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## California Year in Review: 2013 Special Education ALJ Decisions

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# California Year in Review: 2013 Special Education ALJ Decisions

By Ruth Colker\*

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In 2012, I published an article in the *Journal of the National Association of Administrative Law Judiciary* that discussed 100 administrative law judge (ALJ) decisions that were decided under the Individuals with Disabilities Education Act<sup>1</sup> (IDEA) from May 3, 2010, to June 20, 2011.<sup>2</sup> Recently, I read seventy-four additional cases decided by California special education ALJs in the period from January 1, 2013, to December 11, 2013, in preparation for a speaking engagement. The purpose of this article is to discuss those seventy-four cases, both quantitatively and qualitatively, offering some comparisons to my previous analysis.<sup>3</sup>

In my quantitative overview in Part I, I will examine four issues: (1) which parties were most likely to prevail, (2) the success rate when parents do not hire an attorney, (3) the success rate when the school district brings the due process claim (rather than the parent), and (4) the success rate before various ALJs.<sup>4</sup>

In Part II, my qualitative analysis will focus on the following themes: (1) stingy relief even when students prevail, (2) unsuccessful litigation following the termination of a consent decree or court order, (3) negative attitudes towards many of the mothers of the

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<sup>1</sup> 20 U.S.C. §§ 1400–1482 (2012). Under the IDEA, a party can file a complaint with the State educational agency to resolve a dispute under the IDEA. *Id.* § 1415. If the dispute cannot be resolved voluntarily through a resolution session or mediation, then a state level ALJ resolves it. *See id.* (procedural safeguards).

<sup>2</sup> Ruth Colker, *California Hearing Officer Decisions*, 32 J. NAT'L ASS'N ADMIN. L. JUDICIARY 461 (2012).

<sup>3</sup> My analysis does not include about a dozen cases decided in 2013 that were not posted on the state's website on December 20, 2013—the last date that I downloaded cases. My analysis, however, does include every case available on the state's website as of December 20, 2013. *See* OFFICE OF ADMINISTRATIVE HEARINGS, SPECIAL EDUCATION DECISIONS AND ORDERS, <http://www.dgs.ca.gov/oah/SpecialEducation/searchDO.aspx> (last visited Mar. 10, 2014).

<sup>4</sup> *See infra* Part I.

students, (4) school district preference for more restrictive placements, (5) the consequences of the lack of representation of students, and (6) cases involving requests for independent educational evaluations. I will end Part II with discussion of one rather odd case where the parent was also the classroom teacher.<sup>5</sup> Students who received no representation often appeared to have their educational opportunities treated quite adversely, suggesting that they may have been deprived of basic constitutional rights without adequate due process.<sup>6</sup> One positive development I saw, in contrast to my previous review of California decisions, was that parents were relatively successful in obtaining Independent Educational Evaluations (IEE) at public expense.

### I. BROAD OVERVIEW

The first question I pursued was the overall success rate of various parties in these IDEA cases. Table 1 reflects that general data for all seventy-four cases.

*Table 1: Outcome*

	Frequency	Percent
District Prevailed	39	52.7
Student Prevailed	11	14.9
Both Prevailed	24	32.4
Total	74	100.0

Whether students are prevailing frequently under the IDEA depends, in part, on your definition of “prevailing.” In 11 of 74 cases (14.9%), the student prevailed on all issues raised in the complaint. In 39 of 74 cases (52.7%), the district prevailed on all issues. In 24 of 74 cases (32.4%) both sides attained a victory on at least one issue.

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<sup>5</sup> See *infra* Part II.

<sup>6</sup> One of the worst cases was OAH Case No. 2013010704. See Lucia Mar Unified Sch. Dist. v. Parent *ex rel.* Student, No. 2013010704 (OAH Cal. Mar. 19, 2013) (Theresa Ravandi, ALJ), *available at* [http://www.documents.dgs.ca.gov/oah/seho\\_decisions/2013010704.pdf](http://www.documents.dgs.ca.gov/oah/seho_decisions/2013010704.pdf) (last visited Feb. 16, 2014). In that case, the school district succeeded, over the parent’s objection, in arguing it could use an evaluator who had previously restrained the student. See *also* Part II.E.

Because these cases are brought anonymously, it is not possible to survey the students and parents to determine if they consider the student as victorious in the cases with mixed results. As I will discuss in Part II, the relief obtained by the student in many of these cases is quite modest, leading one to suspect that the students were probably not satisfied with the outcome.<sup>7</sup>

The win rate for students during the period from January 1, 2013, to December 11, 2013, appears to be higher than it was from May 3, 2010, to June 20, 2011, the period of my previous investigation.<sup>8</sup> In my previous article, I reported that students prevailed, at least in part, in 35 of 101 (34.6%) of the cases in the database.<sup>9</sup> During this time period, students prevailed, at least in part, in 35 of 74 of the cases (47.3%).<sup>10</sup> But as I will discuss below, the victories on behalf of the student were often quite partial, so it is not clear that parents and students would view this change over time as meaningful.

Not surprisingly, the likelihood of the student prevailing was much higher if a lawyer represented the student.<sup>11</sup> Table 2 reports those results:

*Table 2: Pro Se Representation by Outcome Cross-tabulation*

			Outcome			Total
			District Prevailed	Student Prevailed	Both Prevailed	
<i>Pro Se</i>	No	Count % within <i>Pro Se</i>	19 39.6%	8 16.7%	21 43.8%	48 100.0%
	Yes	Count % within <i>Pro Se</i>	20 76.9%	3 11.5%	3 11.5%	26 100.0%
Total		Count % within <i>Pro Se</i>	39 52.7%	11 14.9%	24 32.4%	74 100.0%

<sup>7</sup> See *infra* Part II.

<sup>8</sup> See Colker, *supra* note 2.

<sup>9</sup> *Id.* at 463.

<sup>10</sup> See *supra* Table 1.

<sup>11</sup> See *infra* Table 2.

The school district prevailed on all issues in 20 of 26 cases (76.9%) in which the student did not have a lawyer, but only prevailed on all issues in 19 of 48 cases (39.6%) in which the student did have a lawyer.<sup>12</sup> In three of the cases, no one represented the student at all.<sup>13</sup> I will discuss these cases further in the qualitative section, but they are troubling examples of possible deprivation of constitutional rights without due process of law.<sup>14</sup>

An unexpected outcome, however, was that the gender of the parent who represented the child seemed to influence the likelihood of the district prevailing on all issues.<sup>15</sup> Table 3 reflects those results:

*Table 3: Outcome by Gender of Plaintiff's Parent*

<b>Party Representing Student</b>	<b>Student prevailed</b>	<b>District prevailed</b>	<b>Both Prevalled</b>	<b>Total</b>
No appearance	0	3 (100%)	0	3
Mother	1 (9.1 %)	10 (90.9%)	0	11
Grandmother	0	1 (100 %)	0	1
Father	2 (22%)	5 (55.6%)	2 (22.2%)	9
Both parents	0	1 (50%)	1 (50%)	2

These small numbers are certainly not conclusive but, when coupled with the qualitative information that will be presented in Part II, they do suggest a significant bias against female caregivers during the due process hearings.<sup>16</sup> The district fully prevailed on all issues when the mother (10 of 11 cases) or grandmother (1 of 1 case) represented the student.<sup>17</sup> By contrast, the district prevailed in 5 of 9 cases (56%) when the father represented the student.<sup>18</sup> In two cases, both parents were present at the hearing, and the ALJ simply noted that the “parents” represented the student, so I could not tell whether one parent was taking the lead on the representation.<sup>19</sup>

<sup>12</sup> *See id.*

<sup>13</sup> *Id.*

<sup>14</sup> *See infra* Part II.

<sup>15</sup> *See infra* Table 3.

<sup>16</sup> *See infra* Part II.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

Another issue that I investigated is whether the burden of proof impacts the outcome of the cases. Of the seventy-four cases in the database, fifteen cases (20%) were brought by the school district, thirteen cases (18%) were brought by both parties, and forty-six cases (62%) were brought by the student. The parents had the burden of proof in the forty-six cases in which they filed for due process; the school district had the burden of proof in the fifteen cases in which they filed for due process.<sup>20</sup> The remaining thirteen cases involve some issues in which the school district had the burden of proof and some in which the parent had the burden of proof.

Table 4 reflects the outcomes with respect to which party filed for due process.

*Table 4: District Filed for Due Process by Outcome Cross-tabulation*

			Outcome			Total
			District Prevailed	Student Prevailed	Both Prevailed	
District Filed for Due Process	No	Count	22	7	17	46
		% within District Filed	47.8%	15.2%	37.0%	100.0%
	Yes	Count	12	3	0	15
		% within District Filed	80.0%	20.0%	0.0%	100.0%
	Both	Count	5	1	7	13
		% within District Filed	38.5%	7.7%	53.8%	100.0%
Total		Count	39	11	24	74
		% within District Filed	52.7%	14.9%	32.4%	100.0%

Of the fifteen cases in which the school district filed for due process, the school district was successful on all issues in 12 of 15 (80%) cases.<sup>21</sup> Of the forty-six cases in which the parent filed for due process, the school district was successful in 22 of 46 (47.8%) cases.<sup>22</sup> Thus, the school district was more successful when it *did*

<sup>20</sup> Under *Schaffer v. Weast*, 546 U.S. 49, 62 (2005), the party bringing the action has the burden of proof.

<sup>21</sup> See *supra* Table 4.

<sup>22</sup> *Id.*

have the burden of proof (i.e., it filed for due process). This outcome is surprising because it should be more difficult for the district to prevail when it has the burden of proof than when the student has the burden of proof.

This outcome may be explained by the kinds of cases involved in the fifteen cases in which the school district filed for due process and the student did not, as well as by the lack of representation by counsel for these students. In eight of the cases, the parent refused to consent to an assessment, and the student was not represented by a lawyer.<sup>23</sup> Because school districts have a “child find” obligation,<sup>24</sup> it is not surprising that they were able to persuade an ALJ to allow them to evaluate the student, especially when the parents had little idea of what legal arguments could be used to successfully challenge such a school-district request.

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<sup>23</sup> See *Torrance Unified Sch. Dist. v. Parent ex rel. Student*, No. 2013030530 (OAH Cal. Sept. 6, 2013) (June R. Lehrman, ALJ), available at [http://www.documents.dgs.ca.gov/oah/seho\\_decisions/2013030530.pdf](http://www.documents.dgs.ca.gov/oah/seho_decisions/2013030530.pdf) (last visited Feb. 25, 2014); *Fresno Unified Sch. Dist v. Parent ex rel. Student*, No. 2012110106 (OAH Cal. May 22, 2013) (Charles Marsen, ALJ), available at [http://www.documents.dgs.ca.gov/oah/seho\\_decisions/2012110106.pdf](http://www.documents.dgs.ca.gov/oah/seho_decisions/2012110106.pdf) (last visited Feb. 25, 2014); *Anaheim City Sch. Dist. v. Parent ex rel. Student*, No. 2013040142 (OAH Cal. May 21, 2013) (Judith L. Pasewark, ALJ), available at [http://www.documents.dgs.ca.gov/oah/seho\\_decisions/2013040142.pdf](http://www.documents.dgs.ca.gov/oah/seho_decisions/2013040142.pdf) (last visited Feb. 25, 2014); *Torrance Unified Sch. Dist. v. Parent ex rel. Student*, No. 2013010162 (OAH Cal. Feb. 7, 2013) (Carla L. Garrett, ALJ), available at [http://www.documents.dgs.ca.gov/oah/seho\\_decisions/2013010162.pdf](http://www.documents.dgs.ca.gov/oah/seho_decisions/2013010162.pdf) (last visited Feb. 25, 2014); *Saddleback Valley Unified Sch. Dist. v. Parents ex rel. Student*, No. 2012110542 (OAH Cal. Feb. 27, 2013) (Robert G. Martin, ALJ), available at [http://www.documents.dgs.ca.gov/oah/seho\\_decisions/2012110542.pdf](http://www.documents.dgs.ca.gov/oah/seho_decisions/2012110542.pdf) (last visited Feb. 25, 2014).

See also *Cucamonga Sch. Dist. v. Parent ex rel. Student*, No. 2012100561 (OAH Cal. Jan. 25, 2013) (Carla L. Garrett, ALJ), available at [http://www.documents.dgs.ca.gov/oah/seho\\_decisions/2012100561%20\(Amended\).pdf](http://www.documents.dgs.ca.gov/oah/seho_decisions/2012100561%20(Amended).pdf) (last visited Mar. 20, 2014); *Santa Clara Unified Sch. Dist. v. Parent ex rel. Student*, No. 2012120574 (OAH Cal. Mar. 14, 2013) (Theresa Ravandi, ALJ), available at [http://www.documents.dgs.ca.gov/oah/seho\\_decisions/2012120574.pdf](http://www.documents.dgs.ca.gov/oah/seho_decisions/2012120574.pdf) (last visited Mar. 20, 2014); *Lucia Mar Unified Sch. Dist. v. Parent ex rel. Student*, No. 201301074 (OAH Cal. Apr. 10, 2013) (Theresa Ravandi, ALJ), available at [http://www.documents.dgs.ca.gov/oah/seho\\_decisions/2013010704.pdf](http://www.documents.dgs.ca.gov/oah/seho_decisions/2013010704.pdf) (last visited Mar. 20, 2014).

<sup>24</sup> See 20 U.S.C. §§ 1401(3), 1412(a) (2012); 34 C.F.R. § 300.111 (2014).

In three cases in which the school district prevailed, the school district was seeking to move the student to a more restrictive environment over parental objection.<sup>25</sup> In two of these three cases, the student did not have a lawyer.<sup>26</sup> In OAH Case No. 2013080703, the student had a lawyer who had reached a previous settlement with the school district, but the lawyer was unable to resist the school district's desire to move the student to a more restrictive placement.<sup>27</sup>

The results in those cases are surprising given the IDEA's preference that students be educated in the "least restrictive environment."<sup>28</sup> This IDEA rule derived from early special education cases in which judges concluded that special education tracking was a mechanism to maintain de facto segregation after racial de jure segregation was ended.<sup>29</sup> Arguably, the least restrictive environment stems from the legal principles developed in *Brown v. Board of Education*,<sup>30</sup> and is constitutionally required. As I will

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<sup>25</sup> See *Irvine Unified Sch. Dist. v. Parent(s) ex rel. Student*, No. 2013080703 (OAH Cal. Oct. 18, 2013) (Sabrina Kong, ALJ), available at [http://www.documents.dgs.ca.gov/oah/seho\\_decisions/2013080703.pdf](http://www.documents.dgs.ca.gov/oah/seho_decisions/2013080703.pdf) (last visited Feb. 16, 2014); *San Dieguito Union High Sch. Dist. v. Parent ex rel. Student*, No. 2013080189 (OAH Cal. Oct. 11, 2013) (Judith Pasewark, ALJ), available at [http://www.documents.dgs.ca.gov/oah/seho\\_decisions/2013080189.pdf](http://www.documents.dgs.ca.gov/oah/seho_decisions/2013080189.pdf) (last visited Feb. 25, 2014); *Fallbrook Union Elementary Sch. Dist. v. Parent ex rel. Student*, No. 201306104 (OAH Cal. Aug. 27, 2013) (Darrell Lepkowsky, ALJ), available at [http://www.documents.dgs.ca.gov/oah/seho\\_decisions/201306104.pdf](http://www.documents.dgs.ca.gov/oah/seho_decisions/201306104.pdf) (last visited Feb. 13, 2014).

<sup>26</sup> In *San Dieguito Union High School District*, No. 2013080189, there was no appearance for the student. In *Fallbrook Union Elementary School District*, No. 201306104, the student did not have a lawyer.

<sup>27</sup> *Irvine Unified Sch. Dist.*, No. 2013080703, at 24–25; see also *Santa Rita Union Elementary Sch. Dist. v. Parents ex rel. Student*, No. 2013010390 (OAH Cal. May 22, 2013) (Peter Paul Castillo, ALJ), available at [http://www.documents.dgs.ca.gov/oah/seho\\_decisions/2013010390.pdf](http://www.documents.dgs.ca.gov/oah/seho_decisions/2013010390.pdf) (last visited Feb. 25, 2014). Here, the district wanted to exit a student from special education services. *Santa Rita Union Elementary Sch. Dist.*, No. 2013010390, at 2. The student's parents represented her, and the district prevailed. *Id.* at 1, 12. This case does not raise problems of a student being educated in a restrictive environment.

<sup>28</sup> 20 U.S.C. § 1412(a)(5) (2012) (requiring that students be educated with children who are not disabled "[t]o the maximum extent appropriate").

<sup>29</sup> See *Hobson v. Hansen*, 269 F. Supp. 401, 513 (D.D.C. 1967). For further discussion, see RUTH COLKER, *DISABLED EDUCATION: A CRITICAL ANALYSIS OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT 17–43* (New York University Press ed., 2013).

<sup>30</sup> 347 U.S. 483 (1954).

discuss in Part II, it is problematic that students are placed in a more restrictive environment without legal representation.

Not one of the cases in which the district, but not the parent, filed for due process involved a request by the parent for an IEE. When a parent seeks an IEE at public expense, a school district must file for due process to avoid paying for the evaluation.<sup>31</sup> Those cases are ones that should be in the category of “district filed for due process.” But, in all of the IEE cases, the parent *also* raised other issues upon which the parent had the burden of proof. The cases would then appear in the “both filed” for due process category. The school district only prevailed in 5 of 13 cases (38.5%) in which both parties filed for due process because the parent often obtained an IEE at public expense in those cases. Students were represented by a lawyer in nearly all of these cases.

These results are more favorable to the student and parent than I found in my previous investigation of California cases. On March 20, 2012, a California district court reversed an ALJ decision denying an IEE to the parents of a student.<sup>32</sup> That district court decision may have caused California ALJs to be more aware of the right of a parent to an IEE absent the school district’s ability to demonstrate that its evaluation was appropriate.

Finally, I looked at whether certain ALJs were more likely to rule on behalf of students than others. This issue presented a small numbers problem because most ALJs had fewer than three cases during the period under investigation. ALJ Peter Paul Castillo had the most cases (eight) and he had a comparatively low rate of ruling entirely for the school district (2 of 8), but it is hard to conclude much from such small numbers. I also analyzed the data by name of school district and name of lawyer, but the numbers for each item were too small to be statistically significant.

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<sup>31</sup> See 34 C.F.R. § 300.502(b)(2)(i) (2014) (providing that a school district may refuse to pay for the parent’s independent educational evaluation if it files a due process complaint and demonstrates that its evaluation was “appropriate”).

<sup>32</sup> See *K.S.N. v. L.A. Unified Sch. Dist.*, No. CV 11-3270 CBM (MANx) (Cal. Mar. 20, 2012). For further discussion of that case, see Colker, *supra* note 2, at 470–81.

## II. QUALITATIVE ANALYSIS

My qualitative analysis of the cases reinforces the statistical trends I report above. These trends are also consistent with outcomes I have previously reported in California and elsewhere except, as mentioned above, that parents are now likely to prevail in cases involving requests for publicly funded IEEs.<sup>33</sup>

### A. *Stingy Relief*

In many of the cases, the student prevailed on some issues, but the relief was quite limited. Four examples typify this problem.

In OAH Case No. 2012080366, a due process hearing was brought on behalf of a five-year-old girl with Down syndrome.<sup>34</sup> The student alleged that the individualized education program (IEP), which was developed without any input from a general education teacher, was significantly deficient.<sup>35</sup> The ALJ found that the student was denied a free and appropriate public education (FAPE) for forty-six school days, but was only ordered forty-six *hours* of compensatory education on social skills training or extracurricular activities.<sup>36</sup> All other requests for relief were denied, including requests for compensatory occupational therapy services and a full-inclusion classroom.<sup>37</sup> This student had a lawyer, and her mother attended the hearing.<sup>38</sup>

In OAH Case No. 2012031076, the mother argued that the school district should have initiated an assessment much sooner, especially after her son's suicide attempt and resulting psychiatric hospitalization.<sup>39</sup> But the remedy for this serious violation was quite modest:

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<sup>33</sup> See COLKER, *supra* note 29, at 137–216.

<sup>34</sup> Parents *ex rel.* Student v. Hollister Sch. Dist., No. 2012080366 (OAH Cal. Jan. 16, 2013) (Troy K. Taira, ALJ), *available at* <http://heekim.com/decisions/2012080366.pdf> (last visited Feb. 25, 2014).

<sup>35</sup> *Id.* at 3.

<sup>36</sup> *Id.* at 17.

<sup>37</sup> *Id.* at 2, 18.

<sup>38</sup> *Id.* at 1.

<sup>39</sup> Parents *ex rel.* Student v. Anaheim Union High Sch. Dist., No. 2012031076, at 4 (OAH Cal. May 9, 2012) (Darrell Lepkowsky, ALJ), *available at*

For its failure to assess Student and find him eligible six months before it did so find, the District will be ordered to provide Student with six hours of counseling services in addition to those hours already provided to Student under his IEP or under any other auspices. The District will also be ordered to reimburse Student's parents for the costs of Dr. Passaro's assessment.<sup>40</sup>

Six hours of counseling as a remedy for a delayed IEP was a very limited victory.

In OAH Case No. 2013010475, the ALJ ordered very modest relief for flagrant violations of the IDEA.<sup>41</sup> The student was a fifteen-year-old boy with autism who resided in a group home.<sup>42</sup> His placement was clearly inappropriate; the classroom teacher testified on behalf of the student.<sup>43</sup> Although the student was provided with an IEE and a functional behavioral assessment (FBA), he was not offered any compensatory education because there was insufficient information to provide the basis for an award.<sup>44</sup> Given the evidence that the student regressed,<sup>45</sup> there should have been a presumption of *some* compensatory education.

In OAH Case No. 2013050219, the ALJ ordered very modest relief for a nineteen-year-old man with autism.<sup>46</sup> The parents did not want the student to graduate from high school so that he could

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[http://www.documents.dgs.ca.gov/oah/seho\\_decisions/2012031076.pdf](http://www.documents.dgs.ca.gov/oah/seho_decisions/2012031076.pdf) (last visited Feb. 25, 2014).

<sup>40</sup> *Id.* at 40.

<sup>41</sup> Parent *ex rel.* Student v. Compton Unified Sch. Dist., No. 2013010475 (OAH Cal. July 8, 2013) (Elsa H. Jones, ALJ), *available at* [http://www.documents.dgs.ca.gov/oah/seho\\_decisions/2013010475.pdf](http://www.documents.dgs.ca.gov/oah/seho_decisions/2013010475.pdf) (last visited Feb. 6, 2014).

<sup>42</sup> *Id.* at 4.

<sup>43</sup> *Id.* at 16.

<sup>44</sup> *Id.* at 63.

<sup>45</sup> *See id.* at 29, 53–54, 64.

<sup>46</sup> Parent *ex rel.* Student v. L.A. Unified Sch. Dist., No. 2013050219 (OAH Cal. Aug. 16, 2013) (Alexa Hohensee, ALJ), *available at* [http://www.documents.dgs.ca.gov/oah/seho\\_decisions/2013050219.pdf](http://www.documents.dgs.ca.gov/oah/seho_decisions/2013050219.pdf) (last visited Feb. 25, 2014).

receive services until his twenty-second birthday.<sup>47</sup> The school placed the student on the diploma track and said he had a 3.2 GPA and a class rank of 186 out of 648 students even though he appeared to have very low academic functioning.<sup>48</sup> The ALJ found: “Father’s speculation that Student’s passing grades were inflated, or a mere pretense, is insufficient to meet his burden of establishing by a preponderance of the evidence that Student could not perform the course work for which he earned credit.”<sup>49</sup> Thus, the ALJ only ordered relief on transition services and provided no additional or compensatory education.<sup>50</sup>

These four examples reflect how difficult it is to assess who “won” when the ALJ renders a mixed result in which both the student and the school district prevailed on various issues.

*B. Unsuccessful Relief Following Culmination of a Consent Decree or Court Order*

One pattern that I found in my review of California cases in 2013 that I had not seen previously, was a student bringing an unsuccessful due process action after a prior settlement agreement or court order had ended. In every instance in which the ALJ mentioned the existence of a prior settlement or court order, the ALJ then ruled entirely for the school district in the new due process case. Seven cases fit this pattern.

In OAH Case No. 2012090216, the student was a nine-year-old boy with autism who had reached a successful outcome with the

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<sup>47</sup> *Id.* at 2.

<sup>48</sup> *Id.* at 16.

<sup>49</sup> *Id.* at 37.

<sup>50</sup> *Id.* at 38. This decision is in contrast to *Parent ex rel. Student v. Los Angeles Unified School District*, where the father successfully argued on behalf of his son that he should not be graduated from high school. No. 2013050272 (OAH Cal. Sep. 26, 2013) (Paul H. Kamoroff, ALJ), available at [http://www.documents.dgs.ca.gov/oah/seho\\_decisions/2013050272%20CORRECT ED.pdf](http://www.documents.dgs.ca.gov/oah/seho_decisions/2013050272%20CORRECT%20ED.pdf) (last visited Feb. 25, 2014). He was able to demonstrate successfully (with the cooperation of various teachers) that the curriculum had been modified dramatically to allow him to receive A, B, and C grades. *Id.* at 2, 15, 29. The ALJ ordered public education until the student’s twenty-second birthday, as well as significant compensatory education. *Id.* at 43.

district in a previous due process action.<sup>51</sup> In this case, however, the student unsuccessfully argued that the district failed to implement his IEP and provide FAPE, as ordered in the prior litigation.<sup>52</sup>

In OAH Case No. 2012060009, there had been a previous settlement resulting in a forty-hour per week applied behavioral therapy program for a seven-year-old boy with autism.<sup>53</sup> The student had been suspended following a biting incident at school.<sup>54</sup> The parents wanted their son to remain in a mainstream class rather than be educated in a special day class for students with disabilities.<sup>55</sup> Although the evidence demonstrated that the school district failed to follow the procedures for students with disabilities and threatened to move the student out of the mainstream classroom,<sup>56</sup> the ALJ found that these procedural violations did not result in substantive harm.<sup>57</sup> The facts in this case suggest a school district that is very reluctantly complying with a settlement agreement while seeking to move the student out of the mainstream educational setting.

In OAH Case No. 2012100025, the student was a sixteen-year-old boy.<sup>58</sup> His parents had reached a settlement with the school district to send him to Fusion, a private school that offers one-to-one instruction, after he was expelled from school for setting off an explosive device during the school day and on a district high school campus.<sup>59</sup> Although all parties agreed that the student had an Other

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<sup>51</sup> Parent *ex rel.* Student v. Santa Barbara Unified Sch. Dist., No. 2012090216 (OAH Cal. Feb. 5, 2013) (June R. Lehrman, ALJ), *available at* [http://www.documents.dgs.ca.gov/oah/seho\\_decisions/2012090216.pdf](http://www.documents.dgs.ca.gov/oah/seho_decisions/2012090216.pdf) (last visited Feb. 25, 2014).

<sup>52</sup> *Id.* at 8.

<sup>53</sup> Bellflower Unified Sch. Dist. v. Parent *ex rel.* Student, Nos. 2012060009 & 2012060628, at 4 (OAH Cal. Mar. 13, 2013) (Alexa J. Hohensee, ALJ), *available at* [http://www.documents.dgs.ca.gov/oah/seho\\_decisions/2012060009%202012060628.pdf](http://www.documents.dgs.ca.gov/oah/seho_decisions/2012060009%202012060628.pdf) (last visited Feb. 25, 2014).

<sup>54</sup> *Id.* at 7.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 24–26.

<sup>57</sup> *Id.* at 35.

<sup>58</sup> *See* Parent *ex rel.* Student v. Acalanes Union High Sch. Dist., No. 2012100025 (OAH Cal. May 2, 2013) (Rebecca Freie, ALJ), *available at* [http://www.documents.dgs.ca.gov/oah/seho\\_decisions/2012100025.pdf](http://www.documents.dgs.ca.gov/oah/seho_decisions/2012100025.pdf) (last visited Feb. 25, 2014).

<sup>59</sup> *Id.* at 5.

Health Impairment, the school district refused to classify him as disabled under IDEA.<sup>60</sup> It argued that he did not need specialized instruction.<sup>61</sup> The ALJ ruled in favor of the school district, finding the student was not eligible for an IEP.<sup>62</sup> She ruled that “Student consciously made choices to not complete assignments or take advantage of opportunities to make up missing work.”<sup>63</sup> The parents were therefore not reimbursed for their expenses in continuing to send their son to the private school.<sup>64</sup> The conclusion that the student need not even be classified as disabled seems surprising. It is difficult to know on the basis of the facts presented whether the student needs to attend a private school, but one would expect that the school district previously consented to pay for the private placement out of an understanding that the student had a disability.

In OAH Case No. 2012080373, the student was a twelve-year-old girl with autism who had previously brought a successful due process action against the school district.<sup>65</sup> The ALJ went out of her way to read *Board of Education v. Rowley* very narrowly,<sup>66</sup> to conclude the IEP was adequate.<sup>67</sup> She said, “An IEP meets the Rowley standard and is substantively adequate if the plan is *likely* to produce progress, not regression, and is *likely* to produce more than trivial advancement.”<sup>68</sup> The ALJ focused on whether progress was “likely” because the record indicated little or no progress under the educational program.<sup>69</sup> The term “likely,” however, is not even

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<sup>60</sup> *Id.* at 11.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 25.

<sup>63</sup> *Id.* at 18.

<sup>64</sup> *Id.* at 25.

<sup>65</sup> See Parent *ex rel.* Student v. Lake Elsinore Unified Sch. Dist., No. 2012080373 (OAH Cal. May 22, 2013) (Judith L. Pasewark, ALJ), available at [http://www.documents.dgs.ca.gov/oah/seho\\_decisions/2012080373.pdf](http://www.documents.dgs.ca.gov/oah/seho_decisions/2012080373.pdf) (last visited Feb. 25, 2014).

<sup>66</sup> 458 U.S. 176, 203–04 (1982) (requiring school districts to provide “personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction . . . [and] should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade”). For further discussion of the *Rowley* standard, see Colker, *supra* note 2, at 487–94.

<sup>67</sup> See *Lake Elsinore Unified Sch. Dist.*, No. 2012080373, at 38.

<sup>68</sup> *Id.* at 52.

<sup>69</sup> *Id.*

found in the Supreme Court's recitation of the appropriate standard in *Rowley*.<sup>70</sup> Instead, the educational program is supposed to "be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade."<sup>71</sup> The ALJ appears to have created an inappropriately easy threshold for the school district to meet in order to conclude that the IEP was appropriate. This case is also discussed in the cases involving distrust of the mother.<sup>72</sup> Her testimony is largely discounted, although she offered graphic concerns of inappropriate behavior by her daughter.<sup>73</sup> The ALJ seems to have been inappropriately skeptical of the strength of the student's case.

In OAH Case No. 2013080189, the student was a seventeen-year-old male who was autistic.<sup>74</sup> He had brought a previous due process action and had received two years of extended school year services and a private placement.<sup>75</sup> But the school district had put a provision in the settlement agreement stating that the settlement agreement did not constitute his "stay put."<sup>76</sup> The student brought a due process action to continue the settlement placement and lost.<sup>77</sup> The student was initially represented by his mother, who spoke Russian.<sup>78</sup> His mother left the hearing after the testimony of the first witness, so the student was essentially unrepresented.<sup>79</sup>

Further, in OAH Case No. 2013080697,<sup>80</sup> the student's father brought a *pro se* case to challenge the educational placement

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<sup>70</sup> *Rowley*, 458 U.S. at 218.

<sup>71</sup> *Id.* at 204.

<sup>72</sup> See, e.g., *Lake Elsinore Unified Sch. Dist.*, No. 2012080373, at 52.

<sup>73</sup> *Id.*

<sup>74</sup> *San Dieguito Union High Sch. Dist. v. Parent ex rel. Student*, No. 2013080189 (OAH Cal. Oct. 11, 2013) (Judith Pasewark, ALJ), available at [http://www.documents.dgs.ca.gov/oah/seho\\_decisions/2013080189.pdf](http://www.documents.dgs.ca.gov/oah/seho_decisions/2013080189.pdf) (last visited Feb. 25, 2014).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* For the "stay put" rule, see *infra* note 91 and accompanying text.

<sup>77</sup> *Id.* at 27.

<sup>78</sup> *Id.* at 1.

<sup>79</sup> *Id.*

<sup>80</sup> See *Parent ex rel. Student v. Cupertino Union Sch. Dist.*, No. 2013080697 (OAH Cal. Nov. 2013) (Rebecca Freie, ALJ), available at [http://www.documents.dgs.ca.gov/oah/seho\\_decisions/2013080697%20.pdf](http://www.documents.dgs.ca.gov/oah/seho_decisions/2013080697%20.pdf) (last visited Feb. 25, 2014).

following a partial victory in an earlier case.<sup>81</sup> The father was upset with the school's placement decision and said that terrorists would have more sympathy for his son than the school district.<sup>82</sup> That comment appears not to have generated much sympathy for his position by the school district or the ALJ.<sup>83</sup>

Finally, one student did prevail in a case in which there had been a previous settlement.<sup>84</sup> But it is an odd fact pattern. The settlement agreement had included transportation for a six-year-old boy with a history of seizures.<sup>85</sup> The school district had written into the settlement agreement that transportation would not be subject to stay put rules.<sup>86</sup> It then tried to eliminate transportation in his new IEP.<sup>87</sup> The student prevailed only because the school district was not complying with its transportation rules for nondisabled students.<sup>88</sup> He was entitled to transportation even if he did not have an IEP.<sup>89</sup> But, like the other cases described above, the school district tried to resist the terms of a settlement agreement as soon as it ended.<sup>90</sup>

Both of those cases raise the same troubling issue: a school district insisting that the placement contained in a settlement agreement not be the student's "stay put" placement. The IDEA provides that a "child shall remain in the then-current educational placement of the child" during the pendency of a due process proceeding "unless the State or local educational agency and the parents otherwise agree" to a different placement.<sup>91</sup> In both of the above cases, the school district likely insisted on the standard stay put

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<sup>81</sup> Parent *ex rel.* Student v. Cupertino Union Sch. Dist., Nos. 2013040122 & 2013030785 (OAH Cal. Jul. 2013) (Margaret Broussard, ALJ), *available at* [www.documents.dgs.ca.gov/oah/seho\\_decisions/2013040122%202013030785.pdf](http://www.documents.dgs.ca.gov/oah/seho_decisions/2013040122%202013030785.pdf) (last visited Mar. 16, 2014).

<sup>82</sup> *Id.* at 7.

<sup>83</sup> *See id.*

<sup>84</sup> *See* Parent *ex rel.* Student v. L.A. Unified Sch. Dist., No. 2013071293 (OAH Cal. Oct. 21, 2013) (Robert G. Martin, ALJ), *available at* [http://www.documents.dgs.ca.gov/oah/seho\\_decisions/2013071293.pdf](http://www.documents.dgs.ca.gov/oah/seho_decisions/2013071293.pdf) (last visited Feb. 25, 2014).

<sup>85</sup> *Id.* at 1.

<sup>86</sup> *Id.* at 3.

<sup>87</sup> *Id.* at 9.

<sup>88</sup> *Id.* at 10.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> 20 U.S.C. § 1415(j) (2012).

rules not applying.<sup>92</sup> Thus, the student was placed in a private school setting or provided transportation without that program becoming the child's stay put placement.<sup>93</sup> In both cases, the student did not have a lawyer at the due process hearing,<sup>94</sup> and it is not clear that the student understood the existence of the default stay put rule. With assistance of a lawyer, the student may have questioned what it meant to "agree" to waive the normal default rules about the stay put placement. These cases raise the question of whether it is a violation of the student's due process rights to waive a right without that waiver being a knowing waiver. Because the IDEA is arguably a statutory codification of a student's education rights,<sup>95</sup> a waiver should not be possible without consultation with a lawyer.

### C. *Negative Attitudes Towards Mothers*

Many cases were unsuccessful, in part, due to the limited weight given to the testimony of the mother. Occasionally, there appeared to be bias against both parents. Out of the seventy-four cases in the database, twelve reflected a pattern of the ALJ giving little weight to the mother's testimony and often describing her in a disparaging light. Occasionally, these cases reflected some bias against the father.

1. In OAH Case No. 2012010475, the student was a twelve-year-old boy who was found eligible for special education under the primary category of speech or language impairment and the secondary category of specific learning disability.<sup>96</sup> The mother

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<sup>92</sup> See *Parent ex rel. Student v. Cupertino Union Sch. Dist.*, No. 2013080697 (OAH Cal. Nov. 2013) (Rebecca Freie, ALJ), available at [http://www.documents.dgs.ca.gov/oah/seho\\_decisions/2013080697%20.pdf](http://www.documents.dgs.ca.gov/oah/seho_decisions/2013080697%20.pdf) (last visited Feb. 25, 2014); *L.A. Unified Sch. Dist.*, No. 2013071293.

<sup>93</sup> See *supra* notes 75–90 and accompanying texts.

<sup>94</sup> *Cupertino Union Sch. Dist.*, No. 2013080697, at 1; *L.A. Unified Sch. Dist.*, No. 2013071293, at 1. In both cases, the fathers represented the students.

<sup>95</sup> Congress enacted an earlier version of the IDEA after plaintiffs prevailed in three significant special education cases. See *Mills v. Bd. of Educ.*, 348 F. Supp. 866 (D.D.C. 1972); *Pa. Ass'n for Retarded Children v. Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971); *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967). For further discussion of the legislative history of the IDEA, see COLKER, *supra* note 29, at ch. 2.

<sup>96</sup> *Parent ex rel. Student v. Dublin Unified Sch. Dist.*, No. 2012010475, at 4 (OAH Cal. Jan. 24, 2013) (Peter Paul Castillo, ALJ), available at

was a licensed speech and language pathologist who had previously worked for the school district.<sup>97</sup> The mother was acknowledged to have expertise but her testimony was then discounted.<sup>98</sup> Under Issue 6(a), the transcript indicated:

While Student had issues at home concerning homework completion, Mother's testimony by itself was not adequate to establish that his problems at home were the result of issues at school. Student needed evidence from Student's therapist for a finding that Student's problems at home were related more to school performance concerns rather than interpersonal issues in the home.<sup>99</sup>

2. In OAH Case No. 2012060172, the student was a nineteen-year-old man with autism.<sup>100</sup> The student lost on all claims despite evidence of very limited educational progress.<sup>101</sup> The testimony of the teacher was credited over the diagnostic results showing very limited progress.<sup>102</sup> With respect to progress in math, his mother was blamed for insisting that he try to take an algebra class—so he could receive a high school diploma—rather than a remedial program.<sup>103</sup> The mother was also blamed for not following the student's transition plan when the family moved out of the district.<sup>104</sup>
3. In OAH Case No. 2012060426, the parents sought to have their seven-year-old found eligible for special education.<sup>105</sup> In

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[http://www.documents.dgs.ca.gov/oah/seho\\_decisions/2012010475.pdf](http://www.documents.dgs.ca.gov/oah/seho_decisions/2012010475.pdf) (last visited Feb. 25, 2014).

<sup>97</sup> *Id.* at 7 n.7.

<sup>98</sup> *Id.* at 22.

<sup>99</sup> *Id.* at 34.

<sup>100</sup> Parent *ex rel.* Student v. Paso Robles Unified Sch. Dist., No. 2012060172 (OAH Cal. Dec. 20, 2012) (Stella L. Owens-Murrell, ALJ), available at [www.documents.dgs.ca.gov/oah/seho\\_decisions/2012060172.pdf](http://www.documents.dgs.ca.gov/oah/seho_decisions/2012060172.pdf) (last visited Feb. 5, 2014).

<sup>101</sup> *Id.* at 39.

<sup>102</sup> *Id.* at 26.

<sup>103</sup> *Id.* at 32.

<sup>104</sup> *Id.*

<sup>105</sup> Parent *ex rel.* Student v. Redwood City Sch. Dist., No. 2012060426 (OAH Cal. Feb. 14, 2013) (Charles Marson, ALJ), available at

concluding that the child was not disabled, the ALJ failed to give weight to the fact that the mother had not been given an opportunity to fill out several items on one rating scale and failed to complete another rating scale,<sup>106</sup> even though she did report evidence of emotional disturbance in a telephone interview.<sup>107</sup> Had the mother had an opportunity to complete all the relevant forms, she might have prevailed in arguing that the student had an emotional disturbance.

4. OAH Case No. 2013031078 reflects a successful attempt by the school district to blame both parents for the student's educational difficulties.<sup>108</sup> The student was a fourteen-year-old boy who was deaf.<sup>109</sup> His father spoke Spanish and his mother spoke English and Spanish.<sup>110</sup> The father did not speak American Sign Language (ASL), and the mother had only basic skills in ASL.<sup>111</sup> The parents wanted their son to be educated in a full immersion ASL program with other deaf students so that he could improve his weak language skills.<sup>112</sup> The ALJ deferred to the school district's recommendation that the student be educated in a multi-sensory modality, which would likely not lead to greater ASL proficiency.<sup>113</sup> Rather than place the burden on the school district to provide the student with effective communication, the ALJ found: "Parents' ASL skills were not at Student's level, which . . . resulted in Student lacking opportunities at home for ASL communication with family members."<sup>114</sup>

This case is very problematic for several reasons. First, it failed to offer an appropriate, individualized outcome for this

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[www.documents.dgs.ca.gov/oah/seho\\_decisions/2012060426.pdf](http://www.documents.dgs.ca.gov/oah/seho_decisions/2012060426.pdf) (last visited Feb. 25, 2014).

<sup>106</sup> *Id.* at 4–7.

<sup>107</sup> *Id.* at 7.

<sup>108</sup> Parent *ex rel.* Student v. Baldwin Park Unified Sch. Dist., No. 2012031078 & 2012070228 (OAH Cal. Mar. 20, 2013) (Adrienne L. Krikorian, ALJ), *available at*

[www.documents.dgs.ca.gov/oah/seho\\_decisions/2013031078%202012070228.pdf](http://www.documents.dgs.ca.gov/oah/seho_decisions/2013031078%202012070228.pdf) (last visited Feb. 25, 2014).

<sup>109</sup> *Id.* at 4.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 6, 19.

<sup>113</sup> *Id.* at 26–27.

<sup>114</sup> *Id.* at 22.

student. It was unrealistic for his parents, whose primary language was Spanish, to become proficient in ASL. Their lack of proficiency in ASL provided more, not fewer, reasons to provide the student with intensive ASL instruction. Second, the result is inconsistent with the Ninth Circuit's decision in *K.M. ex rel. Bright v. Tustin Unified School District*, which emphasized the importance of effective communication.<sup>115</sup> This student did not have any effective language at the time;<sup>116</sup> immersion in ASL is the best way to attain effective communication skills in his primary language.

5. OAH Case No. 2012090211 reflects an additional case involving disrespectful treatment of the mother.<sup>117</sup> The student was a six-year-old boy whose parents spoke Spanish and Zapotec at home.<sup>118</sup> The ALJ used the following language to discount much of the mother's testimony about her son's inadequate language development:

Mother spoke Spanish, but she could not read or write Spanish, and relied on other people to prepare her correspondence. Mother did not understand English, and could not independently determine Student's English-language skills. Mother appeared nervous at hearing and confused by many of the questions posed to her, even though she was assisted by a Spanish-language interpreter. For this reason, Mother's representations, as memorialized by the assessors in their reports, or supported by documentation, were carefully considered and respected, however her hearing testimony was given little weight.<sup>119</sup>

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<sup>115</sup> *K.M. ex rel. Bright v. Tustin Unified Sch. Dist.*, 725 F.3d 1088 (9th Cir. 2013).

<sup>116</sup> See *Baldwin Park Unified Sch. Dist.*, No. 2013031078, at 1–5.

<sup>117</sup> *Parents ex rel. Student v. L.A. Unified Sch. Dist.*, Nos. 2012090211 & 2013010694 (OAH Cal. May 16, 2013) (Eileen M. Cohn, ALJ), available at [http://www.documents.dgs.ca.gov/oah/seho\\_decisions/2012090211%202013010694.pdf](http://www.documents.dgs.ca.gov/oah/seho_decisions/2012090211%202013010694.pdf) (last visited Feb. 16, 2014).

<sup>118</sup> *Id.* at 3.

<sup>119</sup> *Id.*

This case also reflects a pattern of students not prevailing when a language interpreter is present—the ALJ assumed that a Spanish-language interpreter was sufficient even though the parents spoke Zapotec, a language indigenous to Mexico, at home.<sup>120</sup> It is possible that because she was not offered an appropriate language interpreter, she appeared confused.

6. OAH Case No. 2012110106 reflects another example of a case in which the mother’s confrontational behavior was used to justify the school district’s actions even though the school district had previously been ordered to provide compensatory education until the student’s twenty-third birthday.<sup>121</sup> The mother was described as “threatening and confrontational.”<sup>122</sup> The parents were also described as “obstructive and wasteful of District resources. . . . They have photographed, recorded, yelled at and otherwise harassed at least one District employee.”<sup>123</sup> Even though the district was under an order to comply with a previous ALJ decision, the ALJ in this case ruled that the district would not have to provide compensatory education if the parents did not cooperate.<sup>124</sup> In other words, a “blame the parents” mentality was used successfully to undermine a previous decision in favor of the student.
7. In OAH Case No. 2012080373, the mother’s description of the behavior of her twelve-year-old daughter with autism was discounted even though it was quite graphic.<sup>125</sup> For example, the mother described the student as “ripping off her fingernails and toenails or assaulting strangers in public.”<sup>126</sup> The ALJ described the mother as having “distrust and animosity toward the

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<sup>120</sup> *Id.*

<sup>121</sup> Fresno Unified Sch. Dist. v. Parents *ex rel.* Student, No. 2012110106, at 4 (OAH Cal. May 22, 2013) (Charles Marson, ALJ), *available at* [http://www.documents.dgs.ca.gov/oah/seho\\_decisions/2012110106.pdf](http://www.documents.dgs.ca.gov/oah/seho_decisions/2012110106.pdf) (last visited Feb. 25, 2014).

<sup>122</sup> *Id.* at 8.

<sup>123</sup> *Id.* at 15–16.

<sup>124</sup> *Id.* at 22.

<sup>125</sup> Parent *ex rel.* Student v. Lake Elsinore Unified Sch. Dist., No. 2012080373, at 18, 50 (OAH Cal. May 22, 2013) (Judith Pasewark ALJ), *available at* [http://www.documents.dgs.ca.gov/oah/seho\\_decisions/2012080373.pdf](http://www.documents.dgs.ca.gov/oah/seho_decisions/2012080373.pdf) (last visited Feb. 25, 2014).

<sup>126</sup> *Id.* at 18.

District,”<sup>127</sup> and discounted the mother’s description of her child’s current classroom: “Mother’s perception of the classroom may have been accurate on those few occasions she visited, but they do not represent the classroom described by those staff members there on a daily basis.”<sup>128</sup> The ALJ never considered the fact that the mother may have felt hostile because she had already brought one successful case against the district and still found her daughter not making educational progress.

8. In OAH Case No. 2013030379, the mother was seeking home-to-school transportation for her eight-year-old son who was autistic. The mother testified, with the assistance of a Spanish-language interpreter, that she had not initially asked for transportation at the IEP meeting because she felt intimidated.<sup>129</sup> She also testified that school personnel insulted her when she tried to explain how difficult it would be to walk with her son to school in bad weather.<sup>130</sup> The school district succeeded in blaming her for her child’s difficulties by suggesting she was too cheap to buy him a raincoat and did not sign some school forms (when she disagreed with the school district about how to punish her son).<sup>131</sup>
9. In OAH Case No. 2013040142, the mother refused to consent to an assessment that she thought would result in her daughter being classified as emotionally disturbed.<sup>132</sup> The school district argued, and the ALJ found, that the student’s placement in gifted services may be jeopardized if the mother did not consent to the student being evaluated for special education.<sup>133</sup> The student had been classified as emotionally disturbed at a prior school but had been exited out of special education when she supposedly reached her goals.<sup>134</sup> The mother suggested that a school official had touched

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<sup>127</sup> *Id.* at 18 n.11.

<sup>128</sup> *Id.* at 50.

<sup>129</sup> *Id.* at 5.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Anaheim City Sch. Dist. v. Parent ex rel. Student*, No. 2013040142, at 5 (OAH Cal. June 13, 2013) (Judith L. Pasewark, ALJ), available at [http://www.documents.dgs.ca.gov/oah/seho\\_decisions/2013040142.pdf](http://www.documents.dgs.ca.gov/oah/seho_decisions/2013040142.pdf) (last visited Feb. 25, 2014).

<sup>133</sup> *See id.* at 5, 7.

<sup>134</sup> *Id.* at 2.

her daughter illegally,<sup>135</sup> and she also indicated that she had “taught Student to stand up for herself and aggressively retaliate.”<sup>136</sup> Finally, the mother accused the school district of racial bias.<sup>137</sup> Instead of inquiring whether a student in the gifted program was actually in need of special education and related services, the ALJ granted the school district’s request to evaluate the student over her mother’s objection or exit her from gifted services.<sup>138</sup> This matter was resolved at a default hearing when the mother did not appear,<sup>139</sup> so the student’s basic rights to an appropriate education may have been jeopardized without representation.

10. In OAH Case No. 2013010236, the ALJ displayed little sympathy for a mother who required an ASL interpreter to attend and participate in IEP meetings.<sup>140</sup> The ALJ found the mother’s testimony to be inconsistent and unclear,<sup>141</sup> and failed to consider how the communication challenges she faced at the due process hearing would be similar to the challenges she faced at IEP meetings.<sup>142</sup>
11. In OAH Case No. 2013010033,<sup>143</sup> the ALJ characterized the parents’ views as merely the basis of a “personal dispute.”<sup>144</sup> In fact, the parents tried to discredit the school district’s evaluation and thought the proposed IEP did not meet the student’s unique educational needs.<sup>145</sup> Although the ALJ found that the school district had failed to make an offer of a specific placement in

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<sup>135</sup> *Id.* at 4.

<sup>136</sup> *Id.* at 3.

<sup>137</sup> *Id.* at 4.

<sup>138</sup> *Id.* at 8.

<sup>139</sup> *Id.* at 1.

<sup>140</sup> Parent *ex rel.* Student v. New Haven Unified Sch. Dist., No. 2013010236 (OAH Cal. July 24, 2013) (Theresa Ravandi, ALJ), *available at* [http://www.documents.dgs.ca.gov/oah/seho\\_decisions/2013010236.pdf](http://www.documents.dgs.ca.gov/oah/seho_decisions/2013010236.pdf) (last visited Feb. 16, 2014).

<sup>141</sup> *Id.* at 6.

<sup>142</sup> *See id.* at 19–27.

<sup>143</sup> Parents *ex rel.* Student v. Fresno Unified Sch. Dist., Nos. 2013010033 & 2012120631 (OAH Cal. Aug. 29, 2013) (Troy K. Taira, ALJ), *available at* [http://www.documents.dgs.ca.gov/oah/seho\\_decisions/2013010033%202012120631.pdf](http://www.documents.dgs.ca.gov/oah/seho_decisions/2013010033%202012120631.pdf) (last visited Feb. 16, 2014).

<sup>144</sup> *Id.* at 23.

<sup>145</sup> *Id.* at 14–17.

violation of the IDEA, he failed to provide any kind of meaningful remedy.<sup>146</sup> The ALJ opinion refers to “parents” throughout but only the “mother” testified; thus, I understand the comments about “parents” to really refer to the mother.<sup>147</sup>

12. In OAH Case No. 2013080189, the mother, who spoke Russian, wanted the school district to continue to provide the placement that was indicated in a previous settlement agreement for a seventeen-year-old young man. The mother left the hearing before the first witness, when the ALJ rejected her request for a continuance.<sup>148</sup> She was described as having a “tirade” and “ranting.”<sup>149</sup> Later in the opinion, the ALJ said: “Mother must understand that she has not been cheated, violated or treated unfairly when her personal agenda is not unvaryingly adopted.”<sup>150</sup> The mother, however, may have agreed to the “stay put” waiver without understanding the importance of the stay put rule.<sup>151</sup>

Although many of the mothers whose testimonies were discounted appeared to be low-income parents, some mothers who were apparently high-income also had their testimonies discounted. In OAH Case No. 2013031109,<sup>152</sup> the ALJ discounted the mother’s testimony that she was confused at the manifestation determination hearing—because she was a doctor.<sup>153</sup> But it is hard to see how her education as a medical doctor would make her knowledgeable about IDEA matters.

Despite these trends towards a lack of respect for the mother at these hearings, there were three cases in which the ALJ refused to accept the school district’s attempt to blame the mother for the

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<sup>146</sup> *Id.* at 32.

<sup>147</sup> *Id.* at 2.

<sup>148</sup> *Id.* at 2–3.

<sup>149</sup> *Id.* at 3.

<sup>150</sup> *Id.* at 26.

<sup>151</sup> *See id.* at 4 n.4.

<sup>152</sup> *Parents ex rel. Student v. Brea Olinda Unified Sch. Dist.*, No. 2013031109 (OAH Cal. May 20, 2013) (Susan Ruff, ALJ), *available at* [http://www.documents.dgs.ca.gov/oah/seho\\_decisions/2013031109.pdf](http://www.documents.dgs.ca.gov/oah/seho_decisions/2013031109.pdf) (last visited Feb. 16, 2014).

<sup>153</sup> *See id.* at 6, 15, 23.

student's difficulties. In OAH Case No. 2012020045,<sup>154</sup> the student had "Generalized Anxiety Disorder, selective mutism, Asperger's Disorder, Learning Disorder and Major Depressive Disorder."<sup>155</sup> Despite evidence that the student's anxiety had become so severe that she missed thirty-six percent of her classes in eleventh grade,<sup>156</sup> the "District did not offer to modify Student's educational program . . . . The District did not change in any manner Student's related services or placement."<sup>157</sup> After the mother could not even get her daughter to get out of the car to go to school, she notified the district that she would send her daughter to a nonpublic school and request reimbursement.<sup>158</sup>

Like many cases, the school district did try to blame the mother for the difficulties in reaching an acceptable IEP for the student. For example, the mother had failed to consent to a June 2010 assessment plan until October 2010 because she thought the district would not assess the student over the summer break.<sup>159</sup> Despite this modest evidence of lack of cooperation, the ALJ described the mother as "a diligent, yet cautious, advocate for Student."<sup>160</sup> A crucial factor in the mother's credibility may have been that the key IEP meetings were audiotaped.<sup>161</sup> The student also had an exceptionally strong case because her significant absenteeism could be considered a failure to educate.<sup>162</sup> The only educational option apparently contemplated by the district was home instruction, which would have been the most restrictive possible placement.<sup>163</sup> This student also seemed to benefit from a highly supportive family environment. The student's mother, father, and sister were present during the hearing, and the student was represented by a lawyer.<sup>164</sup>

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<sup>154</sup> Parents *ex rel.* Student v. High Tech High, No. 2012020045 (OAH Cal. Jan. 2, 2013) (Paul Kamoroff, ALJ), available at [http://www.documents.dgs.ca.gov/oah/seho\\_decisions/2012020045%20Corrected%20Decision.pdf](http://www.documents.dgs.ca.gov/oah/seho_decisions/2012020045%20Corrected%20Decision.pdf) (last visited Feb. 16, 2014).

<sup>155</sup> *Id.* at 3.

<sup>156</sup> *Id.* at 34.

<sup>157</sup> *Id.* at 9.

<sup>158</sup> *Id.* at 9, 15.

<sup>159</sup> *Id.* at 11–12.

<sup>160</sup> *Id.* at 35.

<sup>161</sup> *See id.* at 8, 13–14, 17–19, 43.

<sup>162</sup> *See id.* at 9, 16, 22.

<sup>163</sup> *Id.* at 12–14.

<sup>164</sup> *Id.* at 1.

That combination of factors derailed the district's attempt to blame the mother for the lack of education.

Similarly, in OAH Case No. 2012110641, the school district tried to blame the mother when it completely failed to comply with the IDEA's scheduling requirements for IEP meetings.<sup>165</sup> The student was a nine-year-old girl with a diagnosis of ADHD.<sup>166</sup> The mother requested an assessment of her daughter in May 2012.<sup>167</sup> No IEP meeting was held until February 2013.<sup>168</sup> The ALJ found that the principal's testimony reflected that the school district "failed to reflect any understanding of the circumstances of this case."<sup>169</sup> The school district sought to blame the mother for difficulty in scheduling meetings but the ALJ refused to accept that explanation: "As a single mother of three children, two of whom had special needs, Parent had arranged to take time from work to attend what she believed would be an IEP team meeting."<sup>170</sup>

Finally, in OAH Case No. 2013040872,<sup>171</sup> the school district was clearly very hostile towards the mother, but lost its credibility when the mother produced an email that was mistakenly sent to her in which she was criticized for taking "freakin notes" and suggested that school staff should bring "Zanex" to meetings with her.<sup>172</sup> In this case, the mother had requested documents five days in advance of meetings because of her own processing impairment.<sup>173</sup> The school district had refused to comply with that request and insisted on holding an IEP meeting without her participation.<sup>174</sup>

The totality of these cases suggests that ALJs need to be very careful about the way gender bias may infect these cases. In Part I,

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<sup>165</sup> Parent *ex rel.* Student v. Mt. Diablo Unified Sch. Dist., No. 2012110641 (OAH Cal. May 6, 2013) (Deidre L. Johnson, ALJ), available at <http://heekim.com/decisions/2012110641.pdf> (last visited Feb. 16, 2014).

<sup>166</sup> *Id.* at 4.

<sup>167</sup> *Id.* at 8–9.

<sup>168</sup> *Id.* at 16–18.

<sup>169</sup> *Id.* at 15.

<sup>170</sup> *Id.* at 11.

<sup>171</sup> Aspire Public Sch. v. Parents *ex rel.* Student, No. 2013040872 (OAH Cal. July 9, 2013) (Rebecca Freie, ALJ), available at [http://www.documents.dgs.ca.gov/oah/seho\\_decisions/2013040872.pdf](http://www.documents.dgs.ca.gov/oah/seho_decisions/2013040872.pdf) (last visited Feb. 16, 2014).

<sup>172</sup> *Id.* at 9.

<sup>173</sup> *Id.* at 11, 13.

<sup>174</sup> *Id.* at 13.

we saw that students were much more likely to prevail if their fathers, rather than their mothers, represented them at the due process hearings. In this section, we see that school districts frequently try to blame the mother or discredit the mother during a disagreement about the education of a child with a disability. In twelve of fifteen instances where the school district tried to discredit the mother, the ALJ accepted that negative characterization of the mother.<sup>175</sup>

*D. School District Preference for More Restrictive Placement*

There were six cases in the database in which the school district tried to argue for a more restrictive placement than desired by the parents of the student. In one case, the school district lost;<sup>176</sup> in five cases, the school district prevailed.<sup>177</sup> This result is surprising given the IDEA's preference for the least restrictive environment.<sup>178</sup>

In OAH Case No. 2012100933, the ALJ understood the importance, under the IDEA, of placing a child in the least restrictive environment.<sup>179</sup> In this case, the school district wanted to move a ten-year-old boy with Down syndrome from a full inclusion setting, where he was making good academic progress, to a more restrictive setting (i.e., special day class (SDC)) so that he could have peers in his classroom at his academic level.<sup>180</sup> The ALJ ruled for the student.<sup>181</sup> The ALJ properly captured Congress's policy underlying integration under the IDEA:

The District witnesses were sincere in their belief that Student needed an SDC classroom to gain academic benefit. They may be correct that Student

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<sup>175</sup> See *supra* Part II.C.

<sup>176</sup> See *infra* text accompanying notes 179–183.

<sup>177</sup> See *infra* text accompanying notes 184–206.

<sup>178</sup> See 20 U.S.C. § 1412(a)(5) (2012) (requiring that students be educated with children who are not disabled “to the maximum extent appropriate”).

<sup>179</sup> Parents *ex rel.* Student v. Julian Charter Sch. *ex rel.* Julian Union Elementary Sch. Dist. No. 2012100933 (OAH Cal. Mar. 26, 2013) (Susan Ruff, ALJ), *available at* [http://www.documents.dgs.ca.gov/oah/seho\\_decisions/2012100933.pdf](http://www.documents.dgs.ca.gov/oah/seho_decisions/2012100933.pdf) (last visited Feb. 16, 2014).

<sup>180</sup> *Id.* at 3.

<sup>181</sup> *Id.* at 28.

would gain greater academic benefit by being in an SDC than he would in the full-inclusion class with his RDI aide. But that belief, however sincerely held, is contrary to the wishes of the Congress and the California legislature. The Congress could have enacted IDEA to maximize a child's academic potential by placing every disabled child in a very small, special education setting. But that was not the policy choice made by Congress. Instead, the policy behind IDEA is to give special education children a basic floor of educational opportunity that places them back in the general education setting as much as possible.<sup>182</sup>

In this case, the school district was providing a one-on-one aide to the student in the full-inclusion classroom,<sup>183</sup> so it is possible that it was seeking to send him to a special day class in order to save money.

In the other five cases, however, the school district was able to successfully argue for a more restrictive placement over the parent's objection.

1. In OAH Case No. 2012110503, the school district sought a more restrictive placement for a thirteen-year-old student with Down syndrome.<sup>184</sup> The parents wanted a full-inclusion placement for the entire day.<sup>185</sup> The school district proposed that the student attend a special day class for forty-three percent of the day.<sup>186</sup> The district was able to demonstrate that the special day class was the least restrictive environment possible for this student in order for him to make adequate educational progress.<sup>187</sup>
2. In OAH Case No. 2013040589, the school district argued for a more restrictive placement for a thirteen-year-old boy with

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<sup>182</sup> *Id.* at 23.

<sup>183</sup> *Id.* at 7.

<sup>184</sup> *Parents ex rel. Student v. Clovis Unified Sch. Dist.*, No. 2012110503 (OAH Cal. Apr. 5, 2013) (Troy K. Taira, ALJ), *available at* [http://www.documents.dgs.ca.gov/oah/seho\\_decisions/2012110503.pdf](http://www.documents.dgs.ca.gov/oah/seho_decisions/2012110503.pdf) (last visited Feb. 25, 2014).

<sup>185</sup> *Id.* at 7, 22.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 31.

- autism.<sup>188</sup> The student's grandmother introduced into evidence a DVD that purportedly showed the student engaging in various activities at a typical level.<sup>189</sup> The ALJ found the DVD unpersuasive and allowed the school district to place the student in a special day class.<sup>190</sup> Because the student was not represented by a lawyer,<sup>191</sup> it is hard to know if sufficient evidence was offered to support a less restrictive setting.
3. In OAH Case No. 2012100380, the school district sought to place a seven-year-old boy with Down syndrome in a special day class over the parents' objection.<sup>192</sup> This case was complicated by the fact that this student had not made adequate progress in his original placement—a full immersion kindergarten in which students would be taught exclusively in Spanish until second grade.<sup>193</sup> His parents wanted him to move to a regular classroom with a full-time aide.<sup>194</sup> The school district argued for a special day class because of his lack of progress in the full immersion program.<sup>195</sup> The student's expert argued that the special day class would be inappropriate because many of the students would be autistic and nonverbal and therefore not help develop the student's language skills; the students' parents relied on that recommendation in arguing that their child should not be placed in the special day class.<sup>196</sup> In ruling against the student, the ALJ found that those arguments were based on "conjecture."<sup>197</sup> Because of the IDEA's preference for the most integrated

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<sup>188</sup> Parent *ex rel.* Student v. San Lorenzo Unified Sch. Dist., No. 2013040589 (OAH Cal. Sept. 18, 2013) (Adeniyi A. Ayoade, ALJ), *available at* [http://www.documents.dgs.ca.gov/oah/seho\\_decisions/2013040589.pdf](http://www.documents.dgs.ca.gov/oah/seho_decisions/2013040589.pdf) (last visited Feb. 16, 2014).

<sup>189</sup> *Id.* at 8.

<sup>190</sup> *Id.* at 8, 26–27.

<sup>191</sup> *See id.* at 1.

<sup>192</sup> El Centro Elementary Sch. Dist. v. Parents *ex rel.* Student, Nos. 2012100380 & 2012080113 (OAH Cal. Apr. 23, 2013) (Darrell Lepkowsky, ALJ), *available at* [http://www.documents.dgs.ca.gov/oah/seho\\_decisions/2012100380%202012080113.pdf](http://www.documents.dgs.ca.gov/oah/seho_decisions/2012100380%202012080113.pdf) (last visited Feb. 16, 2014).

<sup>193</sup> *Id.* at 9.

<sup>194</sup> *See id.* at 60.

<sup>195</sup> *Id.* at 63–65.

<sup>196</sup> *Id.* at 40–42, 51.

<sup>197</sup> *Id.* at 68; *see also id.* at 41, 76.

placement, however, it is not clear why the district would not need to attempt the more integrated placement before placing the student in a special day class.

4. In OAH Case No. 2012070894, the student was a nine-year-old boy with a history of psychiatric hospitalization due to suicidal ideation.<sup>198</sup> The school district succeeded in placing him in a segregated placement for nondisabled children. The ALJ accepted the school district's explanation that the student's behavioral issues were "environmental" and discounted the social worker's testimony that he was a danger to himself and others.<sup>199</sup> The ALJ found that "mental health diagnosis and suicidal attempts are not enough to establish that a student meets special education eligibility criteria."<sup>200</sup> The reference to "environmental" factors could have been a subtle way to criticize the mother (who was present at the hearing) for his adverse behavior. The mother wanted the school district to place the student in a therapeutic, nonpublic school.<sup>201</sup> The school district was unilaterally placing the student in a segregated placement with other African-American boys and allegedly threatened to call the police if the mother did not consent to a segregated placement.<sup>202</sup> The facts in this case harken back to the early D.C. cases involving racial segregation of students with disabilities.<sup>203</sup>
5. Finally, in OAH Case No. 2013080703, the school district wanted to place a six-year-old boy with autism in a multiply-handicapped, special day class.<sup>204</sup> The parents wanted to have him educated in a general education class with a one-to-one

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<sup>198</sup> Parent *ex rel.* Student v Pittsburg United Sch. Dist., No. 2012070894 (OAH Cal. May 23, 2013) (Margaret Broussard, ALJ), available at [http://www.documents.dgs.ca.gov/oah/seho\\_decisions/2012070894.pdf](http://www.documents.dgs.ca.gov/oah/seho_decisions/2012070894.pdf) (last visited Feb. 16, 2013).

<sup>199</sup> *Id.* at 13, 18–19.

<sup>200</sup> *Id.* at 27.

<sup>201</sup> *Id.* at 3.

<sup>202</sup> *See id.* at 15, 24–25.

<sup>203</sup> *See* Mills v. Bd. of Educ., 348 F. Supp. 866 (D.D.C. 1972); Pa. Ass'n for Retarded Children v. Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971); Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967).

<sup>204</sup> Irvine Unified Sch. Dist. v. Parent *ex rel.* Student, No. 2013080703 (OAH Cal. Oct. 18, 2013) (Sabrina Kong, ALJ), available at [http://www.documents.dgs.ca.gov/oah/seho\\_decisions/2013080703.pdf](http://www.documents.dgs.ca.gov/oah/seho_decisions/2013080703.pdf) (last visited Feb. 16, 2014).

aide.<sup>205</sup> Although the student had two lawyers, the only testimony about his ability to benefit from a regular classroom seemed to come from his father who the ALJ characterized as not well informed.<sup>206</sup>

As with the cases in which students waived their rights to stay put, without advice of counsel, many of these cases raise troubling questions of whether the default presumption of an integrated education environment was being followed. OAH Case No. 201200933 reflected good sensitivity to this issue;<sup>207</sup> the other cases did not.

### *E. Lack of Representation for Students*

Not surprisingly, when no one represents a student, the school district always wins. And students typically lose if only one parent represents them. This lack of representation, however, could cause a student to lose constitutionally protected educational rights. Without a lawyer to develop the facts, it is difficult to know whether a constitutional violation has occurred. The following eight cases reflect examples where it appears that the lack of representation by a lawyer may have harmed the student's ability to protect his or her educational rights.

1. In OAH Case No. 2012110542, a mother filed a due process claim in which she requested an IEE.<sup>208</sup> She wanted an IEE to support an argument that her ten-year-old daughter needed additional physical therapy.<sup>209</sup> The mother alleged that her daughter had been frequently injured on the playground. The

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<sup>205</sup> *Id.* at 4.

<sup>206</sup> *Id.* at 1, 26, 27 (characterizing father's views as "unsupported and unpersuasive").

<sup>207</sup> Parents *ex rel.* Student v. Julian Charter Sch. *ex rel.* Julian Union Elementary Sch. Dist., No. 2012100933 (OAH Cal. Mar. 26, 2013) (Susan Ruff, ALJ), *available at* [http://www.documents.dgs.ca.gov/oah/seho\\_decisions/2012100933.pdf](http://www.documents.dgs.ca.gov/oah/seho_decisions/2012100933.pdf) (last visited Feb. 16, 2014).

<sup>208</sup> Saddleback Valley Unified Sch. Dist. v. Parents *ex rel.* Student, No. 2012110542 (OAH Cal. Feb. 27, 2013) (Robert G. Martin, ALJ), *available at* [http://www.documents.dgs.ca.gov/oah/seho\\_decisions/2012110542.pdf](http://www.documents.dgs.ca.gov/oah/seho_decisions/2012110542.pdf) (last visited Feb. 25, 2014).

<sup>209</sup> *Id.* at 7.

mother had requested incident reports when her daughter was injured, but the school district refused to turn them over, arguing they were privileged attorney work product.<sup>210</sup> When the mother lost her request to see the incident reports, she refused to participate in the hearing, resulting in a lack of representation of the student.<sup>211</sup> Even though the school district had the burden of proof, it succeeded in arguing that the mother was not entitled to an IEE at public expense because its own evaluation was adequate.<sup>212</sup> With assistance of counsel, it is possible that the parent could have received a redacted copy of school records that documented her daughter's injuries at the playground. With no representation, however, no evidence was offered to support the argument that the district was not fulfilling its basic obligations to the student.

2. In OAH Case No. 2012120574, the student was an eleven-year-old boy with autism and a speech/language impairment.<sup>213</sup> The student was not attending school.<sup>214</sup> The district brought a due process action to receive permission to assess the student and place him in a special day class.<sup>215</sup> The mother was homeless and living in a recreational vehicle, and seemed unable to provide adequate representation to the student.<sup>216</sup> Nonetheless, the student was provided with no lawyer,<sup>217</sup> and the district prevailed.<sup>218</sup> There is no way to assess whether the district's recommendation for the student was appropriate.
3. One of the most problematic cases is OAH Case No. 2013010704.<sup>219</sup> The student's parent filed for due process

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<sup>210</sup> *Id.* at 1–2 n.1.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 7, 9.

<sup>213</sup> Santa Clara Unified Sch. Dist., v. Parent *ex rel.* Student, No. 2012120574 (OAH Cal. Mar. 14, 2013) (Theresa Ravandi, ALJ), *available at* [http://www.documents.dgs.ca.gov/oah/seho\\_decisions/2012120574.pdf](http://www.documents.dgs.ca.gov/oah/seho_decisions/2012120574.pdf) (last visited Feb. 16, 2014).

<sup>214</sup> *Id.* at 2.

<sup>215</sup> *Id.* at 1–2.

<sup>216</sup> *Id.* at 3.

<sup>217</sup> *See id.* at 1.

<sup>218</sup> *Id.* at 29.

<sup>219</sup> Lucia Mar Unified Sch. Dist. v. Parent *ex rel.* Student, No. 2013010704 (OAH Apr. 10, 2013) (Theresa Ravandi, ALJ), *available at*

challenging the school district's plan to assess a ten-year-old boy who had autism.<sup>220</sup> The student, however, was unrepresented at the hearing.<sup>221</sup> The district proposed to have the student assessed by a teacher who had physically restrained the student on several occasions.<sup>222</sup> As the ALJ acknowledged, the second restraint incident ended with "a police officer handcuffing Student, and Ms. Williams last saw him crying as he left campus with his Parent."<sup>223</sup> The ALJ found that the student's failure to put on any evidence precluded him from making any factual findings "that Student suffered emotional trauma from his past contacts with District personnel."<sup>224</sup> Instead, the ALJ credited testimony that student "was always happy to see [Ms. Williams], had a good rapport with her, and did not appear fearful of her even after she first restrained him."<sup>225</sup> The hearing was held without representation for the ten-year-old child, despite the allegation that the assessment would "result in current harm, trauma, or regression."<sup>226</sup> Again, one must wonder if his constitutional rights to an appropriate education in the least restrictive environment are being protected through this one-sided assessment of the potential of harm.

4. OAH Case No. 2013010390 is typical of cases in which the parents have the dual disadvantages of using an interpreter and having no attorney to represent their child.<sup>227</sup> In this case, the student was a thirteen-year-old girl who had been receiving speech and language therapy.<sup>228</sup> Her primary language was Spanish and she was learning English at school.<sup>229</sup> The student's

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[http://www.documents.dgs.ca.gov/oah/seho\\_decisions/2013010704.pdf](http://www.documents.dgs.ca.gov/oah/seho_decisions/2013010704.pdf) (last visited Feb. 16, 2014).

<sup>220</sup> *Id.* at 1–2.

<sup>221</sup> *Id.* at 1.

<sup>222</sup> *Id.* at 8.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* at 7.

<sup>225</sup> *Id.* at 8.

<sup>226</sup> *Id.*

<sup>227</sup> See *Santa Rita Union Elementary Sch. Dist. v. Parents ex rel. Student*, No. 2013010390 (OAH Cal. May 22, 2013) (Peter Paul Castillo, ALJ), available at [http://www.documents.dgs.ca.gov/oah/seho\\_decisions/2013010390.pdf](http://www.documents.dgs.ca.gov/oah/seho_decisions/2013010390.pdf) (last visited Feb. 25, 2014).

<sup>228</sup> *Id.* at 2.

<sup>229</sup> *Id.*

- parents had previously tried unsuccessfully to get an IEE because the person who administered the school district's assessment "mistakenly believed that Student's primary language was English."<sup>230</sup> The school district succeeded in removing the student from speech and language services, blaming her deficiencies on the fact that English was her second language.<sup>231</sup>
5. Similarly, in OAH Case No. 2013030379, an eight-year-old boy with autism was not represented by an attorney and his parents were provided a Spanish-language interpreter.<sup>232</sup> Despite testimony from the mother that school personnel hit her son and insulted her, she was not able to successfully challenge the IEP.<sup>233</sup>
  6. In OAH Case No. 2013040142, the hearing officer held a default hearing when no one appeared on behalf of the student.<sup>234</sup> The school district wanted to evaluate the student to determine whether it could classify her as emotionally disturbed.<sup>235</sup> The school district argued, and the ALJ found, that the student's placement in gifted services may be jeopardized if the mother did not consent to the student being evaluated for special education.<sup>236</sup> No one appeared to be protecting the student's basic educational rights.
  7. In OAH Case No. 2013060104, the student was a fourteen-year-old boy whom the school district wanted to move to a more restrictive placement.<sup>237</sup> No one appeared on behalf of the

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<sup>230</sup> *Id.* at 3.

<sup>231</sup> *See id.* at 6, 8, 12.

<sup>232</sup> Parents *ex rel.* Student v. Jurupa Unified Sch. Dist., No. 2013030379, 1 (OAH Cal. May 28, 2013) (Darrell L. Lepkowsky, ALJ), *available at* [http://www.documents.dgs.ca.gov/oah/seho\\_decisions/2013030379.pdf](http://www.documents.dgs.ca.gov/oah/seho_decisions/2013030379.pdf) (last visited Feb. 16, 2014).

<sup>233</sup> *Id.* at 9, 16.

<sup>234</sup> Anaheim City Sch. Dist. v. Parent *ex rel.* Student, No. 2013040142, at 1 (OAH Cal. June 13, 2013) (Judith L. Pasewark, ALJ), *available at* [http://www.documents.dgs.ca.gov/oah/seho\\_decisions/2013040142.pdf](http://www.documents.dgs.ca.gov/oah/seho_decisions/2013040142.pdf) (last visited Feb. 25, 2014).

<sup>235</sup> *See id.* at 4–5.

<sup>236</sup> *See id.* at 5, 7.

<sup>237</sup> Fallbrook Union Elementary Sch. Dist. v. Parent *ex rel.* Student, No. 2013060104, at 2, 10 (OAH Cal. Aug. 27, 2013) (Darrell Lepkowsky, ALJ), *available at*

student at the due process hearing; thus, the district prevailed.<sup>238</sup> The student was therefore moved to a more restrictive educational environment without anyone arguing for his right to be in the least restrictive environment.

8. In OAH Case No. 2013030530, a mother refused to make her fifteen-year-old son who had autism available to be tested unless she was permitted to stay in the room with him.<sup>239</sup> The student's father represented him at the hearing.<sup>240</sup> The mother had a prescription from her son's doctor saying that she needed to be present in the assessment room because the student was nonverbal and might become upset in an unfamiliar environment.<sup>241</sup> Nonetheless, the ALJ ruled that the parents needed to make the student available for independent testing; if the parents did not make the student available, the district could terminate its special education services to the student.<sup>242</sup> Again, it is hard to understand how a student can risk having his access to education taken away without appropriate legal representation.

A student did prevail in OAH Case No. 2013040122, even though he was only represented by his father; but this action was the *third* due process case the student brought.<sup>243</sup> The school district had engaged in several blatant violations of the IDEA by not providing sufficient home instruction to the eleven-year-old boy with autism who had a history of seizure activity.<sup>244</sup> Even though the student eventually prevailed, his father did not put on sufficient evidence to document the cost of private Applied Behavioral Analysis (ABA)

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[http://www.documents.dgs.ca.gov/oah/seho\\_decisions/2013060104.pdf](http://www.documents.dgs.ca.gov/oah/seho_decisions/2013060104.pdf) (last visited Feb. 13, 2014).

<sup>238</sup> *See id.* at 1–2, 14.

<sup>239</sup> Torrance Unified Sch. Dist. v. Parent *ex rel.* Student, No. 2013030530, at 7–8 (OAH Cal. Sept. 6, 2013) (June R. Lehrman, ALJ), *available at* [http://www.documents.dgs.ca.gov/oah/seho\\_decisions/2013030530.pdf](http://www.documents.dgs.ca.gov/oah/seho_decisions/2013030530.pdf) (last visited Feb. 25, 2014).

<sup>240</sup> *Id.* at 1.

<sup>241</sup> *Id.* at 5–7.

<sup>242</sup> *Id.* at 20–21.

<sup>243</sup> Parents *ex rel.* Student v. Cupertino Union Sch. Dist., Nos. 2013040122 & 2013030785, at 1, 4 (OAH Cal. July 15, 2013) (Margaret Broussard, ALJ), *available*

*at* [http://www.documents.dgs.ca.gov/oah/seho\\_decisions/2013040122%202013030785.pdf](http://www.documents.dgs.ca.gov/oah/seho_decisions/2013040122%202013030785.pdf) (last visited Feb. 25, 2014).

<sup>244</sup> *Id.* at 14–16, 20–23.

therapy and need for a non-public placement to warrant effective relief on either of those issues.<sup>245</sup> The case reflects the enormous difficulties of a parent representing a child in these matters and obtaining adequate relief.

*F. Success Obtaining Independent Educational Evaluation*

In my previous article, I criticized California ALJs for applying too stringent a burden of proof on parents in cases involving requests for IEEs at public expense.<sup>246</sup> Under the IDEA, if the school district does not want to fund an IEE requested by the parent, it must file for due process to demonstrate that its own evaluation was appropriate.<sup>247</sup> The school district has the burden of proof in these cases.<sup>248</sup> Further, as I previously argued, the parent should not have to hire an expert in order to win the right to have an IEE at public expense.

In this period of study, I found that the ALJs frequently ruled in favor of the student in an IEE case. In five cases, the ALJ ruled for the parent requesting a publicly funded IEE.

1. In OAH Case No. 2012050676,<sup>249</sup> a seventeen-year-old student had been classified as Other Health Impaired (OHI), but his father believed that he also had a specific learning disability.<sup>250</sup> The student's father spent \$4,800 on a private assessment and successfully argued that the school's evaluation had not been sufficiently comprehensive.<sup>251</sup> As a remedy, the ALJ ordered reimbursement of the parent's private evaluation, as well as additional therapy for the student.<sup>252</sup> As in many cases, however,

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<sup>245</sup> *Id.* at 32.

<sup>246</sup> *See* Colker, *supra* note 2, at 465–81.

<sup>247</sup> *See* 34 C.F.R. § 300.502(b)(2)(i) (2014) (providing that a school district may refuse to pay for the parent's independent educational evaluation if it files a due process complaint and demonstrates that its evaluation was "appropriate").

<sup>248</sup> *See id.*

<sup>249</sup> Parent *ex rel.* Student v. Antelope Valley Union High Sch. Dist., Nos. 2012050676 & 2012090331 (OAH Cal. Feb. 11, 2013) (Adrienne L. Krikorian, ALJ), *available at* [http://www.documents.dgs.ca.gov/oah/seho\\_decisions/2012050676%202012090331.pdf](http://www.documents.dgs.ca.gov/oah/seho_decisions/2012050676%202012090331.pdf) (last visited Feb. 25, 2014).

<sup>250</sup> *Id.* at 2–3.

<sup>251</sup> *Id.* at 38–39.

<sup>252</sup> *Id.* at 39–40.

the parent did not succeed in obtaining the full relief requested.<sup>253</sup> The father was not able to obtain a change in placement nor extended school year services.<sup>254</sup> It is not clear whether the parent and student would have considered the remedy a real victory.

2. In OAH Case No. 2012120758, the student was a fourteen-year-old boy who had been diagnosed with ADHD, hearing loss, and a behavior disorder.<sup>255</sup> The district had determined that the student did not qualify for special education because “his needs could be sufficiently met through the use of medication.”<sup>256</sup> As the student was African-American,<sup>257</sup> the case follows the trend of school districts being reluctant to classify African-American children as disabled, possibly out of concerns of racial disproportionality. The student succeeded in arguing that the district’s assessment was “unreliable and unhelpful.”<sup>258</sup> He was provided with an IEE at public expense;<sup>259</sup> the ALJ made no determination as to whether the student was disabled.
3. In OAH Case No. 2012120716, the student was a fifteen-year-old boy who was found eligible under OHI (ADHD) and a specific learning disability.<sup>260</sup> The district had refused to fund an IEE when requested by the student’s mother; it also failed to timely file a due process complaint for fifty-five days until the mother made the request.<sup>261</sup> The ALJ ruled that the parent was entitled to an IEE at public expense due to the district’s delay in responding to her request.<sup>262</sup>

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<sup>253</sup> *See id.* at 37–39.

<sup>254</sup> *Id.* at 34–35, 37.

<sup>255</sup> Kern High Sch. Dist. v. Parents *ex rel.* Student, No. 2012120758, at 3–4 (OAH Cal. Feb. 26, 2013) (Adeniyi A. Ayoade, ALJ), *available at* [http://www.documents.dgs.ca.gov/oah/seho\\_decisions/2012120758%20\(Corrected\).pdf](http://www.documents.dgs.ca.gov/oah/seho_decisions/2012120758%20(Corrected).pdf) (last visited Feb. 15, 2014).

<sup>256</sup> *Id.* at 13.

<sup>257</sup> *Id.* at 3.

<sup>258</sup> *Id.* at 15.

<sup>259</sup> *Id.* at 19.

<sup>260</sup> Parents *ex rel.* Student v. William S. Hart Union High Sch. Dist., No. 2012120716, at 2 (OAH Cal. Mar. 13, 2013) (Carla L. Garrett, ALJ), *available at* [http://www.documents.dgs.ca.gov/oah/seho\\_decisions/2012120716.pdf](http://www.documents.dgs.ca.gov/oah/seho_decisions/2012120716.pdf) (last visited Feb. 15, 2013).

<sup>261</sup> *Id.* at 8.

<sup>262</sup> *See id.*

4. In OAH Case No. 2012080386, a complicated case involving a twelve-year-old boy with cerebral palsy, the parents did prevail in obtaining an IEE.<sup>263</sup> California Children's Services (CCS) took the legally incorrect position that the IDEA requirements did not apply to it.<sup>264</sup> CCS also lost on its legally incorrect position that it did not have to provide funding for an IEE.<sup>265</sup>
5. In OAH Case No. 2013060838, the student was a six-year-old boy whom the school district had found ineligible for special education.<sup>266</sup> The school district's evaluation was seriously flawed.<sup>267</sup> The school psychologist assessed only seven of twenty-two subtests on the Woodcock-Johnson test of achievement.<sup>268</sup> She also failed to use any kind of objective rating form to evaluate the student's behavior, and ignored the mother's ratings of his behavior.<sup>269</sup> The ALJ was able to conclude that the school's evaluation was inadequate,<sup>270</sup> even *without* the parent hiring an educational psychologist.

Nonetheless, not all parents succeeded in their request for an IEE. In OAH Case No. 2013020510, the parent argued that the school district had not evaluated her seventh grader in all suspected areas of disability.<sup>271</sup> The school district denied the mother's request for an IEE to better understand her son's behavioral issues even though the ALJ concluded that the student's "classroom behavior continued to interfere with his success and that of his peers and with

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<sup>263</sup> Parents *ex rel.* Student I v. Cal. Children's Serv., No. 2012080386 (OAH Cal. June 27, 2013) (Peter Paul Castillo, ALJ), *available at* [http://www.documents.dgs.ca.gov/oah/seho\\_decisions/2012080386.pdf](http://www.documents.dgs.ca.gov/oah/seho_decisions/2012080386.pdf) (last visited Feb. 25, 2014).

<sup>264</sup> *Id.* at 3.

<sup>265</sup> *Id.* at 8.

<sup>266</sup> Panama-Buena Vista Union Sch. Dist. v. Parent *ex rel.* Student, No. 2013060838, at 2 (OAH Cal. Aug. 21, 2013) (Charles Marson, ALJ), *available at* [http://www.documents.dgs.ca.gov/oah/seho\\_decisions/2013060838.pdf](http://www.documents.dgs.ca.gov/oah/seho_decisions/2013060838.pdf) (last visited Feb. 25, 2014).

<sup>267</sup> *See id.* at 4–12.

<sup>268</sup> *See id.* at 4, 6.

<sup>269</sup> *Id.* at 9–12.

<sup>270</sup> *See id.* at 17.

<sup>271</sup> Redlands Unified Sch. Dist. v. Parent *ex rel.* Student, Nos. 2013020510 & 2012110422, at 22 (OAH Cal. May 10, 2013) (Marian H. Tully, ALJ), *available at* [http://www.documents.dgs.ca.gov/oah/seho\\_decisions/2013020510%202012110422%20Corrected.pdf](http://www.documents.dgs.ca.gov/oah/seho_decisions/2013020510%202012110422%20Corrected.pdf) (last visited Feb. 15, 2014).

teacher instruction.”<sup>272</sup> The school district also blamed the mother for some of the difficulties with assessing and educating the student.<sup>273</sup> The mother was described as not cooperating with the school counselor and for not making sure that the student took his medication consistently.<sup>274</sup>

Similarly, the parent, proceeding on a *pro se* basis, argued in OAH Case No. 2013090194 that the IEE was inadequate.<sup>275</sup> Even though the mother had an expert testify,<sup>276</sup> she may not have understood what kind of evidence was necessary to argue that the school district’s IEE was inadequate. A Spanish-language interpreter assisted the mother in this case.<sup>277</sup> One must wonder how she could adequately represent her child if she could not even read the underlying English documents.

The fact that parents prevailed in five of seven cases in which they sought a publicly-funded IEE does seem to indicate a more favorable result on behalf of students than was evident in my previous review of cases. Further, it appears that many of these parents prevailed without hiring an outside expert to argue for the evaluation.

### G. *Oddest Case*

This qualitative review of the due process decisions would not be complete without mentioning the oddest case I have ever seen in my review of due process decisions. In OAH Case No. 2012080512, the mother brought a due process action on behalf of her twin twelve-year-old boys who had multiple disabilities due to premature birth and hemorrhages.<sup>278</sup> She decided to send her

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<sup>272</sup> *Id.* at 26.

<sup>273</sup> *See id.* at 5.

<sup>274</sup> *See id.* at 5, 9.

<sup>275</sup> L.A. Unified Sch. Dist. v. Parent *ex rel.* Student, Nos. 2013090194 & 2013071175 (OAH Cal. Oct. 29, 2013) (Robert G. Martin, ALJ), *available at* [http://www.documents.dgs.ca.gov/oah/seho\\_decisions/2013090194%202013071175.pdf](http://www.documents.dgs.ca.gov/oah/seho_decisions/2013090194%202013071175.pdf) (last visited Feb. 15, 2014).

<sup>276</sup> *See id.* at 14.

<sup>277</sup> *Id.* at 1.

<sup>278</sup> *See* Parents *ex rel.* Student A v. Temecula Valley Unified Sch. Dist., Nos. 2012080512 & 2012080514, at 10–11 (OAH Cal. Jan. 28, 2013) (Darrell

children to a charter school but soon realized that the school might not provide them with an adequate education.<sup>279</sup> After she brought this problem to the charter school's attention, the charter school hired the mother to be the children's classroom teacher.<sup>280</sup> She attended IEP meetings as both the mother and the teacher.<sup>281</sup> The mother refused to sign the proposed IEP in December 2011, was laid off in January 2012, and unilaterally began sending the students to a private placement in August 2012.<sup>282</sup> She eventually prevailed on behalf of her children on nearly all issues, including a failure to implement the November 2010 and February 2011 IEPs when she was her children's teacher.<sup>283</sup>

### III. CONCLUSION

ALJ decisions in special education cases give us an excellent window into school district practices under the IDEA. We can see how difficult it is for parents to navigate this system on behalf of their children as well as see the types of errors that are sometimes made by school districts in special education cases. Although parents might bear significant expenses to bring these cases, if they hire lawyers and experts, many parents may pursue due process complaints at little or no expense. Unlike federal district court cases, we therefore can see a broader range of experiences in the special education system by reading ALJ opinions rather than relying exclusively on district court opinions. The California database of special education decisions includes a cross-reference to related district court cases.<sup>284</sup> There are few reported district court cases in the database in comparison to the number of due process decisions. Thus, the ALJ decisions give us a much fuller sense of students' experiences with special education law than federal court cases.

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Lepkowsky, ALJ), available at <http://www.californiaspecialdew.com/oah-hearing-decisions/2012080512-2012080514.pdf> (last visited Feb. 15, 2014).

<sup>279</sup> See *id.* at 24–26.

<sup>280</sup> *Id.* at 25.

<sup>281</sup> *Id.* at 28.

<sup>282</sup> *Id.* at 53, 54, 66–67.

<sup>283</sup> See *id.* at 71–93.

<sup>284</sup> See generally *Decisions and Order Search—Special Education*, OFFICE OF ADMINISTRATIVE HEARINGS,

This review of special education decisions for most of the year of 2013 suggests that it continues to be very difficult for students to prevail if they are not represented by a lawyer, but they are more likely to prevail if their father rather than their mother represents them. In comparison with the previous time period, it appears that ALJs are often ruling in favor of parents when they seek a publicly funded IEE. With the aid of what is arguably the most sophisticated and easy-to-search database in the country, I look forward to continuing to follow developments in California.