

>> Hello, and thank you all for joining us for today's webinar, Special Education Law Year in Review: Lessons Learned, with Art Cernosia. I'm Dr. Melanie Reese, director of CADRE, and I'm joined by our CADRE staff, Noella Bernal, Kelly Rauscher and Manny Guendulay.

Today's webinar is being translated simultaneously into Spanish and into American Sign Language. To access the translations, change slides there, to access translations, here are the instructions. So to access the accessibility features, please follow the instructions accordingly. A few technical notes: All lines are muted, and Chat has been disabled for this webinar. Please post any questions that you might have into the Question box. I will be collecting the questions, and Art will take questions periodically throughout the presentation. All questions will be posed as hypothetical situations, and not as case-specific scenarios. And given the size of the audience, we will likely not have time to address all the questions that are asked, and will attempt to address those with the broadest application in order for Art to get through all of this material.

Thank you in advance for taking the time to respond to the brief survey at the end of the presentation. Your feedback is very important to us, and for CADRE's ability to continue to bring webinars such as this one to you. And finally, this webinar will be posted and archived on CADRE's website. There is a handout that is available, and it is posted in the Chat, or will be shortly.

And now, time for our standard legal disclaimer. The information shared in this webinar is not intended to serve as, nor should it replace legal advice. Opinions expressed by today's presenter are not represented to be an official or unofficial interpretation of legal guidance from the U.S. Department of Education, or from CADRE. Application of information presented may be affected by state statutes, regulations, local policies and practices, and unique fact patterns of a particular case.

So most days I love my job, but there are days like today that I feel particularly grateful to be in a position where I have the honor of introducing today's presenter. Many of us know Art through his long and distinguished career providing training, consultation and technical assistance to states, parent centers, districts and other organizations, and as many years presenting at special education law conferences. CADRE has been in the enviable position of working with Art as our legal consultant since 2018. I've known Art since 2009, where the state I was working in contracted with him specifically for legal consultation and training of dispute resolution practitioners, and I personally have benefitted greatly from his encyclopedic knowledge of IDEA, and his insights into the finer points of law, and mostly his unwavering focus on the benefits of building and improving relationships to best serve children with disabilities. Art keeps threatening to retire, and Art sightings are becoming increasingly rare, but we are loathed to let him go. He is truly one of the best people. And with that, I hand the mic over to Art.

>> Well, thank you very much, Melanie. I really appreciate the invitation. And as Melanie mentioned, I am heading toward retirement. This is my first national presentation in six years, due to Melanie Reese's persistence, and I just couldn't say no any longer. So thank you, Melanie, and thank you, CADRE.

I've been asked to really review some of the major legal developments within the last year, focused on IDEA, so we're not going to mention much about Section 504 at this point, during this seminar. As Melanie mentioned, this is not intended to be a seminar for legal advice. I have selected cases, some of you may know more intimate details about each case. The only thing I know about these cases is what the court ruled on. And also, in virtually every single case, there's multiple issues, so I may have selected one or two issues to highlight during this afternoon's discussion.

For those of you who are decision makers -- hearing officers, administrative law judges, state complaint investigators -- it's especially important for you to read these cases in full and give it your own reading and application to a situation in front of you. Now as Melanie mentioned, I have submitted -- we have slides that we're going to be using. There is also an outline that has been, or will be posted on the CADRE website with more details about each case, including citations so that you could read the cases in full. I also want to caution you -- this is going to be a seminar on the IDEA, and many of you come from states with specific state requirements that may exceed the IDEA, so you need to be aware of that.

Let's get started, we have a lot to cover in the next hour and a half. Next slide, please. I'm going to start with a big one -- a unanimous decision by the Supreme Court, right then and there, that's fairly extraordinary, but in a case called *Perez versus Sturgis* -- there was a decision issued by the court regarding whether the IDEA due process must be exhausted before going into court to seek monetary damages. In this case, we had a former student, who's now an adult, who's deaf, was in school from ages 9 through 20, had individual aides who were supposed to be assisting him in sign language. Some of the aides allegedly were not competent in sign language, other aides left the classroom, and left him for hours at a time. The parents kept being told, "Your son is doing very well. He's moving from grade to grade, he's on track to graduate." Well, wouldn't you know it, shortly before graduation, they were told, "Oh, I'm sorry, your child will not be receiving a diploma."

Well, as you can imagine, that didn't sit well with the family. A due process hearing request under the IDEA was submitted to the state. Before the hearing actually took place, the school district and the family settled, and part of the settlement was additional services for this student at the State School for the Deaf. Shortly thereafter, the adults didn't file the lawsuit under the Americans With Disabilities Act for compensatory, monetary damages. The lower courts held, you can't knock on the court door without exhausting your administrative remedies. And remember, the case never got to a hearing, because it was settled at the due process stage. The Supreme Court took the case, and basically, the Supreme Court's takeaway was, exhaustion of the IDEA due process procedures is not required when seeking a remedy that is not available under the IDEA. The IDEA does not allow for monetary damages. By the way, reimbursement for a private placement is different than monetary damages, but compensatory damages are not available, and all the courts have unanimously held so under the IDEA. So even though this was a debate over whether FAPE was provided, the adult student was seeking relief that was not available under the IDEA, and therefore, was not required to exhaust administrative remedies.

So what's the takeaway here? Next slide, please. The lesson learned -- first of all, for those of you who have been involved in litigation, no one wins. So collaboration between families and schools takes even a greater importance as a result of this case with damages now at stake. At any point, where the family and school reach an impasse through the IDEA process, I would strongly encourage you to seek IEP meeting facilitation, and-or mediation to try to resolve disputes at the lowest possible level. In this case, the court said you could come open the court door and sue for monetary damages; however, the adult student plaintiff will still have the burden of proving that the school district engaged either in intentional discrimination or deliberate indifference, in order to get monetary damages. You should be aware that in a situation where FAPE is at issue and I'm seeking additional services or reimbursement for a unilateral placement, in addition to monetary damages, I will be required to exhaust my administrative remedies.

Right after this decision was rendered, the Congressional research service issued a position paper on this case, and they have raised a question with the Congress as to whether the Congress would like to clarify in the IDEA statute when exhaustion of IDEA remedies would be required, or when a student or family can go right into court under the ADA, or Section 504. To the best of my knowledge, Congress has not responded to that Congressional research paper, as of this point.

So let's get on with other cases, and we're going to start with Child Find. And after each group of cases, I'm going to ask Melanie to share a question. We're going to start with Child Find. And I'm amazed in 2023 the number of Child Find cases going to court. In this case, the Ja.B.-Wilson case from the 6th Court of Appeals, here was a student who was struggling emotionally, saw a therapist in their former elementary school. Most of the concerning behaviors were reported to be at home. The student moved with the family into a new state before the eighth grade. There was no IEP, no Section 504 plan, no safety plan. Two weeks into the school year, the student started having some behavioral issues, was arguing, was disrespectful, refused to do his work, and was placed in an in-school suspension. Early in the school year, in September, mom emailed the student's teacher, saying, "We're very concerned about our student, and we are hoping to get some assistance and interventions to help him be successful this year." That same day, the school counselor emailed the parent and said, "Well, let's set up a parent-teacher conference, and here are some tutoring resources that are available."

The parent met with the teachers, the counselor and the assistant principal the following week, and supports were discussed and added. We're not talking special ed here, we're talking supports in the general classroom. The next day after that meeting, the child had some episodic behaviors at home that escalated to the point where the parents had to take them to a hospital, where he remained for eight days. He was discharged from the hospital with the following diagnoses: General anxiety disorder, conduct disorder, and impulse control. The counselor and the parent met after the child was discharged, and the counselor said, "Parent, let's start the 504 plan process, because in this school, we'd like to have a tiered approach to supporting students. So if 504 doesn't work, we'll then consider whether this child should be evaluated to determine whether he should be on an IEP that is in special education.

Well, before the 504 meeting took place, the child had a major event where the police were called, and the child was arrested. The charges were eventually dropped; however, a disciplinary hearing was scheduled to determine whether the child should be moved to an alternative school within the district. The parent withdrew the student from the public school and started home-schooling the student, eventually placing the student in another school. The parent initiated a due process hearing, saying, "School, you violated Child Find. You should have evaluated my student for special ed purposes before all of these behaviors occurred."

And I'm going to skip to the Court of Appeals, it went to a due process hearing, it went to district court, and then the Court of Appeals. The Court of Appeals, basically said, first of all, not every struggling student deserves -- or is entitled to a special ed evaluation. The school has to have some reason to suspect a disability under the IDEA, or they must have some rational justification for not evaluating the student. In this case, the court said the school took actions; they met with the parents, they started providing supports, they started the 504 process. The school used the term "RTI," and I'm going to come back to that. But the court noted that here, the school had a tiered approach to supporting students, and the court, therefore, held there was no violation of Child Find. This child had no history of special education, the student had just moved to a new state, a new surrounding, it takes a period of adjustment. The school did take action about starting the 504 process, so therefore, the school did not have clear signs that the child may have a disability that warranted an evaluation.

So what do we take away from this case? Next slide, please. I'm going to suggest when a student engages in serious misconduct or hospitalization, it would be reasonable for the school to ask, is there reason that we should suspect that the child may have a disability, and needs special ed? In other words, should we initiate the special ed evaluation process? And we're going to have to consider information from parents, teachers and others in making that decision.

Secondly, the takeaway -- 504 is not a consolation to IEP services, but not all 504 students who are on plans will require a special ed evaluation under the IDEA. The term "RTI" -- first of all, that term is used in the law only to determine whether a child has a specific learning disability. This school was using that term to mean a school-wide approach of supporting students. But it's clear that RTI cannot be used to delay or deny unnecessary special ed evaluation. And if a child is receiving interventions prior to the consideration of an evaluation, it's important, schools and parents out there, to be in communication, so that we know that interventions are working, what interventions are being provided, and what new interventions may need to be considered. Next, please.

Case out of the 3rd Circuit -- here was a child who was in a parochial school for kindergarten, repeated kindergarten in the parochial school, and stayed in the parochial school for first grade. The parochial school told the parents, "You should really consider enrolling your child in the public school, because your child needs reading support that we don't have." So in second grade, the child was enrolled in a public school. The public school assessed the child's reading disability, and provided support from a reading teacher for the child, and that occurred in second and third grade. In fourth grade, the parents initiate a request for a special ed evaluation. A comprehensive special ed evaluation occurred where multiple assessments were administered, progress monitoring, information from parents, teachers, etcetera, were all part of the evaluation. The team ultimately determined that the child was ineligible for special ed, because the child was on grade level, and, therefore, did not need special education. You should be aware that the team used, under assessments, the age norms, since the child had been retained in kindergarten and in first grade, used age norms.

The parents got an independent educational evaluation. The independent evaluator administered most of the same assessments as the school administered, but came to the conclusion that the child should have been found eligible for special ed. In this case, the evaluator used age norms. Ultimately, the court found that the evaluator was making a recommendation solely based on test scores using age norms, and was looking through a, quote-unquote, "medical lens." The court ultimately held no violation of Child Find, since the child was receiving reading support which was not special ed, the interventions the child was receiving were monitored periodically, and then when the parent requested an evaluation, one was done -- the child did not qualify.

Lessons learned -- next slide, please -- supports that are available to any students, in this case such as a reading teacher, is not deemed special education. The court noted that in a footnote. So in many cases, what is special ed? It's really good teaching for all students. So if supports are available to any student in the classroom, there's a real question as to whether it should be deemed special ed -- this court said no. If the child is struggling and receiving supports outside of special ed, it's going to be important to keep an eye on that child, and periodically monitor progress and share that with not only the other teachers, but also the parents. If you look at the last two bullets, remember, the independent evaluator administered some of the same assessments the school administered. Well, there are certain assessments, in fact, the majority of standardized assessments, cannot be administered within a certain period such as 12 months, without being invalidated. And what did the courts say also, what did the IDEA say also? That assessments must be administered in accord with the instructions of the producer -- virtually every test that I have seen, standardized test, if you look in the manual, it'll say, never make a decision on test scores alone. What does the IDEA say? Never make a decision just on one piece of data, that in addition, input from parents, teachers will be important to consider. Next slide, please.

A case called J.M. -- in this case, the child was in a private kindergarten and had a meltdown, and the parents were asked to remove the child from the private kindergarten. The child was evaluated privately at the parent's expense. The parents then enrolled their child in the public school, and did not share with the public school the fact that the child had a meltdown, or that a private evaluation had taken place. Well, early in the school year, the child's teacher had noticed significant behavioral problems that the child was having, called the parent, discussed this, and the parent then said, "Well, my child had some problems in kindergarten, and we're waiting for a private evaluator to issue a report."

In the meantime, the school convened an intervention team and put together an array of supports, both behavior supports, and academic supports, such as reading. The independent evaluator eventually issued the 48-page report, suggesting that the child had a pragmatic communication disorder, and also said, "Well, I can't rule out autism, or ADHD, very difficult diagnosis." The independent evaluator did not recommend a special ed evaluation, but recommended a series of interventions, and come to find out, the interventions that the independent evaluator recommended were already in the intervention plan that the intervention team had put together. Even though not recommended by the independent evaluator, the parent initiated a referral for special education under the category of a specific learning disability. The school evaluated the student using RTI, as allowed under the IDEA, and found that the student did not qualify for special education, especially since the interventions that were being implemented were working.

In this case, the court held no violation of Child Find. The child was making progress, the school did not -- this was not a case where the school to select this child without providing additional supports, and the court held that a school need not use both RTI and severe discrepancy, because there was testimony to suggest that if the child had been assessed using the severe discrepancy criteria option, that the child would have qualified under the category of SLD. The court further said that a school need not evaluate a student to eliminate the possibility of a disability. Next slide, please.

Remember, the independent evaluator said, "Well, I can't rule out autism or ADHD." The court held the school was not required to evaluate the student to rule that in or out, there was no request by the parent to do so, either. I also recommend that schools be clear when they're evaluating a student under the SLD category, whether they're using the severe discrepancy criteria, or the RTI approach in identifying a student with a specific learning disability. And it's going to be important to be consistent, instead of saying, "That child looks like an RTI child." "That child looks like a severe discrepancy child;" being consistent and also explaining to the parents what that means for their child, so that I could truly give informed consent for my child to be evaluated. In this case, there was an independent evaluation. The team, including the parents, must consider the independent evaluation, and if the independent evaluation that the parent obtained has recommendations that the team chooses not to adopt, prior written notice of refusal should be provided to the parent, explaining why that team made that decision, even if the parent was a member of that team. As with every case, in this case we're talking about eligibility. The team should be able to clearly articulate and explain the reason for their decision, not only at the meeting with the other team members, including the parent, but also in the prior written notice.

Before we move to eligibility, any questions on Child Find, Melanie?

>> There's a point clarification question. They thought they heard you say the RTI only applies to SLD support. Do you want to clarify?

>> Under the IDEA, the only provision in the IDEA that discusses response to intervention is an alternative way for identifying children suspected of having a specific learning disability as an alternative to using the severe discrepancy criteria. By and large, however, the term "RTI" has taken on a life of its own, and most people, including the Office of Special Ed programs, have used the term to talk about a school-wide approach to assist students using multiple tiers of interventions way outside of LD -- so in other words, they're using it in a non-legal -- the term is being used much broader than it's legally used under the IDEA.

Let's move on to eligibility. A case called Heather H., from the 5th Circuit. Here was a child in kindergarten and received a private evaluation that the child was autistic, had a general anxiety disorder and a separation disorder. The parents, based on that private evaluation, asked for a special ed evaluation from the school. The school conducted an evaluation and found that the child did not qualify for special education, and was not eligible. Five months later the school did offer the child a 504 plan to address the child's anxiety. In this case, the parent asked for an independent evaluation. The school district said no. And as we're going to find out, if a school district says no to a publicly-funded independent evaluation, that the school must request a due process hearing. So the school requested a due process hearing, and the question is, presented to the court, was the school's evaluation and determination of ineligibility appropriate? The court held yes, that the school's evaluation, including both emotional issues, behavioral functioning, covered anxiety and appropriately covered the issue of autism. There was no evidence that the student's educational performance was declining or negatively impacted. Next, please.

Lesson learned -- those of you who are relatively new to special ed, one of the primary lessons learned is, we never base a decision on one piece of data. Therefore, a medical diagnosis, a psychological classification in and of itself does not determine special ed eligibility. The team, which includes the parents, must answer three questions based on the evaluation data; does the student have one or more of the disabilities listed in the IDEA? Secondly, if so, is the child's educational performance adversely affected? And thirdly, as a result, does a child need special education, that is, specially-designed instruction? And we found out that if I say no as a school to a parent's request for an independent evaluation, I must initiate a due process hearing, and the law says without unnecessary delay. There is not a number of days, but without unnecessary delay. And whether I get an independent evaluation at my own expense or the school's expense as a parent, the team must consider the results. Next, please.

You're starting to see a pattern here -- a lot of these cases are young children who have been privately diagnosed as having a disability. In this case, a medical group diagnosed a child with ADHD and anxiety. There was no recommendation for special education. When the student was in kindergarten, the parents shared this evaluation information, and the child was placed on a 504 plan, and stayed on that 504 plan through fourth grade. His behavior became problematic, although academically, he was doing okay. The parent made a referral for a special ed evaluation. The school district conducted an evaluation, and found that the child did qualify as having an Other Health Impairment -- one of the categories under the IDEA. However, the child did not have an adverse effect on their educational performance, because they were performing on grade level and had passing grades. By the way, you should be aware that the school psychologist who had administered some of the evaluations and was a member of the team disagreed, and thought that this child should be placed on an IEP. If we have a disagreement at the team, and after a good faith attempt to reach consensus, who makes the decision for the team? The person there as the LEA or district representative, subject to the due process rights of the parents. When it gets to court, because in this case, the parent challenged the ineligibility decision, the court said, educational performance, adversity educational performance, is not looking just at the academic performance of a child, that is too narrow. You have to look at other issues besides academics. Turn to the next slide, please.

So looking at more than academics, if you look at that second bullet, adversely affecting educational performance, a child could be on grade level, but however, socially, emotionally, the communication skills, the behavioral issues may interfere. So therefore, the court said that the school's team's ineligibility decision was wrong, and this child qualified. In that last bullet, although this is a team decision and no one member of the team ultimately should make the decision, other than the LEA rep if there's disagreement, the team better have a pretty good reason for disagreeing with one of their own staff member's opinions, especially when that staff member administered part of the assessments of the evaluation. Next, please.

A fairly recent case out of the 4th Circuit called Miller versus Charlotte -- here was a child who was privately diagnosed as being on the autism spectrum. Mom made a referral for a school district evaluation. The school district evaluated the student using autism rating scales, adaptive behavior, speech language, OT -- Occupational Therapy -- and found that the student did not meet the definition of a student with autism under the state standards. In addition, the team said, we don't really see an adverse effect or need for special ed, by the way. In that state, the state rule had a 90 school day -- I'm sorry, 90 calendar day period from consent to the completion of the evaluation. This school district took 110 days. The parent challenged the decision. The court said, well, the parent alleges that if students have deficits and are lacking meaningful progress, that is signs of a disability, and they should have been found eligible. In this case, a private evaluation showed that the child was autistic. The court said private evaluations must be considered; however, private evaluations are part of the multiple pieces of information, and therefore, the private diagnosis does not overcome the other parts of the evaluation. In this case, the fact that the school violated the timelines, it was harmless error that did not impact FAPE -- why? Because the child did not qualify as being eligible for special education. Next slide, please.



What's the takeaway? I'll say it just one more time -- multiple sources of information, which includes parent input, independent evaluations. An underperforming student in and of itself is not an indicator of a disability. We have to probe further in asking that question. Also, this is going to be -- that last bullet -- procedural violations do not always result in a denial of FAPE under the IDEA in a due process hearing or judicial dispute. The IDEA states if there is a procedural violation before we conclude FAPE was denied, we have to have some evidence that that procedural violation impacted the educational benefit that the child was receiving, or significantly impeded the parents' right to participate in the decision making process. For those of you who are out there who are state complaint investigators, state monitors, school people, parents -- the standards are different. If I'm monitoring as a state, a school district, or if I get an investigation, I would need to find that any procedural violation needs correction. We don't engage in the, what impact did that procedural violation have? So the standards regarding procedural violations is different, depending on the forum of the dispute, and I think that's important for us to remember. Melanie, a question on eligibility?

>> Yeah, there are a couple. One is about IEEs -- hypothetically, if a parent wants to get an independent evaluation at private expense, can the school deny the evaluator from conducting an observation, and-or having teachers complete rating scales? The parent is not requesting reimbursement from the school district for the evaluation in this hypothetical.

>> The law according to Art, and there are cases where a parent got an independent evaluation, I believe the case came from Capistrano, California, where the school would not allow the evaluator in, the court held that the independent evaluator has a right to come in. As far as the schoolteachers cooperating with the independent evaluation, I would highly suggest that the teachers or other staff do so, because we are talking about a collaborative effort which is in the best interest of a child.

Now, I'm looking at the time, and I'm panicking a bit, so we're moving on. The FAPE Standard -- we're talking now about adequate compliance with procedures, that's what the Supreme Court in Raleigh said in 1982. Next slide.

In a 9th Circuit case called Clarfeld, there was a child who was attending a private school at public expense under a previous hearing officer's order. An IEP then was developed for the ensuing school year. Among others, there were two procedural issues; one, the IEP ultimately called for the return of the child from the private school and placed in a public school special ed program. The parents said, but there were no teachers from my child's home public school in attendance at the meeting. The court said, well, so the private school teachers were there, and there was no possibility that that child would be attending a general ed environment, so a regular ed teacher need not be there. Secondly, the parents alleged, we never got prior written notice before the IEP meeting that a change of placement would be considered and discussed. The court said the prior written notice comes after the meeting decision, not prior to. Next slide.

Lessons learned -- first of all, I am somewhat surprised at the Clarfeld decision. If you don't have a regular ed teacher there, the IDEA says at least one regular ed teacher, or, not less than one, has to be at an IEP meeting if the child is or may be in a regular ed environment for even part of the day. By not having a regular ed teacher there, I think you're opening up to allegations of predetermination that you have already made the decision this child would not be in a [INAUDIBLE] -- very important to have discussions with me, the parent, to see if I agree that my child should not be considered for general ed, in which case I can excuse the gen ed teacher. Although a prior written notice is not required before an IEP meeting, notice is required by the IDEA; the time and location of the meeting, and we have to work on a mutually agreeable time and place, who's going to be in attendance, what the purpose of the meetings are, my right to bring others, and if my child is 16 or older, that post-secondary transition will be discussed. I also suggest, as a matter of good practice, that we invite the parent to share any thoughts they have that they would like discussed at the IEP meeting, so that the school has the opportunity to give it a full consideration. Next slide.

The word "prior" here has been very problematic since this law was initiated in the 1970s. Prior written notice is issued after the team's decision to either propose to change, or refuse to change the identification evaluation, the educational placement or the provision of FAPE, and it includes not only the decisions, but the reasons how I can get another copy of my procedural safeguards and the options we considered. I wish the law would remove the term "prior," because I've seen this over and over again, even in 2023, it's been happening for 50 years, and I could understand why people are confused. But I want you to understand, notice comes before the meeting, prior written notice comes after the meeting when decisions are made, but prior to the implementation of those decisions. Next, please.

Charter schools -- now most states have charter schools. I happen to live in a state we don't have charter schools, probably because of our lack of population. But here was a child who was on an IEP as being autistic and having ADHD, and attended the brick and mortar charter school, brick and mortar public school. The parents withdrew the student and placed a child in a charter school. The charter school, under the state law, was its own local education agency -- LEA, as the law uses. The parent said, well, we would like our school district of legal residence to develop an IEP, because we may want to consider placing our child back in that school. The school district refused and said, if you enroll back in our school, we will develop an IEP, but while your child is attending the public charter school, we refuse to do so. That decision was upheld by the court. There was no obligation to develop an IEP for a child attending a charter school with its own LEA, because that charter school is fully responsible for that child's provision of an IEP and FAPE to that child.

So what's the takeaway? Next slide, please. If a child -- go back a slide. Next slide. We are missing a slide. Well, let me share with you the lessons learned. First of all, it's going to be essential, going back to the N.F. case, for you to determine based on your state law whether the charter school that the child is attending is part of a larger school district which is considered a local education agency under the IDEA, or under your state law, is it separate from and its own LEA, in which case if the charter school is its own LEA, they are fully responsible as any other LEA or school district for the full compliance with the IDEA. And that is distinct from a private school. If a child is in a private school, the school district where the private school is located would have to evaluate that student if there's reason to believe that a special ed evaluation is necessary, and that the LEA of legal residence, the school district of legal residence would have to develop an IEP for that child, even if the child is not yet enrolled in that school district, unless the parents make it very clear that they don't want to even consider enrolling their child back in the public school district. So I want you to understand the distinction between a charter school and a private school. Next slide, please.

Again, another 9th Circuit case -- here is a student who was referred for special ed in the fourth grade. The school conducted a evaluation to see if the child had a specific learning disability. The parent had obtained an independent evaluation that the child had a reading disability, and the team concluded that the child did qualify for services under the specific learning category, but under written expression in math, and not reading. The parents requested a copy of the test protocols that were administered by the school. The school refused to turn over copies of the test protocols prior to the meeting, but said, "Our school psychologist will meet with you at a time convenient for you to review those test protocols prior to the meeting." The parent ultimately consented.

An IEP was held, an IEP was developed. The parent consented to the IEP, but before the IEP was implemented, removed the child from the school and requested a due process hearing, and the child had been placed in a private school. Number One, the court held that the evaluation used multiple assessments in all areas of suspected disability. The lack of copies of the test protocols did not result in a denial of FAPE, because it did not prevent the parent from meaningfully participating at the meeting. The parent argued, "Well, my child is doing very good at the private school, you see the IEP that the school district offered would not have provided FAPE." The court held the student's progress at the private school is not relevant as to whether the IEP developed by the student, but never implemented because of the student's removal from the school, was appropriate.

Lessons learned -- again, and you've heard this before -- must include multiple sources of information, document consideration of independent educational valuations. I, as a parent, have a right to inspect my child's education records before any IEP meeting, but I don't have a right to a copy of those, unless it would effectively prevent my right to inspect the records. And a very few cases that have held the right to a copy have been in situations where the parent lived out of state, and therefore, could not come to the school within a reasonable distance to review the records. And lastly, well, the court said we're glad the child's doing well at the private placement, but that, again, is not relevant as to whether the IEP was appropriate, especially where the IEP was never implemented. Next case.

We're talking now about the second prong of FAPE -- Educational Benefit. And as you know, the Supreme Court, more recently than the Raleigh case, in the Endrew F. case, said that educational benefit is more than de minimis progress, and for children attending a regular class on an IEP, advancement from grade to grade is going to be important, and that the child has to make progress appropriate in light of their circumstances. And whether the child's in a regular class or a special class, the goals in the IEP is to be appropriately ambitious. Case from the 9th Circuit called Crofts -- here was a child who was in second grade. The parents asked for a dyslexia evaluation based on an evaluation they received from a private school psychologist, who said that the child showed a pattern consistent with dyslexia. The school district conducted an evaluation and found that the child did have a specific learning disability in reading and writing, and the IEP was developed, and the IEP called for -- next slide please -- the IEP called for a multi-sensory approach to reading. There it is, the Crofts case.

Again, a multi-sensory approach to reading. The parents asked for an IEP meeting because they were concerned about their child's lack of progress. They wanted all the teachers trained in Orton-Gillingham, and they also wanted the label changed from "specific learning disability" to "dyslexia." Ultimately, the court said that the IEP developed by the school was appropriate. The school [INAUDIBLE] obligated to classify a child as having dyslexia. The category under the IDEA is SLD, Specific Learning Disability. Also, as far as a specific methodology, only if the team considers that only one methodology is necessary to provide FAPE must the child's IEP reflect that methodology. And that third bullet, the courts held basically the fact that the child didn't meet all of their IEP goals and wasn't on grade level is not determinative of whether FAPE was provided, because the evidence showed that the child made meaningful progress. And if I can quote, "The IDEA does not require that all special ed students perform on par with students in general ed," end quote.

The takeaway -- next slide. There is no requirement under the IDEA that a student be evaluated labeled "dyslexic." Now I'm going to say, I have seen battles over the labels. If the child qualifies, I think another option, there's no prohibition to say this child qualifies under the label, under the category of a specific learning disability; specifically the child has dyslexia. So again, I would urge you to avoid that battle. In this case, if the child is not meeting their goals, if the child is not on grade level, then I think it warrants an IEP review, at least a consideration, to determine whether the IEP should be revised. And I'm going to ask a question: First of all, has the IEP been fully and consistently implemented? Secondly, has the student made some progress? If not, why do we think the student has not made the progress that we had hoped for? So is there a need for us to consider revisions? This could take place [INAUDIBLE] annual review date. If methodology is requested by the parent, a specific methodology, I would ask the parent for the basis of their request. I also would want the team to be able to articulate and explain to me, the parent, what the school's proposal is that they believe will be appropriate for my child, what instruction, the type of instruction that my child will receive that will address their needs. If the team refuses to incorporate a specific methodology at the parents' request, a prior written notice of refusal should be sent. Next case, please.

Here is a case where the child was eligible at age 5, had significant deficits in reading and math, had made progress under their IEP goals; however was significantly below grade level. At the end of third grade, the parent asked that the student be retained in third grade -- the school refused. In fourth grade, the school said the child was making progress. The parent got an independent evaluation and basically said, "Here's a child on first grade level sitting in the fourth grade," and brought a due process hearing alleging that FAPE was not denied. In this case, the court held a couple of things; first of all, we have to judge whether FAPE was offered at the time the IEP was developed, not in hindsight from what we know now. Secondly, the standard is whether the IEP, when it was developed, was reasonably calculated to provide educational benefit. Look what the court said; quote, "Performing at grade level is not a reasonable expectation for all students, and the IDEA does not require it when the student's characteristics make such a goal inappropriate." In this case, the court said you have to look at both academic benefits and non-academic benefits. Next slide, please.

And here's a case that I think is going to be more common than not these days. Here is a child with multiple disabilities. The child had a requirement for a one-on-one registered nurse, and the school provided that one-on-one support, both in pre-K and in kindergarten. The parent, who is also a nurse, removed the student from kindergarten after one day, after observing the nurse working with their student, and saying that "The nurse is not properly suctioning my student." There was a dispute between the school and a parent about a physician's order that appeared to be edited by the parent. The parent ultimately admitted that they had edited the report. The school nurse, at that point, resigned. The school made efforts to find other registered nurses, but was unable to do so. The child stayed home because there was no registered nurse, as the IEP called for. Ultimately, the school called an IEP meeting, calling for a placement in a residential school, based on their inability to find a nurse. The parents request a due process hearing, and then it gets into state court. In this case, the court held that impossibility of performance is not a defense under the IDEA. In this case, the residential placement decision made by the IEP team was made for administrative convenience, and not based on the student's needs. Next slide, please.

Staff vacancies -- and I hear about this in virtually every school district -- when a staff vacancy occurs that's impacting my child's IEP services, school, you have an obligation to let me know as the parent, to keep me notified and updated, asking me if I have any suggestions on a replacement person for that staff -- in this case, it was a registered nurse, but my comments are broader than that. If there is a vacancy that's resulting in the lack of the IEP being fully implemented, I think the school has to engage in immediate and documented attempts -- plural -- to fill that vacancy. Putting an ad in the paper is not sufficient. Putting an ad in the paper, contacting other professional organizations, other school districts, the State Department of Education, potentially contracting with private providers until it's filled. If it's possible, a temporary service. The IDEA states that paraprofessionals working under the supervision and training of a duly qualified person may assist in the provision of special ed and related services. Now that may not be possible in all cases, but if there's going to be a lapse in the IEP implementation, and once that staff position is filled, the team is going to need to reconvene to determine whether that child's entitled to compensatory educational services. But keeping the parent in the communication loop is absolutely important. And I am going to keep going here, since I am a little bit panicked about time.

Least restrictive environment -- student is autistic, had been placed in third grade, primarily in a gen ed environment with a one-on-one aid and a modified curriculum that was modified below grade level standards. In mid-third grade, the school called an IEP meeting and said, "Well, the child is making some social progress, but limited academic progress," and called for a blended program of academics in special ed and socialization in general ed. The parent objected to that, so it was not implemented in either the third or fourth grade. The fifth grade -- the team said the child is so significantly below grade level, that we are going to propose primarily a special ed class. Even though the child had met four of their six academic goals, the team said, those goals were so below grade level, that it's not fair to that student to place them in a general ed setting. Due process hearing, gets up to the Court of Appeals. The Court of Appeals said grade level performance is not always the appropriate standard for determining what the least restrictive environment is. We also have to look at progress under their IEP goals -- in this case, a child achieved four of their six academic goals, and also the non-academic progress. The school said, but the kid made progress because they were with a one-on-one aide in a modified curriculum way below grade standards. The court says that's irrelevant. Next slide.

The takeaway -- you don't just look at grade level performance in determining what the least restrictive environment is, that a child could only be removed from a general ed curriculum after there is reason to believe that the child even with supplementary aides and services cannot be appropriately served. In this case also, there was an expert who said, the data shows the -- study after study has shown that kids with disabilities learn better in an inclusive educational environment. That expert testimony was not rebutted by the school district. The court paid a lot of attention and accepted that in finding that the IEP prepared by the team was not in accord with the least restrictive environment. Next case.

The H.W. case -- in this case, a child with multiple disabilities -- and I'm just going to get down, in light of the time, to kind of bottom line. In this case, the court held that the least restrictive environment for this case was in a blended class, with academics in special ed, non-academics in regular ed. There were 10 IEP changes or amendments between kindergarten and third grade. The court said the school made a good faith attempt to keep providing more support and instruction, to keep the child in general ed. We have to judge this child's progress in a general ed setting, using a holistic approach. Progress toward their IEP goals in and of itself is not determinative, especially where the general ed curriculum has been significantly modified -- think about the previous case we just talked about; different court, different decision. Also, in this case, there was evidence that when the child was in general ed, the child had some disruptive effect in class, was biting, kicking, screamed and yelled, and in spite of behavioral interventions being provided. Next slide.

The takeaway here -- we, first of all, start with general ed as a team, asking if the child could be placed full or part-time, because there has to be in general ed with the use of supplementary aids and services, there's got to be a continuum of placements. And the last bullet -- the IEP must include "an explanation" of the extent, if any, that the child will not participate. And it drives me crazy when I read an IEP that says, "The least restrictive environment for this child is in a special class, because their needs cannot be appropriately met in a regular class." That's a conclusion, and not an explanation. I think the law expects something more than that. Next case, please.

Sixth Circuit case in least restrictive environment -- here was a child who's autistic, mostly non-verbal, learning to communicate through an augmentative communication device. In preschool, for the first two years of preschool, was in a self-contained program, the last year of preschool in an inclusive preschool environment, and was making good progress. However, when the IEP was being developed for kindergarten, the school, the team was recommending a modified placement, academics in special ed, on-academics in general ed. Not only the parent but the preschool staff testified that the child's needs could be met in general ed. Ultimately, the court held that the IEP being proposed for this student was not in accord with least restrictive environment. The child made progress in the inclusive preschool setting. The special ed staff in the preschool setting testified that the child should be in a general ed setting. The last bullet here -- the court had a strong statement that the district position seemed "closer to an unwillingness to mainstream the child, because it will be difficult to do so." Well, that's not going to be significant -- that's not significant or a rationale for not implementing fully the least restrictive environment. Next slide.

Just two points here -- before determining the least restrictive environment is outside the general ed environment, you need to look at supports and accommodations that the child needs -- and I'm just going to add, not staff availability, it's the child's needs that drive the IEP -- and the issue is not whether a special ed class would be academically superior, because we also need to look at the non-academic benefits that a general ed setting may provide the student in terms of modeling language and behavior. Next case -- and I'm sorry for going through this so quickly.

Removing the discipline -- there were two guidelines issued in July by the U.S. Department of Education, and then the outline that is provided that CADRE will post on their website, or has by now posted on their website. You will see the citations to these. The first is a 55-page question and answer document on the IDEA's discipline requirements. The second is a 504 Q and A.

Be careful -- next slide -- be careful, because although it's well done, this guidance is non-binding, and most importantly, although the Q and A does review the discipline requirements under the law, it also incorporates what I would deem best practices under the law. And the document itself does not distinguish between the discussion of what is legally required and what is considered best practice -- someone needs to be very skilled at reading these documents to determine whether the Q and A is responding to a legal requirement, or best practice. And I'm going to give you examples of that in a case coming up quickly here. Next slide.

A case on functional behavioral assessments -- here was a child who's autistic and had a speech impairment. The child engaged in problematic behaviors. The team incorporated, as part of a re-evaluation, behavioral supports and interventions, and a noted in the second bullet, the IDEA requires that if the child's behavior impacts their learning or the learning of others, that the team consider such interventions and strategies. In this case, the parent alleged that the student should have had a functional behavioral assessment prior to the consideration of these interventions and strategies, and a behavioral intervention plan. The court upheld the IEP, and basically held that the IDEA does not require the functional behavioral assessment outside of the disciplinary provisions of the IDEA. Now there has to be assessment data, but a functional behavioral assessment, per se, is not required. Next slide, please.

So again, the IDEA requires that the team be proactive in addressing behavior, and not just reactive. There should be an assessment of behavior. As I mentioned, the term "FBA" is only used in discipline, but even in discipline, it is not defined under the law. The last comment, the last bullet -- even under discipline, the U.S. Department of Education said, "it would be inappropriate for us to define what an FBA is, because that's really left up to the team, and we're not going to define it in the regulations, even in discipline." Next case.

E. W. versus Hawaii -- if you can go back one slide -- E. W. versus Hawaii. Here is a child who was unilaterally placed and reimbursement was ordered for the last school year, because the school district never developed a final IEP. For this school year, for the upcoming school year, a new IEP was completed, and it included intervention supports and goals. A behavior intervention plan was also developed, but it was not incorporated in the IEP. The parent requested another hearing, and alleged that among the hearing, that the behavior intervention plan was not incorporated as part of the IEP. The court upheld the school, saying a behavior intervention plan is not required for this student, because that term is only used in the disciplinary section of the IDEA, and even then, the term "behavior intervention plan" is not defined. Next slide.

It's very important when we use terms to understand how that term is defined in the given context. The hearing officer in this case, based on testimony, said, "A behavior intervention plan is an individual plan used to train staff on specific strategies to implement the behavior interventions and address the child's behavior. So there's a distinction between a behavior intervention plan and what I call a "behavior implementation plan." So there was no requirement that the behavior intervention plan, in this case, really was a plan to train staff, it was more of an implementation plan. The OSEP guidance that I mentioned earlier, the 55-page Q and A, if you look at the last two slides, they define the term -- no, go back, please -- the third bullet -- OSEP defines the term "behavior plan" to address behaviors that interfere with the child's learning, and requires that the plan be part of the IEP, not just in discipline, but when behavior interferes with the child's learning or learning of others. To me, this would be an example of where the Q and A guidance inserts best practices and not legal requirements. We're almost done. Next slide.

Bullying -- here was a child who's autistic, has ADHD. A friend of the child, in the boy's restroom, used an "air soft gun," which I found out are like plastic bullets. The child threatened the student with that gun. The child who had the gun was expelled. This child had a meltdown, was ultimately admitted to the pediatric unit of a hospital for a week. When discharged, the school had an assessment revision and added counseling and a temporary safety plan for the student. Now this was in May, so there was, like, three weeks left in the school year. The temporary safety plan was not part of the IEP. The parent filed a bullying complaint with the assistant superintendent, who investigated and said, "I cannot substantiate that your child had been subjected to bullying." By the way, there was not an incident for the remainder of the school year. The private therapist recommended the child be transferred to another school for the following year. The school district said, "Fine." The parents pulled the child out of school and requested due process. In this case, the court said that the IEP was appropriate, even though it did not include strategies to address bullying. The safety plan was intended to be just a plan for the remaining three weeks of school. The court held had bullying continued, then perhaps the IEP would need to address it. Next slide.



The law requires, and the lead case is a 2nd Circuit case called T. K. versus New York, that if a child with a disability on an IEP has been bullied, that the team needs to meet to determine it's had an impact on the provision of FAPE, and if so, provide additional supports, but being careful not to place this child in a more restrictive, quote, "safer" environment, because that would violate LRE. The last two bullets -- if there's an allegation of bullying, and it involves a student with a disability either as the recipient or the bullier, I suggest that you refer to school district policy in investigating, it is not an IEP team decision as to whether bullying actually occurred. Next case -- and I have five minutes left, and I'm going to finish this. K. C. -- here is a child -- and I'm going to get down to it -- had some really serious and aggressive behaviors, had been in and out of foster placements and a hospital, had been living with a foster family. The IEP called for a self-contained class. There were several instances, including threatening people with a knife, hitting, spitting. Other kids had to be removed. Suspensions exceeded 10 days, and it was a determination that a disciplinary change of placement occurred. A manifestation meeting was held. The team determine the behaviors were a manifestation, and said that the child will be sent to a one-on-one tutoring program in school, until we find an out-of-district placement. The parents ultimately challenged that and said, "They never told me at the manifestation meeting that if my child's behavior is a manifestation, that the child goes back to their last IEP placement unless either parents agree." The court said they were informed of their rights when a manifestation meeting was held. There was no requirement at the manifestation to reiterate those rights. Next slide.

So if the child's behavior is a manifestation, the child goes back to their last IEP placement, unless both the school and the parents otherwise agree. The parents must receive a copy of the procedural safeguards, but there is no requirement to verbally notify the parent at the hearing. I would say best practice would be to let the parent know what a manifestation meeting will be all about, and ask if they have any questions, so that either parent can meaningfully participate. Next side -- and we're just about there.

Early intervention -- I was asked to talk about early intervention. There were nine due process hearings in the last reported year under Part C of the law. This is a letter issued recently by the U.S. Department of Education. It really reiterates what I believe was in existence, that the lead agency under Part C, which may or may not be education, and the State Department of Education has to have a written interagency agreement, and 90 days before that child turns age three, that there has to be a meeting to determine whether a transition plan will be put in place, and that the LEA of legal residence must participate in that meeting. The feds have said the notice of that meeting is that a toddler who may qualify under the Part B, when I am notified, that amounts to a referral.

So if I could actually skip two slides and go to the last -- the Private Providers -- this was a student with autism who had been deemed autistic by the school was removed by the school, and the parents were providing 40 hours of applied behavioral analysis at home, paid for by their insurance company. The parents wanted their student to go back to the public school, and asked the school to accommodate the student by having the private providers accompany the student to school. The school said no. The court upheld the school, and said it was not a necessary accommodation, because the private providers were medically necessary, that was a standard the insurance company used. It was never discussed whether the parent ever asked that the school provide the ADA services. If you go to the next slide, the last bullet, I made mention real quick that courts have held that independent evaluators hired by the parent do have a right to come to class. If others are asked to accompany the student, I would want to find out from the parent the basis of their request, and I would want to look at the potential disruptive effect and provide an answer to the parent. The last slide.

Final lessons -- if you haven't heard so already, if you're with a school or if you're a parent, you don't want to see your name on these slides. Collaborative relationships -- no one wins in litigation. A party may prevail, but you don't win, especially the student. Mediation and IEP facilitation -- and at that point, I'm going to turn it over to CADRE, whose expertise is in mediation and facilitation. Thank you.

>> Art, thank you so very much. Thanks for sharing your time and your insights with us today. It's been a long six years since you've addressed a national audience, and if I have my way, I'll try to make sure it's not another six. There's certainly a lot of unanswered questions that have been asked, so there's plenty of fodder for additional conversation at some point, so maybe I'll start nagging you. We're very grateful for your willingness to join us, and as always, it was a pleasure.

I do want to remind everybody about the survey. If you haven't had a chance to fill it out, it's available, it's in the Chat. Please do, it's important for us.

Please stay tuned. We have an upcoming webinar in September. Kiran Singh Sirah is going to be presenting on storytelling, and the value of storytelling in dispute resolution, and building relationships, so we're looking forward to that, so September 12th, please save the date.

And again, there is a link for the survey. We appreciate you so very much, Art, again, thank you. And finally, my nerd family would be very unhappy with me if I did not end with, "May the Fourth be with you." So have a wonderful summer, everybody. And thank you so very much.