

DUE PROCESS DURING THE PANDEMIC

Patricia R. Andrews, Esquire
Andrews & Price LLC
tandrews@andrewsandprice.com

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MAGGIE J. V.
DONEGAL
SCHOOL
DISTRICT

- U.S. District Court, E.D. PA
- Issue: FAPE
- Holding: Student was offered an “educational program reasonably calculated to enable her to make progress appropriate in light of her circumstances in accordance with Endrew F.

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MAGGIE J.

- Maggie and her 3 biological siblings were adopted after being removed from their biological mother for neglect
- Maggie's mother, beginning in kindergarten began advocating for Maggie to receive additional instruction and services

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MAGGIE J.

- Maggie was evaluated in kindergarten at parent request
 - Borderline IQ of 78
 - No discrepancies – no SLD
 - “fidgety and distracted” but no significant emotional issues
 - Fairly typical behaviors for kindergarten
 - Did qualify for speech and language
 - Mother agreed with evaluation

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MAGGIE J.

- Following year, parent had her privately assessed for ADHD
 - Diagnosed with Reactive Attachment Disorder (RAD) and ODD
 - Based on this, mother requested that Maggie be placed in ES classroom in 1st grade
 - Teacher did not agree she needed this level of intervention
- In first grade Maggie's behaviors began to increase
 - District began providing additional small group and individual programming with the guidance counselor, although they were not included in her IEP

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MAGGIE J.

- At the end of 1st grade, District again proposed a "speech only" IEP with no ESY and NO PBSP
 - However, a reevaluation was started to look at additional eligibility categories
- Parents disagreed and began discussion about:
 - Categorizing Maggie as Emotionally Disturbed
 - Revising IEP to include SDI for behaviors
 - ESY/Summer School
 - Retaining her in 1st grade

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MAGGIE J.

- RR completed and found she met criteria for emotional disturbance
- However, Maggie entered into a partial hospitalization program
- 1st grade report card worse than kindergarten, but she still met expectations academically
- 2nd grade IEP addressed emotional and behavioral needs
 - But she was hospitalized shortly after starting school
 - Mother wanted Maggie in full time support when she returned, but District felt PBSP would meet her needs in a less restrictive environment
 - Behavior did improve

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MAGGIE J.

- 2nd grade ended with progress monitoring showing progress and even skills that were mastered
 - Met expectations in most areas, including school wide behavior
- Parents sought an IEE
- New IEP developed for 3rd grade
 - Parents hired lawyer and disagreed with IEP
 - Felt it did not contain enough supports and did not include IEE recommendations

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MAGGIE J.

- 3rd grade behaviors did increase
 - District provided additional supports
 - More time in ES
 - Tracked behaviors
 - Report card still showed progress and meeting expectations

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IEPs must be reasonably calculated to enable the student to make progress appropriate in light on the student's circumstances



Calculated to provide more than de minimis progress



Student should be able to progress through their grades

MAGGIE J.

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MAGGIE J

- Hearing Officer and Court found no denial of FAPE
 - In 1st grade, the District evaluated Maggie when it became clear it was needed
 - In 2nd grade IEP was revised to include appropriate goals, services and PBSP
 - Daily communication showed improved behavior
 - Even mother agreed Maggie was successful, although she attributed that to things they did at home
 - In 3rd grade although she had 2 major behavior incidents, the rest of the year was similar to 2nd grade, with off-task but easily redirected behavior
 - No denial of FAPE based on 2 escalated incidents
 - District implemented consistent behavior support during the year

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ESPOSITO V. RIDGEFIELD PARK S.D.

- 3rd Circuit Court of Appeals
- Issue: FAPE
- Holding: Affirmed decision that IEP was reasonably calculated to enable student to make progress

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ESPOSITO

- K.M. began receiving special education services in 2005 when he was in 2nd grade with a language disorder
- Evaluations were waived in 2008 and 2012
 - **NOT RECOMMENDED!**
- In 2015, a reevaluation was conducted during senior year to help with post-graduation transition planning
 - Unexpectedly, significant drops in intellectual abilities

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ESPOSITO

- Parents filed for due process in 2017, seeking remedies from 2005-2015
 - Court found statute of limitations limited claims to the 2015-2016 school year
- Parents' witnesses were found to be unpersuasive
 - Monday morning quarterbacked and second guessed decisions after the fact

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ESPOSITO

- Court agreed program was “appropriate”
 - K.M. attended general education courses, except special education in language arts
 - Reasonably calculated to enable K.M. to achieve passing marks and advance from grade to grade
- Waivers of evaluations for 10 years left district vulnerable to litigation

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NORTHFIELD CITY S.D. V. K.S.

- 3rd Circuit
- Issue: Child Find/Pendency
- Holding: history of trauma insufficient to put school on notice to require evaluation; and
- Student stays in general education while parent filed lawsuit

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NORTHFIELD

- When L.S. entered middle school, parents told the school district of daughter's emotional difficulties; history of trauma and difficulty adjusting to new surroundings
- Mother told school she attend therapy due to childhood trauma
- Mother told counselor L.S. engaged in "self harm"
- In spring was struggling with math so mom asked for an evaluation
 - Did not qualify
 - But some supports were put in place

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NORTHFIELD

- By April, LS was very depressed, not going to class, ignoring friends
- Social worker suggested she go to a hospital where she was hospitalized for 5 days
- When she returned school had transition plan in place for L.S. to meet with counselor daily and changed her schedule so she could continue with outpatient therapy
- School conducted reevaluation
 - Emotional issues severe enough to qualify as ED
 - Put IEP in place for next year

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NORTHFIELD

- Before school started, mother filed for due process
 - Alleged child find – should have identified emotional problems earlier
 - IEP did not do enough to support emotional needs
- To start school, District kept LS in regular education

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NORTHFIELD

- Hearing Officer held program was appropriate, but ..
 - Found should have started special education
 - Awarded compensatory education for math that she missed
- District Court agreed that the District identified L.S. timely and that her program was appropriate, but reversed the award of compensatory education due to stay put

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NORTHFIELD

- 3rd Circuit agreed no child find violation
 - Schools must promptly identify all disabled student who need special education services
 - Once school is on notice that child may be disabled, it must evaluate within a reasonable period of time
 - Some disabilities are harder to diagnose, so a school's actions must only be reasonable based on what they knew at the time
 - Schools need not rush to judgment and may take intermediate steps in route to eventually finding a disability

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NORTHFIELD

- Child Find
 - No notice of potential disability or need for services even though parent told school of emotional issues
 - Grades fine
 - Behavior was mild
 - No evidence of emotional problems impeding her learning
 - First evaluation appropriate based on what school knew
 - Issues were with math – no need to evaluate emotional issues
 - Did second evaluation when emotional issues were impacting learning

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NORTHFIELD

- Stay Put
 - Once a parent sues the school, the school “shall” leave the student in her “current educational placement” until the lawsuit is over
 - Parents and school can agree to another placement . . .
 - But if they do not or cannot, school must keep the educational status quo
 - In this case – regular education

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GWENDOLY
NNE S.
V.
WEST
CHESTER
AREA S.D.

- U.S. District Court, E.D. PA
- Issue: Child Find
- Holding: District conducted appropriate evaluation finding student ineligible

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WEST CHESTER

- Court essentially holds that not every child who has any issue at school requires an evaluation or is eligible for special education services
 - Every child has strengths and weaknesses
- Teachers testified Gwendolynne was almost at grade level
- Received reading support through tiered intervention
- Was making progress

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E.P. V. TWIN VALLEY S.D.

- U.S. District Court, E.D. PA
- Issue: Child Find
- Holding: Contrasting opinion that multiple requests from parents was sufficient to thoroughly evaluate

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TWIN VALLEY

- Mother had been discussing student's academic and behavior issues with District since kindergarten
 - Absences were caused by melt downs at home
 - Homework issues
- Continued to request accommodations
- District never did a full or thorough evaluation of student
- As a result, reasonable accommodations were never provided

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M.D. V. COLONIAL SCHOOL DISTRICT

- U.S. District Court, E.D. PA
- Issue: Tuition Reimbursement
- Holding: School District required to provide 1 year of tuition reimbursement

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COLONIAL S.D.

- M.D. attended the District for 3 years and was identified as a special education student with an IEP
- Parents unilaterally enrolled her in private school for 2 years
- In April, 2019, the family reenrolled her in the District to start the 2019-2020 school year and requested an IEP
 - Also provided District with updated medical records that explained new diagnosis
- District issued Permission to Evaluate for an initial evaluation in May

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COLONIAL S.D.

- PTE returned, however, because of summer the District did not complete the evaluation prior to the start of school
 - Completed in September within 60 days of parents return of PTE (minus summer)
- Also did not develop or offer an IEP to start the school year
 - Despite multiple requests from the parents
 - Completed within 30 days of the ER in October
- Parents provided District with a 10 day notice of their intent to place student in private school and seek tuition reimbursement.

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COLONIAL S.D.

- Court overturned hearing officer and awarded tuition reimbursement for 1 year
- Court found procedural error by conducting an initial evaluation rather than considering student immediately eligible based on prior evaluation
- School could have then had an IEP in place to start school and done a reevaluation to obtain any new information needed

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COLONIAL S.D.

- Court held student did not lose IDEA eligibility simply because parents enrolled her in private school
- Once a child is found eligible for special education, they remain eligible until an evaluation deems the student ineligible, even if they leave public school
- Court also found that the District failed to make the Permission to Evaluate/Reevaluate “readily available” when the family reenrolled
 - Month delay inappropriate
 - Had district issued is immediately, evaluation could have been completed before summer

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D.A.
V.
PENN HILLS
SCHOOL
DISTRICT

- U.S. District Court, W.D. PA
- Issue: Private School Transportation
- Holding: School District had duty to accommodate student's transportation needs under Section 504

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PENN HILLS S.D.

- D.A. is a resident of Penn Hills, but is enrolled in Pittsburgh Central Catholic High School
 - D.A. has been diagnosed with asthma, depression, anxiety and a peanut allergy
- Penn Hills provided D.A. with transportation to Central Catholic, which is located within 10 miles of the District border
 - Prior to 2019-2020, D.A. was provided door to door transportation pursuant to a 504 Plan
 - In September, 2019 district informed family it would provide transportation, but not door to door

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PENN HILLS S.D.

- Family filed a Complaint with OCR
 - Settled through mediation
- Following month, District notified the family that they would discontinue providing a 504 Plan because the student was enrolled in a private school
- Parents filed suit

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PENN HILLS S.D.

- Parents argument:
 - District has an obligation to accommodate the student on an equal access basis and failed to do so
- District argument:
 - There is no liability because the district has no legal obligation to provide any FAPE related services to a student that is enrolled by their parents in a private school

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PENN HILLS S.D.

- Court agreed with parents
 - Framed the issue as whether District denied D.A. equal access to its busing services by refusing his requested accommodation of door to door transportation
 - Court looked at whether D.A. had been denied the opportunity to participate equally to all others in public facilities and federally funded programs, rather than whether he was denied FAPE by the District

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PENN HILLS S.D.

- Court held in favor of parents:
 - PA law requires schools that transport their own students to also provide the same transportation to students who attend private schools within a ten-mile distance of the District's boundaries.
 - Because Central Catholic is within 10 miles of Penn Hills' boundaries, Penn Hills is required to transport students that are enrolled there, including D.A.
 - Once Penn Hills offers transportation, they cannot discriminate against students with disabilities by denying them equal access.

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PENN HILLS S.D.

- To accomplish equal access
 - Schools have affirmative duty to make reasonable accommodations to avoid discrimination
 - Must provide access to programs equal to the access provided to nondisabled students
- Agreed that D.A. needed door to door transportation to access transportation to Central
 - Court determined that request therefore was reasonable to allow D.A. to access the service

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A.B. V. ABINGTON SCHOOL DISTRICT

- 3rd Circuit
- Issue: request for evaluation
- Holding: Parents' emails and conversations did not trigger the District's responsibility to conduct evaluation under the IDEA

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ABINGTON S.D.

- A.B. received special education services in the District from 1st-4th grades due to a diagnosis of autism
- Parents then unilaterally placed him in a private school
- District informed parents that they would provide A.B. with an appropriate program if he reenrolled

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ABINGTON S.D.

- More than a year later, parents emailed the Principal:
 - “interested in finding out what programs the district can offer”
- Also had conversation with Principal about possibly enrolling A.B. for 7th grade
- A month later, parents emailed Special Education Director
 - Asking “what programs the district can offer”
- Shortly thereafter parents and Special Education Director spoke about what programs were generally available at the junior high

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ABINGTON S.D.

- Separately, parents requested an evaluation for their other child who was also attending private school
 - “To determine if she is eligible for special education services and programming in the District”
- On August 17, parents emailed district claiming that because the District did not offer an appropriate program and placement for A.B., she had no choice but to continue his enrollment in the private school for 7th grade and requested that the District fund the tuition.
 - The District declined since parents withdrew him 2 years prior and did not request an evaluation or reenroll A.B. in the District.

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ABINGTON S.D.



The Court held:

Vague statements to district are not sufficient to put district on notice that they have a responsibility to provide FAPE to a student unilaterally enrolled in private school



To trigger the evaluation process parents must:

Request an evaluation; OR
Begin the enrollment process

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PERKIOMEN
VALLEY S.D.
V.
R.B.

- U.S. District Court, E.D. PA
- Issue: Transition/Tuition Reimbursement
- Holding: Court upheld reimbursement for residential transition program

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PERKIOMEN VALLEY

- R.B. was an intellectually disabled student with speech impairment
 - Also has medical issues
- In 2012-2013 R.B. was 16 in 11th grade – attended District High School
 - Participated in the Montgomery County IU (MCIU) career exploration transition program
- In 2013-2014 R.B. was 17 in 12th grade – attended District High School
 - Participated in academic, prevocational, communication and independent living skills in classroom
 - Participated in an internship
 - Worked in the school office as an aide
 - Manager of soccer team

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PERKIOMEN VALLEY

- 2014-2015 – 18 years old and in 13th year
 - Participated in MCIU Apartment program 5 days/week where she practiced independent living skills in simulated apartment
 - Also practiced prevocational, communication and independent living skills in the classroom
 - Continued to be an office aide
- Parents began exploring alternative programs that focused on independent living
 - Found VIP – a New York residential transition program for students with disabilities

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PERKIOMEN VALLEY

- At the end of the year, parents informed District that R.B. was not ready to graduate and asked District to fund placement at VIP
- District agreed she was not ready to graduate, but declined to pay for VIP
- For 2015-16 the IEP Team:
 - Proposed that R.B. focus on functional rather than academic skills
 - Identified transition needs
 - Proposed placement at either the high school or vo-tech program

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PERKIOMEN VALLEY

- Parents toured one of the vocational placements
 - Concerned that it only exposed her to one vocation (early childhood)
 - And did not address independent living skills needs
- Parents again asked for payment to VIP and district refused
- Parents unilaterally enrolled her for the 2015-2016 school year

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PERKIOMEN VALLEY

- Program at VIP:
 - Attended non-credit courses which all showed progress
 - Some academic some transition related classes
 - In sprint participated in internship at assisted living facility
 - Individual counseling one per week for academics, social functioning, independent living and employment skills
 - Lived in a residence hall with other students

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PERKIOMEN VALLEY

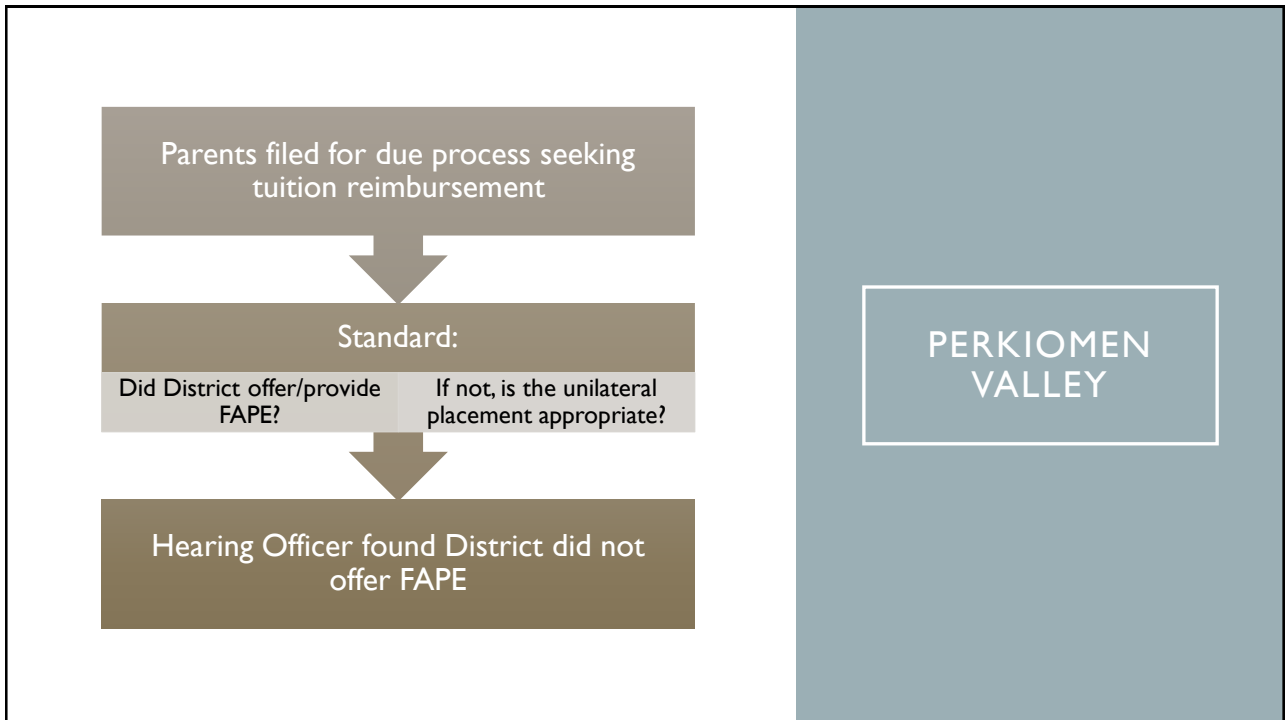
- Parents and VIP planned for R.B. to return to VIP for 2016-2017 school year
 - Parents' expert opined that VIP was appropriate and school district's program was deficient
- School District held IEP meeting
 - District offered full time high school or vo-tech in morning and Chester County IU's Discover Program in the afternoon
 - Parents asked for payment for VIP for 2016-17, but district refused
- School District also asked to reevaluate, but did not conduct the evaluation due to summer

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PERKIOMEN VALLEY

- R.B. returned to VIP for 2016-2017
 - 15th year, 20 years old.
 - Continued to take academic and transition related non-credit classes – showing progress
 - Participated in an internship at a retail store in the fall and hospital in the spring
 - Continued individual weekly counseling
 - Lived in residence hall
- R.B. aged out at the end of the school year

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PERKIOMEN VALLEY

- Transition Services
 - IEP must include appropriate measurable post-secondary goals based on age-appropriate transition assessments related to training, education, employment and independent living
 - Must provide a coordinated set of activities designed within a result-oriented process that is based on child's needs and interested and help the child to transition from school to post school activities
 - Third Circuit has not defined what amount of transition is required in an IEP to ensure FAPE

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PERKIOMEN VALLEY

- Court agreed that District did not offer FAPE
 - Programs offered were not likely to confer meaningful benefit to R.B.
 - Vo-tech program would have only exposed her to one vocation – childcare
 - Testimony that although she initially was interested in this vocation, that may have changed
 - Would not have provided adequate instruction in transportation and independent living skills
 - Identified as needs
 - High School program was not appropriate because her needs were not academic and she had exhausted transition options available

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PERKIOMEN VALLEY

- For 2016-17, District added new IU program to its offer
- Court found still did not offer FAPE because it still did not address need to learn independent living skills
 - Only added vocational skills to the offer
 - CCIU did have other community based instruction programs that were not offered by the district
- Court found VIP did confer meaningful benefit and therefore was appropriate

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PERKIOMEN VALLEY

Court awarded tuition reimbursement

- Did emphasize that this was an individualized decision for R.B. only

Remember the appropriateness of transition services follows a FAPE analysis

- Ensure what you offer is individualized
- To meet the unique needs of the student
- Addresses all identified needs

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L.B.
V.
RADNOR
TOWNSHIP
S.D.

- U.S. District Court, E.D. PA
- Issue: gifted evaluation for special education student
- Holding: District did not discriminate on basis of disability when it determined student was not eligible for gifted services

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RADNOR TWP

- L.M. is a student with autism and a speech and language impairment who qualified for special education services under the IDEA
- At end of 2nd grade, teacher referred him to be evaluated for gifted services
 - Reading above grade level
 - Showed signs of creativity
- District completed screening tool – Gifted Referral and Identification Summary
 - Although he received a low score on the screener, District conducted the evaluation

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RADNOR TWP

- IQ test given with accommodations
 - Dimming lights, snacks and fidgets available, movement breaks, 2 sessions for testing
 - FSIQ – 123 and GAI 125
- Achievement testing
 - 96th percentile reading – one but not 2 full years above grade level
 - 74th percentile math
- Included observations – needs repetition to master skills

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RADNOR TWP

- Evaluation concluded did not qualify
 - Doing well academically
 - Strength in reading
 - Creative writer
 - Competent in math
 - No needs beyond those available in regular education with some enrichment opportunity

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RADNOR TWP

- Parents argue that the District failed to provide appropriate accommodations for L.B. during gifted evaluation in violation of Rehabilitation Act
 - Psychologist, who had significant experience assessing both gifted and special education students providing appropriate accommodations to student
 - Even though parents did not even request accommodations
- Parents also argued violated IDEA by
 - Failing to find student eligible for gifted services; and
 - Failing to provide services that would prevent his disability from masking his potential giftedness

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RADNOR TWP

- Court found evaluation to be appropriate
 - Student's IQ under 130
 - But district assessed each enumerated "multiple criteria" in state regulations
 - Agreed that criteria as a whole did not indicate a need for gifted education
 - Parents were unable to show that L.B. would have been eligible for gifted education if reasonable accommodations were provided