# Updates from the Courts That Count

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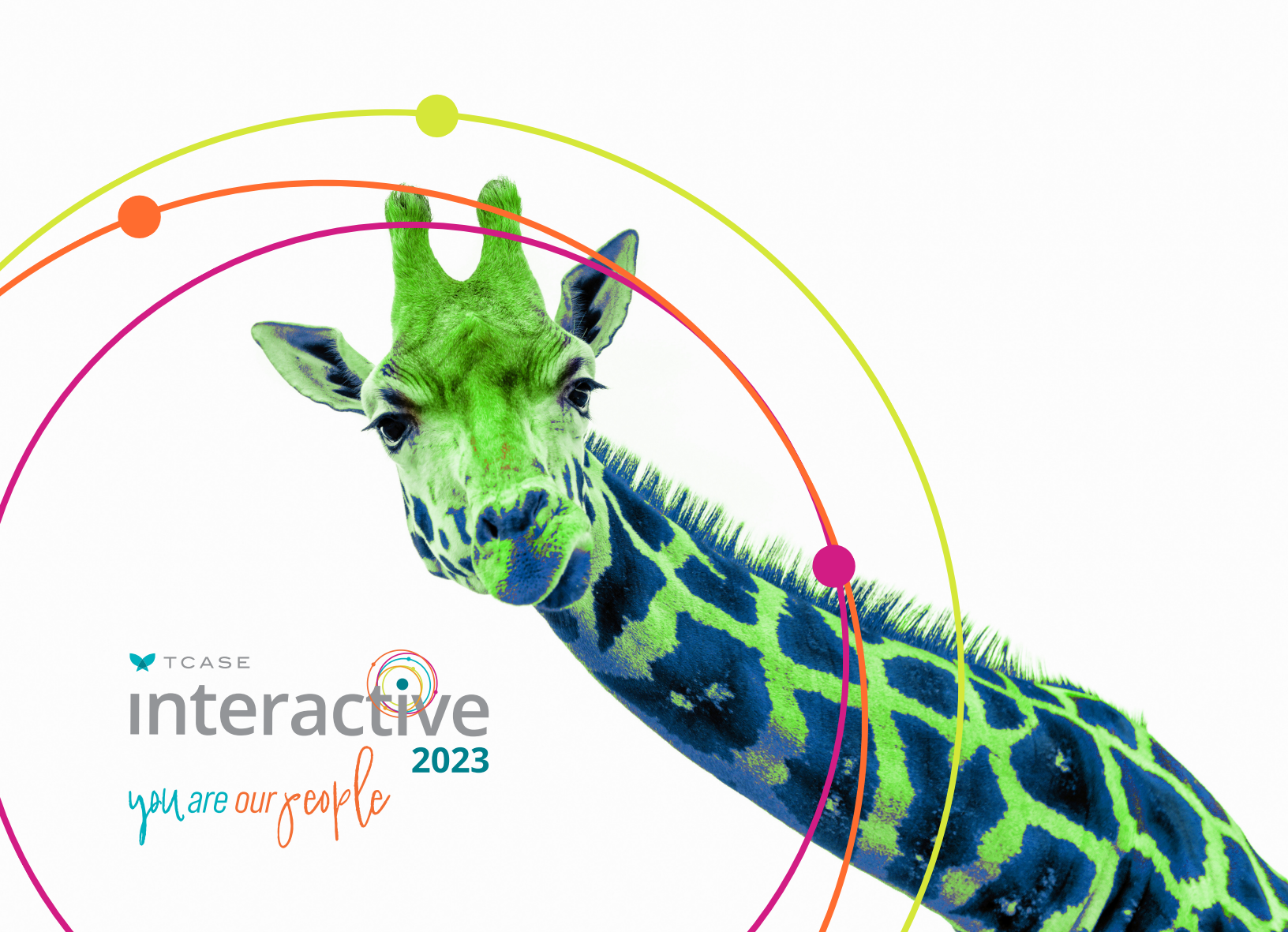

# UPDATE FROM THE COURTS THAT COUNT

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**CHILD FIND**

***D.O. v. Escondido Union School District*, 82 IDELR 125 (9th Cir. 2023)**

**ISSUE:** Was the District's four month delay in evaluating the Student reasonable?

**ANSWER:** Yes. The Ninth Circuit Court of Appeals held the parent's failure to provide a copy of the private evaluation report despite the district's requests justified the four-month delay.

**SUMMARY:** D.O. has been educated in Escondido since "the summer before he started kindergarten" in September 2012 and has received special education services in the District ever since. D.O. demonstrated a need for, and accordingly received, substantial mental health services and behavioral intervention from Escondido, such as "daily classroom support and ... individual and group counseling" from a mental health therapist, "a behavior support plan[] and ... classroom-based behavioral intervention," as well as "specialized academic instruction" and "occupational therapy."1 D.O.'s 2015 reevaluation did not note indications of autism. D.O. was hospitalized for aggressive behaviors (verbal and physical aggressions, property destruction, elopement and hallucinations). Following hospitalization, D.O. was referred to therapy with Dr. Dyson, an outside psychologist. An unnamed person at the hospital, whom D.O.'s mother identified only as "the crisis lady who was working with [D.O.]," suggested to D.O.'s mother that D.O. may be autistic, and D.O.'s mother asked Dr. Dyson to assess him for autism. D.O.'s mother did not tell Escondido about the autism assessment request.

D.O.'s escalating aggression caused Escondido to conduct an Educationally Related Mental Health Services ("ERMHS") assessment in October 2016. As part of the assessment, Dr. Dyson reported to Escondido staff that D.O. "presents with unspecified psychosis and Disruptive Mood Dysregulation Disorder," but "Dr. Dyson did not mention ... any suspicion she had that [D.O.] might have autism, Salvatore D'Amico, the school psychologist responsible for assessing D.O., testified that D.O.'s symptoms "look[] more like a mood disorder, rather than an autism spectrum disorder." D'Amico was present in D.O.'s classroom "at least two times a month" in the 2015-2016 school year and "three times a month" in the 2016-2017 school year. Rania Garva was a mental health therapist at Escondido who "interacted almost daily" with D.O. and provided "daily classroom support and weekly or bi-weekly individual and group counseling" to him. Garva, who was qualified to diagnose "individuals with a mood disorder" as well as "individuals with autism," testified that she disagreed with an autism diagnosis for D.O. because his behavior, including "physical assault, stealing, [and] reckless behavior" was "not consistent with ... a child that is on the autism spectrum." Garva diagnosed D.O. with Bipolar I disorder under the DSM IV and testified that the diagnosis would not have changed under the DSM V.2 Escondido did not consult

On December 5, 2016, D.O.'s IEP team met to review the results of the ERMHS assessment. Dr. Dyson informed Escondido that "she had completed an assessment and based on the assessment, [D.O.] appeared to meet criteria for Autism Spectrum Disorder."

The district court recognized, "[b]efore performing its own autism assessment of D.O., [Escondido] wanted to review Dr. Dyson's report ... to identify the specific tests she used because assessors cannot give certain tests more than once within a year," and Escondido "attempted [a

second time] to obtain the report by asking D.O.'s counsel for the report on April 7, 2017. Even though Dr. Dyson's report is dated December 5, 2016, and D.O.'s mother conceded that she received it "shortly after" the IEP meeting on that day, D.O.'s mother did not give the report to Escondido until July 5, 2017. When asked why she did not "share this report to anyone from Escondido once it was made available to [her]," D.O.'s mother said, "I'm not sure."

The 9th Circuit held that a report from an independent evaluator that the student was on the autism spectrum triggered a duty for the district to evaluate for autism. However, the district's four-month delay before proposing the evaluation was reasonable.

***Miller v. Charlotte-Mecklenburg Schools BOE*, 83 IDELR 1 (4th Cir. 2023):**

**ISSUE:** Did the District err in finding the Student was not eligible for special education and related services?

**ANSWER:** No. The District did not err is finding the Student was not eligible for special education and related services.

**SUMMARY:** In July 2018, a psychologist diagnosed J.M. with autism spectrum disorder. Based in part on that diagnosis, J.M.'s mother--plaintiff Cheri Miller--asked the local school district to evaluate J.M. for an IEP. The District evaluated the Student. The team determined J.M. was not eligible for special education under the IDEA because he did not demonstrate at least three of the four impairments required to qualify as a student with autism needing special services as laid out in state policies. The school district thus declined to provide J.M. with an IEP.

The 4th Circuit determined the following:

> ON CHILD FIND: But the child find obligation does not require schools to provide an IEP to any student whose parent believes their child is entitled to one. quire schools to provide an IEP to any student whose parent believes their child is entitled to one. Rather, when a school district has convened an IEP team and comprehensively evaluated a student's eligibility for services, and where the State maintains and follows detailed policies to evaluate children needing such services, the child find obligation has been satisfied.
>
> ON ELIGIBILITY: The IDEA does not cover every student who is struggling in school; rather, its protections are limited to a student who has a qualifying disability and who, for that reason, "needs special education and related services."
>
> ON EDUCATIONAL NEED: But a student does not "need" such services if the student is already getting what would qualify as a free appropriate public education *without* them.
>
> ON INDEPENDENT EVALUATIONS: The IDEA does not require school districts to defer to the opinions of private evaluations procured by a parent. To the contrary, the IDEA instructs school districts to rely on diverse tools and information sources in making an eligibility determination.

ON MISSED DEADLINES: This Court has held, however, that a bare procedural violation of the IDEA does not warrant a remedy unless a plaintiff shows the violation resulted in the student being denied a free appropriate public education.

***Cheri MILLER, as parent or guardian of minor JM, Plaintiff-Appellant, v. CHARLOTTE-MECKLENBURG SCHOOLS BOARD OF EDUCATION, Defendant-Appellee,* 83 IDELR 1 (April 6, 2023):**

**ISSUE:** Did the school district violate its child find obligation by not finding the student eligible for special education and related services?

**ANSWER:** No, the Fourth Circuit Court of Appeals determined that the school district did not violate the child find obligation when it found that the student with a private diagnosis of autism was ineligible for special education.

**SUMMARY:** The Court noted that the IDEA and its implementing regulations promise students with disabilities a free appropriate public education tailored to their individual needs, and only children with at least one qualifying disability are entitled to services. The statute includes 10 categories of disability, including autism spectrum disorder and specific learning disability. Federal law allows States to develop their own criteria for assessing whether a child falls within a qualifying category.

Here, in July of 2018, a psychologist diagnosed the student with autism spectrum disorder. The student's parent requested an evaluation from the school district. The school district conducted an evaluation in several areas, including adaptive behavior, vision and hearing, educational, speech language, occupational therapy, and autism rating scales. Thereafter, the team determined that the student was not eligible for special education and related services under the IDEA due to the student not demonstrating at least three of the four impairments required to qualify as a student with autism needing special education and related services as set forth in the state's relevant policies. Therefore, the school district declined to provide the student with an Individualized Education Program (IEP).

The student's parent disagreed with these findings. The parent asked for additional evaluations in five areas (adaptive behavior, educational, speech-language, occupational therapy, and autism) and requested three new evaluations (psychological, assistive technology, and behavior/functional). The school district agreed to fund the five areas identified by the parent but did not agree to pay for the three new evaluations.

The parent filed suit, alleging violations of the IDEA. The ALJ granted the school district's motion for summary judgment on all IDEA claims. The state review officer affirmed the ALJ's decision, and the District Court entered summary judgment for the school district, affirming the ALJ's and state review officer's rulings. The Court of Appeals held that it sees no error in the district court's finding that the school district did not violate the IDEA's child find obligation. The Court of Appeals noted that this obligation requires States to "establish 'policies and procedures to ensure that all children with disabilities residing in the State . . . are identified, located, and evaluated.'"

The child find obligation is met "when a school district has convened an IEP team and comprehensively evaluated a student's eligibility for services and where the State maintains and follows detailed policies to evaluate children needing such services." The Court noted that just because a parent may not agree with the outcome of an evaluation that does not amount to a child find violation. The Court did note that the stronger argument for the parent may have been that the eligibility determination was incorrect. However, the parent did not argue this on appeal beyond simply stating that the student had "deficits," "a 'lack of meaningful progress'" and "problems with focus and inattentiveness." The Court stated these allegations, without more, are not indicative of a child with a qualifying disability under the state's policies. The Court provided that the parent's argument failed to create a genuine dispute that the student required an IEP. The Court also noted that the IDEA does not require school districts to defer to opinions of private evaluations provided by a parent, but instead, the school district has to rely on diverse tools and information sources.

***Salinas ex rel. D.S. v. IDEA Pub. Schs. Charter Dist.*, 82 IDELR 203 (February 16, 2023):**

**ISSUE:** Did the school district violate its child find duty by failing to evaluate a student who was diagnosed with ADHD, autism, and mood disorder and was exhibiting an academic decline while receiving virtual instruction during the COVID-19 pandemic?

**ANSWER**: No, the U.S. District Court, Southern District of Texas found that the student's sharp academic decline and his attention difficulties manifested when the student received his education from virtual learning, and thus, the Hearing Officer did not err in finding the switch to online learning significant in ascertaining when the child find duty arose, and in declining to impose that duty before the start of the student's sixth grade year.

**SUMMARY:** The student was diagnosed with ADHD, autism, and mood disorder. The student attended school within the school district from kindergarten through sixth grade. The District Court noted that the Hearing Officer found that the student received average or above average grades. However, in the end of fifth grade the student experienced "a backward slide in grade level . . . ." The school district did not evaluate the student until sixth grade. The student's parent claimed that the school district should have evaluated him in fifth grade and because of this failure, the school district violated its child find duties.

In its analysis, the District Court provided that child find isn't triggered unless there is reason to suspect both that the child has a disability, and that the child needs special education and related services. Here, the student's backward slide was only a "temporary slide," as the student was passing his sixth grade classes and his math and reading teachers reported positive performance. Similarly, the student's difficulties with attention while remote learning were no more than what his peers experienced and the Court found no evidence that the student had problems with communication.

Based on the District Court's review, it found that the student's decline in his school work and his attention difficulties appeared during remote, and thus, the Hearing Officer did not err in holding that the school district did not violate child find by failing to initiate an evaluation during the

student's fifth grade year, as his reported struggles did not amount to a need for special education and related services.

Furthermore, the District Court held that when the school district's child find duty did arise, little more than a month passed between parent's request for help and the evaluation referral. Moreover, during that time period the school district requested and gathered information on the student. Accordingly, any alleged delay was reasonable.

## IEP

***B.S. v. Waxahachie Independent School District*, 83 IDELR 2 (5th Cir. March 23, 2023):**

**ISSUE:** Is the student's IEP reasonably calculated to provide him with educational benefits?

**ANSWER:** Yes. The Fifth Circuit Court of Appeals held the IEP was calculated to provide student with educational benefits despite parent's allegations that the IEP did not adequately address student's behavioral issues. Thus, the Court found the school district complied with the substantive requirements of the IDEA.

**SUMMARY:** Student qualified for special education and related services as a student with autism and a speech impairment. During the 2016-2017 school year, the student was eight years old and in the third grade. Student received most of his classes in the special education classroom with the exception of math, and his specials were in the general education setting. In October 2016, the student had multiple behavioral incidents.

In October 2017, student's triennial FIE was completed. Shortly thereafter, the District held an ARD committee meeting. Parents were unable to attend the meeting. The ARD committee developed goals which included adaptive behavior goals. Student was placed in modified math in a special education classroom. The ARD committee reviewed his behavior and based on the behavioral concerns, the ARD committee included behavior management accommodations and strategies to address and manage his behavior. The ARD committee did not implement a BIP because it found that his behavior did not impede his own learning or that of others. Student's behavior improved until February when student's behavior suddenly deteriorated. However, during this time period, the student's medication was changed, the family moved homes, and a new student was added to his classroom. The District recommended a FBA and BIP. In early March, student had another behavioral incident, and the police were called. The parent asked for an ARD committee meeting. On March 6th, the school district provided student's parents with its notice of proposal to evaluate, which included a request for additional behavioral accommodations (FBA / BIP) and a parent training evaluation. Two days later, the District provided parents notice of the ARD committee meeting. The following day, the parents filed for a due process hearing.

The Hearing Officer ruled in favor of the District and concluded the District provided student with a FAPE. The District Court affirmed the Hearing Officer's ruling.

On appeal, Petitioner argued the 2016 IEP was not reasonably calculated to provide student with educational benefits because it did not adequately address his behavioral issues. The Fifth Circuit Court of Appeals applied the Michael F. Factors. The Court found that the IEP was individualized.

The parents argued that the ARD committee did not fully consider the severity of his behavioral issues in the Fall of 2016 and failed to perform an FBA or implement a BIP early enough to address his behavioral issues. They also argued that his increase in behavior in February demonstrated the IEP's failure, and the school district did not provide any behavioral support.

The Court found that the record demonstrated that the ARD committee was aware and informed about his behaviors in Fall 2016. Student's IEP contained behavioral goals and support strategies. The District provided testimony that student did not need a FBA or BIP prior to February 2017 because his behavior was adequately managed. Finally, the Court held that the fact student's behavior had escalated in the following semester is not conclusive evidence that his IEP was not sufficiently individualized. The teachers stated that they were generally able to manage his behavior under the IEP and when his behavior escalated in February 2017, the District scheduled an ARD committee meeting and requested consent for an FBA and BIP. In addition, the student was moved to a classroom that imposed fewer academic demands on him. The Court found that this type of responsiveness to changes in a student's behavior is what the IDEA requires to ensure that an IEP is sufficiently individualized.

The Court found the remaining Michael F. factors (Collaboration, LRE, and demonstrated academic and non-academic) in favor of the District.

***Lori WASHINGTON ex rel. J.W.; J.W., Plaintiffs-Appellants, v. KATY INDEPENDENT SCHOOL DISTRICT, Defendant-Appellee*, 82 IDELR 218 (March 16, 2023):**

**ISSUE:** Did the District meet its substantive obligations under the IDEA in providing the student an IEP reasonably calculated to enable student to make progress appropriate in light of student's circumstances?

**ANSWER:** Yes, the Fifth Circuit Court of Appeals determined that the Michael F. factors weigh in favor of the District, thus supporting the conclusion that the student's IEPs were adequate to confer a FAPE.

**SUMMARY:** The student transferred to the District in August 2016. The student was in his junior year of high school. After his transfer, the District convened an ARD committee meeting to develop an IEP and BIP. Under the student's IEP, he was doing well and had good grades.

In November 2016, the student was tased by an SRO during a conflict with District staff. Following this behavioral incident, parent did not bring the student back to school for most of the spring 2017 school year. In May 2017, an ARD committee convened to address the student's absences. The student attended the first session of ESY that summer. In fall 2017, student struggled with absences due to Hurricane Harvey. The student's attendance improved in November and December, He received good grades during the 2017-2018 school year and graduated in May 2018.

In December 2017, parent requested a special education due process hearing. The hearing officer determined the District did not violate student's procedural rights and provided him a free appropriate public education (FAPE). The district court affirmed that determination, granted

summary judgment for the District, denied summary judgment for parent, and dismissed the case with prejudice. Parent appealed.

The Fifth Circuit Court of Appeals provided that "[t]o meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F. v. Douglas Cnty. Sch. Dist.*, 580 U.S. 386, 399, 137 S. Ct. 988, 999 (2017). An IEP need not be the best possible one, nor does it entitle a disabled child to a program that maximizes the child's potential." *Klein Indep. Sch. Dist. v. Hovem*, 690 F.3d 390, 396 (5th Cir. 2012). "Nevertheless, a school district must provide the student with a meaningful educational benefit." *Id*.

The Court then turned to the first, third, and fourth factors articulated in Michael F.: whether (1) the program is individualized on the basis of the student's assessment and performance;[1] (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.

Parent argued the student's May 2017 IEP was not sufficiently individualized because it failed to address his absences. The Court noted that the May 2017 ARD committee discussed attendance expectations and the student's expected return date. It adjusted the student's BIP to address the student's attendance problems, offered ESY services, and recommended an FBA or counseling evaluation to determine what further support should be provided. Parent agreed that the services offered by the revised IEP were adequate. Accordingly, the Court held that the student's May 2017 IEP was appropriately individualized.

Parent argued the District failed to collaborate with her by refusing to discuss the events that occurred prior to the tasing incident and the parent alleged that the District predetermined the outcome of the May 2017 ARD committee meeting. The Court noted that the student's assistant principal spoke with parent about the incident on the day it occurred and also attempted to discuss the incident with parent again in January 2017. While the ARD committee did decline to discuss the incident in the ARD committee meeting, the District explained to the parent that the ARD committee was focusing on remedying the effects of the incident. They also proposed that parent schedule a different time to speak with staff about the incident. The Court further found that no evidence suggested the outcome of the May 2017 ARD meeting was predetermined. Parent attended the ARD committee with an attorney and some of her suggestions were incorporated into the student's BIP. Parent agreed with the IEP proposed at the meeting.

Parent also argued the District failed to implement the student's IEPs. She contends the September 2016 IEP was not implemented because the District failed to address the student's absenteeism in a timely manner. The Court cited to *Spring Branch Indep. Sch. Dist. v. O.W.*, 961 F.3d 781, 793 (5th Cir. 2020) for the proposition that "the reasonableness of a delay is not defined by its length but by the steps taken by the district during the relevant period." Here, the Court determined that the District made multiple attempts to transition the student back to school and provide him with

[1]Michael F. factor 2: (2) the program is administered in the least restrictive environment was not analyzed due to parent only disputing the first, third, and fourth Michael F. factors.

educational services, and thus, the District cannot be faulted for delays caused by parents lack of responsiveness and her refusal to return necessary paperwork.

Parent asserted the May 2017 IEP was not implemented because the student missed a substantial portion of the term due to Hurricane Harvey. However, parent failed to show a single provision from the May 2017 IEP that the District was unwilling to implement had the student attended school. The Court held that "a parent cannot agree that the services her child is receiving are sufficient, prevent the school from administering those services by withholding the child, hinder the school's ability to provide additional services by failing to file necessary paperwork, then later sue on the basis that the school did not do enough."

As to the fourth Michael F. factor, parent argued that the student did not receive academic and non-academic benefits. The Court found the student attended some school days in January 2017. On the days he attended, he was able to utilize the Positive Approach to Student Success Program ("PASS") room and meet with the LSSP. He participated in the first term of ESY. He made up an English credit and learned to better interact with others. He attended class and participated in a work-based learning program, sporadically in August, September, and October, and then more consistently in November and December. He also met with the LSSP to learn how to manage his anger and misperception of others. The student received passing grades during the 2017/2018 school year and when he returned back to school after parent withholding him, he did not have any significant behavioral concerns. His teachers testified that student demonstrated an ability to learn, follow directions, and engage with others. For these reasons, the Court held the district court did not clearly err in finding the student received academic and nonacademic benefits.

***A.B., a minor, by his parents and next friends, L.K. and J.B.; L.K.; J.B., Plaintiffs-Appellants, v. Jack R. SMITH, officially as Superintendent; MONTGOMERY COUNTY BOARD OF EDUCATION, Defendants-Appellees*, 83 IDELR 53 (May 18, 2023):**

**ISSUE:** Whether the parents of a student with a disability were entitled to reimbursement for unilaterally placing the student in private school based on allegations that the District's IEPs were deficient and that the student to did not make as much progress in the District as the student made in his private school placement.

**ANSWER:** The Fourth Circuit Court of Appeals held that the District did provide the student a FAPE and the parents' claims were without merit, as the student's grades prior to the 2019-2022 school year exceeded passing marks and he advanced from grade to grade. He was progressing satisfactorily, and the school district had appropriately relied on this progress in developing his IEPs.

**SUMMARY:** In this case, the parents challenged the student's IEPS for the 2019-2020 and 2020-2021 school years. Student had been diagnosed with ADHD, an Expressive Language Disorder, a Social Communication Disorder, and a Specific Learning Disability with impairment in written/dysgraphia. The student's parents were seeking reimbursement from the District for private school for the 2019-2020 and 2020-2021 school years.

The parents asserted arguments that the Administrative Law Judge (ALJ) made an incorrect determination that the 2019-2022 IEP was appropriate due to the ALJ's incorrect finding that the student made educational progress in the school years preceding the 2019-2020 school year. To support their position, the parents alleged that staff had concerns regarding the student's skills in organization, participation, and social/emotional communication. They also alleged the student did not receive any A's and had received several D's during the school year (not as a final grade though). The parents then alleged that the ALJ and the District Court did not consider the progress made in private school during the 2019-2020 and 2020-2021 school years.

The Court noted that the ALJ permitted evidence prior to the 2019-2022 school year in order to provide context to the IEPs at issue in the case. The Court provided that the ALJ determined that the student made sufficient progress in his goals during the 2018-2019 school year and his final grades, which included two advance classes, were all B's and C's. The ALJ also considered the student's grades in private school which were A's, B's, and C's but no advance classes, along with his results on recent assessments.

The Court noted that the ALJ considered the student's performance, progress, and behavior in finding that the 2019-2020 IEP was appropriate and that the school district utilized the student's assessments in developing the student's IEP. Thus, the courts did appropriately consider the student's progress when he attended school in the school district and his progress at private school.

Based on the parent's allegations, it appeared the parents were arguing that the student made better progress at private school as opposed to when he attended school in the school district and the ALJ failed to consider this in making his determination. The Court held that "[a]n IEP need only be 'reasonable,' not 'ideal.' When a child is fully integrated into the regular classroom, appropriate progress is 'passing marks and advance[ment] from grade to grade.' If this is not a reasonable prospect, the IEP need not 'aim for grade-level advancement,' but must 'be appropriately ambitious.'" Here, the Court found that the student's grades prior to the 2019-2020 school year exceeded passing marks and he advanced from grade to grade. He was progressing satisfactorily, and the school district had appropriately relied on this progress in developing his IEPs. The Court noted that even if the student did better in the private school placement, that does not equate to a finding that his prior progress was insufficient or unreasonable or that his IEPs were not designed to ensure appropriate progress. Accordingly, the Court found the claim meritless.

**ADA/504**

***Travis ADAMS as a/n/f of A.A. v. SPRINGTOWN INDEPENDENT SCHOOL DISTRICT,* 82 IDELR 232 (March 14, 2023):**

**ISSUE:** Did the District discriminate against a high school student with a Section 504 plan by failing to respond to the student's bullying complaint?

**ANSWER:** The U.S. District Court, Northern District of Texas held that the parent failed to state a claim that the district violated Section 504 or Title II of the ADA. The Court also ruled that the parent failed to allege sufficient facts to support his constitutional claims brought under 20 USC 1983. The court dismissed the parent's claims with prejudice.

**SUMMARY:** The student had a disability due to emotional conditions resulting from a rape and hospitalization from years earlier. In January 2022, the student was bullied by another student. The student told her to go home and kill herself. Afterwards, the student was not doing well due to the comments made to her and her teacher instructed her to go to the principal's office. The student's counselor was unavailable to speak with her as was the principal. That same day, the student attempted to take her own life.

The student's parent sued under the ADA, Section 504 and 20 USC 1983. The District Court held that the same legal standards apply to the ADA and Section 504 and the same remedies are available under both acts.[2] The District Court found that parent's pleading failed to set forth facts regarding the accommodations in the student's 504 plan, how the school district's bullying policies impacted the student's disability or requested accommodations, or that anyone at the school district intentionally failed to follow that plan. Further, the pleadings failed to assert facts to support parent's claim that any discrimination was due to student's disability. Accordingly, the District Court determined that parent had failed to plead facts to show that anyone at the school district disregarded an excessive risk to the student's safety. Moreover, the District Court found that parent's claims should be dismissed with prejudice, as Petitioner had multiple chances to appropriately assert his claims.

**Note:** Had the District been available to speak with the student after the alleged bullying incident, the District might have been able to avoid a lawsuit under these circumstances.

***P.W.. an individual with a disability, and J.W. and A.W., Parents/Guardians/Next Friends of P.W., Plaintiffs, v. LEANDER INDEPENDENT SCHOOL DISTRICT, Defendant,* 83 IDELR 71 (April 18, 2023):**

**ISSUE:** Can the parents sue a school district for disability discrimination due to the school district's prolonged failure to evaluate their daughter for IDEA services?

**ANSWER:** Yes, the U.S. District Court, Western District of Texas found that the school district's continued use of RTI strategies despite the student's lack of progress, if true, could qualify as gross misjudgment. Accordingly, the parents could move forward on their claims for disability discrimination against the school district.

**SUMMARY:** In kindergarten (2016-2017), the student's teacher reported that the student was writing in reversals and provided that the school district should keep an eye on her for letter reversals. In first grade (2017-2018), the student was reversing letters and numbers. The school district provided RTI services to the student in reading and math and in that same year, parent requested an FIE. The parent alleged the principal attempted to talk her out of pursuing an FIE and

[2] To make out a claim of disability discrimination under § 504 of the Rehabilitation Act, a plaintiff must show that (1) he is a qualified individual, (2) the school district excluded him from participation in, or denied him its benefits services, programs, or activities, or otherwise discriminated against him, and (3) the exclusion, denial of benefits, or discrimination is because of his disability. *Ripple v. Marble Falls Indep. Sch. Dist.*, 99 F. Supp. 3d 662, 690–91 (W.D. Tex. 2015).

advised her to hold off in order to see if RTI could help student. Accordingly, the parent withdrew her evaluation request.

In the fall of second grade (2018-2019), the parents requested a dyslexia testing assessment for the student. The school district conducted the assessment and the results showed that the student had dyslexia. The school district developed a Section 504 plan to support the student. However, the student was still performing below grade level at the end of the student's second grade. In the fall of third grade (2019-2020), the parents requested an FIE. The FIE was completed in January of third grade.

The FIE found the student had an other health impairment due to ADHD. The FIE also noted her dyslexia diagnosis but did not find that she qualified as a student with anxiety, emotional disturbance, or a specific learning disability. The student's ARD committee meeting was held in February of the same school year. Due to the COVID-19 pandemic, school instruction went online.

In the fall of fourth grade (2020-2021), an IEE was completed of the student. The student's IEE recommended that the student attend a private school for children with dyslexia. Shortly, thereafter, the school district convened another ARD committee meeting. The ARD committee reviewed the IEE recommendations and progress of the student. The school district added additional accommodations in the student's IEP based on the IEE recommendations. The student then transferred to a private school.

The parents filed a lawsuit, alleging that the school district violated its Child Find duty by failing to complete a FIE until January 2020, conducted a deficient FIE by not identifying the student as a student with anxiety and a specific learning disability, and failed to offer the student a FAPE. The Hearing Officer found that the school district violated its Child Find obligation by delaying a special education evaluation from at least February 2019 to January 2020. The Hearing Officer did not determine the school district's FIE was deficient or that the school district failed to offer the student a FAPE.

On appeal, the parents alleged the school district did not provide the student a FAPE under the proposed IEP and violated Section 504 and ADA by failing to timely evaluate the student and provide her special education services. The school district moved to dismiss the parents' Section 504 and ADA claims.

The Court provided that Section 504 "requires intentional discrimination against a student on the basis of his disability." Intentional discrimination exists where the school's conduct "depart[s] grossly from accepted standards among educational professionals." Accordingly, the "facts creating an inference of professional bad faith or gross misjudgment are necessary to substantiate a cause of action for intentional discrimination under § 504 or [the] ADA against a school district predicated on a disagreement over compliance with IDEA."

Furthermore, a school is liable when its "continued use of ineffective or inadequate methods ... becomes 'such a substantial departure from accepted professional judgment, practice or standards as to demonstrate that the person responsible actually did not base the decision on such judgment.'"

The student's parent argued that the school district's decision to implement RTI from kindergarten through most of third grade instead of evaluating the student constituted a substantial departure from the professional standards outlined in the Texas Education Agency's 2018 Dyslexia Handbook and guidance from OSEP. Per the professional standards, the use of RTI "must not delay or deny an evaluation for dyslexia, especially when parent or teacher observations reveal the common characteristics of dyslexia." Here, the Court found that the teachers were continuously observing the student reverse letters and numbers. When the parent requested an FIE of the student in first grade, the evidence demonstrated that the principal discouraged the parent from seeking an evaluation, and thus, parent withdrew the FIE request. The Court also found it persuasive that the school district continued with the use of RTI and non-IDEA support through the student's second grade even after the dyslexia assessment, even though these supports were not providing effective for the student. The school district failed to refer the student for special education testing until the parent made the request halfway through the student's third grade. The Court found that such allegations are sufficient to allege gross misjudgment in the school district's use of RTI to delay Section 504 testing until 2018, and special education testing until 2020.

The Court further held that the parent sufficiently alleged gross misjudgment because the school district staff repeatedly told the parents that "dyslexia is separate from special education" and "dyslexia is not under special education, ... just § 504." "The Court noted that this is a misstatement of the contemporary professional standards around dyslexia. OSEP has clarified that there is nothing in IDEA that would prohibit" dyslexia as a qualifying disability under IDEA, and [a] student with dyslexia or a related disorder does not need to present with a second potentially disabling condition to be considered for eligibility under the IDEA."

For these reasons, the District Court denied the school district's Motion for Partial Judgment and the parents' Section 504 and ADA claim of disability discrimination against the student remains alive.

***Lamar Consol. Indep. Sch. Dist. v. J.T. by April S.*, 83 IDELR 22 (March 24, 2023):**

**ISSUE:** Did the school district's response to allegations of teacher mistreatment of a student rise to the level of disability discrimination under the ADA and Section 504?

**ANSWER:** No, the U.S. District Court, Southern District of Texas found that the school district did not discriminate based on the student's disability, granting the school district's motion for judgment on the parent's Section 504 and ADA Title II claims.

**SUMMARY:** A teacher reportedly mistreated a student in the school district. In its analysis, the District Court provided that the parent needed to show that an appropriate district employee had actual notice of the teacher's misconduct and responded in a manner that was "something more" than deliberate indifference. Here, the Court found that the high school's assistant principal investigated the alleged abuse by the teachers as soon as the assistant principal had notice of the alleged incidents. The assistant principal reviewed the video footage of the incident and the teacher was notified that her employment would be terminated due to investigation findings. For these reasons, the Court held that the school district's actions did not rise to the level of disability discrimination, as the school district's response was reasonable.

***W.G. v. Aristoi Classical Acad.*, 83 IDELR 43 (March 23, 2023):**

**ISSUE:** Whether the school district's actions of expelling the student with a disability for possession and consuming alcohol on school grounds amounts to disability discrimination under the ADA and Section 504?

**ANSWER:** No, the U.S District Court, Southern District of Texas held the school district did not violate Section 504 or the ADA by disciplining the student because such discipline was not more harsh that the discipline provided to nondisabled students who engage in the same / similar conduct.

**SUMMARY:** The school district expelled student who was drinking alcohol throughout the school day. The Court provided that Section 504 expressly permits school districts to discipline a student with a disability who is currently engaging in the illegal use of drugs or in the use of alcohol to the same extent it disciplines nondisabled students. Here, the parents made no allegations that any other students were treated more favorably for similar conduct. The Court provided that "[The student] makes no allegations that other students possessed or consumed alcohol throughout the day and were treated more favorably than [he was],". As such, the District Court held that the parents failed to properly plead disability discrimination and dismissed the claims.

## EXHAUSTION OF REMEDIES

***Luna Perez v. Sturgis Pub. Sch.*, 215 L. Ed. 2d 95, 143 S. Ct. 859, 862 (2023):**

**ISSUE:** Whether the student is required to exhaust student's ADA claims?

**ANSWER:** The Supreme Court reversed the lower court's rulings, holding that the student was not required to exhaust his ADA claim. The Court held that exhaustion is required when a party seeks relief that is available under the IDEA, such as compensatory educational services, or tuition reimbursement.

**SUMMARY:** A student who was deaf sued the district under the IDEA and the ADA, alleging that he was denied FAPE and discriminated against based on his disability. The parties settled the IDEA claims, but the ADA claim went to court. The school district filed a motion to dismiss based on the failure to exhaust administrative remedies. Since the IDEA case had been settled, it never went to a due process hearing and so the school district argued that the Court should dismiss the case for "failure to exhaust." This argument was based on the theory that the ADA suit over discrimination was seeking a remedy for a denial of FAPE, and thus, should have been administratively exhausted. The federal district court agreed with the school district and dismissed the case and the 6th Circuit affirmed. Then it went to the Supreme Court.

The Supreme Court reversed the lower court's rulings, holding that the student was not required to exhaust his ADA claim. The Court held that exhaustion is required when a party seeks relief that is available under IDEA, such as compensatory educational services, or tuition reimbursement. However, this suit sought monetary damages for discrimination. That type of remedy cannot be obtained under IDEA and thus, the Court unanimously held that exhaustion is not required.

## ATTORNEY'S FEES

***Sanchez v. Arlington County School Board*, 82 IDELR 126 (4th Cir. 2023):**

**ISSUE:** When was the parent required to file suit to recover attorneys' fees.

**ANSWER:** In this case, the Court held that it should have been filed within 180 days.

**SUMMARY:** The parent filed suit seeking to recover attorneys' fees due to being the prevailing party in a due process case. However, the suit was filed almost two years after the hearing officer's decision. The court held that it was filed too late and was dismissed. The court held that it should have been filed within 180 days, which is the state (Virginia) requirement for the appeal of a due process decision.

## OTHER

***Emiliano Z. v. Hays County Juvenile Det. Ctr.*, 82 IDELR 177 (February 15, 2023):**

**ISSUE:** Whether a Texas juvenile detention center or the local education agency are responsible for providing FAPE to a 16 year old boy who went without counseling services during his stay in a juvenile detention center.

**ANSWER:** The U.S. District Court, Western District of Texas determined the local education agency was responsible for providing FAPE to the student, as the Texas Education Agency and the Texas Juvenile Department had developed and adopted a memorandum of understanding that assigned the responsibility to the local education agencies.

**SUMMARY:** This is a disability discrimination case. Student served a 48-day confinement in a Texas juvenile detention center. The student was not receiving his counseling services during confinement. On appeal, the District Court upheld the Hearing Officer's decision that it was the local charter school's responsibility to offer a FAPE to the student as opposed to the detention center. Petitioner argued that the IDEA applies to all political subdivisions involved in providing special education services, including juvenile correctional facilities and residential facilities, and that the IDEA obligates agencies to share responsibility for the provision of FAPE in residential facilities. The District Court clarified that "while Section 300.2 clearly provides students with disabilities the right to a FAPE in correctional facilities, IDEA and the corresponding federal regulations allow states to determine how to allocate the responsibility for providing these services." Here, the Texas Education Agency and the Texas Juvenile Justice Department had developed and adopted a memorandum of understanding that assigned that responsibility to the local education agencies to provide a FAPE. Thus, the charter school was responsible for providing the student a FAPE, and therefore the District Court affirmed the Hearing Officer's dismissal of Petitioner's IDEA claims.

***Garcia v. Morath*, 82 IDELR 106 (W.D. Tex. 2023) based on Magistrate's Report at 122 LRP 29203:**

**ISSUE:** Whether the TEA will be required to defend a lawsuit brought by parents of a student with disabilities, alleging that the parents have been denied appropriate interpretation services needed to participate fully in the ARD committee meetings.

**ANSWER:** Yes, the Court finds that Plaintiffs have stated a claim that the Texas standard in Section 89. 050(f) "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting the IDEA."

**SUMMARY:** The plaintiffs challenge a TEA rule that appears to limit the requirement to provide translation services to those who are completely unable to speak English. TEA sought dismissal of the case, arguing that it did not directly communicate with parents and does not prevent schools from being more generous with translation services. The court refused to dismiss the case on that basis. The court cited federal regulations requiring state agencies to "take whatever action is necessary to ensure that the parent understands the proceedings of the IEP Team meeting, including arranging for an interpreter for parents with deafness or whose native language is other than English." Therefore, it seems clear that [a state educational agency] may be held responsible if it fails to comply with its duty to assure that IDEA's substantive requirements are implemented.