SPECIAL EDUCATION: THE LEGAL FORECAST FOR 2017

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I. Political Forecast: The Trump Effect

1. New U.S. Supreme Court Justice
2. Curbing the Authority of OCR/OSERS/OSEP
3. New U.S. Secretary of Education
4. The Role of the States
5. The Future of RtI, Voucher Programs, and Charter Schools

II. The Role of Government Agencies (OSERS/OSEP/OCR)

A. *Dear Colleague Letter: Restraint and Seclusion of Students with Disabilities*, 116 LRP 53792 (OCR 12/28/16)

B. *Letter to Andel*, 67 IDELR 156 (OSEP 2/17/2016)

C. *Letter to Wentzell*, 116 LRP 52591 (OSEP 12/07/16).

D. *Dear Colleague Letter: Transgender Students, 116 LRP 18909* (OCR 5/13/16).

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[1] ***Note: This presentation is designed to provide accurate and authoritative information in regard to the subject matter covered. It is provided with the understanding that the presenter is not engaged in rendering legal counsel. If legal advice is required, the services of a competent professional should be sought. Melinda Jacobs is licensed to practice law in Tennessee. Ms. Jacobs makes no representation that she is licensed to practice law in any other state.***

III. Judicial Forecast: What Will The U.S. Supreme Court Do?

1. **Fry v. Napoleon Cmty. Schs., 65 IDELR 221 (6th Cir. 2015), *reh'g denied,* 115 LRP 36429 (6th Cir. 08/05/15), *petition for cert. filed* (U.S. 10/15/15) (No. 15-497); *cert. granted*, 2016 U.S. LEXIS 4264 (6/28/16).** A student's wish for greater independence qualified as an educational goal, and therefore issues relating to the presence of the student's service dog were "crucially linked" to her education and were subject to the exhaustion requirements of the IDEA. The 6th Circuit ruled that the parents could not pursue Section 504 or Title II claims against the student's former district until they exhausted their administrative remedies under the IDEA. The court held that the exhaustion requirement applies if the IDEA's administrative procedures can provide some form of relief or if the claims relate to the provision of FAPE. In this case, the court observed, the parents clearly were disputing the appropriateness of the student's IDEA services. Specifically, the parents argued that the dog's presence allowed the student to be more independent so that she would not have to rely on a one-to-one aide for tasks such as using the toilet and retrieving dropped items. They also maintained that the student needed the dog in school so that she could form a stronger bond with the animal and feel more confident. The court explained that the parents' allegations brought the claim squarely within IDEA's scope. "Developing a bond with [the dog] that allows [the student] to function more independently outside the classroom is an educational goal, just as learning to read Braille or learning to operate an automated wheelchair would be," held the court.

   - Oral Arguments, Oct. 31, 2016

2. **Endrew F. v. Douglas County Sch. Dist. RE-1, 66 IDELR 31 (10th Cir. 2015), *cert. granted,* 2016 U.S. LEXIS 3517, 195 L.Ed. 2d 761 (2016)** Proof that the school district had made annual revisions to the IEP objectives for an elementary student with autism convinced the court that the boy had made "some educational progress" and received FAPE. The 10th Circuit declined to adopt the standard of "meaningful educational benefit" being applied by some other Circuits. Evidence that the child was making excellent progress in a private school for children with autism was irrelevant to the issue of whether the school district had provided FAPE.

   * Oral Arguments, January 11, 2017

3. ***G.G. v. Gloucester Co. Sch. Bd., 132 F. Supp. 3d 736 (E.D. Va. 2015); rev'd, 2016 U.S. App. LEXIS 7026 (4th Cir. 2016); re-hearing en banc denied, 2016 U.S. App. LEXIS 9909 (4th Cir. 2016); preliminary injunction issued, 116 LRP 27265 (E.D. Va. 6/23/16), motion for stay pending appeal denied, 116 LRP 30048 (4th Cir. 7/12/16); appl. to recall and stay granted, (U.S. 8/3/16).*** The U.S. Supreme Court has granted the school district's request to stay the decision of the 4th Circuit Court of Appeals reversing and remanding a prior ruling by a Virginia trial court that

dismissed the Title IX claims made by a transgender student. The student, a transgender male, was denied the right to use the boy's bathroom at school, and refused the district's offer of a unisex bathroom. The trial court rejected the student's request for a preliminary injunction, and dismissed his Title IX claims. The appellate court held that the trial judge's ruling was in error, and remanded the case back for further evidentiary findings. On remand, the trial judge issued injunctive relief to the student. The Fourth Circuit denied the school district's requests for rehearing en banc and a stay pending appeal to the U.S. Supreme Court. On Aug. 3, 2016, the Supreme Court granted the school district's request to recall and stay the 4th Circuit's decision pending the Court's consideration of the school district's petition for writ of certiorari on or before Aug. 29, 2016.

* Oral Arguments Not Yet Scheduled.

IV. Recent Case Law Impacting Special Education[2]

1. Connecticut Coalition for Justice in Educational Funding, Inc. v. Rell, 116 LRP 39593 (Conn. Sup. Ct. 9/7/16), stay granted, 116 LRP 52603 (Conn. Sup. Ct. 9/20/16). A federal judge's comments have infuriated the U.S. Dep't of Education and Connecticut state education officials/local education agencies/advocacy groups. In his comments, the judge rejected the holding of the First Circuit Court of Appeals in *Timothy W. v. Rochester City Schools* (1st Cir. 1989), *cert. denied*, 493 U.S. 983 (1989).

*** See also, Letter to Wentzell, 116 LRP 52591 (OSEP 12/07/16).**

2. ***L.K. et al. v. New York City Dep't. of Educ., 117 LRP 2549 (2d Cir. 1/19/17).*** A New York school district was not obligated to pay for every service provided by a private program, despite being ordered by an administrative judge to fund the private placement. The appellate court ruled that courts must determine whether a child has an "educational need" for a private service before ordering a public school district to fund the service. "The IDEA guarantees 'an appropriate education for each [child with a disability,]' not 'the best education [that] money can buy,'" the panel wrote in an unpublished decision. The court found that many of the services the child received in the private program were not necessary for his educational progress, and that the district would not have an obligation to

[2] Case summaries and citations are provided in edited form as reported in the Individuals with Disabilities Education Law Report (IDELR), published by LRP Publications.

provide those services in the first place. Therefore, the parents were not entitled to reimbursement for those services.

3. ***J.J.E. v. Independent Sch. Dist. 279 (Minn. Ct. App. 1/17/17).*** A Minnesota state court refused to require a school district to provide home instruction for a high school student, even though the IEP developed at his former school district provided for the same. The new district had met and proposed revisions to the incoming IEP, including a shortened school day in lieu of home instruction. The parent had signed in agreement with these changes. "At the time of the hearing before the ALJ, [the student's] IEP consisted of the [former district's] IEP and the revisions contained in the two PWNs," Judge Johnson wrote in an unpublished decision. "Nothing in those documents requires at-home instruction." Because the district followed appropriate procedures in adopting a new IEP for the student, the court found no evidence of an IDEA procedural violation. The court also held that the district's offer of school-based services was appropriate. Not only was the school a less restrictive setting than the student's home, in addition the student was earning passing grades, making academic and behavioral improvements, and forming healthy peer relationships at school.

4. ***A.G. v. Tennessee Dep't. of Educ., 117 LRP 1871 (M.D. Tenn. 1/10/17).*** A federal judge in Tennessee affirmed an administrative judge's partial dismissal of a due process hearing complaint for failure to comply with the IDEA's pleading requirements. "The ALJ found that the amended complaint lacked sufficient detail to allow [the district] to understand how [the district] improperly implemented or failed to implement [the child's] IEP or harmed or interfered with [the child's] education, and [the parent's] proposed remedy," Judge Haynes wrote. The parents failed to litigate their remaining claims through the administrative process, and instead filed an action in federal court. The court dismissed the claims for failure to exhaust IDEA's administrative remedies. However, the court permitted the parents to continue with their claim that the school district had breached a 2015 settlement agreement, holding that settlement agreements reached through mediation are enforceable in court.

5. ***A.M. et al. v. New York City Dep't. of Educ., 117b LRP 979 (2d Cir. 1/10/17).*** The school district violated the IDEA by proposing placement of a six-year-old boy with autism in a special education classroom with no specific methodology. The court pointed to the evaluative data concluding that the child required an intensive ABA program in a 1:1 setting to make progress. The three-judge panel explained that when the reports and evaluative data before the IEP team "yield a clear consensus," the IEP developed for the child must reflect that consensus. "This remains true whether the issue relates to the content, methodology, or delivery of instruction in a child's IEP," U.S. Circuit Judge Richard C. Wesley wrote.

All of the evaluation reports obtained by the parents called for ABA therapy in a 1:1 setting. The school district did not conduct any evaluations of its own. Therefore, it was obligated to follow the recommendations of the private evaluators and should have provided the recommended ABA program

6. ***T.D. et al. v. Rutherford County Bd. of Educ., 117 LRP 960 (M.D. Tenn. 1/09/17).*** A federal judge in Tennessee dismissed the class action claims filed on behalf of two children with autism. The parents of these children claimed that the school district had developed and implemented an illegal policy or practice of allowing students' IEP goals to remain stagnant in order to justify a reduction of direct related services that would ultimately save the district money. The court held that the IEP teams' decisions to provide consultative related services instead of direct related services was based on an individual review by each student's IEP team, and not due to any district-wide policy or practice. Judge Aleta Trauger ruled that a single memo sent via email by an occupational therapist to the parents at their request did not constitute an official "policy" of the district. This memo merely attempted to provide examples of factors that may be considered by a child's IEP team in determining the service delivery for that particular child. Judge Trauger characterized the Plaintiffs' efforts to avoid exhaustion of their IDEA administrative remedies as an attempt to make a "mockery" of the administrative exhaustion requirements. "[The memo] expressly calls for individualized evaluations of related services for each student and notes only that services will perhaps be reduced when a student's goals remain static over time," the judge wrote. Judge Trauger further noted that neither the IDEA nor Tennessee law requires districts to provide direct services as opposed to consultative services. As such, the memo's description of the factors the district considered when deciding between consultative and direct services did not establish a district-wide policy or practice that denied students FAPE. The district maintained that it did not distribute the memo, which was written by its senior occupational therapist, to all parents of students with disabilities. Rather, it asserted that the memo was written to explain to the parents why the district denied direct services in their daughter's case.

7. ***M.A. et al. v. Jersey City Bd. of Educ., 117 LRP 7 (D.N.J. 12/29/17).*** A federal judge refused to allow the parents of an elementary school student with autism to obtain education records of other students in their daughter's classroom. Although the parents argued that they needed the would-be classmates' records to determine whether the proposed placement offered sufficient ABA services, the judge explained that those records had little (if any) bearing on whether the district offered the child FAPE. "The data collected and instructional methods used for the students who did attend [the

public school] for the 2013-14 school year was pursuant to each child's personalized IEP," Judge McNulty wrote. "Encouraging satellite litigation over whether the IEP and instructional methods used for one student is congruent with the needs of another is hardly consistent with Congress' goal that each student be provided with a FAPE 'designed to meet their unique needs.'" The court also held that the parents' expert had sufficient access to school staff, and that the district did not unlawfully destroy or dispose of student records. However, it allowed the parents to submit certain expert reports and interrogatories for the limited purpose of showing that placement is inappropriate at the time it was proposed.

8. ***Artichoker ex rel. D.D. v. Todd County Sch. Dist., 117 LRP 9 (D.S.D. 12/29/17).*** A school district violated the IDEA when it refused to initiate an IDEA eligibility evaluation for a middle school girl diagnosed with PTSD, ED, and SLD. The girl's guardian requested an IDEA eligibility evaluation after the student was involved in several behavioral incidents during the first month of school. The school district failed to evaluate the student, and instead proceeded with its RtI program. The following February, the student was suspended for the remainder of the year after posting a photo of herself on social media at school holding a four-inch knife emblazoned with a marijuana leaf. The guardian filed for due process alleging that the student was entitled to protections during the disciplinary process and that the district erred in failing to evaluate her in a timely manner. The hearing officer determined that the district's decision not to evaluate denied the student FAPE. Upholding the hearing officer's decision, the court explained that under the IDEA disciplinary provisions, a district is deemed to have knowledge that a child has a disability if the parent of the child has requested an evaluation. The court also ruled that a district does not have to wait until its RTI process is completed to conduct an initial evaluation. It rejected the district's contentions that it needed a diagnosis to be deemed to have knowledge of the student's disability. See, *Memorandum to State Directors of Special Education*, 56 IDELR 50 (OSEP 2011)(although districts may use RTI as part of the process of identifying an SLD, they may not use it as a reason for rejecting a referral or failing to conduct a timely evaluation).

9. ***Dep't of Educ., State of Hawaii v. Leo W. by Veronica W., 117 LRP 11 (D. Hawaii 12/29/17).*** The parent of a kindergarten child with autism and ADHD alleged that the school district violated the IDEA by failing to conduct a behavioral evaluation due to the child's in-home aggressive behaviors. The court ruled that the school district was not responsible for providing services at school based on at-home behaviors. The evidence showed that the child was performing on an age-appropriate level at school. The district did commit a procedural violation of the IDEA by refusing to

evaluate the child at the parent's request, but this violation did not result in any educational harm to the child. Judge Kobayashi pointed out that child's present levels of academic achievement and functional performance showed that he was exhibiting age-appropriate behavior at school. Furthermore, the child's special education teacher did not witness any of the defiance, irritability, aggression, or depressive episodes that the parent reported as occurring in the home. "[T]he evidence in the record -- including [the parent's] testimony -- does not show either that [the child's] in-school behaviors were as problematic as his reported at-home behaviors or that his in-school behaviors otherwise warranted a behavioral evaluation," the judge wrote. Nor did the parent show that the LEA's failure to reevaluate the child's behavior impeded her participation in the IEP process. Judge Kobayashi noted that the LEA reconvened the child's IEP team after the parent produced a private evaluation stating that the child had severe behavioral problems, and that it arranged a classroom observation to determine whether further evaluation was necessary.

10. ***Rena C. ex rel. A.D. v. Colonial Sch. Dist., 116 LRP 52882 (E.D. Pa. 12/20/16).*** In an effort to settle a dispute with the parent of a rising ninth-grade student with a disability, the school district offered to pay for the student's private school tuition. The parent failed to respond to the school district's offer within ten days, as required by the IDEA. Two days before a due process hearing, the mother informed the school district that she had enrolled her child in a different private school and that the student was going to be repeating the eighth grade (thus requiring the school district to pay for five additional school years rather than four school years). The school district withdrew its settlement offer. In a consent order developed afterwards, the district agreed to provide tuition, one-on-one instructional support, and transportation reimbursement for the new unilateral placement. The mother sought attorney's fees and contended that the district's settlement offer had not been valid due to its need to obtain school board approval to finalize the offer. The court held that the district's settlement offer was a valid offer, and did not require prior board approval. In fact, the court recognized that until an agreement was reached with the parent, there would have been nothing for the board to approve. Also, the court ruled that the parent was not justified in rejecting the offer simply because it did not include attorney's fees. "Because there was no real dispute about attorney's fees at the time the offer was made, [the mother] was not justified in ignoring and rejecting [the district's] offer," the court held. It ruled that the award of fees was limited to those incurred prior to the expiration of the 10-day offer.

11. ***R.F. by Frankel v. Delano Union Sch. Dist., 116 LRP 52880 (E.D. Cal. 12/19/16).*** The last implemented IEP for a 12-year-old boy with an

intellectual disability, autism, and a speech and language impairment provided that he would have a one-to-one aide for 1,950 minutes per week and supervision for 720 minutes each month from a board certified behavior analyst. After the boy's mother died, the father decided to move approximately 150 miles away, so that relatives could help care for the child. However, when he enrolled the boy in the new district, the IEP team developed an interim IEP that eliminated the aide and reduced his BCBA supervision to 60 minutes per month. The father rejected the proposed IEP, re-enrolled his son in his former district, and filed for due process. After an ALJ concluded that stay put did not apply, the father sought injunctive relief in federal court. Before addressing the standard for injunctive relief, U.S. District Court Judge Lawrence J. O'Neill explained that both the IDEA and its implementing regulations are silent as to whether a child who transfers to a new district between school years is entitled to stay-put. To obtain a temporary restraining order, he continued, the petitioner must show that: 1) he is likely to succeed on the merits; 2) irreparable harm will likely ensue if the preliminary relief is not granted; 3) the balance of equities tips in his favor; and 4) an injunction is in the public interest. Although the father satisfied the first, third, and fourth elements, Judge O'Neill opined, he could not establish that irreparable harm would occur without "the extraordinary remedy of a TRO." He noted that while the current situation of going back and forth between residences and having the child attend school only four days per week was causing hardship to the family, the situation, while not sustainable, was stable. He denied the father's TRO, but ordered that the matter be scheduled for a full hearing on the preliminary injunction request.

12. ***S.S. by S.Y. v. City of Springfield, Mass., 116 LRP 52888 (D. Mass. 12/16/16).*** A Massachusetts federal judge rejected efforts to bring a class action challenging the placement of all students placed by the school district in separate day programs. Although a Massachusetts district had to defend allegations that it discriminated against a teenager with depression when it placed him in a school for children with mental health disabilities, the court denied the parents' motion for class certification based on their failure to demonstrate a violation capable of class-wide resolution. According to the parents, the day program placements were the result of the district's failure to provide "school-based behavior services" in students' neighborhood schools. However, the court pointed out that SBBS was not a well-defined program; rather, it was a term the parents used in their complaint to refer to a combination of assessments, school-based interventions, staff and parent training, and coordination with non-school providers. The court also questioned whether SBBS would be an appropriate remedy for each member of the proposed class. "Even if these services could, in theory, provide a universally positive outcome, the diversity of circumstances affecting members of the proposed class will create a myriad of unique challenges

that will have to be overcome on a student by student basis in order to implement each of these entwined services," U.S. District Judge Mark G. Mastroianni wrote. Because the parents failed to show that each affected students' placement resulted from the unavailability of SBBS in their neighborhood schools, the court held that they could not pursue a Title II class action. The court also ruled that the student's exhaustion of his administrative remedies at 63 IDELR 118 prevented him from acting as a class representative for students who had not yet sought administrative relief under the IDEA.

13. ***Shafi A. et al. v. Lewisville Indep. Sch. Dist., 116 LRP 52891 (E.D. Texas 12/15/16).*** The Texas court upheld the district's imposition of a cost cap for IEEs conducted at public expense, and refused to order the school district to pay for a private evaluation that exceeded these cost limits. The federal judge explained that a child's parents are entitled to request an IEE at public expense if they disagree with a district's evaluation. However, the district has the discretion to limit the cost of the IEE as long as this cap does not prevent the parents from obtaining a private assessment. Here, the court noted that after the district conducted a comprehensive educational evaluation for the student, the parents disagreed with the evaluation report and subsequently sought an independent speech-language evaluation conducted by a private speech-language pathologist. The district declined to pay the cost of the pathologist's IEE because it exceeded their "cost parameters for reimbursing private evaluations." Although the parents argued that the district's denial of their IEE request denied their child FAPE, the court disagreed. It pointed out that the private pathologist's fee significantly exceeded the district's "maximum fee schedule" for IEEs, which was based on customary rates in the area. Moreover, the parents failed to establish unique circumstances which would justify the excessive costs of the parents' requested IEE. Despite this, the court observed, the district contacted the pathologist to negotiate the cost of the IEE and, when it was unable to obtain an appropriate rate, agreed to exceed its cost criteria to pay for an IEE conducted by another pathologist chosen by the parents. The court dismissed the parents' complaint, concluding that the district satisfied its obligations under the IDEA.

14. ***Roe ex rel. Roe v. Doe, 116 LRP 51370 (W.D. Okla. 12/06/16).*** The parents of a kindergarten child with autism filed suit under the IDEA and Section 504 alleging that their child had been sexually assaulted by two school staff members. However, a federal judge dismissed the case for failure to exhaust administrative remedies since the parents did not request a due process hearing prior to filing their case in federal court. The court explained that parents are required to exhaust their administrative remedies under the IDEA before they may file education-related claims in federal

court. Exhaustion is also required when the parent brings claims under other federal civil rights statutes and the relief sought is available under the IDEA, the court added. The parents argued that the exhaustion requirement did not apply under the circumstances because they "only alleged isolated instances of potential physical abuse by district personnel," but the court disagreed. It pointed out that the parents did "not solely allege physical injuries." Rather, the court observed, the parent's complaint also contended that the alleged abuse by school staff created a hostile educational environment that denied their child FAPE. This alleged injury could be redressed through an IDEA due process hearing, the court noted, and granted the district's motion to dismiss the parents' complaint.

15. ***Forest Grove Sch. Dist. v. Student, 116 LRP 50688 (9th Cir. 12/05/16).*** The appellate court held that the choice of educational methodology is within the discretion of public school officials unless the parents of a student with disabilities can prove that the student is not receiving "meaningful" benefit from the program provided. Proof that a high school student with autism and ADHD learned most effectively in English and writing with constant repetition and immediate checks for comprehension did not render the school district liable for implementing these strategies in every class. The federal judge observed that the district had no obligation to maximize the student's potential. As such, the fact that the student made greater progress in her English class did not require all of her teachers to adopt the English teacher's practice of repeating small pieces of information and immediately following up with analysis and application. The court further noted that using the parents' preferred technique in all of the student's general education classes would slow the pace of instruction and substantially reduce the amount of material that the class could cover in one semester. "This would discourage the district and other schools from 'mainstreaming' students, which the IDEA encourages," Magistrate Judge Acosta wrote in his June 2014 ruling. The magistrate judge pointed out that requiring teachers to use the best instructional method for each student with a disability would be unworkable in special education classes as well, resulting in a significant amount of idle time while the teacher provided one-on-one instruction to each student.

16. ***R.V. ex rel. S.V-W. v. Rivera, 116 LRP 50535 (E.D. Pa. 12/05/16).*** The parent of a student with disabilities could sue the State Department of Education in an IDEA action because there was no LEA directly responsible for the denial of FAPE to the student. The student had attended a state charter school until it closed its doors in December of 2014. Because the charter school had closed, the judge explained, the SEA was responsible for ensuring that the student received FAPE. "Where, as here, there is no other educational agency to which a parent may look to vindicate her child's rights

to a FAPE because the LEA in which the alleged violations occurred has since ceased to exist, the SEA's obligations as the backstop to the state's IDEA obligations kick in," the court wrote. Furthermore, the judge pointed out that the SEA did not fulfill its statutory obligation to provide IDEA services when the charter school became unable to do so. To the contrary, the SEA argued that it had no duty to provide compensatory education for the charter school's child find failure unless and until the IHO ordered such relief. Because the IHO's "advisory order" of compensatory education at 116 LRP 16332 materially changed the parties' legal relationship, the court held that the parent was a prevailing party entitled to seek reasonable attorney's fees.

17. ***Smith ex rel. G.C. v. Meeks, 69 IDELR 29 (N.D. Ill. 12/05/16).*** Court orders showing that the biological mother of a student with ADHD had weekend visitation with her son as opposed to legal custody prevented the mother from suing an Illinois district that found the student ineligible for special education. The District Court held that the mother did not have the right to bring such claims on the student's behalf. Under Illinois law, the court observed, the custodial parent has the right to make educational decisions unless a court order says otherwise. The mother argued that she and the student's father had joint custody. The District Court disagreed. U.S. District Judge Jorge L. Alonso pointed out that a state court order from 2009 gave the father temporary custody of the student pending further proceedings and struck the mother's motion for joint custody. Another order from 2013 showed that the mother had moved to change her days of visitation. Judge Alonso explained that the orders, read together, weakened the mother's argument. "Although the custody orders could have been more precise about the parents' respective rights, it is at least clear, in light of all the state-court custody orders and their statutory backdrop, that [the mother] merely had visitation rights," the judge wrote. Because the court orders demonstrated that the father had sole decision-making authority, the IHO did not err in dismissing the mother's due process complaint about the student's IDEA eligibility. The District Court recognized that the mother had a right to access the student's educational records despite her status as a noncustodial parent. However, given that a second IHO had ordered the district to provide such access, the court held that the mother had already been granted the relief to which she was entitled.

18. ***Hicks v. Benton County Bd. of Educ., 69 IDELR 32 (W.D. Tenn. 12/01/16).*** A principal's statements that he might have kept a special education aide on staff if she hadn't informed parents of deficiencies in their children's services bolstered the aide's claim that a Tennessee district declined to renew her employment because of her advocacy. Holding that the aide pleaded viable claims for retaliation under Section 504 and the

ADA, the District Court denied the district's motion for judgment. To establish unlawful retaliation, the aide needed to show that: 1) she engaged in a protected activity; 2) the district knew about that activity; 3) the district took adverse action; and 4) the adverse action was based on the protected activity. Chief U.S. District Judge J. Daniel Breen found that the aide satisfied every element. Not only could the aide's conversations with parents about implementation failures qualify as advocacy, the judge observed, but the district's decision not to renew her employment for the following school year could be an adverse action. "A reasonable jury could conclude that the specter of not being rehired would dissuade a reasonable person from engaging in the protected activity at issue in this case," Judge Breen wrote. The judge noted that the district conceded its knowledge of the aide's discussions with parents. Furthermore, the judge pointed out that the principal's deposition testimony, which included statements about the aide "stirring up" trouble, could support a finding that the district declined to renew her employment because of her advocacy.

19. ***J.M. by Mandeville v. Dep't of Educ., State of Hawaii, 69 IDELR 31 (D. Hawaii 12/01/16).*** Despite the development of a detailed crisis plan for an eleven-year-old boy with autism who had suffered severe bullying by classmates, the parents withdrew the boy and sued for money damages. The federal court affirmed a due process decision finding that the boy's IEP was reasonably calculated to provide him a FAPE. The federal judge recognized that the student had suffered "horrifying and inexcusable" bullying during his enrollment in public school. However, the judge cautioned that schools cannot promise parents that students will never experience bullying. "Although, ideally, no student would ever be subjected to bullying at public school, that type of guarantee is not required to provide a FAPE," the judge wrote. The court also found that the IEP team took adequate steps to address the possibility of peer bullying. Not only did the IEP require the constant presence of a one-to-one aide, but it also included a crisis plan that addressed any negative interactions with peers, included a specific definition of "bullying," both real and perceived, and required LEA staff to remove the student from the situation and bring him to support personnel for immediate assessment and assistance. While the crisis plan did not guarantee protection from bullying, it was reasonably calculated to ensure that the student would receive educational benefits in the public school system.