


## LESSONS LEARNED FROM 2015 CASES

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### 1. *STUDENT R.A. v. WEST CONTRA COSTA UNIFIED SCH. DIST.*, 115 LRP 38543 (N.D. CAL. 2015)

❖ Evaluation Procedures



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### KEY QUOTES

- "The court finds that parents' condition that they be allowed to see and hear the assessment was unreasonable, and they effectively withdrew their consent by insisting on that condition. The ALJ accurately concluded that the District's failure to complete the required assessments was caused by Parents' interference and denial of consent, and that the request to observe the assessment amounted to the imposition of improper conditions or restrictions on the assessments, which the District had no obligation to accept or accommodate."

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### KEY QUOTES (CONTINUED)

- "At the due process hearing, the only reason that Mother could articulate for wanting to observe the assessments was to ensure 'the integrity' of the assessments' results. By contrast, the District established that it was a long-standing and well-supported District policy and procedure to preclude parental observation of assessments, and that its policy was based on concerns that the observation might alter the testing environment and affect the validity of the assessments' results."
- "Plaintiffs have provided no legal authority granting them the right to observe either the psychoeducational or behavior assessment, and likewise provided no evidence that the District violated any law or obligation by refusing to allow Mother to observe the assessments."

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### LESSONS LEARNED

- You can establish and enforce reasonable evaluation procedures.
- A parent's unreasonable conditions on an evaluation constitutes revocation of consent for the evaluation.

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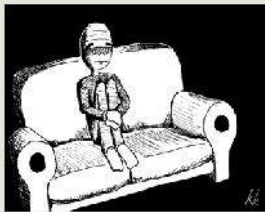
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### 2. *H.M. BY J.M. v. WEAKLEY CTY. BD. OF EDUC.*, 65 IDELR 68 (W.D. TENN. 2015)

❖ Social Maladjustment v. Emotional Disturbance



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- See 34 C.F.R. § 300.8(a)(1)
- See also 34 C.F.R. § 300.8(c)(4)

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#### 34 C.F.R. § 300.8(a)(1)

- “Child with a disability means a child evaluated in accordance with §§ 300.304 through 300.311 as having [an intellectual disability], a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in this part as “emotional disturbance”), an orthopedic impairment, autism, traumatic brain injury, another health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services.”

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#### 34 C.F.R. § 300.8(c)(4)

- “(i) *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.
- (ii) Emotional disturbance includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance under paragraph (c)(4)(i) of this section.”

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## BACKGROUND FACTS

- Student with a history of depression, sexual abuse, and post-traumatic stress disorder was chronically truant and “acting out”.
- The Administrative Law Judge agreed with the District’s determination that Student was not eligible for special education services as child with an emotional disturbance, and found that Student was “just ‘socially maladjusted’”.
- The district court reversed.

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## KEY QUOTES

- “The court defined the term [social maladjustment] as ‘continued misbehavior outside acceptable norms’ and ‘a persistent pattern of violating societal norms with lots of truancy, substance abuse, i.e., a perpetual struggle with authority, easily frustrated, impulsive, and manipulative.’” (citing *Springer v. Fairfax County School Board*, 134 F.3d 659 (4th Cir. 1998))
- “Plaintiffs contend that Judge Summers’s conclusion that H.M. was socially maladjusted alone and, therefore, not a child with a disability, was in error, as she also exhibited at least two of the characteristics necessary for a finding of emotional disturbance...”

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## KEY QUOTES (CONTINUED)

- “[T]he Court finds, based on the entire record, it is more likely than not that her major depression, not just her misconduct and manipulation, underlay her difficulties at school. The evidence also reflects that her depression had lasted for a long time, was marked and affected her performance at school.”

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## LESSONS LEARNED

- Make sure your evaluation team is trained to conduct a differential diagnosis.
- You can be both socially maladjusted and emotionally disturbed.

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## 3. COBB COUNTY SCH. DIST. V. D.B. BY G.S.B. AND K.B., 66 IDELR 134 (N.D. Ga 2015)

- ❖ Functional Behavioral Assessment (FBA)

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- See 34 C.F.R. § 300.304(c)(7)
- See also 34 C.F.R. § 300.324(a)(2)(i)
- See also *OSERS Questions and Answers on Discipline Procedures*, Q/A E-3 (Revised June 2009)
- See also 6.31.2.11(F)(1) NMAC

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### 34 C.F.R. § 300.304(c)(7)

- “Each public agency must ensure that—... Assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided.”

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### 34 C.F.R. § 300.324(a)(2)(i)

- The IEP Team must— “In the case of a child whose behavior impedes the child’s learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior....”

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### OSERS QUESTIONS AND ANSWERS ON DISCIPLINE PROCEDURES, Q/A E-3 (REVISED JUNE 2009)

- “FBAs and BIPs must also be used proactively, if the IEP Team determines that they would be appropriate for the child.”

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### 6.31.2.11(F)(1) NMAC

- “Public agencies are strongly encouraged to conduct functional behavioral assessments (FBAs) and integrate behavioral intervention plans (BIPs) into the IEPs for students who exhibit problem behaviors well before the behaviors result in proposed disciplinary actions for which FBAs and BIPs are required under the federal regulations.”

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### BACKGROUND FACTS

- D.B. is a 5-year-old student with autism.
- The IEP Team agreed that D.B.'s behavior interfered with learning and that he needed goals to address his behavior. Parents requested that the District conduct an FBA. IEP Team agreed and District conducted an FBA.
- Parents disagreed with the District's FBA and requested that the District pay for the parents' independent FBA.
- District requested a due process hearing to prove that its FBA was appropriate.
- ALJ found District's FBA to be inappropriate and ordered the District to pay for the parents' independent FBA. District appealed. Court affirmed ALJ decision.

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### KEY QUOTES

- “FBAs rely on the premise that all behaviors serve a purpose. With this in mind, FBAs attempt to identify the underlying reasons and environmental variables that contribute to problem behaviors. Information gathered through the FBA helps evaluators design a Behavior Intervention Plan ('BIP') with strategies to reduce or eliminate conditions that encourage problem behaviors and to create conditions that encourage positive behaviors.”
- “IDEA provides no explicit requirements for FBAs. Rather, industry standards provide the framework for such an evaluation. FBAs may be conducted by educators or behavioral analysts. First, the evaluator relies on teacher and parent interviews, direct observation, and school records to identify targeted behaviors and form a hypothesis about the purpose of the problem behaviors. Next, the evaluator collects 'ABC' -- Antecedent, Behavior, Consequence -- data.”

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### KEY QUOTES (CONTINUED)

- “ ‘Antecedents’ are events or environmental conditions that precede (and presumably trigger) problem behaviors. ‘Behavior’ refers to behavior topographies, which describe how the behavior looks. ‘Consequence’ data records the immediate aftermath of the behaviors.”
- “The evaluator looks for patterns in the ABC data to create a hypothesis about the function of the problem behaviors. Because FBAs have no explicit requirements, analysts may exercise substantial discretion in tailoring their data collection to the particular student. But analysts must ensure the accuracy of the data by, e.g., including explanations and demonstrations of data collection, asking data takers to define variables to ensure understanding across all data takers, observing data collection, or providing feedback during the collection.”

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### KEY QUOTES (CONTINUED)

- “The ALJ found that D.B. required a more thorough assessment than that accomplished by Cooper’s FBA. Her findings relied on the seriousness of D.B.’s violent and aggressive behaviors toward himself and others. Such serious behaviors require a more definitive identification of the functions of these behaviors. The ALJ concluded that the District’s FBA was insufficient because it did not take data on escape/avoidance and access to preferred items. She further concluded that the FBA did not reliably collect data as to the consequences of D.B.’s behavior. In support of this finding, the ALJ cited numerous failures that ‘preclude a statistical and reliable assessment concluding [escape/avoidance and access to preferred items] are the functions.’”

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### KEY QUOTES (CONTINUED)

- “The ALJ found that D.B. required a more thorough assessment than that accomplished by Cooper’s FBA. Her findings relied on the seriousness of D.B.’s violent and aggressive behaviors toward himself and others. Such serious behaviors require a more definitive identification of the functions of these behaviors. The ALJ concluded that the District’s FBA was insufficient because it did not take data on escape/avoidance and access to preferred items. She further concluded that the FBA did not reliably collect data as to the consequences of D.B.’s behavior. In support of this finding, the ALJ cited numerous failures that ‘preclude a statistical and reliable assessment concluding [escape/avoidance and access to preferred items] are the functions.’”

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## KEY QUOTES (CONTINUED)

- “There is ample evidence in the record -- certainly more than a preponderance -- to support the ALJ's finding that Cooper's FBA was insufficient to evaluate D.B.'s educational needs. Again, IDEA's implementing regulations require that the '[a]ssessment tools and strategies provide *relevant* information that *directly* assists' determination of the child's educational needs. 34 C.F.R. § 300.304(c)(7) (emphasis added). Considering what is at stake here -- a disabled child's access to a free appropriate public education -- the Court agrees with the ALJ's decision that the FBA did not fulfill IDEA's requirements.”

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## LESSONS LEARNED

- Follow industry standards when conducting an FBA and be able to articulate those standards.
- Make sure the FBA is technically sound and provides relevant information that directly assists the IEP Team in determining and addressing the needs of the child.
- Rely on the FBA when developing behavior strategies and/or a BIP.

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## 4. VALDEZ HERNANDEZ EX REL. J.V. V. BOARD OF EDUC. OF ALBUQUERQUE PUB. SCHS., 66 IDELR 78 (D.N.M. 2015)

### ❖ Physical Restraint

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- See **Restraint and Seclusion: Resource Document (May 15, 2012)** available through the U.S. Department of Education website at:

<http://www2.ed.gov/policy/seclusion/restraints-and-seclusion-resources.pdf>.

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## BACKGROUND

- This case involved a 13-year-old student with Down Syndrome who was involved in a classroom altercation with staff.
- On one occasion, staff "physically managed" the student consistent with the District's policies and guidance documents-- (1) "Staff Conduct with Students -- March 2007 Revision; and (2) "Best Practice [sic] Use of Physical Management for Students with Disabilities." These documents emphasize that "[p]hysical management is always a last resort, used only after all other less restrictive interventions have been exhausted or ruled out due to significant safety concerns."
- Parent brought action claiming District discriminated based on disability, arguing that the District through its guidance documents "manifests its intention to plan for and rely on physical restraints (with their attendant risk of injury) only with respect to students with disabilities." Court rejected these arguments, ruling in favor of the District.

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## KEY QUOTES

- "Hence, the contention that APS 'manifests its intention to plan for and rely on physical restraints' solely for students with disabilities is demonstrably false; APS policy expressly contemplates the restraint of all students, irrespective of disability. (not differentiating between students with respect to four enumerated justifications for physical intervention). Viewed in aggregate, it is unclear how APS policy is the product of prohibited discrimination."
- "Permitting additional physical interventions solely in circumstances described in a student's IEP does not rely on stereotypes about the disabled, but rather draws from an individuated determination about what is appropriate for that student. To hold to the contrary would effectively imply that any policy incorporating exceptions predicated on IEPs is discriminatory because it facially differentiates between disabled and non-disabled students."

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## KEY QUOTES (CONTINUED)

- “[A]s a comparison of the Best Practice document and background restraint policy makes patent, the Best Practice memorandum requires that APS employees be more conscientious in their physical interventions with disabled students by demanding that certain procedures be followed, including the documenting of all physical management of disabled students. Certainly, this policy benefits, rather than harms, disabled students. Thus, because the undisputed facts make patent that Defendant is entitled to judgment as a matter of law, the Court will grant summary judgment as to the federal discrimination claims.”

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## LESSONS LEARNED

- Train staff on proper use of Restraint.
- Make sure your policies and procedures (guidance documents) rely on current, sound guidance regarding use of restraint.
- Policies and procedures should apply to all students and may also specifically address the individual determinations to be made with respect to students with disabilities, and may impose additional protections for students with disabilities.

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## 5. *NORTH HILLS SCH. DIST. v. M.B.*, 65 IDELR 150 (Pa. CMMW. 2015)

### ❖ Assistive Technology



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- See 34 C.F.R. § 300.5
- See also 34 C.F.R. § 300.5
- See also 34 C.F.R. § 300.324(a)(2)(v)
- See also 34 C.F.R. § 300.105(a)

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#### 34 C.F.R. § 300.5

- “*Assistive technology device* means any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of a child with a disability. The term does not include a medical device that is surgically implanted, or the replacement of such device.”

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#### 34 C.F.R. § 300.6

- “*Assistive technology service* means any service that directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device. The term includes—
- (a) The evaluation of the needs of a child with a disability, including a functional evaluation of the child in the child’s customary environment;
  - (b) Purchasing, leasing, or otherwise providing for the acquisition ... ;
  - (c) Selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing assistive technology devices;
  - (d) Coordinating and using other therapies, interventions, or services with assistive technology devices...;
  - (e) Training or technical assistance for a child with a disability or, if appropriate, that child’s family; and
  - (f) Training or technical assistance for professionals ....”

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### 34 C.F.R. § 300.324(a)(2)(v)

- The IEP Team must— "...Consider whether the child needs assistive technology devices and services."

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### 34 C.F.R. § 300.105(a)

- "Each public agency must ensure that assistive technology devices or assistive technology services, or both, as those terms are defined in §§ 300.5 and 300.6, respectively, are made available to a child with a disability if required as a part of the child's—
  - (1) Special education under § 300.36;
  - (2) Related services under § 300.34; or
  - (3) Supplementary aids and services under §§300.38 and 300.114(a)(2)(ii)."

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### BACKGROUND

- Outside the school setting, an 8-year-old student with autism who was essentially nonverbal had experienced success communicating his wants and needs using a tablet. At school, M.B. became frustrated and responded by moaning, crying or making other sounds.
- The IEP Team reduced speech services despite the statement in the IEP: "It continues to be of utmost importance that [M.B.] develop basic communication skills in order to interact with peers and adults and achieve success in [M.B.'s] educational environment."
- Court affirmed the hearing officer's award of compensatory education in the amount of one hour per day for every day of school that M.B. attended during the 2013-2014 school year, until the recommendations from the AT Assessment are incorporated in the IEP and implemented.

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## KEY QUOTE

- “Like the Hearing Examiner, we are perplexed that despite having known and agreed since at least the 2012-2013 kindergarten year that M.B. had significant communication needs, there had been only inconsistent and limited progress on M.B.’s communication goals. Despite widespread agreement that M.B. used behaviors to communicate when other avenues are unavailable, and that M.B. had more success with assistive technology outside of school, the District failed to take affirmative measures to determine why M.B. did not exhibit those successes at school.”

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## LESSONS LEARNED

- Make sure you consider the need for assistive technology as part of any initial evaluation or reevaluation since a purpose of evaluation is to assist in the development of the IEP.
- A child’s need for assistive technology must be considered, and if needed, documented in the child’s IEP.
- When there is inconsistent or limited progress, consider conducting a reevaluation and revisiting the IEP.

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6. *H.L. BY GEORGE L. AND SUSAN F. V. DOWNINGTON AREA SCH. DIST., 65 IDELR 223 (3D CIR. 2015)*

❖ Least Restrictive Environment (LRE)



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- See 34 C.F.R. § 300.114(a)(2)
- See also 34 C.F.R. § 300.42

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### 34 C.F.R. § 300.114(a)(2)

- “Each public agency must ensure that—
  - (i) 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 nondisabled; and
  - (ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”

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### 34 C.F.R. § 300.42

- “Supplementary aids and services means 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.”

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## OUTCOME

- The Hearing Officer found that “the District failed to give ‘serious consideration’ to using supplementary aids and services to keep H.L. in regular classes, and therefore failed to offer her a FAPE within the LRE...”
- District Court and Third Circuit Court of Appeals affirmed. However, reimbursement for the private school placement was denied, only because the court was not persuaded that the student made academic gains in the private school.

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## KEY QUOTE (LRE TEST AND FACTORS)

- “Whether a school district complied with the LRE requirement depends first on whether education in the regular classroom, with the use of supplementary aids and services, can be achieved satisfactorily. This, in turn, is assessed by (1) the steps the school district has taken to accommodate the child in a regular classroom; (2) the child's ability to receive an educational benefit from regular education; and (3) the effect the disabled child's presence has on the regular classroom. If education in the regular classroom cannot be achieved satisfactorily, we ask whether the school has included the child in school programs with nondisabled children to the maximum extent appropriate.”(internal citations omitted)

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## KEY QUOTES (CONTINUED)

- “[T]he IEP did not address why inclusion on the same scale as Kimberton was inadvisable or why the specially-designed instructions it proposed could not be fully implemented in the regular classroom. The [Prior Written Notice] contained a single line rejecting full inclusion as not appropriate for H.L.'s needs. This was clearly insufficient, and H.L. has shown that it was more likely than not that the District failed to consider the ‘whole range’ or ‘continuum’ of possible placements as mandated by the IDEA.”
- “[T]he District provided no evidence of what steps it took towards full inclusion.”

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## LESSONS LEARNED

- Don't be lax about LRE.
- Even 90 minutes of removal from the regular classroom is significant.
- When considering any removal from the regular education setting, apply your circuit's factors and document your justification.

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## 7. *TROY SCHOOL DISTRICT V. K.M.*, 65 IDELR 91 (E.D. MICH. 2015)

❖ IEP implementation in the Least Restrictive Environment



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## BACKGROUND FACTS

- The hearing officer held that the Student with autism, ADHD and Oppositional Defiant Disorder should return to the regular education classroom from an autism-specific classroom despite Student's aggressiveness and classroom disruption.
- The IEP Team recommended a move from the general education classroom to a more restrictive placement. As a result of a settlement, the more restrictive (autism-specific) placement was implemented for a 30-day trial period. After the conclusion of the trial period, the parents challenged the placement as too restrictive.

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### KEY QUOTES (STUDENT'S CONDUCT IN THE REGULAR CLASSROOM)

- "On the fourth day of the seventh grade... K.M. escalated instantaneously in his math classroom, throwing chairs at his teacher, the adult support, and students. K.M. cursed and yelled, 'Leave me alone you mother fucker,' 'I'm going to kill you,' and 'I'm going to kill the students.' ... When Mr. DeVault removed K.M. from the room, K.M. bit Mr. DeVault in the leg through his jeans, drawing blood and leaving a bite mark. ... K.M. continued screaming through the hallway, frightening other students."
- "When K.M. was released to his father, K.M. bolted out the school door, entering and exiting the woods on the edge of the school property. ... K.M. found a log, measuring 55 inches in length and 9 inches in circumference, and charged back toward the school attempting to crash the log through a classroom window. ... K.M.'s father stepped in front of him and K.M. struck him with the log in the head and neck area."

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### KEY QUOTES (STUDENT'S CONDUCT IN THE SPECIAL EDUCATION-AUTISM SPECIFIC PROGRAM)

- "K.M. experienced continued behavioral episodes. ... On January 6, 2012, Maureen Ziegler ('Ziegler'), a Statewide Autism Research and Training consultant and autism expert retained by the District, observed K.M. ... K.M. had an episode where he threw items at staff and began climbing into the ceiling. 911 emergency was contacted and K.M.'s parents arrived. ... K.M. came down from the ceiling and left with his mother."

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### KEY QUOTES (OUTCOME)

- "The Court finds that because the June 2011 IEP and PBSP were never properly implemented, that placement at a more restrictive school, such as Edison, is inappropriate since the least restrictive placement set forth in the June 2011 IEP was never implemented. Evidence established that the West Bloomfield placement did not follow the IEP in that K.M. had a negative association with an authoritarian principal and an unwelcome environment."
- "The more restrictive environment of Edison or similar placement would not benefit K.M. Although K.M. has disrupted the general education setting, those incidents could be more controlled if the staff was properly trained and the IEP was properly followed."

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## LESSONS LEARNED

- Failure to properly implement a student's IEP including BIP can lead to an order to return a highly aggressive student from a special education classroom back to the general education classroom.

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8. *ENDREW F. BY JOSEPH F. AND JENNIFER F. V. DOUGLAS COUNTY SCH. DIST. RE-1*, 115 LRP 39422 (10TH CIR. 2015)

❖What is FAPE?



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- See *Board of Educ. v. Rowley*, 102 S.Ct. 3034 (1982)
- See also 34 C.F.R. § 300.324(b)

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**BOARD OF EDUC. V. ROWLEY, 102 S.Ct. 3034 (1982)**

- "Therefore, a court's inquiry in suits brought under [the IDEA] is twofold. First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more."

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**KEY QUOTES**

- The parents argue that the Tenth Circuit "abandoned the 'some educational benefit' standard previously articulated in our cases (and applied by the ALJ and the district court) in favor of a heightened 'meaningful educational benefit' standard."
- "[T]he ALJ and the district court applied the correct standard, and we too consider the parents' challenge to the sufficiency of the IEP under this circuit's 'some educational benefit' standard."

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**KEY QUOTES (REGARDING ACADEMIC PROGRESS)**

- "In this case, the parents contend there is no trend of progress, both because the District failed to measure Drew's progress on his past IEPs and because any progress made was de minimis."
- "Drew's IEPs from second, third, and fourth grades reveal that the objectives and measuring criteria listed under the annual goals set for Drew by the IEP team typically increased with difficulty from year to year. In the areas where Drew was not ready to move ahead, the objective remained the same on the next year's IEP. Drew's special education teacher testified at the hearing that the change in objectives reflected the progress Drew was making. Drew's mother also testified that despite her belief Drew was not reaching his potential, she did see some academic progress in first, third, and fourth grades."

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### KEY QUOTES (REGARDING ACADEMIC PROGRESS CONTINUED)

- “This is without question a close case, but we find there are sufficient indications of Drew's past progress to find the IEP rejected by the parents substantively adequate under our prevailing standard. It is clear from the testimony at the due process hearing that Drew is thriving at Firefly. But it is not the District's burden to pay for his placement there when Drew was making some progress under its tutelage. That is all that is required. ‘The Act does not require that States do whatever is necessary to ensure that all students achieve a particular standardized level of ability and knowledge. Rather, it much more modestly calls for the creation of individualized programs reasonably calculated to enable the student to make some progress towards the goals within that program.’”

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### KEY QUOTES (REGARDING BEHAVIORAL PROGRESS)

- “As recounted above, the District worked to address the behaviors that affected Drew's ability to learn in the classroom. The ALJ found that ‘the District worked collaboratively with the parents and other service providers to address [Drew's] behaviors as they arose.’ ... And when the District reached the conclusion that Drew's behavioral problems had escalated to such a degree that they were creating a barrier to his academic progress during his fourth-grade year, they called in specialists to reassess and implement a new behavior plan. Drew never received the benefit of the District's efforts because his parents had already enrolled him in Firefly when the meeting was scheduled to take place.”

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### LESSONS LEARNED

- A FAPE is demonstrated through “some educational benefit” including academic and behavioral progress.
- It doesn't take much, but the evidence must be credible and objective.
- When a student is not receiving an educational benefit, FAPE is demonstrated by taking prompt action to ensure the IEP is “reasonably calculated” to enable the child enable the child to receive educational benefits.

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**9. YORK SCH. DEP'T V. S.Z. EX REL. P.Z., 65 IDLER 39 (D. ME. 2015)**

❖ Passing grades evidence of FAPE?



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▪ See 34 C.F.R. § 300.324(b)

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**34 C.F.R. § 300.324(b)**

- “Review and revision of IEPs—(1) *General.* Each public agency must ensure that, subject to paragraphs (b)(2) and (b)(3) of this section, the IEP Team—
  - (i) Reviews the child’s IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and
  - (ii) Revises the IEP, as appropriate, to address—
    - (A) Any lack of expected progress toward the annual goals described in 300.320(a)(2), and in the general education curriculum, if appropriate;
    - (B) The results of any reevaluation conducted under § 300.303;
    - (C) Information about the child provided to, or by, the parents, as described under § 300.305(a)(2);
    - (D) The child’s anticipated needs; or
    - (E) Other matters.”

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## BACKGROUND

- School district claimed that student was earning passing grades, and making progress academically and nonacademically, but assessments and observations indicated the contrary.
- District Court held that District's failure to provide intensive language-based instruction entitled Parent to two year's worth of tuition reimbursement for private special education boarding school (totaling \$118,012).

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## KEY QUOTES

- "With respect to the Department's claim that the December 2010 IEP provided adequate in-class support for P.Z., the IEP failed to specify with precision what kind of help P.Z.'s ed techs were required to offer or how much of their time would be focused on P.Z. as opposed to other students in his classes."
- "With respect to the Department's broad claim that the December 2010 IEP provided P.Z. with consistent special education programming across all his classes, the record reveals that the V & V [Visualizing & Verbalizing] instruction the District points to was not incorporated into P.Z.'s other classes in any formal or coherent way."
- "[C]laims about the quality and cohesion of P.Z.'s programming lacked credibility -- that they were, as P.Z. apparently felt, a 'gimmick.'"

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## KEY QUOTES (CONTINUED)

- "With respect to P.Z.'s day-to-day experience at York High School, the believability of the Department's witnesses was undercut by contemporaneous observations ... before litigation was contemplated. These reports showed P.Z. falling behind his peers and tuning out of his classes."
- "With respect to P.Z.'s generally strong end-of-the-year grades, Martin conceded on cross-examination that a large portion of P.Z.'s Pre-Algebra grade was based on an amorphous evaluation of his 'class participation,' for which P.Z. usually received an A+, and on P.Z.'s performance on his homework, which, according to S.Z., P.Z. could not have completed without hours and hours of her help."

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### KEY QUOTES (CONTINUED)

- “[The special education director’s] testimony showed that she did not know how P.Z.’s teachers arrived at their grading decisions or whether they made modifications to the grades of students on IEPs. This testimony supports an inference that the Department lacked hard-and-fast standards for assigning grades and undercuts their evidentiary significance.”
- “P.Z.’s WISC-IV scores had fallen in every category since his last evaluation in January of 2008...”
- “[P.Z.’s psychologist] believed that the programming called for by P.Z.’s April 2010 IEP was not adequate because it lacked consistency. She testified that his IEP seemed to provide ‘modifications or accommodations ... within the classrooms’ rather than the more immersive, comprehensive ‘language-based’ approach he needed.”

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### KEY QUOTES REGARDING HOME

- “S.Z. hired a private tutor to work with P.Z. for a couple hours a week during the summer before ... P.Z. entered the seventh grade. She also hired a private math tutor to work with P.Z. twice a week during the school year, for sixty to ninety minutes a session. Despite these efforts, seventh grade was a ‘disaster from day one,’ according to S.Z. The Department’s teachers demanded significantly more work of P.Z. than he could keep up with, especially in math class. S.Z. now spent hours a night helping P.Z. with his homework. His academic struggles were taking an emotional toll. At times, P.Z. would come home crying and ask his mother why his brain did not work.” [Transcript citations omitted.]
- “S.Z. argues that P.Z. would have failed his freshman year classes if not for her nearly superhuman efforts at home; the Department contends that he was doing just fine.”

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### LESSONS LEARNED

- **Passing grades are not necessarily persuasive evidence of FAPE.**
- **Collecting objective data of progress to corroborate the grades.**
- **Have a plan for dealing with the poor test-taker.**
- **Take seriously parental concerns regarding the extra effort and support required after school in order for the student to be successful at school.**

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**10. *S.B. EX REL. E.G. V. NEW YORK CITY DEP'T OF EDUC.*, 115 LRP 28150 (S.D. NY 2015)**

❖ Ensuring proper resources



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- See 71 Fed. Reg. 46670 (August 14, 2006)
- See also 34 C.F.R. § 300.323(a)

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**71 FED. REG. 46670 (AUGUST 14, 2006)**

- "It is important, however, that the agency representative have the authority to commit agency resources and be able to ensure that whatever services are described in the IEP will actually be provided. However, we do not need to regulate in the manner suggested, as the public agency will be bound by the IEP that is developed at an IEP Team meeting."

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### 34 C.F.R. § 300.323(a)

- “At the beginning of each school year, each public agency must have in effect, for each child with a disability within its jurisdiction, an IEP, as defined in § 300.320.”

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### KEY QUOTES

- “The real issue, as plaintiffs have repeated time and again, is that the school had more special education students enrolled than it had a budget or teachers for, and this circumstance made adherence to the IEP impossible.”
- “[P]laintiffs’ contentions are based on the Parent’s visit to Clara Barton, the Parent’s observations there, and the Parent’s conversations with teachers and administrators. The Parent had a right to evaluate the school to gain information regarding whether the school was an appropriate Placement.”

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### KEY QUOTES (CONTINUED)

- “Plaintiffs contend that the Clara Barton placement was inappropriate or unavailable. When the Parent visited the school, the Parent’s observations and conversations with teachers and administrators supported the reasonable conclusions that (1) the school was oversubscribed; (2) the school was unable to implement the IEP because the 15:1 class did not provide scaffolding or multi-sensory instruction; (3) the teachers did not know and were not allowed to know the functional levels of their students and thus could not modify the curriculum as prescribed in E.G.’s IEP; and (4) the 15:1 class was taught six grade levels higher than E.G.’s functional ability. Plaintiffs do not make these allegations on the sole ground that the other students at Clara Barton are under-served. Instead, plaintiffs insist the allegations are based on information that the Parent learned during the visit to Clara Barton.”

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## LESSONS LEARNED

- Make sure your LEA representative provides the necessary follow-up to ensure adequate resources are in place for implementing the IEP.
- Make sure staff knows the chain of command for raising concerns regarding adequacy of resources.

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## 11. *BRISTOL TWP. SCH. DIST. v. Z.B. BY K.B. AND R.B.*, 116 LRP 1736 (E.D. Pa. 2016)

### ❖ Manifestation Determination Review

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- See 34 C.F.R. § 300.530(e)(1)(ii)

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### 34 C.F.R. § 300.530(e)(1)

- “Within 10 school days 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 relevant members of the child’s IEP Team (as determined by the parent and the LEA) must review all relevant information in the student’s file, including the child’s IEP, any teacher observations, and any relevant information provided by the parents to determine—
  - (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.”

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### BACKGROUND FACTS

- This case involved a 17-year-old student with ADHD.
- The misconduct that was the subject of the manifestation determination review (MDR) involved a pretend physical altercation in the hallway with some friends, which led to a physical altercation with a teacher who tried to stop the pretend fight.
- Hearing officer held MDR deficient; district court affirmed.

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### KEY QUOTES

- “Dr. Newsham protested during the hearing that she included the parents in the conversation at the manifestation determination review, read her findings aloud, and gave the team an opportunity to object. But, ultimately, Dr. Newsham convened the manifestation determination with a prefabricated document that encompassed solely her views and conclusions and then asked if anyone objected, which is materially different than, say, for efficiency, filling in background information gathered ahead of time in order to facilitate meaningful discussion about the appropriate answers to the two crucial questions at the heart of the manifestation determination, questions that Dr. Newsham had already answered ‘no’ to.”

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### KEY QUOTES (CONTINUED)

- “The manifestation determination team also did not consider any specifics regarding the incident in question, or specifics about Z.B.’s behavior as a manifestation of his disability. Although the worksheet provided a space for a detailed description of the incident and the behavior in question, all the team considered was that Z.B. had engaged in ‘aggressive assault behavior.’ Dr. Newsham candidly explained, ‘To be quite honest, we looked at it more from a global picture. We didn’t [dive] into the specifics. We weren’t looking at what occurred during that specific incident. We were looking at does [Z.B.’s] disability have anything to do with aggressive behaviors? And the team absolutely did not feel that.’”

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### KEY QUOTES (CONTINUED)

- “This failure to consider the specific circumstances of the incident and the alleged conduct renders the manifestation determination deficient because it precluded any meaningful discussion of whether Z.B.’s behavior was a manifestation of his disability.”
- “As the Hearing Officer noted, the manifestation determination review team considered Z.B.’s behavior in light of what is typical for students with ADHD rather than giving ‘specific consideration’ to whether the behavior arose from, or was substantially related to, Z.B.’s particular disability and manifestation thereof.”

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### LESSONS LEARNED

- Always fully engage parents in the discussion and analysis of the MDR and document their input
- Do not make decisions based on globalized understandings of the disability category; and instead, consider the disability in relation to the particular student and how it impacts the particular student.
- Bring as much information as possible about the incident to the MDR table and make the determination based on the particulars of the incident.

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