized that, in certain circumstances, reduction or denial of reimbursement is appropriate, providing, in relevant part:
>
> (ii) Reimbursement for private school placement
>
> If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment
>
> (iii) Limitation on reimbursement
>
> The cost of reimbursement described in clause (ii) may be reduced or denied --
> ***
>
> (II) if, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in section 1415(b)(3) of this title, of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for such evaluation; or
>
> (III) upon a judicial finding of unreasonableness with respect to actions taken by the parents.

Id. at *84 (citing 20 U.S.C. § 1412(a)(10)(C). IDEA regulations echo these provisions. *See* 34 C.F.R. § 300.148(c)-(d) (formerly codified at 34 C.F.R. § 300.403(c)-(d))).

The court further wrote:

> IDEA regulations were amended on August 14, 2006, effective October 13, 2006, to implement 2004 amendments to the IDEA. *See D.D. ex rel. V.D. v. New York City Bd. of Educ.*, 465 F.3d 503, 508 n.6 (2d Cir. 2006); Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed. Reg. 46, 540 (Aug. 14, 2006). In briefing the instant appeal, the parties cited to the version of the regulations in effect prior to October 13, 2006. [citations omitted]. Although many of the regulations cited by the parties have been recodified, none has been amended in any respect material to the outcome of the instant appeal. Accordingly, I have cited to the version of the regulations that became effective October 13, 2006, adding a parenthetical reference to the prior version if recodified.

Id. at *84 n.36.

[735] Id. at *85, *quoting* Ms. M. ex rel. KM. v. Portland Sch. Comm., 360 F.3d 267, 273-74 (1st Cir. 2004) (citation and internal punctuation omitted); *see also, e.g.*, Diaz-Fonseca, 451 F.3d at 32 ("As the term 'reimbursement' suggests, tuition reimbursement is a backward-looking form of remedial relief; reimbursement merely requires the defendant to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper EEP. It goes without saying that those 'expenses' must be actual and retrospective, not anticipated. Indeed, this reasoning is at the heart of the distinction, recognized by this court, between 'tuition reimbursement' and 'compensatory education.'") (citations, footnote and internal punctuation omitted).

[736] Id. at *85, *quoting* Pihl v. Massachusetts Dep't of Educ., 9 F.3d 184, 188 n.8 (1st Cir. 1993) (citations omitted).

[737] Id. at *91.

[738] Id. at *95, 102-104, *citing* Patricia P., 203 F.3d at 469 (finding no clear error in district court's determination that mother's "lack of cooperation" in unilaterally placing child in Maine, not sending him back to Illinois for evaluation and offering only to permit school staff to travel to Maine to evaluate him "deprived the school district of a reasonable opportunity to conduct an evaluation of [the child] and fulfill its obligations under the IDEA"); Great Valley Sch. Dist. v. Douglas, 807 A.2d 315, 321-22 (Pa. Commw. Ct. 2002), *appeal denied*, 815 A.2d 1043, 572 Pa. 744 (Pa. 2003) ("We hold that among the burdens initially assumed by those unilaterally enrolling a child in a remote educational institution are burdens associated with the location of that institution. Where a school district has not participated in a placement decision, no burden associated with the location can be assigned to it. Thus, a school district cannot be compelled to assume any responsibility for evaluating a child while he remains outside [the state] in a unilateral placement").

[739] Id. at *106.

[740] Id. at *110.

[741] Id. at *112-113, *citing* MM, 303 F.3d at 534-35 ("[I]t would be improper to hold the School District liable for the procedural violation of failing to have [an] IEP completed and signed, when that failure was the result of the parents' lack of cooperation."); *see also, e.g.*, Loren F. ex rel. Fisher v. Atlanta Indep. Sch. Sys., 349 F.3d 1309, 1319 n. 10 (11th Cir. 2003) (where "parents significantly hindered or frustrated the development of an IEP, the district court may be justified in denying equitable relief on that ground alone"); Doe v. Defendant I, 898 F.2d 1186, 1189 n.1 (6th Cir. 1990) (parent could not be heard to complain that school district failed to complete a timely IEP when IEP's non-completion was attributable to parent's request that school allow student to perform on his own for a while). The court described the *MM* decision:

> In *MM*, it was undisputed that (i) the proposed IEP in question had never been signed or completed, (ii) MM's parents had attended two IEP team meetings regarding the proposed IEP and then had canceled a third, and (iii) the school district had requested notification from the

parents when they were ready to reconvene and had received none. *See MM*, 303 F.3d at 534. The parents in *MM* cited *Knable* for the proposition that the draft IEP failed to satisfy IDEA requirements, entitling them to reimbursement of the costs of a unilateral private placement. *See id.* The *MM* court distinguished *Knable*, noting that whereas in *Knable* no IEP team meeting even had been convened prior to the school's draft IEP offer, in *MM*, the school district had been willing to offer a FAPE and had been attempting to do so, affording the parents a full and fair involvement in the process. *See id.* The court observed, "It is significant that there is no evidence that MM's parents would have accepted any FAPE offered by the District that did not include reimbursement for the Lovaas program. As we have noted, the District is not obligated by the IDEA to provide a disabled child with an optimal education; it is only obliged to provide a FAPE." *Id.* at 535.

Id. at *113-114.

742 Id. at *116-117.

743 Id. at *117.

744 Id. at *117, *citing* MM, 303 F. 3d at 535.

745 Id. at *121.

746 Id. at *121-122.

747 Id. at *125.

748 489 F.3d 105 (2d Cir. 2007).

749 Id. at 111.

750 Id. at 107.

751 Id.

752 Id. at 108.

753 Id.

754 Id.

755 Id.

756 Id.

757 Id. at 109.

758 Id.

759 Id.

760 Id.

761 Id.

762 Id. at 109, 110.

[763] Id. at 109-110.

[764] Id. at 109, 110.

[765] Id.

[766] Id.

[767] Id.

[768] Id.

[769] Id.

[770] Id.

[771] Id. at 111-112.

[772] Id. at 113-114.

[773] Id. at 114.

[774] Id. at 115 (*quoting* Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 (6th Cir. 2003); *citing* Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 26-27 (1st Cir. 2002)).

[775] Id. at 115 (*quoting* Frank G. v. Board of Educ., 459 F.3d 356, 365 (2d Cir. 2006), *quoting* Rowley, 458 U.S. at 188-89).

[776] Id.

[777] 496 F.3d 932 (9th Cir. 2007).

[778] Id. at 935.

[779] Id.

[780] Id.

[781] Id.

[782] Id.

[783] Id. For a brief time, R. B. qualified for and received preschool and kindergarten special education services. *Id.* However, the school district found her no longer eligible for services during her first grade year. *Id.* at 935-936. Instead, the district served her under Section 504 of the Rehabilitation Act and implemented a behavior intervention plan. *Id.* at 936. A "neutral" psychologist concluded that R. B. was no longer a "child with a disability." *Id.*

[784] Id.

[785] Id.

[786] Id.

[787] Id.

[788] Id.

[789] Id.

[790] Id.

[791] Id.

[792] Id.

[793] First, the Ninth Circuit determined that the school district did not engage in a violation of FAPE through any alleged procedural violation, concluding that the 1997 amendments to IDEA did not mandate attendance at eligibility or IEP meetings by the child's *current* regular education teacher, so long as at least one regular education teacher attended. *Id.* at 938-942.

[794] Id. at 944-947.

[795] Id. at 945.

[796] Id.

[797] Id.

[798] Id.

[799] Id. at 945-946.

[800] Id. at 947 (relying on psychological reports that R. B. only had "mild depression below the level required to establish a 'severe emotional disturbance.'").

[801] Id. at 946, 947.

[802] 561 F. Supp. 2d 589 (N.D. Tex. 2007).

[803] Id. at 593.

[804] Id. Leah's PDD, or low intellectual ability, distinguishes this case from the others utilized in Chapter Two, where the students each had average to superior intellectual functioning. According to one evaluation performed of Leah when she was in the ninth grade, ". . . Leah was reading at the second-grade level and comprehending short reading passages at an upper-first-grade level. Leah did not complete the testing in mathematics." Id. at 596.

[805] Id.

[806] Id. at 594.

[807] Id.

[808] Id. at 594-595. Leah was in several regular classes as well.

[809] Id. at 595.

[810] Id.

[811] Id.

[812] Richardson High School, or "RHS."

[813] Id.

[814] Id.

[815] Id. at 596.

[816] Id.

[817] Id.

[818] Id. at 597.

[819] Id. at 602.

[820] Id.

[821] Id. at 603.

[822] Id.

[823] Id.

[824] Id.

[825] Id.

[826] Id. at 603, 604.

[827] Id. at 604.

[828] Id., *citing* 20 U.S.C. §1412(a)(10)(C).

[829] Id., *citing* Cypress-Fairbanks v. Michael F., 118 F.3d at 248.

[830] Id., *quoting* Indep. Sch. Dist. No. 284 v. A.C., 258 F.3d 769, 774 (8th Cir. 2001).

[831] Id., *quoting* Kruelle v. New Castle County Sch. Dist., 642 F.2d 687, 693 (3d Cir. 1981).

[832] Id. at 604-605.

[833] Id. at 605, *quoting* Clevenger v. Oak Ridge Sch. Bd., 744 F.2d 514, 516 (6th Cir. 1984); *also citing* Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1122 (2d Cir. 1997) ("If institutionalization is required due to a child's emotional problems, and the child's emotional problems prevent the child from making meaningful educational progress, the Act requires the state to pay for the costs of the placement.").

[834] Id. at 606.

[835] Id.

[836] Id., *quoting* 20 U.S.C. § 1401(26)(A)-(B).

[837] Id. at 606-607, *quoting* 34 C.F.R. §300.104.

[838] Id. at 607.

[839] Id. at 607-608, stating that "reimbursement may be denied, reduced, or awarded in full, pursuant to the discretion afforded by § 1412(a)(10)(C)." *Id.* at 608.

[840] Id. at 608.

[841] Id.

[842] 2007 U.S. Dist. LEXIS 73911 (S.D. Tex. Sept. 29, 2007).

[843] Id. at *6.

[844] Id.

[845] Id. at *8-10.

[846] Id. at *11-12.

[847] Id. at *9-10.

[848] Id. at *13-14.

[849] Id. at *14.

[850] Id.

[851] Id.

[852] Id.

[853] Id.

[854] Id. at *14-16.

[855] Id. at *16.

[856] Id. at *19, 24-27.

[857] Id. at 27-31. The court applied the *Cypress-Fairbanks* factors, *supra*, to hold that the district's proposed IEP offered a FAPE.

[858] 2007 U.S. App. LEXIS 24349 (11th Cir. Oct. 16, 2007) (per curiam) (unpub'd). No page numbers appear in the Lexis-Nexis version of the decision. Accordingly, I am unable to provide pin-citations to the exact reference.

[859] Id.

[860] Id.

[861] Id.

[862] Id.

[863] Id.

[864] Id.

[865] Id.

[866] Id.

[867] Id.

[868] Id., *quoting* Devine v. Indian River County Sch. Bd., 249 F.3d 1289, 1293 (11th Cir. 2001).

[869] Id.

[870] Id.

[871] Id.

[872] 2007 U.S. Dist. LEXIS 78361 (E.D. Pa. Oct. 22, 2007).

[873] Id. at *6.

[874] Id. at *5-6.

[875] Id. at *5-8.

[876] Id. at *7, 8.

[877] Id. at *9-18. Lauren's father testified that "Lauren's behavior was deteriorating while she was at Kennedy Kendrick, raising concerns about drinking, drugs, failing to keep her curfew, and neglecting her school work." Id. at *18.

[878] Id. at *8, 11, 15, 17-18. The district covered some of the cost of The Heritage School, a residential school in Provo, Utah. Id. at *8. Despite her success, the Heritage School discharged Lauren in July 2005.

[879] Id. at *18.

[880] Id. Lauren's father, David V., "testified that he did not call the District to ask about a residential placement because he wasn't confident that the District would come up with an appropriate placement." Id. at *19.

[881] Id. at *20.

[882] Id. at *22.

[883] Id. at *23-24.

[884] Id. at *25-39.

[885] 2007 U.S. Dist. LEXIS 85394 (E.D. Tenn. Nov. 19, 2007).

[886] Id. at *11, 12, 13, 16. Rocky took Effexor, Zyprexa, Lexapro, and Abilify. "In Summer 2004, Rocky continued seeing Dr. Causo, who discontinued Zyprexa and increased his Abilify." Id. at *15. Among the side effects of the medications included drowsiness and sleeping in class. Id. at *17-18, 19. When doctors reduced his medications, he became "depressed and irritable." Id. at *18.

[887] Id. at 65. The court reviewed the statutory and case law regarding governmental liability under Section 1983 and Section 504. Id. at 34-65.

> While there were delays in evaluating Rocky, those were due primarily to the summer break; there was no outright refusal to evaluate and accommodate Rocky. Before school started, Ms. Bivens met with Rocky to show him around the school and to encourage him to see her if he had any problems. During the first week she personally assisted him in changing classes and his locker. Within the first month and a half BCHS employees had met twice with Rocky and Ms. Hill to discuss his needs and various possible accommodations. Ms. Bivens asked Ms. Hill about the "suicide" notes and was assured by Ms. Hill that Rocky was alright. Plaintiff asserts Rocky's teachers "forced" Rocky to reduce his medications to dangerous levels, but Ms. Hill's testimony indicates Mr. Clark told Ms. Hill to talk to Rocky's doctor about reducing his medication - she did so and it was the doctor who ultimately made the decision to reduce Rocky's medication. Teachers attempted to make accommodations for Rocky's sleepiness by allowing him to stand up and to drink caffeinated beverages in class. Further, there was no evidence whatsoever to indicate that Rocky had ever had any difficulty on the bus or had posed a problem on the bus prior to the day of his death.

Id. at *61-62.

[888] Id. at *16-20.

[889] Id. at *17-18, 19.

[890] Id. at *21-22.

[891] Id. at *22.

[892] Id. at *23.

[893] Id.

[894] Id.

[895] Id. at *24-25.

[896] Id. at *25-26.

[897] Id. at *26. “Ms. Hill was given a Prior Written Notice form” describing:

> (i) the proposed scope of the evaluation (psycho educational testing and academic testing),
> (ii) the reasons for the proposed evaluation (lack of academic progress),
> (iii) the options considered prior to the proposal (continue with modifications),
> (iv) the reasons these options were rejected (information from physicians),
> (v) the materials used as a basis for the proposal (“Physician information, grades, teacher information, Discipline records, cum. records, counselor information, parent information”), and
> (v) other relevant factors (“parental referral and concerns”).

Id. at *26-27.

[898] Id. at *30.

[899] Id. at *65.

[900] *See* Doe v. Alabama, 915 F.2d 651 (11th Cir. 1990); Sylvie, 48 F. Supp. 2d 681 (W.D. Tex. May 5, 1999); Dixon, 1999 U.S. Dist. LEXIS 21388 (S.D. Ohio Nov. 4, 1999); Butler v. Evans, 225 F.3d 887 (7th Cir. 2000); Jennings, 39 F. App'x 921, 2002 U.S. App. LEXIS 14372 (4th Cir. July 16, 2002) (per curiam) (unpub'd); Arlington County v. Smith, 230 F. Supp. 2d 704 (E.D. Va. Nov. 14, 2002); Arseneault, 51 F. App'x 412, 2002 U.S. App. LEXIS 24131 (4th Cir. Nov. 26, 2002) (per curiam) (unpub'd); Town of Bloomfield v. S. C., 2005 U.S. Dist. LEXIS 21424 (D.N.J. Sept. 22, 2005); Corpus Christi v. Christopher N., 2006 U.S. Dist. LEXIS 23568 (S.D. Tex. Mar. 31, 2006); A. E., 463 F. Supp. 2d 208 (D.Conn. 2006).
Gagliardo, 489 F.3d 105 (2d Cir. 2007); Michael Z., 561 F. Supp. 2d 589 (N.D. Tex. 2007); L. G., 2007 U.S. App. LEXIS 24349 (11th Cir. Oct. 16, 2007) (per curiam) (unpub'd); Lauren V., 2007 U.S. Dist. LEXIS 78361 (E.D. Pa. Oct. 22, 2007).

[901] 34 C.F.R. § 300.8(c)(4)(i).

[902] 34 C.F.R. § 300.8(c)(4)(ii).

[903] 20 U.S.C. § 1401(3); *see also* 34 C.F.R. § 300.8(a)(1).

[904] 38 F. Supp. 2d 750 (E.D. Wis. 1999).

[905] 2000 U.S. App. LEXIS 26902 (4th Cir. Oct. 26, 2000) (unpub'd).

[906] Id. at *5.

[907] 2007 U.S. Dist. LEXIS 10310 (D. Me. Feb. 12, 2007).

[908] A similar issue presented in *Hill*, 2007 U.S. Dist. LEXIS 85394 (E.D. Tenn. Nov. 19, 2007), where the parent of a student, Rocky, who jumped to his death from a school bus alleged that the district should have found him eligible for special education services prior to the incident. The parent believed that, had the district implemented an IEP addressing the student's behavior, his death would not have occurred. The court rejected this argument, finding that the district was in the process of evaluating Rocky for special education services, without delay, at the time of his unfortunately death.

[909] Id. at *95, 102-104, *citing* Patricia P., 203 F.3d at 469 (finding no clear error in district court's determination that mother's "lack of cooperation" in unilaterally placing child in Maine, not sending him back to Illinois for evaluation and offering only to permit school staff to travel to Maine to evaluate him "deprived the school district of a reasonable opportunity to conduct an evaluation of [the child] and fulfill its obligations under the IDEA"); Great Valley Sch. Dist. v. Douglas, 807 A.2d 315, 321-22 (Pa. Commw. Ct. 2002), *appeal denied*, 815 A.2d 1043, 572 Pa. 744 (Pa. 2003) ("We hold that among the burdens initially assumed by those unilaterally enrolling a child in a remote educational institution are burdens associated with the location of that institution. Where a school district has not participated in a placement decision, no burden associated with the location can be assigned to it. Thus, a school district cannot be compelled to assume any responsibility for evaluating a child while he remains outside [the state] in a unilateral placement").

[910] Id. at *106.

[911] 496 F.3d 932 (9th Cir. 2007).

[912] Id. at 935.

[913] Id.

[914] Id. at 945.

[915] Id. at 945-946.

[916] 108 F. Supp. 2d 906 (M.D. Tenn. Aug. 10, 2000).

[917] Id. (citations omitted) (*quoting* 20 U.S.C. § 1401(a)(18), and Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176, 207, 102 S. Ct. 3034 (1982)); *see also* 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.

[918] *See* Rowley, 458 U.S. at 192 (1982).

[919] 34 C.F.R. § 300.8(a)(2)(i), *referencing* 20 U.S.C. §§ 1401(3); 1401(30).

[920] 458 U.S. 176, 102 S. Ct. 3034 (1982).

[921] *See* Rowley, 458 U.S. 176, 206-07, 102 S. Ct. 3034 (1982). This study, however, does not address procedural errors by the school district.

[922] Rowley, 458 U.S. at 206-07 (emphasis supplied).

[923] Rowley, 458 U.S. at 200-201.

[924] *See* M. M. v. School District of Greenville County, 303 F.3d 523, 526 (4th Cir. 2002) (*citing* Rowley, 458 U.S. at 207); *see also* Adam J. v. Keller Indep. Sch. Dist., 328 F.3d 804, 808 (5th Cir. 2003) ("The free appropriate public education proffered in an IEP need not be the best possible one, nor one that will maximize the child's educational potential; rather, it need only be an education that is specifically designed to meet the child's unique needs, supported by services that will permit him to benefit from the instruction. The IDEA guarantees only a basic floor of opportunity, consisting of specialized instruction and related services which are individually designed to provide educational benefit.") (internal citations and quotations omitted).

[925] Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 195 (2d Cir. 2005).

[926] 468 U.S. 883, 104 S. Ct. 3371 (1984).

[927] 526 U.S. 66, 119 S. Ct. 992 (1999).

[928] 471 U.S. 359, 105 S. Ct. 1996 (1985).

[929] 510 U.S. 7, 114 S. Ct. 361 (1993).

[930] 51 F. App'x 412, 2002 U.S. App. LEXIS 24131 (4th Cir. Nov. 26, 2002) (per curiam) (unpub'd).

[931] 463 F. Supp. 2d 208 (D. Conn. 2006).

[932] Id. at 214.

[933] Id.

[934] 489 F.3d 105 (2d Cir. 2007).

[935] Doe v. Alabama, 915 F.2d 651 (11th Cir. 1990); Sylvie, 48 F. Supp. 2d 681 (W.D. Tex. May 5, 1999); Arlington County v. Smith, 230 F. Supp. 2d 704 (E.D. Va. Nov. 14, 2002); Corpus Christi v. Christopher N., 2006 U.S. Dist. LEXIS 23568 (S.D. Tex. Mar. 31, 2006); C. G., 2007 U.S. Dist. LEXIS 10310 (D. Me. Feb. 12, 2007); L. G., 2007 U.S. App. LEXIS 24349 (11th Cir. Oct. 16, 2007) (per curiam) (unpub'd); and Lauren V., 2007 U.S. Dist. LEXIS 78361 (E.D. Pa. Oct. 22, 2007).

[936] *See, e.g.*, Sylvie, *supra*; Christopher N., *supra*; C. G. at *56-57.

[937] *See, e.g.*, Sylvie; C. G. at *56-57.

[938] *See, e.g.*, Sylvie; Jennings, *supra*; Christopher N., *supra*.

[939] *See, e.g.*, Doe, *supra*; Jennings; Christopher N.

[940] Jennings at 922.

[941] *See, e.g.*, Doe, *supra*; Sylvie, *supra*; Jennings, *supra*; Arlington County v. Smith, *supra*; *see also,* A. E. v. Westport, 463 F. Supp. 2d 208, 214 (although this case involved a private day placement instigated by the parents, the arguments were similar to those used in cases involving residential placement).

[942] *See, e.g.*, Sylvie, *supra*.

[943] *See, e.g.*, Sylvie; Christopher N.; L. G.

[944] *See, e.g.*, Sylvie; Christopher N. at *24-25.

[945] *See, e.g.*, Rowley, *supra*; Sylvie; Arlington County v. Smith, *supra*; Christopher N.

[946] *See, e.g.*, Sylvie; Christopher N.

[947] Jennings at 923; Christopher N. at *16.

[948] *See* Jennings, *supra*; Christopher N., *supra*; C. G., *supra*.

[949] *See, e.g.*, Doe, *supra*; Christopher N.

[950] Jennings at 923.

[951] Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1050 (5th Cir. 1989) (internal citations omitted), *quoted by* Christopher N. at *15-16.

[952] *See, e.g.*, A. E. at 219-221 (although this case involved a private day placement instigated by the parents, the arguments were similar to those used in cases involving residential placement); C. G. at *49-50.

[953] *See, e.g.*, Doe, *supra*; Arlington County v. Smith, *supra*; Christopher N. at *25.

[954] *See, e.g.*, Lauren V. at *23-24.

[955] C. G. at *112-113, *citing* MM, 303 F.3d at 534-35 ("[I]t would be improper to hold the School District liable for the procedural violation of failing to have [an] IEP completed and signed, when that failure was the result of the parents' lack of cooperation.").

[956] Id. at *117.

[957] Id. at *117, *citing* MM, 303 F. 3d at 535.

[958] 2005 U.S. Dist. LEXIS 21424 (D.N.J. Sept. 22, 2005).

[959] Id. at *7-8, 13-15.

[960] 561 F. Supp. 2d 589 (N.D. Tex. 2007).

[961] Id. at 602.

962 Id.

963 Id. at 603.

964 Id.

965 Id.

966 Id.

967 Id. at 603, 604.

968 Id. at 606.

969 34 C.F.R. § 300.34(c)(5).

970 34 C.F.R. § 300.34(a).

971 225 F.3d 887 (7th Cir. 2000).

972 Id. at 894.

973 Id.

974 Id. at 894-895 (*citing* 20 U.S.C. § 1401(22)).

975 Id. at 895.

976 Jennings, 39 F. App'x 921, 2002 U.S. App. LEXIS 14372 (4th Cir. July 16, 2002) (per curiam) (unpub'd).

977 Id. at 925, *quoting* Jennings., No. 00-1898 at 19 (*citing* 20 U.S.C. § 1412(a)(10)(C)).

978 2005 U.S. Dist. LEXIS 21424 (D.N.J. Sept. 22, 2005).

979 Id. at *19.

980 Id. at *30.

981 Id.

982 Id., *quoting* 20 U.S.C. § 1401(22); 34 C.F.R. 300.24(a).

983 Id., *quoting* 20 U.S.C. § 1401(22); 34 C.F.R. § 300.24(a).

984 Id. at *31, *quoting* 34 C.F.R. § 300.302.

985 Id. at *31.

986 Id. at *31-33.

987 561 F. Supp. 2d 589 (N.D. Tex. 2007).

988 Id., *quoting* 20 U.S.C. § 1401(26)(A)-(B).

989 Id. at 606-607, *quoting* 34 C.F.R. §300.104.

[990] Id. at 607.

[991] Id., *quoting* Indep. Sch. Dist. No. 284 v. A.C., 258 F.3d 769, 774 (8th Cir. 2001).

[992] Id., *quoting* Kruelle v. New Castle County Sch. Dist., 642 F.2d 687, 693 (3d Cir. 1981).

[993] Id. at 604-605 (emphasis supplied).

[994] Id. at 605, *quoting* Clevenger v. Oak Ridge Sch. Bd., 744 F.2d 514, 516 (6th Cir. 1984); *also citing* Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1122 (2d Cir. 1997) ("If institutionalization is required due to a child's emotional problems, and the child's emotional problems prevent the child from making meaningful educational progress, the Act requires the state to pay for the costs of the placement.").

[995] *See* Rowley, 458 U.S. 176, 206-07, 102 S. Ct. 3034 (1982). This study, however, does not address procedural errors by the school district.

[996] Rowley, 458 U.S. at 206-07 (emphasis supplied).

[997] 34 C.F.R. § 300.8(c)(4)(i).

[998] 34 C.F.R. § 300.8(c)(4)(ii).