42nd Annual
Pacific Northwest Institute on

SPECIAL EDUCATION & THE LAW

October 27-29, 2025
Hilton Bellevue
Bellevue, Washington

Presented by:

COLLEGE OF EDUCATION
UNIVERSITY of WASHINGTON

Institute website: pnwi.uw.edu

Program Overview

Pre-Institute Mini-Courses

Monday, October 27, 2025

7:30 AM	Registration desk opens
7:30–9:00 AM	Continental breakfast
9:00–11:00 AM	Morning Mini-Courses (A, B, C)
11:00 AM–12:30 PM	Lunch on your own
12:30–2:30 PM	Early afternoon Mini-Courses (D, E, F)
2:30–3:00 PM	Refreshment break
3:00-5:00 PM	Late afternoon Mini-Courses (G, H, I)

Pacific Northwest Institute

Tuesday, October 28, 2025

7:00 AM	Registration desk opens
7:00–8:30 AM	Continental breakfast
8:30–10:00 AM	First General Session
10:00–10:30 AM	Refreshment break
10:30–12:00 PM	Tuesday morning Workshops (1-3)
12:00–1:00 PM	Hosted luncheon
1:00–2:30 PM	Tuesday afternoon Workshops (4-6)
2:30–3:00 PM	Refreshment break
3:00–4:30 PM	Tuesday late afternoon Workshops (7-9)
4:30–6:00 PM	Reception

Wednesday, October 29, 2025

7:00 AM	Registration desk opens
7:00–8:30 AM	Continental breakfast
8:30–10:00 AM	Second General Session
10:00–10:30 AM	Refreshment break
10:30 AM–12:00 PM	Wednesday morning Workshops (10-12)
12:00 PM	Adjourn

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Special Education and the Law

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TABLE OF CONTENTS

General Session I

Special Education Law Year in Review

By:

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Pacific Northwest Institute on Special Education and the Law
October 27-29, 2025
Bellevue, Washington

F3 Law

Special Education Law Year In Review

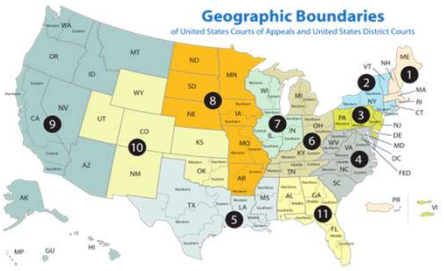
2025 PWN Institute

Presented by: Jonathan P. Read and Jan E. Tomsky

What We'll Cover . . .

- Selected recent judicial decisions (mid-2024 through mid-2025), organized by topic, from U.S. Circuit Courts and U.S. District Courts
- Federal guidance from OSEP/OSERS

Circuit Court Map



Noteworthy Judicial Decisions

Child Find

H.S. v. District of Columbia (D.D.C. 2025)

Facts:

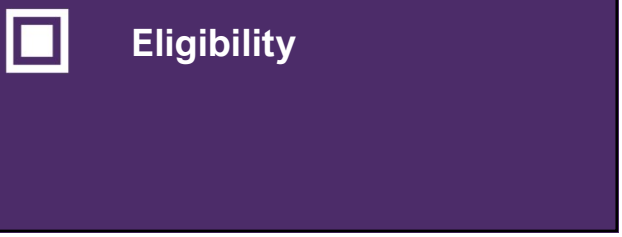
- Fifth-grade student was diagnosed with anxiety disorder
- Performed well academically but struggled in Spanish class
- District refused to evaluate student as its staff believed the student was generally able to participate successfully in the general education curriculum
- Parents claimed district committed child find violation
- Hearing officer found in district's favor
- Parents appealed to district court

H.S. v. District of Columbia (D.D.C. 2025)

Decision:

- District Court upheld IHO's decision that district reasonably believed the student did not have a disability that adversely affected her educational performance or necessitated specialized instruction
- Student generally met her teachers' expectations for social and personal development, although she engaged in work avoidance at times
- "[H]er aversion to Spanish was well-known to [the school's] staff, so when her academic progress stalled in Spanish, the school could rationally attribute it to the Spanish language environment rather than to her diagnosed separation anxiety"
- District reasonably responded by providing the student with a Section 504 plan to address anxiety issues

(H.S. v. District of Columbia (D.D.C. 2025) 125 LRP 11515)



F.C. v. Irvine Unified Sch. Dist. (C.D. Cal. 2025)

Facts:

- Student began experiencing symptoms of Kleine-Levin Syndrome ("KLS") in August 2019; KLS is characterized by recurrent bouts of excessive sleep and cognitive/ behavioral changes
- As result of his symptoms, student missed extensive amount of classroom instruction and assignments, but passed all of his eighth-grade classes, which parents attributed to private tutors
- When student matriculated to high school for 2020-2021, parents completed health form indicating no disabling conditions
- Parents withdrew student from district in January 2021 and placed him in private school
- Student diagnosed with KLS in May 2021
- After parents expressed interest in re-enrolling student, district conducted assessment and concluded Student was not eligible for special education
- Parents claimed district violated child find and that assessments should have found student eligible

F.C. v. Irvine Unified Sch. Dist. (C.D. Cal. 2025)

Decision:

- District court upheld ALJ's conclusion of no child find violation, as record did not establish that district knew or should have known that student was a child with a disability
- Prior to student's formal diagnosis of KLS, parents and doctors believed and represented to district that student was exhibiting symptoms related to virus or infection
- ALJ also correctly determined that student did not need special education or related services to access his education
- Even if student had a qualifying health condition, student "did not meet the second requirement of the definition which required student be unable to access the curriculum without specialized academic instruction"
- Accommodations provided to student were sufficient to allow student to pass his classes; student understood curriculum, performed at grade level, and made progress in his studies

(F.C. v. Irvine Unified School Dist. (C.D. Cal. 2025) 125 LRP 2497)

G.M. v. Barnes (4th Cir. 2024)

Facts:

- Although second-grade student, who was diagnosed with ADHD, performed above average in math, his statewide reading and writing assessments declined
- Student still met grade-level standards in reading and writing
- In determining whether student would qualify for special education under SLD category, district's eligibility team, consistent with state law, considered whether student exhibited pattern of strengths and weaknesses in performance, achievement, or both, relative to age or state-approved grade-level standards
- Parents disputed finding of ineligibility, believing student qualified under SLD category

G.M. v. Barnes (4th Cir. 2024)

Decision:

- 4th Circuit upheld district court's ruling that student was not eligible for special education
- Student's "solidly average" performance in general education classroom and progression from grade to grade demonstrated district's findings were appropriate
- Court: "Since [the student] had no pattern of strengths and weaknesses relative to age or state-approved grade-level standards, [he] did not have an SLD"
- Student's strength in math did not turn his reading and writing performance into a "weakness" for SLD purposes
- Although student's ADHD qualified as "other health impairment" under IDEA, existence of such disability did not confer automatic eligibility absent proof that student required special education services as result of his ADHD

(G.M. v. Barnes (4th Cir. 2024) 124 LRP 32983)

Evaluations

Boffa v. Banks (S.D.N.Y. 2025)

Facts:

- District had been developing IEPs for the student with cerebral palsy, quadriparesis, microcephaly, and other disabilities since 2009-10
- Multiple IEPs identified the student as a "visual learner" who required "vision services" to make educational progress
- District did not conduct a vision assessment until February 2022
- By that time, the student had already been diagnosed with a cortical visual impairment by her private school and had been deemed "legally blind" by an independent evaluator
- Parents privately placed student and sought reimbursement, claiming districts failure to assess for vision issues resulted in denial of FAPE

Boffa v. Banks (S.D.N.Y. 2025)

Decision:

- District court upheld denial of FAPE claim
- Prolonged failure to conduct vision assessment missed the student's significant difficulties with processing visual information
- Student had made substantial progress since she enrolled in the private special education school and began receiving vision services
- Court awarded reimbursement for the student's unilateral private placement and ordered the district to extend the student's IDEA eligibility through age 25
- "The court finds it hard to believe that three years of attendance at [the private school] could come close to making up for a thirteen-year denial of vision services"

(Boffa v. Banks (S.D.N.Y. 2025) 125 LRP 3481)

FBAs

W.A. v. Panama-Buena Vista USD (E.D. Cal. 2024)

Facts:

- Kindergarten student exhibited several negative behaviors, which escalated when he entered 1st grade
- Behaviors included extreme physical aggression toward peers and staff
- District found student eligible for special education under ED and OHI categories
- When parent did not consent to IEP, District offered to conduct additional assessments, which included FBA
- Parent disputed results of FBA and sought IEE
- District filed for due process hearing to defend FBA
- ALJ found FBA met all required standards and was appropriately conducted

W.A. v. Panama-Buena Vista USD (E.D. Cal. 2024)

Decision:

- District court upheld ALJ's findings regarding adequacy of District's FBA
- Court rejected parent's assertion that FBA relied upon insufficient quantitative data, noting that school psychologist included sufficient data, information, analysis, and reporting, which included interviews, observations, and thorough records review
- Court also rejected parent's argument that FBA did not support school psychologist's hypothesis that "access" was function of student's target maladaptive behavior, as teacher testimony indicated that "student was triggered by being denied an activity or to avoid having to complete an activity"
- FBA contained appropriate functional equivalent replacement behavior ("FERB") and behavioral goals

(W.A. v. Panama-Buena Vista Union School Dist. (E.D. Cal. 2024)124 LRP 22428)

IEEs

C.D. v. Arlington County Sch. Bd. (E.D. Va. 2025)

Facts:

- Parent requested a publicly funded IEE for 12th-grader with SLD in January 2023, less than five months before her son's scheduled graduation from high school
- District initially denied the parent's IEE request after learning that the assessments were intended to secure accommodations for the student in college
- District subsequently agreed to fund IEE in April 2023, after the parent filed a due process complaint
- Parent asserted that district's delayed response to IEE requested resulted in denial of FAPE

C.D. v. Arlington County Sch. Bd. (E.D. Va. 2025)

Decision:

- District court found that district's delay was a procedural violation of the IDEA
- Court, however, determined that no educational harm resulted and, therefore, parent was not entitled to relief
- Given the time needed to conduct the requested assessments and consider the results, IEE would have had a minimal impact on IEP development
- Further, "[t]he [parent] did, in fact, receive benefits from the delayed IEE in having the updated testing available to help [the student] get accommodations in college"

(C.D. v. Arlington County Sch. Bd. (E.D. Va. 2025) 125 LRP 3555)

IEPs and Provision of FAPE

E.H. v. Issaquah Sch. Dist. (W.D. Wash. 2025)

Facts:

- Parent of eighth-grader with intellectual disability had unilaterally placed the student in a private school
- Parent emailed the district indicating that she was considering returning the student to public school and asked for a reevaluation
- Parent ultimately consented to reevaluation, but district did not have IEP in place at beginning of school year since it had not yet completed the evaluation by the time the school year began
- Parent, who reenrolled the student in private school, alleged that the district failed to timely reevaluate the student
- ALJ found in district's favor

E.H. v. Issaquah Sch. Dist. (W.D. Wash. 2025)

Decision:

- District court affirmed ALJ's finding
- District reevaluated the student within 31 school days of receiving consent, which was within the 35 days required by state law
- Any delay in responding to parent's reevaluation request was reasonable in light of mitigating factors, including confusion over parent's email address and parent's failure to follow up
- Court agreed with ALJ that the district acted quickly to make up for lost time and worked diligently, even on days when school was not in session, to effectively complete the reevaluation
- Also, court held that failure to have the IEP in place at the beginning of the school year did not impede the student's right to FAPE, as the district offered to implement the student's previous IEP as a stopgap measure while finalizing the new IEP

(E.H. v. Issaquah Sch. Dist. (W.D. Wash. 2025) 125 LRP 8564)

William A. v. Clarksville-Montgomery County Sch. Sys. (6th Cir. 2025)

Facts:

- District's proposed IEP for high school student with dyslexia focused on assistive technology to help him learn to read and write
- Student relied on artificial intelligence bots and speech-to-text programs to complete assignments
- Although student completed the general education curriculum and graduated with a 3.4 GPA, he was unable to read or spell his own name
- Student ultimately made progress when he began receiving private tutoring in basic reading skills
- Parents claimed district's IEP denied FAPE

William A. v. Clarksville-Montgomery County Sch. Sys. (6th Cir. 2025)

Decision:

- 6th Circuit upheld lower court's finding of denial of FAPE
- IEP's focus on AT deprived the student of the opportunity to acquire basic reading skills that would allow him to decipher and understand written information on his own
- IEP also improperly focused on advanced skills like reading fluency instead of alphabetic sequencing, syllable recognition, and other foundational reading skills
- Reliance on artificial intelligence bots and speech-to-text programs to complete assignments masked student's inability to read
- Student was capable of learning to read, as evidenced by his success in the private tutoring program

(William A. v. Clarksville-Montgomery County Sch. Sys. (6th Cir. 2025) 125 LRP 3627)

A.L. and N.L. v. Howell Twp. Bd. of Educ. (D.N.J. 2025)

Facts:

- 6-year-old student with ADHD struggled in class and made little academic progress
- District amended her IEPs on several occasions, placing the student in smaller groups and a more individualized setting, added a BIP and a paraprofessional, and offered ESY services
- When student continued to struggle, her guardians enrolled her in an out-of-district school
- Guardians alleged that the student's program was inappropriate, given her regression and lack of progress

A.L. and N.L. v. Howell Twp. Bd. of Educ. (D.N.J. 2025)

Decision:

- District court affirmed ALJ's decision that district provided FAPE
- Despite student's difficulty making significant progress, she made adequate, gradual, and satisfactory progress in many respects, based on data, progress reports, and witness testimony
- Guardians conceded that whenever the student struggled, her IEPs were adjusted accordingly
- District reevaluated the student on multiple occasions to assess her needs
- Guardians could have rejected updated and revised IEPs, but they did not object

(A.L. and N.L. v. Howell Twp .Bd. of Educ. (D.N.J. 2025) 125 LRP 4958)

B.Z. v. Hewlett Woodmere Union Free Sch. Dist. (E.D.N.Y. 2025)

Facts:

- Student, who had multiple mental health conditions, had a lengthy history of refusing to enter his local high school building
- For many years, student's school refusal prevented him from earning credits toward his graduation
- Parent moved student to private school where he made "tremendous" progress, both academically and socially, with one-to-one instruction
- District proposed an IEP for student that included five hours of weekly instruction in the district's credit recovery program, which would include any other students who wished to participate

B.Z. v. Hewlett Woodmere Union Free Sch. Dist. (E.D.N.Y. 2025)

Decision:

- District court granted parent reimbursement for the private school program, finding that district's IEP denied FAPE by offering a small-group instructional program without proposing any strategies that would address the student's school avoidance
- Two mental health professionals attributed the student's significant progress to the private school's one-to-one instructional model, which allowed him to attend classes "without feeling judged"
- Addressing district's proposed IEP, the court stated: "How a student can be expected to make educational progress when, by all accounts, he will not enter the building to attend his classes ... is beyond this court's comprehension"

(B.Z. v. Hewlett Woodmere Union Free Sch. Dist. (E.D.N.Y. 2025) 125 LRP 2485)

C.B. v. Nazareth Area Sch. Dist. (E.D. Pa. 2025))

Facts:

- District's proposed IEP for student with autism, a speech impairment, and ADHD offered use of Augmentative and Alternative Communication (AAC) device
- AAC was intended to assist the student with his communication struggles and resulting behavioral frustrations
- IEP did not, however, address modeling of the AAC device to ensure the student used it across settings and with different communication partners
- IHO determined that IEP did not offer FAPE to the student and awarded compensatory education

C.B. v. Nazareth Area Sch. Dist. (E.D. Pa. 2025)

Decision:

- Affirming the IHO's decision, district court found district's IEP was deficient because it failed to require consistent modeling of the device; therefore, the district's argument that it implemented the IEP's AAC provision was irrelevant
- Lack of such modeling meant that the student was unable to consistently communicate, and, as a result he communicated through his deteriorating behavior, which prevented him from making educational progress
- District's speech and language therapist provided some training on how to model the device, but such modeling did not consistently occur throughout the day and the AAC device was often left unused or only used for small bits of communication

(C.B. v. Nazareth Area Sch. Dist. (E.D. Pa. 01/06/25) 125 LRP 1213)

E.C.D. v. San Diego Unified Sch. Dist. (S.D. Cal. 2025)

Facts:

- 8-year-old student qualified for special education under categories of hearing impairment and SLI
- District developed IEP that included 5 hours per week of DHH services in general education classroom
  - IEP included references to both Florence Elementary School (student's home school) and Lafayette Elementary School as location for services
  - IEP notes clarified that IEP team recommended placement at Lafayette and made clear that "IEP document may contain errors that include 'Florence Elementary' in the document, as that is where [student] is currently enrolled. That is not editable until enrollment changes."
  - District reaffirmed in IEP notes that, based on its assessments, it did not believe that full-time deaf education specialist desired by Parents was necessary for student to benefit from his educational program and "can result in learned helplessness"
- Parents disputed IEP and sought reimbursement for private school placement

E.C.D. v. San Diego Unified Sch. Dist. (S.D. Cal. 2025)

Decision:

- District court affirmed ALJ's decision in district's favor
- Educational setting (Lafayette) offered by district was particularly suited to students who are deaf and hard of hearing
- Assessors credibly testified that student did not need full-time DHH co-teacher
- Final draft of proposed IEP "removed all doubt and clearly established that the offer was for placement at Lafayette," and parents understood it that way
- No evidence that Parents rejected offer of FAPE because of any confusion about offered location and IEP fully explained any errors in the document, eliminating any possible confusion
- Even if offer was confusing, it would have constituted harmless error

(E.C.D. v. San Diego Unified School Dist. (S.D. Cal. 2025) 125 LRP 2365)

K.B. v. Memphis-Shelby Co. Schs. (W.D. Tenn. 2024)

Facts:

- Nonverbal elementary school student with autism, ADHD and intellectual disability received academic instruction in functional skills classroom and attended lunch, recess, and support classes in general education setting
- As result of such placement, student attended two lunch periods each school day – one with functional skills class and one with general education class
- Student, however, did not speak to or interact with his peers during either lunch period, nor did district provide student with supervision or assistance during these lunch periods
- ALJ found that district's IEPs provided FAPE

K.B. v. Memphis-Shelby Co. Schs. (W.D. Tenn. 2024)

Decision:

- District court reversed ALJ's decision, finding that district's IEP denied FAPE
- Arrangement allegedly caused the student to gain weight and extra lunch period took up valuable time, only allowing staffers to provide the student with three hours and 15 minutes of academic instruction per day
- "For a non-verbal elementary school student . . . to be left unsupervised for two lunch periods a day goes beyond 'peculiar'"
- District also improperly developed IEP before it completed appropriate evaluation and inappropriately omitted ABA services and occupational therapy recommended in prior assessments

(K.B. v. Memphis-Shelby Co. Schs. (W.D. Tenn. 2024) 124 LRP 8431)

Moreland Family v. Mary M. Knight Sch. Dist. (W.D. Wash. 2024)

Facts:

- District's IEP for student with hearing impairment required provision of closed-captioning accommodation
- District failed to provide student with closed-captioning for "unknown" period of time in September 2021 due to continuing software problems
- During this time, however, student was able to participate fully in online lessons using his personal closed-captioning device
- Further, student communicated with his teachers using chat blogs and message boards and accessed all written instructional materials

Moreland Family v. Mary M. Knight Sch. Dist. (W.D. Wash. 2024)

Decision:

- Court: "While the district's failure to provide closed captioning amounts to a material violation of its duty to implement the IEP, the court cannot conclude that [the student] was denied a FAPE or educational benefits"
- District successfully argued that malfunction of its closed-captioning software in September 2021 was harmless error, given student's demonstrated ability to use his personal closed-captioning device to access education
- Because district did not deny student FAPE, court determined it had no obligation to pay for private tutoring

(Moreland Family v. Mary M. Knight Sch. Dist. (W.D. Wash. 2024) 124 LRP 28007)

IEP Goals

Edward M.R. v. District of Columbia (D.C. Cir. 2025)

Facts:

- Middle-schooler with autism and ADHD struggled with memory and concentration
- District's IEPs repeated some goals from previous IEP
- Parents asserted that IEPs were flawed because they repeated goals and student failed to make progress or, in some instances, regressed
- District court determined that IEPs provided FAPE
- Parents appealed to D.C. Circuit

Edward M.R. v. District of Columbia (D.C. Cir. 2025)

Decision:

- D.C. Circuit upheld district court's finding
- Court noted that FAPE is not measured by how much progress a student makes, but rather whether the student's IEP was designed to provide FAPE
- Parents failed to identify any flaws in IEPs or IEP development
- Because student struggled with memory, his progress depended in part on repetition and consistency
- "[R]epeating goals was reasonable because [the student] had yet to achieve them"
- Districts IEPs also contained several "appropriately ambitious" new goals

(Edward M.R. v. District of Columbia (D.C. Cir. 2025) 125 LRP 4880)

Least Restrictive Environment ("LRE")

N.P. v. Lago Vista Indep. Sch. Dist. (W.D. Tex. 2025)

Facts:

- Middle schooler with hydrocephalus, a speech impairment, and a visual impairment had part of his cerebellum removed at birth and had severe academic deficits
- District attempted to educate student in a general education setting by provided the student with accommodations and a modified curriculum
- District also allowed the student to redo assignments and tests, reduced his math work by half, and placed an additional teacher in the room to support him
- When student continue to struggled, the district proposed to change the student's placement to a small classroom focused on basic academic and functional skills
- Parent claimed the proposed new setting was overly restrictive

N.P. v. Lago Vista Indep. Sch. Dist. (W.D. Tex. 2025)

Decision:

- District court determined that the proposed placement change was the LRE for the student
- District made legitimately, albeit unsuccessful, effort to educate the student in a general education setting
- Despite the accommodations and modifications that the district provided, the student was years behind in math and reading, and his tests were sometimes modified "so much that the curriculum was at points unrecognizable"
- Student needed more repetition, time, and one-to-one support for him to retain information and benefit from the curriculum
- Such supports could only be offered in the smaller setting proposed by the district

(N.P. v. Lago Vista Indep. Sch. Dist. (W.D. Tex. 2025) 125 LRP 8552)

R.J. v. Irvine Unified Sch. Dist. (C.D. Cal. 2024)

Facts:

- Fourth-grader with ED attacked and threatened various classmates and staff before fleeing campus
- Student ran through busy intersection, disrobed, and shouted obscenities at random mother passing by with her baby
- District amended student's IEP to include one-to-one behavioral aide
- Parent, however, claimed that student's behavior established her need for residential placement

R.J. v. Irvine Unified Sch. Dist. (C.D. Cal. 2024)

Decision:

- District's offer was LRE for student
- Additional supervision of 1:1 aide allowed student to remain in public school program while protecting student and her classmates from potential harm
- Student performed well academically and generally complied with behavioral expectations
- Non-compliant behaviors were small percentage of her overall behavior
- Student's private psychologist did not speak with staff, review student's records, or observe her current program before recommending residential placement

(R.J. v. Irvine Unified Sch. Dist. (C.D. Cal. 2024) 124 LRP 24747)

Methodology

H.R. v. District of Columbia (D.D.C. 2024)

Facts:

- District developed IEPs for unilaterally placed sixth-grade student with multiple disabilities attending private school
- IEPs offered two reading goals and 15 hours per week of specialized instruction in structured classroom setting with limited distractions when being introduced to new skills
- IEPs did not include specific goals and specialized instruction for student's executive functioning needs
- Parents challenged proposed IEPs, asserting that they did not specify reading program methodology that would be provided and did not adequately address student's reading and executive functioning needs

H.R. v. District of Columbia (D.D.C. 2024)

Decision:

- District court rejected parents' claims
- District was not required to include Orton-Gillingham reading methodology or specific executive functioning goals
- IDEA does not require IEPs to provide specific program or employ specific methodology in educating student, as districts generally maintain discretion in determining instructional methodology
- District's IEPs adequately specified how student's reading instruction would be provided
- Executive functioning needs were adequately addressed elsewhere proposed IEPs through accommodations relating to chunking, visual timers, checklists, etc.

(H.R. v. District of Columbia (D.D.C. 2024) 124 LRP 28849)

Parent Participation

Elena M. v. School Dist. of Philadelphia (E.D. Pa. 2025)

Facts:

- Parent challenged district's IEPs created from November 2021 through March 2022 for elementary school student with autism
- Parents contended that they were denied meaningful participation because progress monitoring documents were so flawed that district staff could not explain them
- At the March 2022 IEP meeting, parents claimed they learned for the first time that the district was only providing one-to-one support in the general education classroom, not in special education classes
- IHO rejected parents claims, finding that district provided FAPE

Elena M. v. School Dist. of Philadelphia (E.D. Pa. 2025)

Decision:

- Court overturned IHO's decision
- Without clear communication regarding what services were offered, IEP team could not reasonably determine whether services were appropriate
- Further, district members of the IEP team, and the parents, were "confounded" by progress monitoring documents and could not decipher data
- IEP team could not have appropriately addressed the student's lack of progress when revising her IEP due to its failure to understand the progress reports
- Confusion and lack of communication deprived parents of their right to meaningfully participate in IEP process

(Elena M. v. School Dist. of Philadelphia (E.D. Pa. 2025) 125 LRP 9179)

Cockrell v. Bessemer City Bd. of Educ. (N.D. Ala. 2024)

Facts:

- Each of IEPs for student with SLD required the district to send progress reports every nine weeks at the same time it sent report cards
- Parent claimed that she only received two progress reports
- Only two progress reports were found in the student's file
- Parent was allowed to ask questions and fully participated in IEP team meetings
- IHO determined that the procedural violation of failing to send progress reports had no impact on the parent's participation in the IEP process
- Parent appealed to the district court

Cockrell v. Bessemer City Bd. of Educ. (N.D. Ala. 2024)

Decision:

- District court reversed the IHO's decision that the procedural violation had no impact on the parent's participation in the IEP process, finding in favor of the parent
- Court rejected the district's contention that the parent could have obtained information about the student's progress by asking appropriate questions during the student's IEP team meetings
- "Without progress reports or information about the extent to which [the student] was advancing towards mastery of goals, [the parent] did not know what questions to ask of [the special education director] or [the] IEP team"

(Cockrell v. Bessemer City Bd. of Educ. (N.D. Ala. 2024) 124 LRP 35205)

Luo v. Owen J. Roberts Sch. Dist. (E.D. Pa. 2024)

Facts:

- Due to a scheduling conflict, an independent evaluator of student with autism and ID was not able to attend the student's IEP team meeting in person
- District did not excuse the independent evaluator from the meeting to discuss the student's IEE results; instead it allowed the evaluator to participate by telephone, although it did not notify the parent in advance that the evaluator would not be present and would participate telephonically
- Evaluator disconnected her call before the end of the meeting and evaluator's input "was not deep or comprehensive"
- Parent objected to independent evaluator's participation in an IEP team meeting by telephone

Luo v. Owen J. Roberts Sch. Dist. (E.D. Pa. 2024)

Decision:

- District court concluded that any procedural error resulting from the district's failure to obtain the parent's consent was harmless
- "While a team member may only be excused from the meeting with the consent of a parent, it does not follow that parental consent is required for a participant to attend via alternative means such as by telephone"
- Parent actively contributed to discussions about the student's program and provided his input on a draft IEP
- Given the parent's active participation in the discussion and the IHO's directive to reconvene the IEP team, including the independent evaluator, for an in-person discussion of the IEE report, procedural violation did not infringe on parent's ability to participate in the IEP process

(Luo v. Owen J. Roberts Sch. Dist. (E.D. Pa. 2024) 124 LRP 41906)

Postsecondary Transition

T.F. v. District of Columbia (D.D.C. 2025)

Facts:

- High school student with severe autism was unable to read or use a computer independently
- Student also was unable to recognize street signs or grocery signs, count change, or tell time independently
- District's transition assessments provided the student with pictures of various occupations and job-related tasks
- IEP team developed postsecondary goals that called for student to explore requirements for two different vocational programs, research job duties for maintenance workers, and research assisted living facilities
- Parent claimed transition plan denied student FAPE

T.F. v. District of Columbia (D.D.C. 2025)

Decision:

- Court found denial of FAPE
- Court questioned whether transition assessments accurately identified the student's interests and career goals
- Even if the assessments were appropriate, the resulting transition plans fell short of IDEA requirements
- It was unclear how the student could begin exploring vocational programs or researching job duties with only the one-hour lesson in computer skills that his transition plan offered
- "Surely a goal or service cannot be 'appropriate' when a student wholly lacks the skills necessary to even begin using that service or making progress toward that goal"

(T.F. v. District of Columbia (D.D.C. 2025) 125 LRP 9183)

Kass v. W. Dubuque Cmty. Sch. Dist. (8th Cir. 2024)

Facts:

- 12th-grader with multiple disabilities earned the required credits to graduate; however, his IEP team determined that he did not meet his transitional needs and should remain in school
- IEP team proposed that the student would not enroll in general education classes; instead, he would spend a half-day focusing on reading and math skills to prepare for the transition to a work environment
- Student would receive two hours of specialized instruction at school or in the community, followed by work with a job coach at a business
- Parents objected to the proposed IEP, appealing a district court's determination that the student's postsecondary transition plan was appropriate

Kass v. W. Dubuque Cmty. Sch. Dist. (8th Cir. 2024)

Decision:

- 8th Circuit upheld the district court's decision
- IEP team properly considered, but rejected, the parents' request for instruction in core classes, believing that focusing on functional skills in the community was more appropriate
- While the parents argued that the IEP was deficient because the shortened school days denied the student substantive benefits derived from instruction, they overlooked how he had already met graduation requirements in core academics
- IEP provided instruction in the student's areas of need in the school and community, also addressing behavior and employability, social interaction, and independent living skills
- Transition goals were adequate and sufficiently measurable

(Kass v. W. Dubuque Cmty. Sch. Dist. (8th Cir. 2024) 124 LRP 15032)

Predetermination

A.B. v. McKnight (D. Md. 2025)

Facts:

- Parents of student with SLD and OHI expressed concerns during IEP meetings regarding how the IEP would address student's trauma history
- Parents subsequently enrolled student in a private school and sought tuition reimbursement from district
- Parents claimed that district predetermined student's services and placement
- ALJ found no evidence of predetermination and denied reimbursement claim
- Parents appealed to district court

A.B. v. McKnight (D. Md. 2025)

Decision:

- District court upheld ALJ's finding
- Some preparation and thought regarding the appropriate placement is not only permissible, but necessary, and does not evidence predetermination
- District engaged in substantial, sustained dialogue with the parents and repeatedly sought to address their feedback throughout multiple IEP team meetings spanning nine months and before recommending the placement
- Meeting notes reflected that the IEP team explicitly connected its recommendations to the student's academic and emotional needs and detailed how proposed services would address them; team made repeated attempts to involve the parents, incorporate their feedback, and listen to their concerns

(A.B. v. McKnight (D. Md. 2025) 125 LRP 2203)

Service Animals

Dietz v. Germantown Mun. Sch. Dist. (W.D. Tenn. 2025)

Facts:

- Nonverbal grade-school student with multiple disabilities was accompanied to school by his seizure-alert service dog
- Dog repeatedly disregarded commands and engaged in inappropriate behaviors that included eating out of the trash can, getting the "zoomies," and chasing other children
- Because dog was frequently out of control, district barred the dog from attending school with the student
- Parents sought injunction to keep dog on campus

Dietz v. Germantown Mun. Sch. Dist. (W.D. Tenn. 2025)

Decision:

- District court found parents were unlikely to succeed with their discrimination complaint
- ADA's service animal regulations permit a district to exclude a service animal when it is out of control of the handler
- Parents' request for "some assistance" from staff to command the service dog at school was unreasonable
- Dog's presence resulted in disruptions to class; when the dog failed to obey commands, the student would try to harm him by hitting or kicking him or pulling his ears and tail

(Dietz v. Germantown Mun. Sch. Dist. (W.D. Tenn. 2025) 125 LRP 12991)

Kimball Area Pub. Schs., Indep. Sch. Dist. No. 739 v. I.R.M. (D. Minn. 2025)

Facts:

- Service dog of grade-school student with autism was trained to interrupt the student's inappropriate behaviors by providing "kisses," redirecting him from behavioral triggers, and preventing his elopement
- Parents asked district to incorporate service dog into student's IEP with staff support, such as a district-employed handler
- District refused to do so, believing it could reduce the student's self-harming and eloping behaviors at school by providing him with a one-to-one paraprofessional
- Parents claimed that proposed IEP without provisions for service dog denied student a FAPE

Kimball Area Pub. Schs., Indep. Sch. Dist. No. 739 v. I.R.M. (D. Minn. 2025)

Decision:

- District court found in district's favor
- Proposed IEP, which offered the student behavioral interventions in lieu of a service dog handler, provided student with FAPE
- One-to-one paraprofessional would redirect the student's self-harming and disruptive behaviors through verbal commands and the use of a light-up toy
- Dog was only "sometimes useful" in reducing inappropriate behaviors and keeping the student from eloping
- Dog would sometimes distract the student from his classwork

(Kimball Area Pub. Schs., Indep. Sch. Dist. No. 739 v. I.R.M. (D. Minn. 2025) 125 LRP 10171)

Stay-Put

C.S. v. New York City Dept. of Educ. (S.D.N.Y. 2024)

Facts:

- District agreed to pay for unilateral private placement for four unrelated students with autism at cost of approximately $128,000 per student per year
- Students' expenses increased dramatically when the school began billing for each service instead of charging flat-rate tuition
- By highlighting the impact of the change, the district claimed that students were no longer attending the same program and desired to discontinue funding the students' tuition
- Parents sought stay-put protection to maintain district's obligation to pay tuition at the private school

C.S. v. New York City Dept. of Educ. (S.D.N.Y. 2024)

Decision:

- District court agreed with district
- Stay-put protections no longer applied because of private school's shift to a fee-for-services model
- "[The students'] pendency placements[s] changed when the parents unilaterally contracted with the [school] for a services-based program at a substantially higher cost"; once the parents changed the students' placements, the students no longer had a right to stay-put protections under the IDEA.
- Significant increase in charges could have cost district up to $425,000 per student per year

(C.S. v. New York City Dept. of Educ. (S.D.N.Y. 2024) 125 LRP 9549)

Transportation

Pierre-Noel v. Bridges Pub. Charter Sch. (D.C. Cir. 2024)

Facts:

- Medically fragile 8-year-old student used wheelchair and lived in building without an elevator
- Charter school acknowledged that student could not get to school bus unless someone helped him up and down stairs in his building
- Parent claimed student needed porter services (carrying him up and down stairs to bus) in order to receive FAPE
- Charter school contended its obligation to provide transportation services under IDEA only required it to drive student to and from school.

Pierre-Noel v. Bridges Pub. Charter Sch. (D.C. Cir. 2024)

Decision:

- D.C. Circuit ordered charter school to help the student up and down the stairs inside his apartment building, concluding that student could not benefit from his IEP unless he attended school
- Court criticized charter school's contention that "transportation" means using a vehicle to transport students with disabilities to and from school, noting that IDEA describes "transportation" and other related services as services that students with disabilities need to benefit from their special education programs

(Pierre-Noel v. Bridges Pub. Charter Sch. (D.C. Cir. 2024) 124 LRP 32461)

Federal Guidance

Adaptive Physical Education

Letter to Tymeson

- OSEP: Although IDEA regulations do not specifically require IEP team to include an individual who has knowledge in special physical education, adaptive physical education teacher could be part of team as individual who has knowledge or special expertise regarding student's unique special physical education needs
- Individual who has knowledge in special physical education may also fill other roles on IEP team, including general education teacher; special education teacher; individual who can interpret the instructional implications of evaluation results; or representative of district who is qualified to provide, or supervise the provision of, specially designed instruction
- **Note**: OSEP observed that 34 CFR § 300.39 uses the term "adapted physical education" while the comments to 2006 final regulations use the terms "adapted physical education" and "adaptive physical education" interchangeably, although both refer to the provision of specially designed instruction to meet the unique needs of students with disabilities and to ensure their access to the general education curriculum, where possible

(Letter to Tymeson (OSEP 2024) 124 LRP 33432)

FBAs

Dear Colleague

- IEP teams can use FBAs to gain better understanding of student's behavioral needs and to determine the positive behavioral interventions and supports needed to provide FAPE
  - By incorporating FBA into MTSS/PBIS framework, educators can proactively address interfering behaviors through tiered-prevention mode
- FBAs are part of IDEA evaluation process, with applicable procedural safeguards, including parental consent requirements when:
  - FBA is one of assessment tools and strategies conducted as part of initial evaluation or reevaluation; or
  - FBA, along with a review of additional data, is used as initial evaluation or reevaluation
- FBA may also be used in situations when LEA is not evaluating or reevaluating student for eligibility or continued eligibility under IDEA
  - In such circumstances, IDEA does not require parental consent, "but parents, and the student as appropriate, may provide important information related to the FBA"

(Dear Colleague: Using FBAs to Create Supportive Learning Environments (OSERS/OESE 2024) 124 LRP 39889)

IEPs

Letter to McAndrews and Ramirez

- OSEP responded to allegation that some districts' IEPs allotted only minimal time for SDI while, in reality, students received much more SDI than was listed in their IEPs
- OSEP: "The amount of time to be committed to each of the various services to be provided must be appropriate to the specific service, and clearly stated in the IEP in a manner that can be understood by all involved in the development and implementation of the IEP"
- Districts cannot unilaterally change amount of services included in student's IEP
- "[I]f the public agency wants to revise the child's IEP, including the amount of services in the child's IEP, after the IEP team meeting, it must engage the parent in further discussion, which may, but need not necessarily, occur through an IEP team meeting"

(Letter to McAndrews and Ramirez (OSEP 2024) 124 LRP 33702)

Inclusive Educational Practices

Dear Colleague Letter

- OSERS encouraged SEAs, LEAs, and school staff to uphold high expectations for academic and functional success of all students through use of inclusive educational practices
- Discussion included following requirements in IDEA and the ESEA that align with inclusive educational practices
  - Students with disabilities must be placed in general education classes consistent with LRE requirements
  - Same challenging state academic standards must apply to all public schools and all public school students in state (except for small percentage of students with the most significant cognitive disabilities for whom the state may define alternate academic achievement standards aligned with the state's content standards)
  - Plans developed by state, LEA, or school under Title I of ESEA must be coordinated with programs carried out under the IDEA
  - IEPs must be designed to meet student's needs to enable student to be involved in and make progress in general education curriculum
  - Students with disabilities must be provided appropriate special education and related services, supplementary aids, and supports in the general education classroom, whenever appropriate based on student's IEP

(Dear Colleague Letter on Inclusive Educational Practices (OSERS/OESE January 2025) 125 LRP 2423)

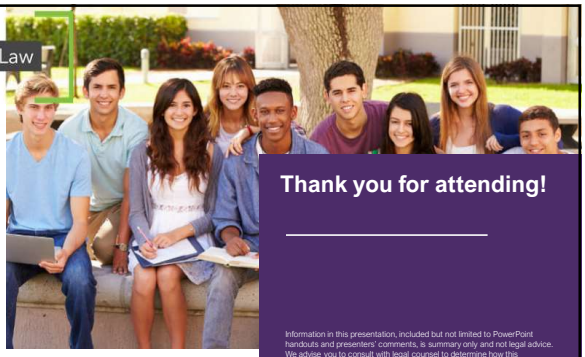
Transition Services

Coordinating Transition Services and Postsecondary Access

- OSERS FAQ urged SEAs, LEAs and vocational rehabilitation ("VR") agencies to work together to ensure that students with disabilities successfully transition to postsecondary life
- When deciding whether district or VR agency will pay for particular transition service, districts should consider whether service is one the district would customarily provide as a component of FAPE
- Criteria for determining financial responsibility may include considerations that include:
  - Is the purpose of service related to employment outcome or education?
  - Is service usually considered special education or related service necessary for provision of FAPE?;
  - Is service one that the school customarily provides under IDEA?
  - Is the student with a disability eligible for transition services under IDEA or under Section 504?

(Coordinating Transition Services and Postsecondary Access: Guidance on Requirements Under the IDEA and the Rehabilitation Act (OSERS 2025) 125 LRP 2265)

F3 Law



Thank you for attending!

Information in this presentation, included but not limited to PowerPoint handouts and presenters' comments, is summary only and not legal advice. We advise you to consult with legal counsel to determine how this information may apply to your specific facts and circumstances.

F3 Law

- Business
- Communications & Media Relations
- Education Technology
- Employment Law
- Facilities & Construction
- Governance & Leadership
- Government Affairs & Public Policy
- Interscholastic Activities
- Investigations
- Labor Relations & Negotiations
- Litigation
- Next Level Client Services
- Real Estate & Property
- Special Education
- Student Rights & Discipline
- Title IX
- Virtual Learning
- Inland Empire
- Fresno
- Los Angeles
- Midwest
- Oakland
- Pacific Northwest
- Sacramento
- San Diego

General Session II

Parent v. District: Perspectives from Each Side

By:

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Attorney at Law
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Seattle, WA

Moderated by:

Dr. Vanessa Tucker
Ph.D., BCBA-D

Pacific Northwest Institute on Special Education and the Law
October 27-29, 2025
Bellevue, Washington

PROFESSIONAL INTRODUCTIONS

- DR. VANESSA TUCKER Ph.D., BCBA-D, LBA (MODERATOR)
- CARLOS CHAVEZ, JD (PACIFICA LAW GROUP)
- LARA HRUSKA, JD MSW MSEd (CEDAR LAW)

POINTS OF AGREEMENT

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TOPIC 1 – SCHOOL REFUSAL & AVOIDANCE

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TOPIC 2 – DYSLEXIA INTERVENTIONS

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TOPIC 3 – 1:1 SUPPORT FOR STUDENTS WITH ASD

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TOPIC 4 – PROGRESS MONITORING & DATA

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TOPIC 5 – OUT-OF-STATE RESIDENTIAL PLACEMENT

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TOPIC 6 - INTERIM ALTERNATIVE EDUCATIONAL SETTING (IAES)

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Workshop 1

Transportation Issues in Special Education: Avoiding the Bumps and Legal Hazards

By:

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Pacific Northwest Institute on Special Education and the Law
October 27-29, 2025
Bellevue, Washington

TRANSPORTATION ISSUES IN SPECIAL EDUCATION: AVOIDING THE BUMPS AND LEGAL HAZARDS

BETSEY A. HELFRICH
THE LAW OFFICE OF BETSEY HELFRICH

THE NUMBERS:

Report on the Condition of Education 2024, U.S. Department of Education - the National Center for Education Statistics (May 30, 2024)

Total public elementary and secondary school enrollment in fall 2022: **50.8 million students**

Nationally, **26 million** children in the U.S. take 480,000 buses to and from school each day
(NYSBCA 2023)

IDEA

- Individuals with Disabilities Education Act of 1975
- IDEA is a funded law
- Children with disabilities have available special education and related services designed to provide a Free and Appropriate Public Education designed meet their unique needs

FAPE

- Free and Appropriate Public Education
- *Endrew F. v. Douglas County Sch. Dist. RE-1*, 69 IDELR 174 (US 2017):

  "To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."

SECTION 504

- Section 504 of the Rehabilitation Act of 1973 (September 26, 1973), codified at 29 U.S.C. § 701 et seq.
  - Regulations at 34 C.F.R. Part 104
  - First U.S. federal civil rights protections for persons with disabilities
  - Non-discrimination law

SECTION 504

Section 504 of the Rehabilitation Act provides, in pertinent part, that "no otherwise qualified individual with a disability in the United States...shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance."

29 U.S.C. § 794(a)

UPDATE TO 504 REGULATIONS

The U.S. Department of Education announced May 6, 2022, it was seeking comments on amending Section 504 regulations (45 years after the original publication of the regulations implementing Section 504)

Regulations were never updated…

SERVICE ANIMALS

The day school resumes after Christmas break, Johnny gets on the bus with Whiskers the cat. Whiskers looks particularly grumpy post-holiday and Johnny hands the driver a note from mom that says:

Johnny has my permission to bring Whiskers to school and on the bus. He felt anxious about going back to school and Whiskers will keep him calm.

P.S. Whiskers has ALL of his claws – keep an eye out

If someone's dog calms them when having an anxiety attack, does this qualify it as a service animal?

It depends. The ADA makes a distinction between psychiatric service animals and emotional support animals. If the dog has been trained to sense that an anxiety attack is about to happen and take a specific action to help avoid the attack or lessen its impact, that would qualify as a service animal. However, if the dog's mere presence provides comfort, that would not be considered a service animal under the ADA.

See: https://www.ada.gov/resources/service-animals-faqs/

SERVICE ANIMALS

What you can ask

In situations where it is not obvious that the dog is a service animal, staff may ask only two specific questions:

(1) is the dog a service animal required because of a disability? and
(2) what work or task has the dog been trained to perform?

Staff are not allowed to request any documentation for the dog, require that the dog demonstrate its task, or inquire about the nature of the person's disability.

IEP IMPLEMENTATION

TRANSPORTATION UNDER THE IDEA

The IDEA regulations have broadly defined transportation as follows:

- Travel to and from school and between schools;
- Travel in and around school buildings; and
- Specialized equipment (such as special or adapted buses, lifts, and ramps) if required to provide special transportation for a child with a disability.

34 CFR 300.34(c)(16)

IDEA - RELATED SERVICES

Related services means **transportation** and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech-language pathology and audiology services…. Related services also include school health services and school nurse services, social work services in schools, and parent counseling and training.

34 CFR 300.34

SECTION 504 - RELATED SERVICES

Under Section 504, an appropriate education is defined as "the provision of regular or special education and related aids and services that (i) are designed to meet the individual educational needs of handicapped persons as adequately as the needs of non-handicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of [the 504 regulations]."

34 CFR 104.33(b)(1)

WHEN IS TRANSPORTATION REQUIRED?

"The IEP Team is responsible for determining if transportation is required to assist a child with a disability to benefit from special education and related services, and how the transportation services should be implemented. The IEP should describe the transportation services to be provided, including transportation to enable a child with disabilities to participate in nonacademic and extracurricular activities in the manner necessary to afford the child an equal opportunity for participation in those services and activities to the maximum extent appropriate to the needs of that child."

- *Questions and Answers on Serving Children with Disabilities Eligible for Transportation*, 53 IDELR 268 (OSERS 2009)

SCENARIO

Bobby Brady is the head of the School District's Transportation Department. He gets a call from one of his drivers who drives a special needs route. The driver's bus got stuck in the mud that morning while trying to exit a rather steep driveway. After listening to the distress of the driver about the sticky situation, Bobby states, "today is your lucky day, I know that parent well and they will be okay meeting you at the top of the driveway from now on. I will call them now and tell them about the change."

BD. OF EDUCATION OF WAYLAND-COHOCTON CENTRAL SCH. DIST., 118 LRP 37607 (NY SEA 2018)

- Student eligible under IDEA as a student with multiple disabilities.
- Student's placement was at state approved nonpublic day school.
- IEP called for:
  - bus with an attendant
  - wheelchair accessible vehicle
  - door-to-door transportation
  - air-conditioned vehicle

- At the beginning of the school year, bus driver for the student's route picked up and dropped off the student each day by entering the student's driveway and going to the concrete pad with wheelchair ramp attached to student's house.
- In November, the bus became stuck in the mud on the driveway so District decided the bus could no longer go down the driveway to pick up the student.
- Parent agreed to temporarily bring the student to the end of the driveway while the District found a different vehicle to come down the driveway.

- In January, the parent began to drive the student to school and district paid mileage.
- Parent filed due process stating District failed to implement the "door-to-door" requirement called for in the student's IEP and thus, was denied FAPE.
- Hearing officer determined that District failed to provide student with FAPE.
- Found that door-to-door transportation meant "going down the driveway and to the home."

- Hearing officer directed the District to go down the driveway and pick up the student at her door.
- District appealed arguing "door-to-door" in the IEP meant stopping at the end of the student's driveway at the road rather than a collective pick-up point where other students get picked up. District said the driveway was dangerous.
- Ultimately, the state determined that the District's appeal was untimely.

IEP IMPLEMENTATION

Fremont Union Sch. Dist., 74 IDELR 302 (SEA CA 2018):

- 16-year-old male student with autism
- Non-verbal and suffers from uncontrolled seizures
- IEP specified curb-to-curb transportation
- Parents understood curb-to-curb to be inside the family's gated apartment community
- Transportation agency's manual prohibits busses from going in gated communities

IEP IMPLEMENTATION

Fremont Union Sch. Dist., 74 IDELR 302 (SEA CA 2018):

- Father asks District to reconsider, District says its an insurance matter, Father files due process
- Due to student's medical needs and size, "which curb is designated as his stop is material"
- "An IEP, like a contract, may not be changed unilaterally"
- "Policies promulgated by the Transportation Agency do not override [the District's] obligation to implement the IEP"
- For this particular Student, changing his pick-up location to outside the complex gates was a material failure to implement the transportation services of his IEP
- District ordered to provide Student with round-trip curb-to-curb transportation from the curb adjacent to Student's home and reimburse parents for transportation

SCENARIO

Student's IEP says pick up will be at the "nearest safest location". Last year parent used to walk or drive student down the long drive to meet the bus at the road. This year mom is starting an in-home day-care and is unable to get her child with educational autism down the driveway to meet the bus. She demands that the bus come down the driveway this year to get the student. However, the driveway is very narrow and the bus will not fit. What do you do?

WHAT IS REQUIRED?

S.M. v. Freehold Regional School District Board of Education, 124 LRP 1731 (D.C. N.J 2024):

Student's IEP included door to door transportation services, an individual transportation aide, and a day school for students with autism.

Due to work schedules, student's parents were not available for at least an hour before the bus arrived to take him to school.

School provided an aide to come to the home to assist in getting him ready for the school bus, but student would often not get on the bus.

Student had 86 absences and 38 days of tardiness in one school year

Student switched to residential placement then returned

WHAT IS REQUIRED?

S.M. v. Freehold Regional School District Board of Education, 124 LRP 1731 (D.C. N.J 2024):

Parents filed due process citing various claims

The first issue before the Court is whether the Board failed to provide the "home-based programming" needed to address B.M.'s issues transitioning to school in the mornings, resulting in a denial of FAPE

Court rejected before-school services beyond transportation, and the particular circumstances of this case, which included the fruitless prior attempts at in-home aide services

WHAT IS REQUIRED?

- The Board did not violate B.M.'s entitlement to a FAPE by not providing the "home programming" requested by Plaintiffs. "The inquiry in this case is not whether the B.M.'s poor attendance impacted his education at the Shore Center but rather whether the services requested fall within the scope of the IDEA. The Court concludes they do not."
- "While the Court is sympathetic to [the parents'] professional demands, the touchstone of a [district's] responsibilities under the IDEA is the child's educational needs -- not the parents' professional needs," the judge wrote.

WHAT IS REQUIRED?

- Matter appealed to 3rd Circuit

S.M. v. Freehold Regional High School District Board of Education (3rd Cir. June 2025):

The Third Circuit rejected parents' argument, concluding that no reasonable interpretation of the IDEA requirement for "transportation … required to assist [the student] … to benefit from special education" extended to services prior to picking up the child for school.

WHAT IS REQUIRED?

K.N. v. Bridges Public Charter Sch. & D.C. (D.C. Cir. 2024)

- Decided September 3, 2024
- Eight year old student
- Multiple disabilities
  - -spastic quadriplegic cerebral palsy
  - - nonverbal
  - - requires a wheelchair to move
  - - tracheotomy tube to breathe
  - - gastronomy tube to eat and take medication

K.N. V. BRIDGES PUBLIC CHARTER SCH. & D.C. (D.C. CIR. 2024)

- Student previously learned remotely
- IEP meeting held to discuss transfer back to school for 1st grade
- Because Student would be attending in person, his IEP specified that he would require transportation in a bus with a dedicated nurse to monitor his medical equipment.
- Parent requested school provide an aide who could carry student from their apartment to the bus
  - - to access Student's non-wheelchair-accessible apartment from the front door of the apartment building there are fourteen steps outside the building and six steps inside it
  - - through the back door of the building, there are fourteen interior steps
- Mom could not carry student due to a medical condition, and her husband would not be home three of the five weekdays
- IEP team added parent's requirements to the IEP

K.N. V. BRIDGES PUBLIC CHARTER SCH. & D.C. (D.C. CIR. 2024)

- The District denied Mom's request, citing its policy that District staff retrieve students only from the outermost door of their dwelling (the outside door of K.N.'s apartment building), and in no event physically lift or carry students
- The Office of the State Superintendent of Education had a policy that states bus drivers are not responsible for providing physical assistance beyond "occasional non-intrusive assistance" that does not involve carrying the student
  - - Drivers and attendants will not enter any apartment buildings, lobbies, entryways or alleys
- Mom filed a federal lawsuit and District won finding that what mother requested is not transportation under the IDEA
- District court rejected parents' request for the school to provide an aide to carry Student from the threshold of their apartment to the bottom of the stairs as part of the IEP's transportation services
- The Court concluded that the student's mother "could arrange for private lifting services, seek assistance from another public program, move to an ADA-compliant home, or arrange for her husband to carry [the child]. But the IDEA does not oblige the District to carry [the child] up and down residential stairs to the bus." *Id.* at 47.

K.N. V. BRIDGES PUBLIC CHARTER SCH. & D.C. (D.C. CIR. 2024)

- Mom appealed
- Mom won on appeal
- Opening line of opinion:

"Congress enacted the Individuals with Disabilities Education Act to ensure that children with disabilities are not reflexively segregated from their peers at school, or worse, unnecessarily stranded at home."

- "In sum, the IDEA's terms, scheme and purpose indicate that 'transportation' services include the door-to-door assistance sought by Pierre-Noel for K.N."
- "The service she seeks — moving K.N. from their apartment to the vehicle that will take him to school — fits within the scope of transportation services that must be provided to disabled students."

K.N. V. BRIDGES PUBLIC CHARTER SCH. & D.C. (D.C. CIR. 2024)

- "The scope of those related services—and in particular the meaning of "transportation"—is the core issue in this case."
- "That the statute links transportation with those bespoke services (therapy etc..) suggests that Congress likewise intended transportation services to be comprehensive and dependent on the unique needs of a specific child."
- "In our view, the IDEA requires the District to move K.N. between his apartment door and the vehicle that will take him to and from school. Such door-to-door assistance is encompassed by the District's obligation to provide transportation services."

IEP IMPLEMENTATION

- Review and revise any blanket transportation policies

- *Boykins v. Trinity Inc.*, 78 IDELR 278 (E.D. Mich. 2021): a deceased student's estate could pursue constitutional claims against a district because its transportation policy, which required the student to remain in a hot school bus with poor ventilation until the school was "ready to receive" him, likely contributed to his death

STUDENT SAFETY

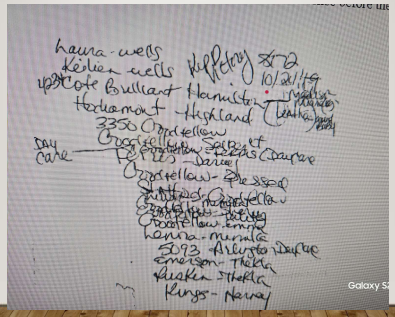
D.J. by & through Jackson v. First Student, Inc., No. ED 111487, 2024 WL 3152509 (Mo. Ct. App. June 25, 2024) :

St. Louis charter school contracted with First Student for transportation services

9 year old student's route was established so student was dropped off at safe corner

On day of incident – Substitute driver. First Student did not provide its updated software-generated route sheet with turn-by-turn directions to driver before driving the route.

Driver was given a handwritten list of intersections along the route. A copy of that list was in evidence before the jury



STUDENT SAFETY

D.J. by & through Jackson v. First Student, Inc., No. ED 111487, 2024 WL 3152509 (Mo. Ct. App. June 25, 2024) :

On the afternoon run, driver stopped the school bus at the southeast corner of Goodfellow and Lalite and which required Child to cross two lanes of traffic on Goodfellow.

In the video recording obtained from the school bus, driver said, "I don't know how I remember these routes."

Student is struck by a car passing the bus on the left

Car fled the scene and perpetrator never found

Student required surgery

STUDENT SAFETY

D.J. by & through Jackson v. First Student, Inc., No. ED 111487, 2024 WL 3152509 (Mo. Ct. App. June 25, 2024) :

Parent sued for negligence

The jury had before it the software-generated route sheet, the handwritten list of intersections, the bus contract, KIPP's RFP, the training manual, and the school bus video recording depicting Richardson's actions, Child unloading from the school bus

Jury awarded $1.3 million in damages against First Student

Court found a legal duty arose between First Student and Child under the school bus contract

Contract stated:

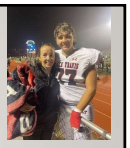
Any "stop location and/or time changes" must be submitted in writing. First Student must consult with KIPP "as to stops or portions of routes that [First Student] considers to be a safety concern due to traffic patterns or configurations." If First Student believes a "stop or route presents an unacceptable safety risk to [First Student's] property or students, [First Student] may reject the stop or route portion and provide [KIPP] with alternative designations by written notice." KIPP's RFP further requires First Student to provide a "[m]ethodology to insure [sic] drivers have a working knowledge of the routes and metropolitan St. Louis area" and **"ensure that each driver will have an updated route and/or student listing prior to making any run."**

First Student has an independent duty to provide its bus drivers with sufficient information about the child's designated drop-off location, separate from the duty to drop the child off at a reasonably safe place.

STEERING AWAY FROM LIABILITY

- Compliance with IEP required
- Amendment only with parental agreement or IEP meeting
- A substantial delay in implementing a student's transportation may constitute an IDEA violation if it interferes with the student's ability to derive an educational benefit.
  - *Wilson v. District of Columbia*, 56 IDELR 125 (D.D.C. 2011), the District of Columbia's delay in arranging transportation services caused a 9-year-old boy to miss three weeks of his four-week extended school year program. It ruled that the delay amounted to a material implementation failure and a denial of FAPE.

INVESTIGATE CLAIMS OF HARASSMENT



- Lake Travis, TX
- Student with peanut allergies
- Teammates put peanuts in his football locker and cleats before a game
- Mother testified at a school board meeting that her son had been bullied by two players from the football team. At the time of the incident, head coach and athletic director suspended the players for two games, a penalty some parents felt was too lenient.
- The district later ruled that the incident didn't meet "the legal definition" of bullying
- The lawsuit, filed in the U.S. District Court of the Western District of Texas, seeks $1.5 million in damages.

A.J.T. V. OSSEO AREA SCHOOLS (US 2025)

- January 17, 2025, the US Supreme Court agreed to hear this case
- On appeal from the 8th Circuit
- Case about student with severe seizures and parent request for alternate learning hours
- Court of Appeals found that the school district failed to provide a free appropriate public education in violation of the IDEA
- However, the court dismissed discrimination claims brought under the ADA and the Rehabilitation Act.
- Bad faith/gross misjudgment v. deliberate indifference standard under review
- Supreme Court voided bad faith gross misjudgment standard

TRAIN BUS DRIVERS

- *Wagon v. Rocklin Unified Sch. Dist.,* 74 IDELR 196 (E.D. Cal. 2019): discrimination claim filed against District based on bus driver's comments to a student with a disability
- Training ideas:
  - mandatory reporting
  - IDEA disabilities
  - Section 504
  - bullying protocol and prevention
  - restraint policies and safe techniques
- Keep documentation of trainings

STEERING AWAY FROM LIABILITY – DRIVER SHORTAGE

- Be mindful of equal opportunity and benefit standard
- Same quality of bus/vehicle
- Consider length of ride
  - *Hemet Unified Sch. Dist.,* 12 ECLPR 22 (SEA CA 2014) (A bus ride that would take an hour and 10 minutes each trip was inappropriately lengthy given child's acid reflux but not a denial of FAPE).

STEERING AWAY FROM LIABILITY – DRIVER SHORTAGE

- Watch shortened days:
  - *March 2024 class action against District of Columbia Dept of Ed*
  - *Orange County Sch. Dist.,* 118 LRP 11197 (FL SEA 2017): District owed compensatory service for time where student arrived late each day due to transportation issues.
  - School day for special education students should not be longer or shorter than school day for general education students unless the IEP team determined necessary for FAPE for that student.

STEERING AWAY FROM LIABILITY – DRIVER SHORTAGE

- Parents transporting students?
  - only if mutually agreed upon with parents. *Letter to Hamilton*, 25 IDELR 520 (OSEP 1996)
  - if parent declines District must provide transportation. *Knappa Sch. Dist.*, 119 LRP 43054 (SEA OR 06/25/19) (because the parents informed the district that their work schedule did not allow them to transport the student to his new educational placement, the district's failure to acquire a bus driver to transport the student constituted a denial of FAPE)
- Districts may use the standard IRS business mileage rate to reimburse parents who transport their own children to and from school. In *A.S. v. Harrison Township Board of Education,* 67 IDELR 207 (D.N.J. 2016), the District Court declined to award the parents minimum wage for the time they spent driving their child to and from his private elementary school. While the district had to reimburse the parents the standard IRS business mileage rate, it was not required to pay them employment wages.
- Develop and have parents sign an agreement
  - properly licensed, car inspected
  - not in our custody and control
  - standards for reimbursement

LIMITING LIABILITY

- Oversight and communication
- Partner between departments
- Do not shorten special education student school days

STUDENT SAFETY

Florida 2018/Guatney:

- Six minutes passed before aide on bus noticed student was in distress. Aide was sitting with her back to student and using her phone when not talking with the bus driver.
- Seven additional minutes went by as the driver tried to reach their dispatcher at the school district office instead of calling 911 — Aide refused to touch student. The dispatcher finally called for an ambulance.
- 22 minutes after incident started, ambulance arrived.

New Jersey 2023:

- A school bus monitor in New Jersey has been charged in the death of a 6-year-old girl with special needs who died after a harness securing the child to her wheelchair fatally choked her without the monitor noticing.

Student Confidentiality

SCENARIO

Mom sends the school a note that states that since Greg has been very ill, he can only eat certain foods. Even though students are allowed to eat snacks on the bus and are known to trade snacks, the school's front office doesn't want to share this information with the transportation department because they don't want to violate HIPAA.

WHAT IS FERPA?

- Family Educational Rights and Privacy Act
- The Family Educational Rights and Privacy Act is a Federal law that protects the privacy of students' education records. The law applies to all schools, colleges and universities that receive funds under an applicable program of the U.S. Department of Education.

20 USC 1232g

34 CFR 99

FERPA

- Districts may disclose personally identifiable information concerning a student to "school officials" within the institution who have a "legitimate educational interest" in the student.
- FERPA regulations allow the school to determine which individuals possess such an interest.

34 C.F.R. 99.31(a)(1)

WHO HAS RIGHTS?

- Parents and eligible students.
- Parent is defined as "a parent of a student and includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or guardian." 20 USC 1232g
- Rights transfer to student when he or she turns 18 years of age or enters a postsecondary educational institution at any age.

FERPA RIGHTS

- FERPA specifically grants custodial and noncustodial parents or students who are 18 years old the right to: Inspect and review the pupil's educational records.
- Challenge the accuracy and information contained in the records.
- Prohibit the disclosure of records in some circumstances.
- Grant permission to disclose records.

- *See generally* 34 CFR Part 99

FERPA QUIZ

- Sally used to live with her grandma while mom was in Florida with her boyfriend. Your driver was very friendly with grandma. Mom is back in town and Sally is living with mom. Your driver asks you for a copy of Sally's recent report card and IEP because mom and grandma are no longer speaking and grandma just wants to know how Sally is doing.

SCHOOL OFFICIALS

- An educational agency or institution may disclose personally identifiable information from an education record of a student without the consent required by §99.30 if the disclosure meets one or more of the following conditions:
  - (1)(i)(A) The disclosure is to other school officials, including teachers, within the agency or institution whom the agency or institution has determined to have legitimate educational interests.
  - (B) A **contractor,** consultant, volunteer, or other party to whom an agency or institution has outsourced institutional services or functions may be considered a school official under this paragraph provided that the outside party—
  - (1) Performs an institutional service or function for which the agency or institution would otherwise use employees;
  - (2) Is under the direct control of the agency or institution with respect to the use and maintenance of education records; and
  - (3) Is subject to the requirements of §99.33(a) governing the use and re-disclosure of personally identifiable information from education records.

34 CFR 99.31

SCHOOL OFFICIALS

- School transportation officials (including bus drivers), may qualify as school officials. *Letter to Anonymous*, (FPCO 2017)
- Outside people who perform professional and business services for the district as part of its operations, including independent contractors, may also be considered to have a legitimate educational interest, which may prove relevant where schools hire private companies to supply transportation services. 34 CFR 99.31; *Questions and Answers on Serving Children with Disabilities Eligible for Transportation,* (OSERS 2009).

IDEA - WHO GETS A COPY?

- Federal Regulations:
- Accessibility of child's IEP to teachers and others. Each public agency must ensure that— (1) The child's IEP is accessible to each regular education teacher, special education teacher, related services provider, **and any other service provider who is responsible for its implementation;** and (2) Each teacher and provider described in paragraph (d)(1) of this section is informed of—(i) His or her specific responsibilities related to implementing the child's IEP; and(ii) The specific accommodations, modifications, and supports that must be provided for the child in accordance with the IEP.

34 CFR 300.323(d)

CASE EXAMPLE:

Students are not responsible for informing staff members about the contents of their IEPs & 504 plans

- *Durant (IA) Community School District*, (OCR 04/22/13): A ninth-grader approached his high school principal on the first day of school and asked where he should eat lunch. Although the student mentions past difficulties with peers, the principal tells the student to eat in the cafeteria with the rest of the student body. Student has a fight in the cafeteria that results in a three-day suspension and criminal charges for assault.
- Had the district informed relevant staff members that the student had an IEP requiring him to eat lunch apart from his peers, incident and OCR investigation could have been avoided.

BEST PRACTICES

- Per 34 CFR 99.7, in your annual FERPA notice specify criteria for determining who constitutes a school official and what constitutes a legitimate educational interest.
- Remind in writing not to re-disclose
- Engage in MOU or contract

SHARING INFORMATION

- Develop a plan to share IDEA and Section 504 student information with bus drivers' and key transportation personnel with a legitimate educational interest.
- Share behavior plans and encourage communication from drivers to key District personnel.
- Keep documentation of receipt.
- Train regarding confidentiality and need not to re-disclose.
- Share with substitutes!

BUS VIDEO

- All 50 states have enacted some form of an open records law
- Many are modeled after the federal Freedom of Information Act (FOIA)
- Review state law & board policies
- Develop a procedure
- Family Compliance Policy Office:
  See FAQs on Photos and Videos Under FERPA
  See Letter to Wachter

BUS VIDEO

US Department of Education, Privacy Assistance Technical Center, *Frequently Asked Questions:*

https://studentprivacy.ed.gov/frequently-asked-questions

When is a photo or video of a student an education record under FERPA?

As with any other "education record," a photo or video of a student is an education record, subject to specific exclusions, when the photo or video is: (1) directly related to a student; and (2) maintained by an educational agency or institution or by a party acting for the agency or institution. (20 U.S.C. 1232g(a)(4)(A); 34 CFR § 99.3 "Education Record")[1]

Directly Related to a Student:

FERPA regulations do not define what it means for a record to be "directly related" to a student. In the context of photos and videos, determining if a visual representation of a student is *directly* related to a student (rather than just incidentally related to him or her) is often context-specific, and educational agencies and institutions should examine certain types of photos and videos on a case by case basis to determine if they directly relate to any of the students depicted therein. Among the factors that may help determine if a photo or video should be considered "directly related" to a student are the following:

- The educational agency or institution uses the photo or video for disciplinary action (or other official purposes) involving the student (including the victim of any such disciplinary incident);
- The photo or video contains a depiction of an activity:
  - that resulted in an educational agency or institution's use of the photo or video for disciplinary action (or other official purposes) involving a student (or, if disciplinary action is pending or has not yet been taken, that would reasonably result in use of the photo or video for disciplinary action involving a student);
  - that shows a student in violation of local, state, or federal law;
  - that shows a student getting injured, attacked, victimized, ill, or having a health emergency;
- The person or entity taking the photo or video intends to make a specific student the focus of the photo or video (e.g., ID photos, or a recording of a student presentation); or
- The audio or visual content of the photo or video otherwise contains personally identifiable information contained in a student's education record.

A photo or video should not be considered directly related to a student in the absence of these factors and if the student's image is incidental or captured only as part of the background, or if a student is shown participating in school activities that are open to the public and without a specific focus on any individual.

If a video is an education record for multiple students, can a parent of one of the students or the eligible student view the video?

- When a video is an education record of multiple students, in general, FERPA requires the educational agency or institution to allow, upon request, an individual parent of a student (or the student if the student is an eligible student) to whom the video directly relates to inspect and review, or "be informed of" the content of the video, consistent with the FERPA statutory provisions in 20 U.S.C. § 1232g(a)(1)(A) and regulatory provisions at 34 CFR § 99.12(a). FERPA generally does not require the educational agency or institution to release copies of the video to the parent or eligible student.
- In providing access to the video, the educational agency or institution must provide the parent of the student (or the student if the student is an eligible student) with the opportunity to inspect and review or "be informed of" the content of the video. If the educational agency or institution can reasonably redact or segregate out the portions of the video directly related to other students, without destroying the meaning of the record, then the educational agency or institution would be required to do so prior to providing the parent or eligible student with access. On the other hand, if redaction or segregation of the video cannot reasonably be accomplished, or if doing so would destroy the meaning of the record, then the parents of each student to whom the video directly relates (or the students themselves if they are eligible students) would have a right under FERPA to inspect and review or "be informed of" the entire record even though it also directly relates to other students.

Student Discipline

SCENARIO

Student Peter has frequent behavior issues and one day engages in a fight on the bus and then kicks out two bus windows after the fight is over. The bus driver gets things under control and reports this behavior to his Transportation Director and the High School Principal. The Principal tells the driver he will issue discipline, and report this matter to the police. The Transportation Director is in the room when the Principal talks to Peter's parents and then calls the police. The Principal tells Peter's parents he will be suspended from school for 15 school days and Peter's dad says, "As you know, Peter suffers from some pretty serious PTSD. Transportation is part of his IEP. Will we have a team meeting to discuss this?" The Principal says, "the only thing we need to discuss is how expensive those windows are to replace!" Then he hangs up the phone and tells the Transportation Director no meeting with the family will be required. Is he correct?

DISCIPLINARY PROTECTION FOR STUDENTS WITH DISABILITIES

Students with Disabilities are Entitled to Additional Protections Under the Law (IDEA & 504)

- Procedural Rights & Notice
  - including the rights afforded to general education students
- Manifestation Determination
- An LEA must provide FAPE to all students with disabilities between the ages of 3 and 21 inclusive, including children with disabilities who have been suspended or expelled.

34 CFR 300.101(a)

SCENARIO

- Jenny punches another student on the bus and receives a 15-day suspension from the bus but is not suspended from school.
- Transportation is a related service in Jenny's IEP.
- No manifestation determination review was held.
- Jenny's parents file due process saying you have improperly changed Jenny's placement through a disciplinary removal without the required protections.

Answer

Bus Suspensions:

Letter to Sarzynski, 59 IDELR 141 (OSEP 2012): A bus suspension must be treated as a disciplinary removal and all of the IDEA's discipline procedures applicable to children with disabilities apply if transportation is listed on the IEP. If a student is suspended from transportation for more than 10 consecutive school days, and transportation is included in the IEP, that suspension constitutes a change of placement. Such a change of placement triggers the requirement for a manifestation determination.

Question

Questions and Answers on Serving Children with Disabilities Eligible for Transp., 53 IDELR 268 (OSERS 2009):

Question: If transportation is included in the IEP for a child with a disability who has documented behavioral concerns on the bus, but not at school, when may a school district suspend the child from the bus?

Answer

Answer: If transportation is included in the child's IEP, a bus suspension must be treated as a suspension under 34 CFR 300.530 and all of the discipline procedures applicable to children with disabilities would apply. An LEA is not required to provide alternative transportation to a child with a disability who has been suspended from transportation for 10 school days or less unless the LEA provides alternative transportation to children without disabilities who have been similarly suspended from bus service. 34 CFR 300.530(d)(3).

Scenario (cont'd)

Carol, Jenny's mom, is available to drive Jenny to school during her suspension and Jenny doesn't miss one day of school during the period of her bus suspension.

Does this fact change anything?

Answer

The fact that a family member voluntarily transports the student to and from school does not change the analysis. "Generally, a school district is not relieved of its obligation to provide special education and related services at no cost to the parent and consistent with the discipline procedures just because the child's parent voluntarily chooses to provide transportation to his or her child during a period of suspension from that related service."

Letter to Sarzynski, 59 IDELR 141

WHEN DOES BUS SUSPENSION COUNT AS OUT OF SCHOOL SUSPENTION (OSS) FOR STUDENTS WITH IEPs?

Student is suspended off bus and the student's IEP shows transportation as....	And the student....	Does the day count as OSS?
Related service	Does not attend school	Yes
Related service	Attends school because parent provides transportation	Yes
Related service	Attends school because parent provides transportation and the school reimburses (or offers to reimburse) the parent for providing the "transportation service"	No
Not a related service	Does not attend school	No If student misses greater than 10 days due to bus suspension, the IEP team should reconvene to discuss behavioral concerns on bus and consider transportation as a related service

BIPS AND BUSES

- Carefully review and update student behavior intervention plans and goals based on current need and individual circumstances.
- Repeated misconduct may indicate a need for new or different behavioral supports (aide on bus, seating plan, etc...)
- Share BIPs and key information with transportation personnel with a legitimate educational interest.

STEERING AWAY FROM LIABILITY

01	02	03	04
Discuss unique transportation situations at IEP meetings and include key transportation personnel as needed	Be specific	Don't make unilateral amendments	Implement the IEP as written

THANK YOU!!

Betsey Helfrich
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Workshop 2

"Substantially Limits": A Section 504 Eligibility Deep-Dive

By:

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Pacific Northwest Institute on Special Education and the Law
October 27-29, 2025
Bellevue, Washington

"Substantially Limits": A Section 504 Eligibility Deep-Dive

Presented by:

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A little housekeeping …

- These slides are intended to summarize rules and cases that are often very complex. Neither the slides nor the presentation are legal advice.
- We'll be looking at "substantially limits" *before* and after 2008's Americans with Disabilities Act Amendments Act to see how the ADAAA lowered the standard to expand coverage.
- Bold language is Dave's emphasis unless otherwise indicated.

A little housekeeping …

- Please consult a licensed attorney in your state for answers to particular fact situations.
- Keep in mind OCR's emphasis on procedural compliance and its policy to not second-guess eligibility decisions made pursuant to the appropriate process.

Some Important Source of Information…

- 2012 Dear Colleague Letter on ADAAA, 58 IDELR 179 (OCR 2012) **(Hereinafter 2012 DCL).**
- Frequently Asked Questions: Section 504 Free Appropriate Education (FAPE)(OCR, last modified June 30, 2025) **(Hereinafter, 2025 Q&A.).**
- Office for Civil Rights, *Students with ADHD and Section 504: A Resource Guide,* (July 2016). **(Hereinafter ADHD Resource Guide).**

Section 504 Eligibility

- To be Section 504 eligible, a student must be both "qualified" and "handicapped." 34 CFR § 104.3(j)(1):
- "Handicapped persons means any person who
  - (i) has a physical or mental impairment which substantially limits one or more major life activities;
  - (ii) has a record of such an impairment; or
  - (iii) is regarded as having such an impairment."

Section 504 Eligibility: The Elements of Prong 1

Physical or Mental Impairment	Substantially Limits	One or More Major Life Activities
Identify the impairment or impairments giving rise to the problem—what's causing it? EX: Struggling at school is not an impairment, it's a result. Focus on causation vs. result	How much impact is there on the student's performance of the major life activity or activities? This question asks if the student is impaired *enough.*	The area or areas of human life negatively impacted by the impairment or impairments.

Defining "Substantially Limits"

OCR Guidance prior to ADAAA

- Appendix A to ED's Section 504 Regulations: "No definition of this term is possible at this time."
- *Letter to McKethan,* 23 IDELR 504 (OCR 1995)("neither the regulation nor this office has defined the word substantially.").
- The decision about whether the student is substantially limited is "made by the school district not OCR." *Id.*
- Lack of standard definition = the possibility of wide variation in how a particular student's eligibility might be viewed by different Section 504 Committees.

Defining "Substantially Limits"

- In the absence of a definition from OCR, look to other federal agencies for a serviceable definition.
- Dave thinks the test for substantial limitation created by the Equal Employment Opportunity Commission, with a little bit of tinkering, is a good fit for public schools to apply to student eligibility.

EEOC Defining "Substantially Limits"

- Equal Employment Opportunity Commission (EEOC) & ADA
  - EEOC writes the regs that govern your school's relationship with you as an employee under ADA.
  - EEOC regs have no authority on K-12 students (that's ED's job) but can be used by K-12 schools in the absence of ED guidance.
  - Consider EEOC's *pre-ADAAA* definition …

EEOC on "Substantial Limitation" prior to ADAAA

A person is substantially limited when she is

"Unable to perform a major life activity that the average person in the general population can perform;"

— OR—

"Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity." 29 C.F.R. §1630.2(j)(1)(i)&(ii).

EEOC on "Substantial Limitation" prior to ADAAA

Note the elements of the EEOC approach:

1. Everyone is impaired, but we are not all disabled.

2. The approach is consistent with the civil rights eligibility and FAPE standard in Section 504

   - Educators benchmark routinely based on training and experience
   - Recognize & address the "Odd Confidence Problem"

EEOC on "Substantial Limitation" prior to ADAAA

Note the elements of the EEOC approach:

3. It calls for an evaluation of how the student performs the major life activity by looking at condition, manner and duration of performance.

4. The student's condition, manner and duration of performance of the activity is compared to that of the average person.
   - **Adult application:** average person 18 years and up. **For students,** compare to the average student of the same age or grade or range of age or grade (e.g., 7-8 year olds, 2nd and 3rd graders).
   - Compare to **average** student, not hyper-achievers. *Montgomery County Pub. Schs.,* 40 IDELR 24 (SEA MD 2003).

EEOC on "Substantial Limitation" prior to ADAAA

Let's try a few examples…

Evaluate whether the student is substantially limited in the major life activity of walking.

Assume that the average student of this age/grade can walk:
1. In a relatively straight line
2. Without stopping
3. For about an Hour

Don't overthink the hypothetical benchmark, just apply it.

EEOC on "Substantial Limitation" prior to ADAAA

- Example 1: Due to impairment, the student cannot walk.
- Example 2: Due to impairment, the student can walk in a relatively straight line for 5 minutes, then gets dizzy, falls down and cannot continue.
- Example 3: Due to impairment, the student can walk in a relatively straight line for 15 minutes, then gets dizzy, falls down and cannot continue.

EEOC on "Substantial Limitation" prior to ADAAA

Example 4: Due to impairment, the student can walk in a relatively straight line for 30 minutes, then gets dizzy, falls down and cannot continue.

Example 5: Due to impairment, the student can walk in a relatively straight line for 45 minutes, then gets dizzy, falls down and cannot continue.

Example 6: Due to impairment, the student can walk in a relatively straight line for 55 minutes, then gets dizzy, falls down and cannot continue.

EEOC on "Substantial Limitation" prior to ADAAA

What do these examples demonstrate?

- Even if we all use the same test for substantial limitation, the results will vary.
- Based on Dave's experience, the following factors impact the eligibility decision: geographic location, time of day of decision, committee makeup, elementary vs. middle school vs. high school.

Congress Expanded § 504 & ADA Eligibility in 2008

What was wrong with substantial limitation? FEDERAL REGISTER, Vol. 76, No. 58, Friday, March 25, 2011 p. 17008 (EEOC summary).

Congress didn't like *Sutton v. United Air Lines,* 30 IDELR 681, 527 U.S. 471 (1999) on the issue of mitigating measures.

Congress Expanded § 504 & ADA Eligibility in 2008

What was wrong with substantial limitation? *Id.*

Congress didn't like *Toyota Motor Manufacturing v. Williams,* 102 LRP 6137, 534 U.S. 184 (2002), on substantial limitation when the individual can perform functions that matter to most people.

Congress Expanded § 504 & ADA Eligibility in 2008

And a problem with EEOC's substantial limitation definition? Said Congress:

"Congress finds that the current Equal Employment Opportunity Commission ADA regulations defining the term ''substantially limits'' as ''significantly restricted'' are inconsistent with congressional intent, by expressing too high a standard." 42 USC §12101(a)(8).

Congress Expanded § 504 & ADA Eligibility in 2008

A problem with EEOC's substantial limitation definition? Said Congress

- "the Equal Employment Opportunity Commission will revise that portion of its current regulations that defines the term "substantially limits" as "significantly restricted" to be consistent with this Act, including the amendments made by this Act." 42 USC §12101(b)(6).
- Congress told EEOC to make the standard less demanding, **BUT provided no replacement language.** *Id.*
- The goal of ADAAA was to increase eligibility.

OCR on "Substantial Limitation" post-ADAAA

With respect to a substantial limitation definition, OCR added nothing new following the ADAAA.

- "Does OCR endorse a single formula or scale that measures substantial limitation?
- No. The determination of substantial limitation must be made on a case-by-case basis with respect to each individual student. The Section 504 regulatory provision at 34 C.F.R. 104.35(c) requires that a group of knowledgeable persons draw upon information from a variety of sources in making this determination." *2025 Q&A, Question 21.*

OCR on "Substantial Limitation" post-ADAAA

Following the ADAAA, OCR did not amend the Section 504 regulations. In post ADAAA guidance letters, there is little on substantial limitation.

- "An impairment need not prevent or severely or significantly restrict a major life activity to be considered substantially limiting." *2012 DCL.*

OCR on "Substantial Limitation" post-ADAAA

To implement the ADAAA's mitigating measures rule, OCR simply lays out the rule without embellishment. OCR's 2012 DCL.

"In the phrase 'a physical or mental impairment that substantially limits a major life activity,' the term 'substantially limits' shall be interpreted without regard to the ameliorative effects of mitigating measures, other than ordinary eyeglasses or contact lenses."

OCR on "Substantial Limitation" post-ADAAA

OCR commentary on the impact of the mitigating measures rule.

- "Therefore, **impairments that may not have previously been considered to be disabilities because of the ameliorative effects of mitigating measures might now meet the Section 504 and ADA definition of disability.** For example, a student who has an allergy and requires allergy shots to manage that condition would be covered under Section 504 and Title II if, without the shots, the allergy would substantially limit a major life activity." *(Id.)*

OCR on "Substantial Limitation" post-ADAAA

As the purpose of the mitigating measures rule is to increase eligibility, OCR provided the following reference to discussions in Congress.

> "the Committee on Education and Labor in the House of Representatives cautioned that 'an individual with an impairment that substantially limits a major life activity should **not be penalized** when seeking protection under the ADA simply **because he or she managed their own adaptive strategies** or received informal or undocumented accommodations that have the effect of lessening the deleterious impacts of their disability.'" See H.R. REP. No. 110-730, pt. 1, at 15 (2008); *2012 OCR DCL.*

EEOC on "Substantially Limits" post ADAAA: Relaxation of the Standard

EEOC's post-ADAAA substantial limitation regs at 29 C.F.R. 1630(2)(j)*(et.seq.)* include the following on the lowering of the standard:

> "(i) The term 'substantially limits' shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. **'Substantially limits' is not meant to be a demanding standard."**
>
> (iv) The determination of whether an impairment substantially limits a major life activity requires an individualized assessment. However, in making this assessment, the term 'substantially limits' shall be interpreted and applied to **require a degree of functional limitation that is lower than the standard for 'substantially limits' applied prior to the ADAAA."**

EEOC on "Substantially Limits" post ADAAA: Relaxation of the Standard

So, what did EEOC do?

- The two paragraph definition became nine paragraphs. 29 C.F.R. 1630(2)(j)*(et.seq.).*
- "Rules of Construction" approach versus a definition
- The rules are organized here for ease of use together with Dave's summary or commentary.

EEOC on "Substantially Limits" post ADAAA: Relaxation of the Standard

Paragraphs (i) & (iv), "Substantially" Defined?

"(i) The term '**substantially limits' shall be construed broadly** in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. 'Substantially limits' is not meant to be a demanding standard."

EEOC on "Substantially Limits" post ADAAA: Relaxation of the Standard

Paragraphs (i) & (iv), "Substantially" Defined?

(iv) The determination of whether an impairment substantially limits a major life activity requires an individualized assessment. However, in making this assessment, the term 'substantially limits' shall be interpreted and applied to require a degree of functional limitation that is **lower than the standard for 'substantially limits' applied prior to the ADAAA."**

EEOC on "Substantially Limits" post ADAAA: Relaxation of the Standard

Commentary to Paragraphs (i) & (iv), "Substantially" Defined?

- Requires individualized assessment
- Shall be construed broadly in favor of expansive coverage.
- Shall not be a demanding standard; requires a degree of functional limitation that is lower than the standard applied prior to the ADAAA

EEOC on "Substantially Limits" post ADAAA: Relaxation of the Standard

Paragraph (ii): The Comparison

"(ii) An impairment is a disability within the meaning of this section if it substantially limits the ability of an individual to perform a major life activity **as compared to most people in the general population."**

EEOC on "Substantially Limits" post ADAAA: Relaxation of the Standard

Paragraph (ii): The Comparison

(ii)(cont'd) **"An impairment need not prevent, or significantly or severely restrict,** the individual from performing a major life activity in order to be considered substantially limiting. Nonetheless, **not every impairment will constitute a disability** within the meaning of this section."

EEOC on "Substantially Limits" post ADAAA: Relaxation of the Standard

Paragraph (iii): The Focus During Litigation

"(iii) The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether an individual's impairment substantially limits a major life activity."

EEOC on "Substantially Limits" post ADAAA: Relaxation of the Standard

Paragraph (iii): The Focus During Litigation

(iii)(cont'd) "Accordingly, the threshold issue of whether an impairment 'substantially limits' a major life activity **should not demand extensive analysis."**

EEOC on "Substantially Limits" post ADAAA: Relaxation of the Standard

Commentary to Paragraph (iii): The Focus During Litigation

- To judges and hearing officers: focus on whether covered entities have complied with their obligations and whether discrimination has occurred
- Whether an impairment 'substantially limits' a major life activity should not demand extensive analysis."

EEOC on "Substantially Limits" post ADAAA: Relaxation of the Standard

Paragraph (v): The Type of Data Required

"(v) of an individual's performance of a major life activity. **The comparison** to the performance of the same major life activity by most people in the general population usually **will not require scientific, medical, or statistical analysis."**

A Little Dave Commentary: This language is consistent with long-standing OCR guidance on medical diagnosis

EEOC on "Substantially Limits" post ADAAA: Relaxation of the Standard

Paragraph (v): The Type of Data Required

"(v)(cont'd) Nothing in this paragraph is intended, however, to prohibit the presentation of scientific, medical, or statistical evidence to make such a comparison where appropriate."

EEOC on "Substantially Limits" post ADAAA: Relaxation of the Standard

Commentary on Paragraph (vi): Mitigating Measures

- The regulation largely tracks the statute. (See OCR language)
- The positive impact of mitigating measures are to be subtracted out when making the substantial limitation determination.
  - How does the student perform the major life activity without the positive impact of mitigating measures?
  - The positive impact of ordinary eyeglasses and contacts are not subtracted out. Why?

EEOC on "Substantially Limits" post ADAAA: Relaxation of the Standard

Paragraph (vii): Episodic & In Remission

"(vii) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."

EEOC on "Substantially Limits" post ADAAA: Relaxation of the Standard

Commentary on Paragraph (vii): Episodic & In Remission

Episodic: The impact of the impairment may change over time or from time-to-time. Substantial limitation is not just about impact on the day eligibility is determined.

In Remission: If the impairment in remission was substantially limiting **when active,** it constitutes a disability and provides nondiscrimination protection.

EEOC on "Substantially Limits" post ADAAA: Relaxation of the Standard

Paragraph (viii): No need for multiple major life activities to be substantially limited

"(viii) An impairment that substantially limits one major life activity need not substantially limit other major life activities in order to be considered a substantially limiting impairment."

EEOC on "Substantially Limits" post ADAAA: Relaxation of the Standard

Paragraph (ix): Six-Month Rule

"(ix) The six-month 'transitory' part of the 'transitory and minor' exception to 'regarded as' coverage in §1630.15(f) **does not apply to the definition of "disability" under paragraphs (g)(1)(i) (the 'actual disability' prong) or (g)(1)(ii) (the 'record of' prong)** of this section. The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning of this section."

EEOC on "Substantially Limits" post ADAAA: Relaxation of the Standard

Commentary on Paragraph (ix): Six-Month Rule

- The six-month 'transitory' rule does not apply to Prong One (the eligibility criteria applied by 504 Committees). *Summers v. Altarum Institute Corp.,* 48 NDLR 95 (4th Cir. 2014).
- For Section 504 Committee eligibility evaluations, an impairment need not last six months to be substantially limiting (see following analysis instead).

EEOC on "Substantially Limits" post ADAAA: Condition, Manner and Duration, 29 C.F.R. 1630(2)(j)(4).

- "(ii) Consideration of facts such as condition, manner, or duration may include,
- among other things, consideration of
  - the **difficulty, effort, or time** required to perform a major life activity;
  - **pain** experienced when performing a major life activity;
  - the **length of time** a major life activity can be performed;
  - and/or the **way an impairment affects the operation** of a major bodily function.
  - In addition, the non-ameliorative effects of mitigating measures, such as negative side effects of medication or burdens associated with following a particular treatment regimen, may be considered when determining whether an individual's impairment substantially limits a major life activity."

Common Issues in Substantial Limitation: Temporary Impairments

Some temporary impairments, due to limited impact, won't create eligibility. In 1994, provided this example:

> "If a **right-handed student broke his left arm** and the break is expected to heal normally, without complications, this would probably not constitute a disability. The reason is that the impairment will heal within a short period of time and, even during its worst phase, would not prevent the student from attending school or from doing written assignments." *Letter to Rahall,* 21 IDELR 575 (OCR 1994).

Common Issues in Substantial Limitation: Temporary Impairments

Other impairments, while temporary, have more impact and longer effect. *Rahall* explains that

> **"if the student broke both legs,** recovery is delayed by complications and surgeries, and the entire period of disability will last for many months, the condition would likely be covered…. the amount of time is sufficiently long to suggest that the student's educational program will be significantly disrupted."

Common Issues in Substantial Limitation: Temporary Impairments

OCR sums up its position in *Rahall:*

> "There are **no hard and fast rules** as to the specific temporary impairments that may constitute disabilities under Section 504 and the ADA. Therefore, it is not possible to list conditions that will always be considered disabilities. Schools must evaluate these conditions on a case-by-case basis."
>
> Dave Note: *Rahall* is pre-ADAAA!

Common Issues in Substantial Limitation: Temporary Impairments

- OCR Guidance (2025 Q&A, #33):
  - "A temporary impairment does not constitute a disability for purposes of Section 504 unless its severity is such that it results in a substantial limitation of one or more major life activities **for an extended period of time."**
  - Note that there is no guidance as to how much time is an "extended period" of time. *(See discussion in Anaheim City, below)*

Common Issues in Substantial Limitation: Temporary Impairments

OCR Guidance (2025 Q&A, #33):

> "The issue of whether a temporary impairment is substantial enough to be a disability must be resolved on a case-by-case basis, taking into consideration both **the duration (or expected duration)** of the impairment and the **extent to which it actually limits** a major life activity of the affected individual."

Common Issues in Substantial Limitation: Temporary Impairments

What about the bright-line 6- month rule? *Summers v. Altarum Institute Corporation,* 48 NDLR 95 (4th Cir. 2014).

> "while the ADAAA imposes a six-month requirement with respect to 'regarded-as' disabilities, it imposes no such durational requirement for 'actual' disabilities, thus suggesting that no such requirement was intended."

Common Issues in Substantial Limitation: Temporary Impairments

Note this commentary in the EEOC regulations rejecting a specific minimum duration of time for substantial limitation.

> "the Commission has not in the final regulations specified any specific minimum duration that an impairment's effects must last in order to be deemed substantially limiting. **This accurately reflects the intent of the ADA Amendments Act,** as conveyed in the joint statement submitted by cosponsors Hoyer and Sensenbrenner."

> "That statement explains that the **duration of an impairment is only one factor** in determining whether the impairment substantially limits a major life activity, and impairments that last only a short period of time may be covered if sufficiently severe." 76 Federal Register No. 58, p. 16982 (March 25, 2011).

Common Issues in Substantial Limitation: Temporary Impairments & the 504 Duty to Evaluate

- The school's duty to evaluate under Section 504 is triggered by the school's suspicion that the student is disabled and in need of services.
  - "A recipient that operates a public elementary or secondary education program or activity **shall conduct an evaluation** in accordance with the requirements of paragraph (b) of this section of any person who, **because of handicap, needs or is believed to need special education or related services** before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement." 34 CFR §104.35(a).

Common Issues in Substantial Limitation: Temporary Impairments & the 504 Duty to Evaluate

- In short, a student should be referred to §504 when the District believes that the student may be eligible, i.e., when the District believes that
  1. the student has a physical or mental impairment that substantially limits one or more major life activities, AND
  2. believes that the student is in need of either regular education with supplementary services or special education and related services. *Letter to Mentink,* 19 IDELR 1127 (OCR 1993).
- **The duty does not depend on parent request for evaluation.** *West Contra Costa (CA) Unified School District,* 42 IDELR 121 (OCR 2004)("The District had this obligation under Section 504 whether or not the parent made a request for an assessment.")
-

Common Issues in Substantial Limitation: Temporary Impairments

- In *Anaheim City (CA) School District,* 115 LRP 19319 (OCR 2014), the student suffered a severe leg break during the summer and was required to utilize a wheelchair for 4 weeks.
  - The school provided the student a health plan and after parent request, provided an assigned individual to assist the student during bathroom breaks, lunch, recess and between classes.
  - During pendency of an IDEA evaluation, the school completed a 504 eval in five weeks. Parents claim the 504 evaluation took too long.

Common Issues in Substantial Limitation: Temporary Impairments

- *Anaheim School District (cont'd)*
  - **The school took the position that a reasonable period of time for a Section 504 evaluation could be ascertained by looking to the state's IDEA timeline for evaluation.**
  - "the District indicated to the Complainant that it had up to sixty days to complete assessments"
  - "The sixty-day period refers to the maximum time within which assessments must be completed, while the regulatory standard for an appropriate period under Section 504 is based on reasonableness."

Common Issues in Substantial Limitation: Temporary Impairments

- *Anaheim School District (cont'd)*
  - "OCR notes the District's Section 504 policies and procedures document, 'General Guidance' states that for a temporary impairment to be considered a disability it must result in a 'substantial limitation of one or more major life activities for an *extended period* of time' (our emphasis)." *Id.*
  - *Dave Note:* The school policy tracked the OCR "extended period of time" language. So, a short-lived impairment may not create eligibility AND consequently, may not trigger the duty to offer a 504 evaluation.

Common Issues in Substantial Limitation: Temporary Impairments

So, what does "extended period of time" mean?

"The interpretation of 'extended' should not contravene the regulatory standard under Section 504 for reasonableness, and should not be interpreted rigidly. In particular, the eligibility determination of whether a temporary impairment qualifies as a disability must be conducted on a case-by-case basis, through an appropriately individualized assessment." *Id.*

"given the District's awareness that the Student had an obvious physical impairment requiring a wheelchair, **a reasonable time-frame for assessment should not be extensive."** *Id.*

Common Issues in Substantial Limitation: Temporary Impairments

- *A Little Dave Commentary:* OCR seems critical of the 5 weeks used by the district to evaluate in light of the obvious impairment, but OCR does not find a violation.
- Missing from the analysis is the answer to a practical question: at what point is an impairment so temporary that it does not trigger the duty to evaluate?
- **Consider with the school attorney a common-sense rule:** If the impairment won't outlast the §504 process, does the school need to evaluate under 504?

Common Issues in Substantial Limitation: Temporary Impairments

- How does LRE impact the referral decision?
  - Moving a regular ed student to home instruction due to impairment requires 504 evaluation. *Lourdes (OR) Public Charter School,* 57 IDELR 53 (OCR 2011).
  - Home hospital can't substitute for a 504 evaluation. *Cobb County (GA) School District,* 51 IDELR 54 (OCR 2008). (Student absent 17 days in the fall and then most of Spring).

Common Issues in Substantial Limitation: Temporary Impairments

- **The "evaluate where LRE is changed due to homebound" rule is subject to exception.** *Boling (TX) Independent School District,* 110 LRP 48659 (OCR 2009).
  - OCR finds no violation where homebound was provided without a Section 504 evaluation due to school's belief—based on a series of representations from the parent—that the student's medical condition was temporary, and he would be returning to school shortly.

Common Issues in Substantial Limitation: Temporary Impairments

Talk with your school attorney about this:

- No clear, bright-line rule from OCR on Section 504 referral of students with temporary impairments.
- Don't get too caught up in "extended time" or six months as standards for duration.

Common Issues in Substantial Limitation: Temporary Impairments

Talk with your school attorney about this:

- There are two factors to consider: (1) probable duration of the impairment and (2) degree and nature of the impact during the duration of the impairment.
- Where an impairment is of both short duration and minimal impact, there is less call for an offer of a Section 504 evaluation than when the impairment is of a longer duration and/or has greater impact.

Common Issues in Substantial Limitation: Temporary Impairments

Talk with your school attorney about this: Changes to LRE require more serious consideration.

- When students must receive instruction at home because of a physical or mental impairment, the student is served in a very restrictive placement due to little or no access to peers.
- Changes to LRE require referral *consideration* even when the impairment has short duration.

Common Issues in Substantial Limitation: An Impairment is not Automatically a Disability

Prior to the ADAAA, OCR resisted the notion that some impairments are so impactful that they will always result in eligibility. This was OCR's response to such claims.

> **"Are there any impairments that automatically mean that a student has a disability under Section 504?** No. An impairment in and of itself is not a disability. The impairment must substantially limit one or more major life activities in order to be considered a disability under Section 504." Revised Q&A #22

Common Issues in Substantial Limitation: An Impairment is not Automatically a Disability

- In light of Congress' desire that eligibility be viewed more broadly, and significant changes lowering the eligibility standard, found
  - "it is impossible to determine with precision how many individuals have impairments that will meet the current definition of substantially limiting a major life activity or a record thereof." Federal Register Vol. 76, No. 58, p. 16990 (March 25, 2011).
- **Some impairments, commented EEOC, while not automatically resulting in eligibility, would *virtually always* result in eligibility.**

Common Issues in Substantial Limitation: An Impairment is not Automatically a Disability

EEOC's "virtually always" list.

> "We do know, however, that, at a minimum, this group should easily be concluded to include individuals with the conditions listed in § 1630.2(j)(3)(iii) of the final regulations—including **autism, cancer, cerebral palsy, diabetes, epilepsy, HIV infection, multiple sclerosis, muscular dystrophy, and a variety of mental impairments."** *Id.*
>
> *A Little Dave Commentary:* It appears that OCR reviewed EEOC's position and liked the descriptive language. OCR's January 2012 guidance letter indicates that a handful of impairments will almost always result in eligibility.

Common Issues in Substantial Limitation: An Impairment is not Automatically a Disability

OCR changes position following EEOC?

- "While there are no per se disabilities under Section 504 and Title II, the nature of many impairments is such that, **in virtually every case,** a determination in favor of disability will be made." 2012 DCL
- "Thus, for example, a school district should not need or require extensive documentation or analysis to determine that a child with **diabetes, epilepsy, bipolar disorder, or autism** has a disability under Section 504 and Title II." 2012 DCL

Common Issues in Substantial Limitation: Academic Success & Substantial Limitation

- Educational success does not prevent a finding that the student is substantially limited by an impairment.
  - Old school thinking: How can you achieve academic success AND be substantially limited in learning, reading, or thinking at the same time?
  - Modern approach in EEOC commentary. 76 Federal Register, No. 58, March 25, 2011 *[hereinafter, "EEOC."].*

Common Issues in Substantial Limitation: Academic Success & Substantial Limitation

1. ''It is critical to reject the assumption that an individual who has performed well academically cannot be substantially limited in activities such as learning, reading, writing, thinking, or speaking.'' *EEOC, p. 17012-13.*

Substantial limitation is a comparison of the student's performance of the major life activity (condition, manner, and duration) to that of the average student/most students.

Common Issues in Substantial Limitation: Academic Success & Substantial Limitation

"Condition, manner, or duration may also suggest the amount of time or effort an individual has to expend when performing a major life activity because of the effects of an impairment, even if the individual is able to achieve the same or similar result as someone without the impairment." *EEOC, p. 17012.*

Common Issues in Substantial Limitation: Academic Success & Substantial Limitation

2. "For the majority of the population, the basic mechanics of reading and writing do not pose extraordinary lifelong challenges; rather, recognizing and forming letters and words are effortless, unconscious, automatic processes." *EEOC, p. 17013.*

Let's do an experiment…

Common Issues in Substantial Limitation: Academic Success & Substantial Limitation

- "Because specific learning disabilities are neurologically-based impairments, the process of reading for an individual with a reading disability (e.g., dyslexia) is word-by-word and otherwise cumbersome, painful, deliberate, and slow — throughout life."
  - Dave Note: Think about the way the road is traveled, and not just the destination.

Common Issues in Substantial Limitation: Academic Success & Substantial Limitation

3. "Thus, someone with a learning disability may achieve a high level of academic success, but may nevertheless be substantially limited in the major life activity of learning because of the additional time or effort he or she must spend to read, write, or learn compared to most people in the general population." *EEOC, p. 17012.*

Common Issues in Substantial Limitation: Academic Success & Substantial Limitation

4. "Individuals diagnosed with dyslexia or other learning disabilities will typically be substantially limited in performing activities such as learning, reading, and thinking when compared to most people in the general population."

- This is especially true when you take away the positive impact of mitigating measures. EEOC, p. 17009.

Common Issues in Substantial Limitation: Academic Success & Substantial Limitation

The same logic (and virtually identical language) applied by OCR to ADHD in 2016

"Someone with ADHD may achieve a high level of academic success but may nevertheless be substantially limited in a major life activity due to his or her impairment because of the additional time or effort he or she must spend to read, write, or learn compared to others." *ADHD Resource Guide*

Common Issues in Substantial Limitation: Academic Success & Substantial Limitation

The same logic (and virtually identical language) applied by OCR to ADHD in 2016

- "In OCR's investigative experience, school districts sometimes rely on a student's average, or better-than-average, grade point average (GPA) and make inappropriate decisions." *Id.*

Final Thoughts on "Substantially Limiting" Discuss the following with the School Attorney

1. OCR has not provided a definition, and has given little guidance

2. OCR leaves it to the schools to define substantial limitation, but the standard used must be consistent with Congress' changes in ADAAA.

Final Thoughts on "Substantially Limiting" Discuss the following with the School Attorney

3. Congress didn't define substantial limitation but did require provide some instruction to EEOC on changing its definition consistent with Congress' desire for higher levels of eligibility (and more emphasis on the entity's nondiscrimination requirements).

Final Thoughts on "Substantially Limiting"
Discuss the following with the School Attorney

4. Schools must not apply a standard requiring
- (1) a significant or severe restriction on the performance of a major life activity, nor
- (2) the 'level of limitation, and the intensity of focus' found in *Toyota*. The student need not be substantially limited in a part of the major life activity that is important to or central to the lives of most people.

Final Thoughts on "Substantially Limiting"
Discuss the following with the School Attorney

5. The author's approach to substantial limitation addresses both issues and Congress' desire for greater eligibility by
- Reminding schools of the lower standard,
- Applying the ADAAA's mitigating measures rule, and
- The author's tie breaker rule (following slide)

Final Thoughts on "Substantially Limiting"
Discuss the following with the School Attorney

5. Dave's Tie-Breaker Rule
- If at the end of the Section 504 evaluation, the Section 504 Committee has identified an impairment and a major life activity impacted, BUT,
- The 504 Committee is unsure if the student is substantially limited, THEN:
- The tie goes to eligibility.

Workshop 3

The Five Ws of Child Find: Understanding Child Find Obligations under the IDEA and Section 504

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Pacific Northwest Institute on Special Education and the Law
October 27-29, 2025
Bellevue, Washington

The Five W's of Child Find:

Understanding Child Find Obligations under the IDEA and Section 504

Elizabeth L. Polay

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Pacific Northwest Institute on Special Education and the Law

October 28, 2025

Agenda

- What is child find?
  - And why is child find important?
- Where does the child find obligation apply?
- Who is responsible for child find obligations?
- When is the child find obligation met?
- Prior Written Notice

What is "Child Find?"

- Child Find is a continuous and affirmative obligation of states and local districts to **identify, locate, and evaluate** all children with disabilities in need of special education and related services (which includes those who are suspected of having a disability) residing within the geographical boundaries of the state or local district. 34 CFR 300.111(1)(a)(i)
- Multiple aspects of "Child Find" to remember:
  - Locate
    - Not restricted to students in public school (more to come…)
  - Evaluate
    - Not restricted to students who are struggling with advancement from grade to grade - 34 CFR 300.111(c)
  - Identify
    - Includes identifying all areas of disability-related need for students who are eligible for special education and related services

What does it mean to suspect a disability?

- Courts have held that the "threshold for 'suspicion' is relatively low."
- **The inquiry is not whether a student actually qualifies for services, but rather, whether the student should be referred for an evaluation**
- Case Example (The 9th Circuit Standard for Child Find): *Dep't of Educ. v. Cari Rae S.*, 35 IDELR 90 (D. HI 2001):
  - Student's 79 absences and numerous behavioral referrals should have alerted the district to a possible emotional impairment
  - Although district ultimately found student eligible under the IDEA, district was liable for child find evaluation by failing to evaluate the student at an earlier time

Why is Child Find important?

- The affirmative obligation of Child Find is a requirement of state and federal law
  - IDEA: Children with disabilities have available special education and related services designed to provide a free appropriate public education ("FAPE") designed to meet their unique needs
  - Section 504: Federal law that requires, in relevant part, that "no otherwise qualified individual with a disability in the United States…shall solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance." 29 USC 794(a)
- Serving kids and meeting them where they are is the business of schools and educators

Where does the Child Find obligation apply?

- In order to comply with Child Find under the IDEA, each state must put policies and procedures in place to ensure that:
  - All children with disabilities residing in the state, including children with disabilities who are homeless children or are wards of the state and children with disabilities attending private schools, regardless of the severity of their disability, and who needs special education and related services, are identified, located, and evaluated; and
  - A practical method is developed and implemented to determine which children are currently receiving needed special education and related services.
    - 34 CFR 300.111(a)
- Child Find under Section 504 requires:
  - District must "[u]ndertake to identify and locate every qualified handicapped person residing in the recipient's jurisdiction who is not receiving a public education."
    - 34 CFR 104.32(a)
  - A district must conduct an evaluation of any student "who, because of handicap, needs or is believed to need special education or related services."
    - 34 CFR 104.35(a)

- Child Find applies to:
  - ***All*** students in the district's boundaries from birth to age 21 (if they have not received a regular high school diploma)
  - Public school students
  - Private school students
  - Homeschoolers
  - Highly mobile children, including migrant children

What this means:

Child Find applies to concerns in:

- Academics
  - Caution: Frequent errors in overemphasis on academics
  - *A.P. v. Pasadena Unified Sch. Dist.*, 78 IDELR 139 (C.D. Cal 2021):
    - Court found on behalf of parent for child find violation
    - High school student with increased absences
    - District waited four months to evaluate because grades not impacted significantly
- Behavior
- Communication
- Functional skills
- Mental health
- Social skills
- Gross or fine motor skills

Where might we notice potential suspected disabilities?

- In the classroom
- During unstructured time or specials
- Around transitions
- In social situations
- In conversation
- On the playground
- On the school bus
- Shared by family/caregivers or medical professionals

Who is responsible for the Child Find obligation?

The School District!

(That means You!)

Child Find is the *District's* Affirmative Obligation

The request for an evaluation does not have to be in writing

- *District of Columbia Pub. Sch.*, 12 ECLPR 109 (SEA DC 2015)

Parent does not have to use "magic words" to trigger child find

- *Chichester Sch. Dist.*, 114 LRP 24895 (SEA PA 2014)

No magic words required

La Joya Independent Sch. Dist., 41 IDELR 175 (SEA TX 2004)

- Parent informed school that her incoming kindergartener had speech problems and needed services.
- Also provided the card of student's private speech therapist.
- District did not seek parent consent for evaluation until 7 months later based on escalating classroom difficulties
- Hearings Officer explained a parent doesn't always know the right terminology and procedures for a special education evaluation
- Hearings Officer found the date of enrollment was the date she referred the child for evaluation and when the district should have sought consent
- **Notification that the child has special needs is sufficient to imply a request for an assessment**

Case Example:
Charlotte-Mecklenburg Bd. of Educ. v. Brady by Brady
80 IDELR 288 (WDNC 2022)

- In second grade, student began exhibiting self-injurious behaviors, expressing suicidal ideations, and crying in school due to expressed anxiety
- Student's anxiety and crying during classes increased and continued throughout middle school
- On multiple occasions in middle school, Student was hospitalized and made threats of suicide while at school
- In response to Student's suicide threats, School required Student to be assessed by psychologist or psychiatrist before allowing Student to return to school
- 504 plan was developed
- Prior to 504 meeting, Student's parent provided team with email from Student's psychologist, stating:
  - "We understand that with her specific diagnoses, [Student] qualifies as OHI and is eligible for an IEP - is tutoring covered by an IEP? Is there something that is covered by an IEP that can benefit her?"

Brady (cont.)

- No special education evaluation or eligibility conducted.
- Student continued to have absences, hospitalizations, and below average grades
- Student attempted to commit suicide at school
- The next day, the assistant principal contacted Student's parent about what happened and that they needed to plan for Student to attend school elsewhere because school was not prepared to handle her
- Under medical advice, Student's parents removed her from the District and enrolled her at a short-term residential treatment center, then ultimately in online classes
- **District never attempted to schedule a referral meeting to determine if Student should be evaluated for special education**

Brady: Result

- District argued that the email from the doctor was not requesting evaluation
- Court found email used keywords from the IDEA and asked what type of resources were available under the IDEA
- This was enough to be considered an evaluation request, because **no magic words are required for referral**

Case Example: *Great Valley Sch. Dist.*, 123 LRP 25017 (SEA PA, June 28, 2023)

- Student began showing signs of anxiety and depression during remote learning (2020-21 school year)
- Student began seeing outside therapist in fall 2021 for anxiety and depression
- Student attended a coping skills group run by a social worker contracted by the District at school
- October 2021: Student wrote a note expressing suicidal ideation on the back of a quiz
- District conducted a suicide risk screener, which prompted a full risk assessment – ratings indicated student was a "moderate risk"
- Parent was contacted and counselor recommended involvement with student's private therapist

Great Valley Sch. Dist., 123 LRP 25017 (SEA PA, June 28, 2023) (cont.)

- Student stopped participating in sports due to increasing anxiety and interactions with the coach
- Records indicated that teachers, the guidance counselor, and parent knew that sports had become an "anxiety-ridden" activity
- November 2021: student began to self-harm and expressed suicidal ideation
- After an incident of self-harm, student was scheduled to attend a partial hospitalization program instead of school
- Counselor regularly communicated with the PHP staff about transition back to the district
- Transition was delayed when student had to be returned to the emergency room in December 2021

Great Valley Sch. Dist., 123 LRP 25017 (SEA PA, June 28, 2023) (cont.)

- January 2022: Student observed texting a hotline at school. After another risk assessment, district recommended student go to the emergency room
- January 31, 2022: Parent told counselor that doctors were recommending inpatient hospitalization
- February 1, 2022: parent requested an IDEA evaluation
- Within 1 week of the request, the counselor, school psychologist, and parent spoke about the hospitalization, possible 504, initiation of a comprehensive IDEA evaluation, and the status of return to the PHP

Great Valley Sch. Dist., 123 LRP 25017 (SEA PA, June 28, 2023) (cont.)

- After additional hospitalizations and txt programs, student was found eligible for a 504 plan in September 2022. The 504 plan included the following:
  - Access to the guidance office for breaks throughout the day
  - Student would be allowed to carry a cell phone throughout the school day for the next month
    - Student could contact parent or outside therapist using the cell phone
    - This phone and/or text contact could only occur in the guidance suite
  - Student would be allowed a fidget in the classroom to reduce stress
- Section 504 plan did not include counseling, positive behavior strategies, other related aids, supports, or services like social work, counseling, or psychological services

Great Valley Sch. Dist., 123 LRP 25017 (SEA PA, June 28, 2023) (cont.)

- IDEA consent was not executive until September 2022
- Student returned to school on a modified schedule in late September 2022
- But missed 9 full school days in October 2022
- November 2022, District proposed a specialized outside placement in a therapeutic emotional support setting
- Parent placed student at a private school in November 2022 – student was attending five days per week in person at the time of the hearing

Great Valley Sch. Dist., 123 LRP 25017 (SEA PA, June 28, 2023) (cont.)

- Parent claimed child find was triggered since 2019-20 school year
- ALJ agreed student should have been evaluated during the 2021-22 school year, after the November 2021 discharge from inpatient PHP
- 10-month delay from December 2021 to October 2022 was unreasonable
- District's independent knowledge of student's struggles and hospitalizations was enough to trigger child find
- District should have arranged to evaluate the student during the inpatient residential stay
- Result:
  - Reimbursement for private school tuition
  - Compensatory education:
    - 5 hours per week from November 2021 through June 2022 (for lack of appropriate instruction)
    - 150 minutes per week from the first week of school during the 2022-23 school year through October 28, 2022 for the child find delay
    - Parent has sole discretion in choosing the compensatory education provider at district expense

Hospitalization and Child Find

- Under the IDEA, districts have an affirmative duty to locate, identify, and evaluate all students who need or may need special education due to a disability
- If a child has been hospitalized for mental health needs:

Do we have an obligation to refer for evaluation under the IDEA and/or Section 504?

Hospitalization and Child Find
DC Public Schools – 125 LRP 4352 (12.16.24)

- Between 2021 through 2023, the student was hospitalized 5 times for suicidal ideations, self-harm, drug and alcohol abuse, and elopement
- Student was subsequently diagnosed with depression and anxiety
- Parents did not immediately inform the district about the hospitalizations or reasons for the hospitalizations
- Parents did not provide copies of student's discharge notices or related records

Hospitalization and Child Find
DC Public Schools – 125 LRP 4352 (12.16.24)

- When student received failing grades in 2022-23 school year, parents expressed concern about bullying and student's academic progress
  - Historically had received As and Bs prior to 2021-22 school year
  - During 2021-22 school year, student received Cs, Ds, one A, and one F
  - First two terms of 2022-23 school year, she received mostly Ds and Fs
  - Student was enrolled in Honors courses – no cognitive delays
  - Third term – Mostly Fs and one C
- Father emailed district about student's emotional condition only after a verbal confrontation between classmate and the student
- Student was chronically absent during the 2022-23 school year
  - First two terms – 51 absences with 29 unexcused
  - By third term – 73 absences and 30 unexcused
- December 16, 2022 – parent reported to staff member that a peer told student they "hope your whole family dies." Parent asked to prevent the students from having contact with each other
- February 20-21, 2023, Student was treated at a hospital facility for suicidal ideation
- March 19, 2023 – parent notified school that student was admitted to a residential facility where they were expected to stay for 45-60 days
  - Asked about the support the student would have when they returned to school

Hospitalization and Child Find
DC Public Schools – 125 LRP 4352 (12.16.24)

- No teachers reported concerning behaviors in the classroom
- No disciplinary history in school
- May 18, 2023 – parent withdrew student and indicated intention to enroll in private school
- Student was enrolled by family in a "safe house" and wilderness program
- November 28, 2023, parents indicated intention to enroll for 2023-24 school year with a copy of a private evaluation documenting student's mental health history and concerns
- Upon request, school district started initial evaluation process
- Student eventually found eligible June 14, 2024

Hospitalization and Child Find
DC Public Schools – 125 LRP 4352 (12.16.24)

Was there a Child Find or evaluation violation here?

Hearings Officer says No Violation

Hospitalization and Child Find
DC Public Schools – 125 LRP 4352 (12.16.24)

- The only email from parents to school about concerns in 2021-22 school year was about potential bullying and academic progress
  - No mention of hospitalizations or mental health concerns
- 2022-23 school year
  - ALJ acknowledged declining academic performance and chronic absenteeism
  - No correspondence from parents regarding absences
  - No correspondence from parents that absences or academic concerns were due to mental health concerns
  - No indication that school was aware of mental health issues

Hospitalization and Child Find
DC Public Schools – 125 LRP 4352 (12.16.24)

- Parent claimed district should have suspected student suffered from emotional disturbance prior to May 2023 withdrawal
  - But ALJ says, "The record supports a finding that [parent] did not believe that himself"
  - Student was hospitalized twice and did not inform the school of any reasons for hospitalization
  - Only communications with the school were about bullying and academic progress
  - No indication from any source that absences were due to a mental health concern

Hospitalization and Child Find
DC Public Schools – 125 LRP 4352 (12.16.24)

- Takeaways:
  - If you know there has been a hospitalization, discuss evaluation or reevaluation, whatever is appropriate
  - If a student is chronically absent – check with the student's parents and document any justification the parent gives
    - If it requires further evaluation or investigation – do so
    - Take some reasonable action in relation to the issue, whatever it is
  - If student's grades are dropping – check with the student's parents and document any questions or justification from the parent
    - Respond appropriately
  - Here: lack of documentation from the parent of any other concerns while documentation from the district of responding appropriately based on what was actually shared saved the district from a violation

Child Find and RTI

- **A District's Response to Intervention ("RTI") system or other intervention system is not a substitute for the District's obligation to conduct a review of a request for evaluation under the IDEA or Section 504**
- A school district may use a multi-tiered intervention system to take data and support students
- Processes may need to be engaged on parallel tracks to provide interventions while also complying with the District's Child Find obligation under the IDEA or Section 504

OSEP Memo – January 21, 2011

Emphasizes that "[i]t is critical that … identification [of students with disabilities] occur in a timely manner and that no procedures or practices result in delaying or denying this identification."

At that time, OSEP had learned that some districts used RTI processes to delay or deny timely special education evaluations for children suspected of having a disability

"States and LEAs have an obligation to ensure that evaluations of children suspected of having a disability are not delayed or denied because of the implementation of an RTI strategy."

MTSS/RTI/SST – Or Other Intervention Programs (cont.)

- *Return to School Roadmap – Child Find Under Part B of the Individuals with Disabilities Education Act* (OSERS Aug. 24, 2021):

Question B-3: **Can an LEA require that all students participate in general education multi-tiered systems of support (MTSS) or other general education interventions prior to referring a child for special education?**

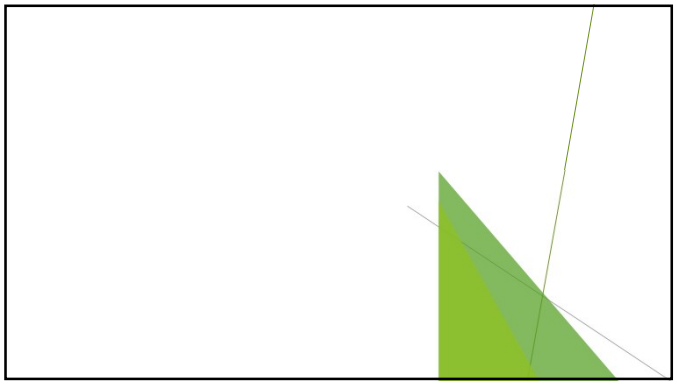
Answer: No. MTSS is a comprehensive continuum of evidence-based, systemic practices to support a rapid response to students' needs with regular observation to facilitate data-based instructional decision-making. Many LEAs have implemented successful MTSS frameworks, thus ensuring that children who simply need short-term and targeted, or intensive interventions are provided those interventions. IDEA, however, does not require, or encourage, an LEA to use an MTSS approach prior to a referral for evaluation or as part of determining whether a child is eligible for special education or related services.

A parent may request an initial evaluation at any time to determine if their child is a child with a disability, regardless of whether the child has participated in an MTSS framework. 34 C.F.R. § 300.301(b). The implementation of MTSS strategies cannot be used to delay or deny the provision of a full and individual initial evaluation, pursuant to 34 C.F.R. §§ 300.304 through 300.311, to a child suspected of having a disability under 34 C.F.R. § 300.8.[FN] It would be inconsistent with the evaluation provisions at 34 C.F.R. §§ 300.301 through 300.111 for an LEA to reject a referral and delay provision of an initial evaluation on the basis that a child has not participated in an MTSS framework.

https://sites.ed.gov/idea/files/rts-qa-child-find-part-b-08-24-2021.pdf

Parents Requests for Evaluation
(and other factors to consider)

- IDEA regulations allow a parent to request an initial evaluation at any time
- RTI cannot be used to delay or deny the provision of a full and individual evaluation (34 CFR 300.304-300.311)
- If LEA agrees with a parent who refers child for evaluation, LEA *must* evaluate (with informed written consent of parent)
  - No specific timeframe but it must be reasonable
- If LEA disagrees and does not suspect child has a disability, must provide PWN explaining why
  - Parent can then challenge that decision through various complaint processes, including due process hearing request
- **"It would be inconsistent with the evaluation provisions of [the IDEA] for an LEA to reject a referral and delay provision of an initial evaluation on the basis that a child has not participated in an RTI framework."**



Junction City Sch. Dist. 69, 124 LRP 41660
(Oct. 4, 2024)

- **An evaluation planning meeting held 34 days after the parent's request was held within a reasonable amount of time**
  - The district showed that it made diligent efforts to identify a mutually agreeable date for the meeting
  - The district continued to prioritize the development of a new IEP at the same time
- **Waiting two months to obtain consent after an evaluation planning meeting was a denial of FAPE**
  - Evaluation planning meeting on November 29, but consent to evaluate wasn't provided to the parent until January 29
  - The district argued the reason for the delay was due to waiting for an OT report from recent testing.
  - Even if it was waiting for an OT report, the district should've moved forward with getting consent for the other evaluations.
  - Loss of educational opportunity for the student by delaying special education services by almost 2 months.

P.W. v. Leander Ind. Sch. Dist., U.S. District Court, Western District of Texas – 4/18/23 (123 LRP 13759)

- Facts:
  - Kindergartener started showing signs of dyslexia
  - Parents requested dyslexia evaluation in 1st grade because student was reversing letters and numbers
  - Principal talked them into withdrawing evaluation request until district determined whether RTI strategies were working
  - District declined to evaluate the student until 2nd grade
  - Even then, only offered a 504 plan
  - Developed an IEP in 3rd grade only when student received a dx of ADHD

P.W. v. Leander Ind. Sch. Dist., U.S. District Court, Western District of Texas – 4/18/23 (123 LRP 13759)

- Holding:
  - Parents sufficiently pleaded disability discrimination under both Section 504 and the ADA
  - District's actions demonstrated bad faith and gross misjudgment
  - "[The parents] have … plausibly alleged gross misjudgment based on [district] staff repeatedly telling [them] that 'dyslexia is separate from special education' and 'dyslexia is not under special education … just [Section] 504."

Ja.B. v. Wilson Cnty. Bd. of Educ., Sixth Circuit Court of Appeals 3/6/23 – 82 IDELR 191

- Facts:
  - As early as age 2, student exhibited "rage behaviors" and saw a therapist for emotional regulation
  - Most concerning behaviors occurred at home
  - While living in IL, school records reflected meeting academic and behavioral expectations
    - No safety plan, IEP, 504, etc.
  - Late July 2017 – family moved to TN
  - Family requested to tour school to ease student's anxiety about the move
  - Received his first in-school suspension in his third week of school
  - Parents told new school about adoption hx and behavioral struggles at home
  - Student's behavior escalated at both home and school, but worse at home
  - Led to brief hospitalization

Ja.B. v. Wilson Cnty. Bd. of Educ., Sixth Circuit Court of Appeals 3/6/23 – 82 IDELR 191

- Facts (cont.)
  - After hospitalization, parents reached out to school counselor again and talked about IEP or 504 plan
  - Counselor told parents that 504 process would come first and possibility of an IEP would come later, depending on the 504 plans' efficacy
  - **School officials believed a tiered intervention system was most appropriate**
  - Student continued to receive behavioral referrals for similar behaviors, and was suspended more than once
  - Escalated to involvement with SRO – student was arrested and suspended
  - Parents eventually enrolled student in private school, and student transitioned to a residential treatment center for "emotional regulation, medication, and stabilization"

Ja.B. v. Wilson Cnty. Bd. of Educ., Sixth Circuit Court of Appeals 3/6/23 – 82 IDELR 191

- Holding:
  - School staff had testified at due process hearing that behavior was not out of the ordinary for a middle school student
  - Expert opinions were mixed
  - ALJ held that district did not deny student a FAPE in failure to evaluate for special education
  - Parents appealed to federal court – went all the way to the 6th circuit
  - Found district's actions appropriate for the following reasons:
    - Had no history with the student because he had moved across state lines – get to know him
    - Student had no history of receiving special education in prior school district – across state lines
    - Some experts testified that special education evaluation not necessary yet
    - Contested whether district had any knowledge of the student's medical dx
    - Moving forward with the 504 process and not foreclosing the special education process was a reasonable solution because of those factors
    - Acknowledged RTI cannot delay evaluation, but stated that based on these facts, it was not necessary yet

Dayton Public Schools OH SEA – 2/3/23

- Facts:
  - February 2022 – 5th grade student was receiving passing grades in all classes
    - Was receiving Tier I and Tier II interventions
    - Attended English Language learning group for 320 minutes, 2 days per week
    - Student had reading difficulties due to being an English language learner
    - Student consistently tested in the lowest percentiles on assessment scores in 3rd, 4th, and 5th grades
  - April 2022 – parents made written request for special education evaluation
    - Student was still passing all classes
  - May 2022 – District issued PWN denying request for evaluation because of insufficient data to suspect learning disability at that time
  - August 2022 – parent's attorney sent a letter asking for a special education evaluation
    - Meeting held and consent for evaluation signed by parent
  - October 2022 – student found eligible for special education in category of SLD

Dayton Public Schools
OH SEA – 2/3/23

- Holding
  - Ohio agency did not find it convincing that the district felt it did not have sufficient data to make a determination to evaluate in May 2022
  - There were years of assessment scores showing the student testing in the lowest percentiles in reading
  - There was a demonstrated lack of progress in his interventions
  - Passing grades were not reflected by the academic assessment data
  - Student should have been evaluated prior to April 2022 request

- If you are engaging in an RTI process for a student, what sort of triggers would initiate a special education evaluation mid-process?
  - Parent referral?
  - Behavior?
  - Mental health?
  - Social/peer relationships?
  - ***Academics?***

Takeaways

Not all referrals result in evaluation or eligibility but…

- All referrals need to be properly considered under District policy and the law
- Case Example: *Heather H. v. Northwest Indep. Sch. Dist.*, 122 LRP 18681 (5th Cir. 2022):
  - Kindergarten student with private dx of autism, anxiety, and separation anxiety
  - Private psychological evaluation shared with district
  - Court found no reason to evaluate the child
  - Teachers reported "relatively normal transition" to KG and
  - No observations that student exhibited anxiety in the school setting or that his educational performance suffered
  - Takeaways:
    - Document data on age-appropriate and peer-normative behaviors
    - Follow the referral/consideration process and document final decision with PWN

When is Child Find obligation met?

- When process for consideration of special education referral is complete
  - Document the decision with a Prior Written Notice
- If the evaluation planning team decides to engage in an evaluation, when a student is found eligible or noneligible
  - Note 1: The evaluation should address all areas of suspected disability. This is not a limitation by disability category, to be discussed later…
  - Note 2: Under state and federal law, the school district has 60 school days to complete the evaluation process from the day the parent signs consent for the evaluations
- If a student is found noneligible for special education and related services, when a Prior Written Notice is issued documenting the decision
- If a student is found eligible, when a student is properly identified as a student with disabilities in need of special education and related services, **AND** when a PWN is issued documenting the decision

Identification under Section 504

Determination that student has a physical or mental impairment that substantially limits one or more major life activities or major bodily functions

Must provide FAPE to students who qualify under 504

FAPE standard under 504: provision of regular or special education and related aids and services designed to meet the student's individual educational needs ***as adequately as the needs of nondisabled students are met.***

What is a Disability?

An individual with a "disability" is someone who:

- Has a physical or mental impairment that substantially limits one or more major life activities
- Has a record of such an impairment
- Is regarded as having such an impairment (this prong is really about discrimination and adverse treatment)

What is a Physical or Mental Impairment?

- Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems; or
- Any mental or psychological disorder, such as intellectual disability (formerly termed mental retardation), organic brain syndrome, emotional or mental illness, and specific learning disabilities.

49

What are Major Life Activities?

Basic actions that the average person in the general population can perform with little or no difficulty

Examples of Activities:

- Breathing
- Ingesting
- Sensing
- Thinking
- Reading
- Speaking
- Interacting
- Sleeping
- Caring for oneself
- Learning
- Concentrating
- Communicating
- Writing
- Sitting
- Reaching
- Standing
- Bending
- Working
- Manipulating
- Walking
- Lifting

50

What else are Major Life Activities?

Major Bodily Functions, including:

- Respiratory
- Circulatory
- Brain
- Immune
- Endocrine
- Musculoskeletal
- Genitourinary
- Bowel
- Reproductive
- Cardiovascular
- Neurological
- Special sense organs
- Lymphatic
- Hemic
- Normal cell growth
- Digestive
- Bladder

51

What is a "Substantial Limitation" of a Major Life Activity?

- Unable to perform a major life activity; or
- Significantly restricted in the condition, manner, or duration of performing the activity compared to most people in the general population

Other considerations:

- An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active

52

Examples of Episodic Impairments or Impairments in Remission

Schizophrenia | Depression | Diabetes | Epilepsy

Multiple Sclerosis | HIV/AIDS | Cancer

53

Additional Factors in Determining Whether an Individual is Substantially Limited

The determination of whether an impairment substantially limits a major life activity excludes the ameliorative effects of mitigating measures, except for corrective lenses.

Mitigating Measures include:

- Medications and Medical Supplies or Equipment
- Low Vision Aids
- Hearing Aids and implantable hearing devices
- Prosthetics
- Mobility Devices
- Alternate devices, adaptive equipment, or assistive technology
- Auxiliary Aids and Services
- Learned Behavioral or Adaptive Neurological Modifications

54

How much should we debate whether a person experiences a qualifying disability?

- The courts in recent years have focused more on whether the accommodations provided are reasonable
  - NOT whether the person qualifies as a person with a disability
  - Don't spend a lot of time or resources debating an individual's disability status

Eligibility under IDEA

- Must meet eligibility criteria as defined by IDEA and state regulations:
- State regulation criteria are typically found in state statutes or administrative rules:
  - Autism Spectrum Disorder (ASD)
  - Deaf-Blindness
  - Deafness
  - Developmental Delay
  - Emotional Disturbance
  - Hearing Impairment
  - Intellectual Disability
  - Multiple Disabilities
  - Orthopedic Impairment
  - Other Health Impairment
  - Specific Learning Disability
  - Speech or Language Impairment
  - Traumatic Brain Injury
- **Who, by reason thereof, needs special education and related services**

Reevaluation/Eligibility Requirements under Section 504

- **How often are we required to reevaluate or reestablish eligibility under Section 504?**
  - **No hard and fast rule on this**
  - **Federal law/guidelines are silent on a required timeframe**
  - **Section 504 requires periodic re-evaluation to retain eligibility**
  - **OCR has told us that compliance with IDEA's 3-year reevaluation requirement will meet the requirements under 504**

Interesting Evaluation Case: 504 Versus IDEA Evaluation Requirements

- *BSM v. Upper Darby Sch. Dist.*, 124 LRP 17147, 3rd Cir. 2024
- District evaluated a student's speech and language needs during kindergarten
- Student became eligible under IDEA for speech and language until April of 2nd grade year
- But the district did not evaluate the student's emotional needs or develop a 504 plan to address depression symptoms until 4th grade year
  - Parents claimed symptoms to be evident starting in kindergarten
  - Court acknowledged there was some debate on when district would have been on notice, but definitely prior to 4th grade

504 Evaluation Case (cont.)

- Beginning of 4th grade – student was privately evaluated and diagnosed with disruptive mood regulation disorder
- Following this report, parents asked for 504 plan
- District promptly complied with request for evaluation
- But ultimately concluded not eligible for SDI related to this new dx
  - Did not meet criteria for SLD
  - Did not meet criteria for EBD
- School psych who conducted evaluation recommended a 504 plan

504 Evaluation Case (cont.)

- Court noted that the standards for eligibility/child find under IDEA and 504 are similar but not identical
- Definition of disability is broader under 504
  - Section 504 covers more students
  - Including students who are merely perceived as disabled
- The IDEA explicitly states that nothing in that act shall limit rights under 504 or ADA
- Despite eligibility for speech and language SDI and consideration of other qualifying disabilities under the IDEA, the District violated Section 504's standard for consideration of child find/evaluation and eligibility
- Vacated to determine whether the District should have conducted a 504 evaluation/eligibility determination earlier than it did in the 4th grade

Case Study

- Parent requests a special education evaluation for student in the area of Autism
- Student has medical diagnosis of Autism
- Student did not meet eligibility criteria for ASD or any other special education eligibility category
- Parents are frustrated and district representative says the student automatically qualifies for a 504
- Draft a 504 plan at the eligibility meeting

Case Study: Discussion

- Qualification under either process (IDEA or 504) is not automatic because of a medical diagnosis
  - IDEA: Consider eligibility criteria
  - Section 504: Does student have physical or mental impairment that substantially limits a major life activity
- Could include:
  - Communication
  - Attention
  - Processing
  - Executive functioning skills
  - Functional skills
- If appropriate - make a 504 plan referral

Takeaways:

- Child Find is an affirmative and continuous obligation on the school district, not the parent, to identify, locate, and evaluate students for special education and related services and/or reasonable accommodations under Section 504
- Understand the referral process for your district when you suspect a child may have a disability under the categories in the IDEA or under Section 504
- Consider evaluation through the proper process, regardless of other intervention processes that might be occurring simultaneously
- Document steps taken throughout the Child Find process and clearly communicate those steps to parents
- Issue PWN for any decision to change or refuse to change identification, evaluation, placement, or provision of FAPE to a student

Questions?

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Workshop 4

What's the Current State of Discipline of IDEA Students? New USDE Guidance and Changing Perspectives

By:

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Austin, TX

Pacific Northwest Institute on Special Education and the Law
October 27-29, 2025
Bellevue, Washington

What's the Current State of Discipline of IDEA Students? New USDE Guidance and Changing Perspectives

Presented by
Jose L. Martín, Attorney
Richards Lindsay & Martín, L.L.P.—Austin, Texas
2025 Pacific Northwest Special Education Law Conference
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Policy Underpinnings

- First, federal courts started finding that expulsion of students with disabilities from school for behaviors related to disability was inherently discriminatory and in violation of IDEA.

  See, e.g., *Stuart v. Nappi*, 443 F.Supp. 1235 (D.Conn. 1978); *Doe v. Koger*, 551 IDELR 515 (N.D.Ind. 1979); *S-1 v. Turlington*, 552 IDELR 267 (5th Cir. 1981); *Kaelin v. Grubbs*, 554 IDELR 115 (6th Cir. 1982); *School Bd. of Prince William v. Malone*, 556 IDELR 406 (4th Cir. 1985); *Doe v. Maher*, 557 IDELR 353 (9th Cir. 1986).

- USDOE went on to adopt that position (see *OCR Staff Memorandum*, 16 IDELR 491 (OCR 1989)).

Policy Underpinnings

- Then, OCR issued guidance under §504 indicating a series of short-term removals (each ≤ 10 consecutive school days) that exceeds 10 total school days could create a "pattern" that collectively amounts to a disciplinary change in placement.

  OCR Policy Memorandum: 00168 (October 28, 1988)(setting forth factors to be considered in determining whether there is a "pattern of exclusions"—(1) length of each removal, (2) proximity to one another, and (3) total amount of exclusion); see also *OCR Memorandum*, 307 IDELR 07 (OCR 1989).

Policy Underpinnings

- The guidance limiting accumulations of short-term removals was necessary to prevent schools from engaging in excessive use of short-term removals, which can compromise a student's ability to receive FAPE.

  Still echoing that policy priority, USDOE's commentary to the 2006 IDEA regulations stated that "discipline must not be used as a means of disconnecting the child with a disability from education." 71 Fed. Reg. 46715 (August 14, 2006)

Policy Underpinnings

- Thus, the early cases and guidance identified the following initial policy concerns with respect to discipline of students with disabilities:

  1. Long-term disciplinary removals (>10 consecutive school days) for behavior related to disability violate IDEA (and constitute impermissible disability-based discrimination); and
  2. Excessive short-term disciplinary removals jeopardize a student's right to a FAPE.

Main General Legal Doctrines

- On long-term removals, the manifestation determination review (MDR) requirement to ensure that any such removals do not discriminate on the basis of disability. 34 C.F.R. §300.530(c), (e)).

  IDEA also requires continued FAPE in the discipline setting.

- Limitation on excessive accumulations of short-term removal by means of "pattern of removal" change-of placement rule (34 C.F.R. §§300.530(a), 300.536).

"User-Friendly" Method for Understanding IDEA's Disciplinary Removal Rules

1. Identify short-term disciplinary removals.
2. Identify long-term disciplinary removals.
3. Apply the rules for each of above separately.
4. For short-term removals, apply "free days" analysis, proceed with caution once you reach a total of 10 days in a school year.
5. Well before removals reach total of 10, have IEP meeting.
6. For long-term removals, it's all about the manifestation determination and FAPE (if the student is removed).

Additional Legal Doctrines

- Additional flexibility for "special circumstance" offenses (drugs, weapons, serious bodily injury). 34 C.F.R. §300.530(g).

  Allows 45-school-day removal to interim alternative setting even if behavior found to be related to disability.

- Protections extended to students suspected of being IDEA-eligible. 34 C.F.R. §300.534.

  With criteria for determining when students are "deemed" (i.e., suspected) eligible under IDEA.

Additional Legal Doctrines

- In case of discipline due process dispute, stay-put in the interim disciplinary setting. 34 C.F.R. §300.533.

  As opposed to pre-2004 stay-put application.

- But, parents get expedited due process hearing to challenge MDR or disciplinary placement. 34 C.F.R. §300.532.

Additional Legal Doctrines

- Schools may report crimes committed by IDEA students to law enforcement authorities, who are not limited in their duties and responsibilities because of IDEA. 34 C.F.R. §300.535.

  But, schools must forward sp ed and discipline records to authorities, if parents consent to the disclosure.

Related Legal Doctrines

- For students with behaviors that impede their learning or that of others, IEP team must consider positive behavior interventions, strategies, supports. 34 C.F.R. §300.324(a)(2)(i)

  A duty to proactively address student behavior through IEP process.

- Functional behavioral assessments (FBAs) and behavioral interventions to be considered if a student is removed long-term to an interim setting and required, if MDR determines behavior is related to disability, to address the behavior. 34 C.F.R. §300.530(d)(1)(ii), (f)(1).

IDEA Discipline Status and "News"

- As the law has not been amended since 2004, and the regulations have remained the same since 2006, the legal framework of IDEA discipline has become static.

- Biden-era USDOE issued discipline guidance in July 2022, but it was really a restatement of existing doctrines and a return to a disproportionate impact analysis enforcement approach in district-wide investigations on discipline practices. ***Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA's Discipline Provisions*, 81 IDELR 138 (OSEP 2022).**

IDEA Discipline Status and "News"

- **"Reinstating Common Sense School Discipline Policies," POTUS Executive Order (April 23, 2025)**

  Rejects disparate-impact analysis under which schools can be found to have applied discipline in a discriminatory fashion if any minority groups of students are disciplined or referred to law enforcement at higher rates than others.

  Cites a 2018 Federal Commission on School Safety Report that found the enforcement approach enabled some students with dangerous behavior to remain in the classroom and made schools less safe.

IDEA Discipline Status and "News"

- **"Reinstating Common Sense School Discipline Policies," POTUS Executive Order (April 23, 2025)**

  Requires USDOE Secretary to issue new guidance to LEAs and SEAs regarding non-discriminatory school discipline (by deadline of May 23, 2025).

  Requires USDOE, HHS, DOJ, DHS to submit a report "regarding the status of discriminatory-equity-ideology-based school discipline and behavior modification techniques" in US public education (deadline of August 23, 2025).

IDEA Discipline Status and "News"

- **"Reinstating Common Sense School Discipline Policies," POTUS Executive Order (April 23, 2025)**

  Report must discuss the role of non-profit organizations receiving federal grants that are promoting "discriminatory-equity-ideology-based discipline with recommendations to ensure federal monies do not flow to these organizations.

  Report must also include model school discipline policies that "promote common sense," protect school safety and "are rooted in American values and traditional virtues."

IDEA Discipline Status and "News"

- **"Reinstating Common Sense School Discipline Policies," POTUS Executive Order (April 23, 2025)**

  As of the date of these materials, USDOE has issued no guidance pursuant to the Executive Order.

  Questions—What is meant by "common sense" discipline policies? What type of discipline policies are those "rooted in American values and traditional virtues?"

  Might certain positive behavior intervention approaches for students with disabilities now be viewed as inconsistent with this Order?

IDEA Discipline Status and "News"

- ***Rapid City (SD) Area Sch. Dist. 51-4*, 124 LRP 16721 (OCR 2024)**

  OCR's District-wide investigation (hundreds of student files, parent listening sessions) found data showing that Native American students were disproportionately disciplined at higher rates compared to white students.

  Disparities combined with lax practices that deviated from local policy (apparently to the benefit of white students).

  Native American students were also referred for truancy at higher levels than white students with similar rates of absences.

IDEA Discipline Status and "News"

- ***Rapid City (SD) Area Sch. Dist. 51-4*, 124 LRP 16721 (OCR 2024)**

  A small percentage of Native American students participated in advanced learning programs compared to white students.

  Students termed as engaging in "habitual disobedience" and also under mental health treatment might not be referred for §504 or IDEA evaluation.

  OCR noted that the District had never examined its discipline data to understand the potential reasons for the disparities or take steps to address them.

IDEA Discipline Status and "News"

- ***Rapid City (SD) Area Sch. Dist. 51-4*, 124 LRP 16721 (OCR 2024)**

  On March 27, 2025, OCR terminated the resolution agreement in its entirety, finding the Agreement itself was discriminatory, as it included requirements related to DEI.

  OCR spokesperson indicated the Office would be reviewing other resolution agreements reached by past administrations it might also find illegal or inappropriate.

IDEA Discipline Status and "News"

- ***Rapid City (SD) Area Sch. Dist. 51-4*, 124 LRP 16721 (OCR 2024)**

  What about the courts? Federal courts have tended to view data showing statistical evidence of a discriminatory pattern in application of school policies as raising "an inference of discriminatory intent." See, e.g., *M.M. v. Antelope Valley Union High Sch. Dist.*, 124 LRP 36467 (C.D.Cal. 2024); *Diaz v. American Telephone and Telegraph*, 752 F.2d 1356 (9th Cir. 1985).

  (An "inference" is a rebuttable logical deduction based on evidence and circumstances, rather than direct proof).

IDEA Discipline Status and "News"

- ***Rapid City (SD) Area Sch. Dist. 51-4*, 124 LRP 16721 (OCR 2024)**

  Prior to OCR reaching formal findings, the District entered into a resolution agreement with OCR.

  The Agreement called for an examination of discipline data, hiring of a "discipline equity supervisor," establishing a standing committee of community members, policy revision, tracking of discipline data, and staff training, among others.

Law Enforcement and School Resource Officers (SROs)

- **Schools are free to report criminal offenses that occur at school to law enforcement, and those authorities may exercise their law enforcement duties with those students (34 C.F.R. §300.535).**

  School must transmit copies of sp ed and disciplinary records to the appropriate authorities to whom it reports, but must do so in a manner that complies with FERPA consent requirements (i.e., parent consent required). 34 C.F.R. §300.535(b).

  The legal perils to schools of over-involving police and school SROs are many and complex—attorney guidance is crucial.

Law Enforcement and School Resource Officers (SROs)

- **Schools are free to report criminal offenses that occur at school to law enforcement, and those authorities may exercise their law enforcement duties with those students (34 C.F.R. §300.535).**

  Schools should study what offenses merit reporting (after dialogue with police department) or SRO intervention.

  Reports to SRO/police are not a behavior intervention.

  Clear cases: serious assaults, drugs, weapons.

  Imprudent use can easily lead to litigation…. Let's think school-to-prison pipeline concerns, for example.

Law Enforcement and School Resource Officers (SROs)

- **Current Areas of Concern**:

  SROs used for behavior intervention and discipline
  Lack of training on students with disabilities
  Promotion of school-to-prison pipeline
  Unclear mission
  Law enforcement perspective/training
  Loss of educator control in incidents
  Tendency to over-action
  Limited district control over SROs

- **Thoughts on SROs**

  Make sure any SROs assigned to your district have received the restraint training your district provides to staff and administrators.

  You will also want to offer training to SROs on §504/IDEA, reasonable accommodations in dealing with students with disabilities, legal implications, handcuffing criteria, need to allow BIP implementation.

  MOUs should call for coordination, troubleshooting, district input on practices and assignments.

- **Thoughts on SROs**

  Often, SROs are overfocused on their law enforcement functions and under-focused on student education programs, developing relationships with staff and students, and their overall crime prevention function.

  See *Guiding Principles for School Resource Officer Programs*, Community-Oriented Policing Services (US Dept of Justice 2022).

- **SROs and Restraint of Students**

  Thorny legal questions arise immediately—If an SRO is effecting the arrest of a student for a criminal offense subject to State law limitations on restraint?

  E.g., student is in possession of drugs, but is creating no imminent risk of serious bodily injury.

  Certainly, the SRO's authority as a certified law enforcement officer would allow him or her to handcuff the student in the process of placing the student under arrest.

  One would think that an SRO placing a student under arrest for a criminal offense is outside of State law restraint limitations, as the officer is exercising valid law enforcement responsibilities at that point.

- **SROs and Restraint of Students**

  But, if an SRO uses his handcuffs to restrain a child who is not being arrested, one would think any State law restrictions on restraint would apply (meaning a standard such as imminent risk of serious bodily injury).

  Thus, it is probably best if school staff engage in any necessary restraints at school, unless an SRO has determined that they are in the process of arresting a student.

***C.B. v. Moreno Valley Unified Sch. Dist.*, 123 LRP 34183 (C.D.Cal. 2023)**

Parents of a 10-year-old African-American student with ADHD and Oppositional Defiant Disorder (ODD) sued the District for disability discrimination in its use of SROs and restraint.

District contracted with police officers from local police force to serve as SROs on its campuses, but the SROs are not under the District's supervision or control.

District's handbook does not include as a factor in an SRO handcuffing a student whether the student has a disability or exhibits disability-related behavior.

***C.B. v. Moreno Valley Unified Sch. Dist.*, 123 LRP 34183 (C.D.Cal. 2023)**

The Handbook also recommends "SRO intervention" as a consequence for "disruptive behavior" without accommodation for students with disability behaviors.

SROs receive no training on students with disabilities, accommodations for students with disabilities, disability-related behavior, or specialized de-escalation techniques.

SROs are never provided information on students' disabilities or BIPs when intervening in incidents.

C.B. v. Moreno Valley Unified Sch. Dist., 123 LRP 34183 (C.D.Cal. 2023)

In fact, District policy forbids staff from sharing info with SROs on students' disabilities, although SROs were frequently called into the student's self-contained behavior unit to intervene in his disruptive behavior.

The Student has a history of disability-related aggressive and defiant behavior and was subjected to restraints by SROs on multiple occasions.

Data showed that SROs were called in incidents involving students with disabilities with much higher frequency that situations involving nondisabled students.

C.B. v. Moreno Valley Unified Sch. Dist., 123 LRP 34183 (C.D.Cal. 2023)

The Court granted summary judgment to the parents, finding that the school's policies, practices, and lack of training of SROs and staff cumulatively had a disproportionate and discriminatory impact on students with disabilities, such as the student, in violation of §504 and ADA.

C.B. v. Moreno Valley Unified Sch. Dist., 123 LRP 34183 (C.D.Cal. 2023)

Notes—The Court implies that it might be inappropriate to handcuff a student with a disability who is exhibiting disability-related behavior. What if the disability-related behavior is creating a threat of harm? What if they are being placed under arrest?

Does he mean de-escalation techniques must be exhausted first? If so, is that always feasible in emergency situations?

What if the school offers SROs disability training, but they do not attend? The Court agrees that the District does not control the SROs.

***C.B. v. Moreno Valley Unified Sch. Dist.*, 123 LRP 34183 (C.D.Cal. 2023)**

Notes—The major legal problem is involving SROs for "disruptive behavior" and treating it as a "consequence" in the District Handbook.

Also, why is a behavior unit teacher frequently calling SROs? Should not behavior incidents in such a unit be dealt with by staff and administrators trained to deal with such students? This appears to be both overuse and misuse of SROs who are not trained in dealing with students with disabilities.

***C.B. v. Moreno Valley Unified Sch. Dist.*, 123 LRP 34183 (C.D.Cal. 2023)**

Notes—The Court finds that Crisis Prevention Institute (CPI), one of the most common and professionally respected restraint methods does not include sufficient training on "how disability-related behaviors escalate," identifying "disability-related behaviors," or making "exceptions" for students with disabilities.

***J.M. v. Parlier Unified Sch. Dist.*, 80 IDELR 17 (E.D.Cal. 2023)**

Unlike the previous District Court, this Court examined the degree to which campus administrators exercised control over SROs assigned to campuses under an MOU with a local police department.

Here, after an SRO allegedly used excessive force in taking a high schooler's cell phone and handcuffing him in a non-emergency situation, parents sued the principal who was present.

***J.M. v. Parlier Unified Sch. Dist.*, 80 IDELR 17 (E.D.Cal. 2023)**

But, the Court found no evidence that the principal had the authority to direct and supervise the SRO, who had duties as an officer and an employee of the city.

Thus, the principal could not have directed the SRO to disregard what the SRO determined to be criminal conduct occurring in his presence.

"A resource officer like O'Brien remains a police officer, irrespective of his status as being assigned to a school as an SRO."

***J.M. v. Parlier Unified Sch. Dist.*, 80 IDELR 17 (E.D.Cal. 2023)**

Also, the Court found that the principal neither knew or should have known that the SRO would act with excessive force."

Thus, the Court dismissed the claims.

Note—Does it matter that SROs are not under the District's control? Yes, but the ways that a district chooses to use and trains its SROs are certainly in the districts' control.

***J.M. v. Parlier Unified Sch. Dist.*, 80 IDELR 17 (E.D.Cal. 2023)**

Note—Main inquiry is whether the District exercises "significant control" over SROs. *Bristol v. Bd. of County Commr's of County of Clear Creek*, 312 F.3d 1213, 1218 (10th Cir. 2002).

In MOU situations, this is rare, as local law enforcement agencies will want to exercise supervision and control over their officers, as they are assigned to schools in a law enforcement capacity.

***J.M. v. Parlier Unified Sch. Dist.*, 80 IDELR 17 (E.D.Cal. 2023)**

Note—Regardless of level of control, as far as OCR is concerned, by contracting with the SROs under a MOU, school districts are obligated to ensure that they do not discriminate on the basis of disability. See 34 C.F.R. §104.4(b)(1), (4). ***Denton (TX) Ind. Sch. Dist.*, 124 IDELR 11692 (OCR 2024).**

***J.M. v. Parlier Unified Sch. Dist.*, 80 IDELR 17 (E.D.Cal. 2023)**

Note—Inevitably the problem is a clash of equally valid public policy priorities—the public wants safe schools but it is also concerned over the school-to-prison pipeline phenomenon and the over-criminalization of classroom misbehavior.

The preceding cases also show how difficult are the legal issues presented and how courts in even the same state may have very different ideas about SRO involvement with students with disabilities.

***A.V. v. Douglas County Sch. Dist. RE-1*, 80 IDELR 160 (D.Colo. 2022)**

Parents sued the District after SROs detained, handcuffed, arrested, and charged their 11-yr-old with Autism.

Apparently, the SRO handcuffed the student for refusing to go with him to the SRO office.

The school informed SROs of the student's disabilities and history of self-harm, called the parents, and took steps to prevent the student from escalating.

The Court found that there was no evidence that the District "controlled or directed the SROs such that the District could be considered their joint employer."

***A.V. v. Douglas County Sch. Dist. RE-1*, 80 IDELR 160 (D.Colo. 2022)**

Indeed, the interagency MOU specifically stated that "SROs shall not be subject to supervision or direction by the District."

Note—If these SROs continue to act without considering students' disabilities or common responses to confrontation despite having such information, would the District have a duty to quit the MOU and let the SROs go at a certain point? When?

At what point is the school tacitly creating a policy or custom of allowing SROs to engage in inappropriate actions against students with disabilities?...

***A.V. v. Douglas County Sch. Dist. RE-1*, 80 IDELR 160 (D.Colo. 2022)**

Note—Some courts have implied that schools that have a policy or custom of allowing SROs to act inappropriately when dealing with students with disabilities may be subject to liability.

Official capacity claims against a district require that an official policy or custom caused the injury. *Monell v. N.Y. City Dept. of Soc. Servs.*, 436 U.S. 658, 694 (1978). These are commonly known as *Monell* claims.

See also, *A.G. v. City of Statesville,* 79 IDELR 9 (W.D.S.C. 2021)(applying *Monell* standard in the context of SROs and public schools).

***A.V. v. Douglas County Sch. Dist. RE-1*, 80 IDELR 160 (D.Colo. 2022)**

Note—See ***D.L. v. Hernando County Sheriff's Office*, 123 LRP 33954 (M.D.Fla. 2023)**(parents alleged that school staff were aware that SROs used handcuffing with students with disabilities unnecessarily and allowed this to continue to happen, so Motion to Dismiss case was denied).

***A.V. v. Douglas County Sch. Dist. RE-1*, 80 IDELR 160 (D.Colo. 2022)**

Note—A claim of **failure to train** can meet the *Monell* standard. *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001).

Schools that have MOUs on SROs may want to consider offering the SROs additional training on dealing with students with disabilities, not demanding unnecessary compliance, understanding de-escalation needs, allowing staff to implement BIPs, avoiding intervening in incidents involving sp ed and 504 students.

Disciplinary Protections in Non-Discipline Situations

- A recent development has been the "bleeding" of IDEA and §504 discipline protections into non-disciplinary decisions involving intrastate student transfer admission and revocation decisions.
- Are these in fact change of placement decisions within the meaning of IDEA? If they are, are they disciplinary change of placement decisions within the meaning of the IDEA discipline provisions?...
- Should schools proactively hold IEP meetings to ensure transfer revocation decisions are not discriminatory? What about transfer denials?

***M.R. v. Yelm Sch. Dist.*, 124 IDELR 44112 (W.D.Wash. 2024)**

A Washington district revoked an intrastate transfer for an IDEA-eligible student when it discovered he had a history of disruptive conduct.

Parent filed a DP hearing request, and the ALJ ruled she lacked jurisdiction over the issue because Washington provides for an administrative appeal for revocations of transfers.

The Court, however, focused on whether the revocation was a "change in placement" within the meaning of IDEA such that federal law took precedence.

***M.R. v. Yelm Sch. Dist.*, 124 IDELR 44112 (W.D. Wash. 2024)**

The Court found that the revocation was "more analogous to expulsion," as it would require him to enroll in his resident district midway through the school year.

It thus requested supplemental briefing on this issue.

Note—Is this really a change in placement or a matter of the school and location of the educational services? If this is akin to a disciplinary change in placement, then one would think an MDR is needed. But the student is not facing a disciplinary removal to an interim disciplinary setting, which normally is the trigger for an MDR….

***Billings (MT) Pub. Schs.*, 81 IDELR 54 (OCR 2022)**

A District allowed a non-resident teen student with a disability to enroll on a discretionary transfer basis.

After he engaged in a behavior incident, the District revoked the student's transfer.

His parent complained to OCR, alleging that the transfer was revoked on the basis of behavior related to disability.

50

***Billings (MT) Pub. Schs.*, 81 IDELR 54 (OCR 2022)**

OCR expressed concern that the revocation may have been based on criteria that may discriminate on the basis of disability, without an individualized review by his §504 committee (or IEP team).

The District agreed to voluntarily correct the problem, including inviting the teen to reapply for enrollment.

51

***Billings (MT) Pub. Schs.*, 81 IDELR 54 (OCR 2022)**

Notes—This is at least the second time OCR takes this position. In ***Torrance (CA) Unified Sch. Dist.*, 122 LRP 9442 (OCR 2022)**, a campus principal revoked a student's inter-district transfer due to absences and behavior, and OCR found that a §504 committee had to review the decision to ensure it did not discriminate against the student on the basis of disability.

What OCR does not discuss in these cases is whether something akin to an MDR must be conducted before a transfer revocation? It appears that OCR would want the committee to overturn any transfer revocation based on behavior related to the student's disability.

***Billings (MT) Pub. Schs.*, 81 IDELR 54 (OCR 2022)**

Practical Guidance—§504 designees and sp ed directors should be informed by campus administration before they make a decision on revoking a student's discretionary intra-district or inter-district transfer.

Even if local policies state that transfers can be revoked for behaviors, absences, or poor grades, if those factors are present because of a child's disability, it may be legally problematic to revoke the transfer without team review.

The student's §504 committee or IEP team should review the decision to ensure the revocation is non-discriminatory.

Shortened School Day

- The recurring question of whether and when it is appropriate to shorten the school day of a child with disabilities has led to some recent litigation and legislation.
- At times, the issue is one of "informal" removals of students in the middle of the school day due to behavior but without documentation as a suspension.
- At other times, the issue is one of formally shortening a child's school day through the IEP process.

Shortened School Day

- ***Are informal removals, such as shortened school days considered in calculating a change in placement?***

  Yes, if the IEP team "does not also consider other options such as additional or different services and supports that could enable a child to remain in school for the full school day." ***Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA's Discipline Provisions*, 81 IDELR 138 at Question C-6 (OSEP 2022).**

  Note—The guidance addresses situations where campuses unilaterally engage in informal practices that result in shortening of students' school days.

- **Shortened School Day due to Behavior**—USDOE indicates such practices, when unilaterally undertaken by school administrators are in fact "improper changes in placement."

  "These actions could include when a school administrator unilaterally informs a parent that their child with a disability may only remain in school for shortened school days because of behavioral issues or when a child with a disability is not allowed by the teacher to attend an elective course because of behavioral concerns." ***Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA's Discipline Provisions*, 81 IDELR 138 at Question C-1 (OSEP 2022).**

- **Beware of Informal or "Soft" Removal Practices**—Removing students to office or halls is a form of short-term removal under IDEA (removes child from setting for behavior).
- Schools should not engage in other "informal removal" practices, such as calling parents to come pick up student due to behavior without documenting removal as a bonafide suspension.

  USDOE is "wise" to these practices and states that they "count" as short-term disciplinary removals…. See ***Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA's Discipline Provisions*, 81 IDELR 138 at Question C-1 (OSEP 2022).**

Case Examples

- ***J.R. v. George County Sch. Dist.*, 81 IDELR 282 (S.D.Miss. 2022)**

  In a fairly straightforward case that nevertheless made it to federal court, a Mississippi school reduced the school week for a student with ID and AU to only 4 hrs/wk.

  Moreover, all instruction took place in an administrative office, secluded from other students, with a focus on redirecting negative behavior, but little actual academic instruction.

  Unsurprisingly, the student made little progress on his IEP goals.

Case Examples

- ***J.R. v. George County Sch. Dist.*, 81 IDELR 282 (S.D.Miss. 2022)**

  The Court found that this response to escalating behavior problems was inappropriate and also violated the LRE requirement.

  Despite the parent's participation in the IEP process, the IEP was inappropriate and failed to either address the student's needs or lack of progress.

  Note—The fact that the student was exhibiting aggressive behaviors did not allow the school to provide such a minimal educational program.

Case Examples

- ***Rapid City Sch. Dist.*, 125 IDELR 2159 (SEA Complaint—South Dakota 2024)**

  After the school frequently called the parent to pick the student up after a suspension, the parent asked the IEP team to put the student on a half-day program.

  The suspensions and informal removals were usually due to disruptive behaviors, throwing things, leaving the classroom, and hitting, among others.

  The IEP team agreed, and placed the student on a half-day program (8-12:30 PM) for the rest of the school year.

- ***Rapid City Sch. Dist.*, 125 IDELR 2159 (SEA Complaint—South Dakota 2024)**

  Although the team offered a full-day program, the parent rejected it, asserting she had grown tired of the student being sent home early due to behavior.

  Initially, the SEA found that the school had failed to conduct an MDR after accumulations of short-term removals passed a total of 10 days in the school year.

  On the shortened school day, the SEA stated that "the school day of a student with a disability should only be shortened if the IEP team determines a shortened school day is necessary for FAPE."

- ***Rapid City Sch. Dist.*, 125 IDELR 2159 (SEA Complaint—South Dakota 2024)**

  But, there was no evidence that the IEP team decision was based on the student's needs.

  The fact that the parent requested the shortened school day was not a valid reason to do so.

  Note—The significant point made in this SEA complaint is that the fact that the parent is requesting a shortened school day does not insulate the school from potential liability under IDEA.

  The remaining legal questions will be whether the shortened school day is necessary for FAPE and whether it is truly based on the student's needs.

- ***J.N. v. Oregon Dept. of Educ.*, 125 IDELR 19903 (9th Cir. 2025)**

  In this recent decision, the 9th Circuit refused to dismiss a class action alleging that the Oregon DOE failed to sufficiently prevent school districts from shortening school days for students with disabilities.

  The DOE argued that the Oregon Legislature's 2023 law limiting shortened school days addressed the issue, the Court disagreed, finding that the legislative action did not fully address the harm alleged.

  The state law's stricter requirements had no bearing on the Oregon DOE's monitoring and oversight activities.

- ***J.N. v. Oregon Dept. of Educ.*, 125 IDELR 19903 (9th Cir. 2025)**

  Note—In 2023, the Oregon Legislature passed a law requiring parental consent prior to placing a student on an abbreviated school day program. Oregon Senate Bill 819 (2023).

  Moreover, regular IEP meetings are required to review the placement of any student on a shortened day program.

  Question—Again, does the fact that a parent consents to a shortened school day mean that the placement is appropriate under IDEA? Does the parent's consent fully insulate the school district from IDEA liability?

- ***A.B. v. Michigan Dept. of Educ.*, 80 IDELR 19 (W.D.Mich. 2021)**

  Similarly, in 2021 the Michigan DOE also got into trouble for allegations that it failed to ensure schools did not unnecessarily shorten IDEA students' school days due to behavioral problems.

  The Court refused to dismiss the case, finding that the parents alleged that investigations into shortened school day complaints were prematurely closed.

  Thus, the matter could proceed to a determination of whether the DOE acted with bad faith or gross misjudgment.

- ***A.B. v. Michigan Dept. of Educ.*, 80 IDELR 19 (W.D.Mich. 2021)**

  Note—Of course, currently the legal analysis would have to be one of "deliberate indifference" rather than bad faith and gross misjudgment based on the Supreme Court's recent decision ***J.T. v. Osseo Area Schs., Ind. Sch. Dist. No. 279*, 125 LRP 17919 (2025).**

- ***Sultan Sch. Dist.*, 125 LRP 18524 (SEA Complaint Washington, 2025)**

  In an SEA complaint that included a claim of improper shortened day program, the SEA stated the following:

  > "Students who receive special education should be allowed to participate in a district's educational programs and services to the same extent as their non-disabled peers, consistent with their rights under IDEA.
  >
  > Any decision to limit or restrict their access and participation must be made by their IEP team, based solely on any adjustments necessary due to their disability and/or unique needs."

- ***Sultan Sch. Dist.*, 125 LRP 18524 (SEA Complaint Washington, 2025)**

  > "If a student receiving special education services cannot attend school a full school day, the reason must be documented in his or her records and addressed in the student's IEP."
  >
  > The SEA noted that the USDOE had taken the position that use of an "administratively" shortened school day to address behavior could constitute a series of disciplinary removals from the current placement, thus triggering the IDEA discipline protections. ***Letter to Mason*, 118 LRP 32230 (OSEP 2018).**

- ***Sultan Sch. Dist.*, 125 LRP 18524 (SEA Complaint Washington, 2025)**

  Note—Indeed, the Washington OSPI has issued sound guidance on this issue, pointing out several issues that schools must examine in considering shortened day:

  - the potential impact of shortening the school day
  - the district's responsibility for the decision even when a parent requests shortened day
  - that shortened day is not a substitute for behavioral interventions, strategies, and supports
  - that such placement should be "rare and based on the student's unique needs"
  - ensuring no "informal" shortened day takes place

- **Some Takeaways on Shortened School Day Programs**

  They can be legitimately needed for students with significant medical conditions affecting stamina and physical ability to withstand full day instruction.

  See, e.g., ***Christopher M. v. Corpus Christi Ind. Sch. Dist.*, 17 IDELR 990 (5th Cir. 1991)**(full school day would be harmful to student with profound disabilities and limited physical stamina).

  For behavioral reasons, it is difficult to argue a student's needs are better met with less structured programming, less instruction, less behavioral intervention, less socialization opportunities.

- **Some Takeaways on Shortened School Day Programs**

  Beware of situations where parents request shortened day.

  Why is the parent requesting it? Tired of school calls and removals?

  Is there solid data supporting the need for shortened day?

  In the cases of doctors' recommendations for shortened day, what is the reason or concern? Are there other ways to address the problem in the context of full day services?

  If the campus is seeking shortened day due to serious behavior, is sp ed providing sufficient support?

- **Some Takeaways on Shortened School Day Programs**

  Shortened school day can be a transitional setting to a full day program, but a gradual retransition plan with support services is necessary.

  Even a valid shortened day should be reviewed frequently to examine whether increasing school time is possible.

Physical Restraint of Students

- ***Is restraint or seclusion appropriate discipline?***

  The 2022 Guidance says no, although it may need to be used in emergency situations (imminent danger of serious physical harm). ***Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA's Discipline Provisions*, 81 IDELR 138 at Question B-3 (OSEP 2022).**

  Note—Of course. physical restraint or seclusion are not behavioral interventions, but rather emergency measures. *See, e.g.,* 2016 OCR Dear Colleague Letter—*Restraint and Seclusion of Students with Disabilities*, 116 LRP 53792 (OCR 2016).

Physical Restraint of Students

- **State Laws**

  Many state laws concur with USDOE guidance that restraint is allowable only in emergencies that create an imminent risk of serious bodily injury.

  Note—See, e.g., California Educ. Code §§49.001, 49.005, 49.006 ("imminent risk of serious physical self-harm or harm of others").

  Washington Admin. Code 392-172A-02076 ("imminent likelihood of serious harm").

  Oregon Revised Statutes §339.291 ("reasonable risk of imminent and substantial physical or bodily injury to the student or others").

Physical Restraint of Students

- **Legal Landscape**

  Physical restraint creates legal risk of claims under IDEA, §504, ADA, the US Constitution, and state laws.

  Increasingly, restraint cases are the subject of money damages cases in federal courts.

Physical Restraint of Students

- ***R.K. v. Matayoshi*, 75 IDELR 121 (D.Hawaii 2019)**

  The physical restraint of a IDEA-eligible child with Autism led to a money damages case under §504 that went all the way to a jury trial.

  The jury, however, found that the school had not been "deliberately indifferent."

  The Court here, ruling on a motion to overturn the jury verdict, found there was ample evidence to support the jury's decision.

Physical Restraint of Students

- ***R.K. v. Matayoshi*, 75 IDELR 121 (D.Hawaii 2019)**

  The evidence showed staff restrained the student to prevent her from hitting herself and running away.

  The student fled her classroom, climbed an outdoor staircase, and threatened to jump off, while staff attempted to calm her down, guided her down the staircase, and only restrained her when she began hitting herself and trying to run away.

Physical Restraint of Students

- ***R.K. v. Matayoshi*, 75 IDELR 121 (D.Hawaii 2019)**

  "The jury could reasonably have concluded that school officials decided to restrain the student to protect her, and thus meant to further her right to a safe education, not hinder it."

  Note—The case shows that a single restraint can lead to a lengthy and highly expensive legal battle, but on the other hand, not restraining a child in a dire situation can also involve legal risks, as seen in the next case.

Physical Restraint of Students

- ***Doe v. Macomb Intermediate Sch. Dist.*, 124 LRP 39959 (E.D.Mich. 2024)**

  The parent of a child with Autism alleged that school staff were deliberately indifferent when they attempted to de-escalate his self-injurious behaviors with blocking techniques rather than physically restrain him.

  The student suffered a traumatic brain injury due to his self-injurious behavior.

  The case included individual Constitutional claims against the Sp Ed Teacher, Principal, and School Psychologist.

Physical Restraint of Students

- ***Doe v. Macomb Intermediate Sch. Dist.*, 124 LRP 39959 (E.D.Mich. 2024)**

  The Court found that staff engaged in the use of blocking despite knowing the risk of self-injury.

  Moreover, there was evidence that staff knew that the blocking de-escalation technique triggered the student, instead leading to escalation and self-injury.

  Lastly, staff had ample time and the necessary training to keep the student safe by means of restraint techniques learned in Crisis Prevention Institute (CPI) training.

Physical Restraint of Students

- ***Doe v. Macomb Intermediate Sch. Dist.*, 124 LRP 39959 (E.D.Mich. 2024)**

  Thus, the Court allowed the individual liability claims to proceed to a jury trial.

  Note—While staff are trained to emphasize the use of de-escalation techniques, in this case the use of such non-restraint alternatives actually increased the potential for legal liability—a real legal quandary for staff.

  Lesson: Student safety comes first—If de-escalation is not working and the student has the potential to inflict serious harm, staff will be forced to restrain.

Physical Restraint of Students

- ***Doe v. Macomb Intermediate Sch. Dist.*, 124 LRP 39959 (E.D.Mich. 2024)**

  Another Note—This Judge is apparently unconcerned with the failings of the CPI techniques that the Judge found so problematic in ***C.B. v. Moreno Valley Unified Sch. Dist.*, 123 LRP 34183 (C.D.Cal. 2023)**, the case where untrained SROs were called upon for simple behavioral disturbances.

- ***Stratton v. Oroville City Elem. Sch. Dist.*, 125 LRP 7974 (E.D.Cal. 2025)**

  A more common type of restraint case, here involving a grade-schooler with Autism who was restrained by a classroom aide.

  The parent sued for money damages under §504 and ADA, claiming that the aide failed to implement his BIP prior to restraining him.

  Indeed, the parents alleged that when the student refused to complete a task, the aide grabbed him by the arm, forced him to walk outside, and put increasing pressure on his wrist.

- ***Stratton v. Oroville City Elem. Sch. Dist.*, 125 LRP 7974 (E.D.Cal. 2025)**

  In light of the allegations, the Court refused to dismiss the case in its early stages.

  Note—This is a more typical presentation of a restraint case, where the allegation is that staff failed to implement de-escalation strategies in a BIP before engaging in a restraint.

  Here, made worse by the aide not using training-approved restraint techniques.

- ***Richardson (TX) Ind. Sch. Dist.* (OCR 2025)**

  In a recent OCR decision, the agency found that District staff at times engaged in restraints not in accordance with their CPI training.

  In addition, SROs at times restrained students but were untrained in CPI.

  OCR stated that its "restraint analysis concerns whether the use of restraint resulted in a denial of FAPE."

  Since restraints were undertaken before resort to BIP interventions were a denial of FAPE, as they represented a failure to timely implement the student's IEP.

- ***Richardson (TX) Ind. Sch. Dist.* (OCR 2025)**

  Note—Staff conducting restraints not in accordance with their training can risk individual liability claims, especially if the student is injured.

  Staff should be instructed to use only the restraint techniques specifically taught in their restraint method training.

  On the SROs, the recurring problem of contracting with local PDs who provide SROs who are not then trained in the district's restraint methods….

Takeaways on Restraint

A necessary emergency intervention, as schools cannot allow students to hurt themselves or others

First restraint incident should trigger an IEP meeting to review behavior components of IEP, de-escalation strategies, crisis planning

Additional restraints must be studied by IEP team to ascertain antecedents and patterns of escalation

Goal—Arrive at point where behavior incidents are de-escalated before a risk of imminent injury presents itself

Recent MDR Cases

- MDRs present the key potential dispute in IDEA discipline cases—disagreement over whether the violation of code of conduct is a manifestation of disability.
- Last revised in 2004 to require a closer relationship between behavior and disability to determine manifestation.
- At times, a huge amount of legal resources are expended over a single disciplinary action (usually not a FAPE dispute).

Recent MDR Cases

- ***C.D. v. Atascadero Unified Sch. Dist.*, 83 IDELR 80 (C.D.Cal. 2023)**

  School's MDR found the behavior was not related to his disabilities, and he was suspended long-term.

  HO found the behavior was not related and Court agreed.

  Court found student could have been aggressive anytime during the incident, but did it only when preferred staff were not present.

  He also appeared to understand the hazard of being close to the construction, as he put on his glasses due to flying materials.

Recent MDR Cases

- ***C.D. v. Atascadero Unified Sch. Dist.*, 83 IDELR 80 (C.D.Cal. 2023)**

  He also used language indicating he understood the risk, but wanted to remain, and was not agitated.

  "Aggression toward Ms. Hale was not impulsive, and Student processed the situation and understood it."

  Thus, Court found his behavior was a choice, and not related to his disabilities.

  9th Circuit affirmed, finding the conduct was "particularly inappropriate, violent, and targeted." 124 LRP 11529 (9th Cir. 2024)

Recent MDR Cases

- ***C.D. v. Atascadero Unified Sch. Dist.*, 83 IDELR 80 (C.D.Cal. 2023)**

  Note—Not every behavior of a student with ID will be a manifestation of his disability.

  In a brief unpublished decision, the 9th Circuit Court noted the "targeted" nature of the aggressive behavior in upholding the finding that the incident was not related to disability.

Recent MDR Cases

- ***Kern High Sch. Dist.*, 124 LRP 29282 (SEA Wash 2024)**

  During baseball practice, 10th-grader with ADHD took a peer's phone and made a false report of an active shooter.

  School had a school psychologist prepare a "manifestation determination report," which the team reviewed and relied on in conducting the MDR..

  Parent argued the behavior was an impulsive "joke," but team noted student took a peer's phone without permission, hid his identity when making the false report, and then fled the scene.

  ALJ found the behavior was not impulsive, as student "had numerous opportunities to off-ramp his behavior."

Recent MDR Cases

- ***Kern High Sch. Dist.*, 124 LRP 29282 (SEA Wash 2024)**

  The steps involved in the behavior "taken in the aggregate demonstrate Student's behavior was calculated and not impulsive."

  ALJ also found that the behavior would not be linked to the student's outside medical diagnosis of Autism, as the behavior was "opportunistic" and "inconsistent with behaviors expected of someone with Autism."

  Note—The ALJ's decision was issued after a 5-day "expedited" hearing.

Potential Pre-Eligibility Discipline Protections

- **Students suspected of having a disability, but not yet eligible under IDEA may be entitled to IDEA discipline protections. 34 C.F.R. §300.534.**

  There must be a valid basis for suspicion of eligibility—(1) parent concerns, (2) staff concerns on behavior, or (3) parent referral.

  Pending referral definitely means discipline protections apply

  But, parent referral request after offense does not necessarily stop discipline, if there really is not a reason to suspect disability.

Potential Pre-Eligibility Discipline Protections

- **Exceptions to Pre-Eligibility Protections**

  1. Parent had refused consent for sp ed evaluation or placement.
  2. Student was previously evaluated but did not qualify.

  In these situations, discipline may proceed under regular policies

  See 34 C.F.R. §300.534(d)(1).

Potential Pre-Eligibility Discipline Protections

- **Students suspected of having a disability, but not yet eligible under IDEA may be entitled to IDEA discipline protections**

  Thus, unless an exception applies, if there is valid reason to suspect disability, student is entitled to MDR prior to a long-term disciplinary removal, especially in situation were an IDEA evaluation is actually pending during the offense.

  In these situations, schools are usually advised to postpone disciplinary action until IDEA evaluation and IEP team review is completed (so MDR, if child is eligible, can be based on evaluation data).

Potential Pre-Eligibility Discipline Protections

- **Students suspected of having a disability, but not yet eligible under IDEA may be entitled to IDEA discipline protections**

  But, in ***Letter to Nathan*, 73 IDELR 240 (OSEP 2019)**, OSEP held that the discipline regulation "does not include an exception to allow additional time to complete an evaluation prior to conducting the MDR" if the school had made a decision to effect a disciplinary change in placement for the student with suspected eligibility.

  Meaning, if the school insists on proceeding with long-term removal prior to evaluation, it must still conduct an MDR.

Potential Pre-Eligibility Discipline Protections

Letter to Nathan indicates that the MDR could in fact proceed without an initial evaluation. "The group would likely consider the information that served as the LEA's basis of knowledge that the child may be a child with a disability under IDEA, such as concerns expressed by a parent, a teacher or other LEA personnel about a pattern of behavior demonstrated by the child."

Thus, the MDR would address "whether the conduct in question was caused by, or had a direct and substantial relationship to, the child's *suspected* disability."

Potential Pre-Eligibility Discipline Protections

Practical Guidance—Conducting an MDR with evaluation data can be complicated enough; is it feasible to conduct an MDR based on an area of "suspected" disability? This seems an iffy proposition—one easily subject to potential legal challenge.

It may be best to stick to the approach of postponing disciplinary action until the evaluation is conducted, unless the matter is highly urgent (safety measures are always possible, and, the evaluation can be expedited…).

Workshop 5

Solidifying the IEP for Students with Autism

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Solidifying the IEP for Students with Autism

Percentage of students ages 5 through 21 served under IDEA within disability categories by educational environment: Fall 2022

Disabilities	80% or More	40% through 79%	Less than 40%
Autism	40.6	17.1	34.8
Emotional Disturbance	55.6	16.9	13.9
Intellectual Disability	19.4	27.9	46.7
Specific Learning Disability	76.4	18.3	3.4
Other Health Impairment	70.8	17.6	7.5

Percentage of students ages 5 through 21 served under IDEA who were reported under the category of autism by year and state

State	2013 Percent	2022 Percent	Change	Percent Change
Alaska	6.3	9.9	3.5	55.9
California	11.1	17.3	6.2	55.9
Hawaii	7.3	11.9	4.5	61.7
Idaho	9.2	11.5	2.2	24.0
Montana	3.5	5.8	2.2	62.9
Oregon	11.0	14.6	3.5	31.9
Washington	8.5	13.2	4.8	56.2

Evaluation

- *N.B. v. Hellgate* (9th Cir. 2008)
  - During an IEP meeting, parents suggested to IEP team members that Student might be autistic.
  - The school referred the parents to Missoula Child Development Center ("CDC"), where free autism testing could be performed with parental consent.

Evaluation

- *N.B. v. Hellgate* (9th Cir. 2008)
  - The CDC reported that C.B. exhibited behavior consistent with autism spectrum disorder, including significant ongoing speech and language deficits, motor skill deficits, mild cognitive deficits, and atypical behaviors.
  - The fact that Hellgate referred the parents to the CDC shows that Hellgate was mindful that an evaluation was necessary.

Evaluation

- *N.B. v. Hellgate* (9th Cir. 2008)
  - Cited to Union School District case
    - Parents of the student failed to turn over portions of a report issued by a specialist
    - Ninth Circuit said the "failure of the [parents] to turn over portions of a specialist's report cannot excuse the District's failure to procure the same information for itself."
  - The failure to obtain critical medical information about whether a child has autism "render[s] the accomplishment of the IDEA's goals—and the achievement of a FAPE—impossible."

Evaluation

- *Amanda J. v. Clark County School District* (9th Cir. 2001)
  - Court relied upon facts related to the diagnosis
    - "Although autism manifests itself in different ways, its symptoms in children are often measurable by eighteen months of age."
    - "…diagnosis of autism can be made reliable in two-year-olds."
    - "Early diagnosis is crucial because education (of children as well as of parents and teachers) is the primary form of treatment, and the earlier it starts, the better."
    - "Without early identification and diagnosis, children suffering from autism will not be equipped with the skills necessary to benefit from educational services."

Evaluation

- *Amanda J. v. Clark County School District* (9th Cir. 2001)
  - Evaluator found student "severely autistic" under CARS
  - No evidence this was disclosed to parent
  - IEP team found student eligible due to areas of receptive/expressive language, cognitive ability, self-help, and social/emotional condition.
  - Placed in specialized early childhood special education program

Evaluation

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  - IEP team found student eligible due to areas of receptive/expressive language, cognitive ability, self-help, and social/emotional condition.
  - Placed in specialized early childhood special education program
  - Eligible for ESY, speech services, fine motor goals

Evaluation

- *Amanda J. v. Clark County School District* (9th Cir. 2001)
  - The District blatantly violated one of the Act's procedural requirements, preventing full and effective parental participation, thereby "driv[ing] a stake into the very heart of the Act."
  - District had information in its records, which, if disclosed, would have changed the educational approach used for Amanda, increasing the amount of individualized speech therapy and possibly beginning an autism-specific program much sooner.

Evaluation

- *Amanda J. v. Clark County School District* (9th Cir. 2001)
  - This is a particularly troubling violation, where, as here, the parents had no other source of information available to them. No one will ever know the extent to which this failure to act upon early detection of the possibility of autism has seriously impaired Amanda's ability to fully develop the skills to receive education and to fully participate as a member of the community.

Evaluation

- *J.R. v. Ventura Unified Sch. Dist.* (C.D. California 2024)
  - Initial evaluation in kindergarten documented speech delays and difficulty expressing his needs
  - Concerns about inattentiveness, restlessness, immaturity, and difficulty following directions
  - Social, emotional, behavioral functioning in the clinically significant range
  - School did not assess for autism in 2012, 2015, 2018, or 2021.
  - In 2018 or 2021 district's psychologist concluded autism was not a suspected area of disability

Evaluation

- *J.R. v. Ventura Unified Sch. Dist.* (C.D. California 2024)
  - Failure to assess for autism denied a FAPE
  - The Ninth Circuit could not be more clear: developing an educational program which meets the substantive requirements of the IDEA is "impossible" where the IEP team "fails to obtain information that might show that the child is autistic."
  - The goals and services set forth in J.R.'s IEP were "likely inappropriate because they were made without sufficient evaluative information about [his] individual capabilities as an autistic child."

Evaluation

- *J.R. v. Ventura Unified Sch. Dist.* (C.D. California 2024)
  - For example, without proper assessment, the district "summarily concluded" that when J.R. failed to complete work, he "simply lacked motivation."
  - Had the district fully assessed J.R. for autism, it would have better considered setting goals for J.R.'s autism-related social, behavioral and communication deficits and providing services aimed at ameliorating these deficits.

Evaluation

- *Timothy O. v. Paso Robles Unif. Sch. Dist.* (9th Cir. 2016)
  - School noticed student displayed symptoms of autism
  - School did not include any standard assessments for autism.
  - "A school district cannot disregard a non-frivolous suspicion of which it becomes aware simply because of the subjective views of its staff, nor can it dispel this suspicion through informal observation."
  - Required to conduct an assessment using the "sound and reliable methods that the Act demands."

Evaluation– OR Rule

- OAR 581-015-2130
  - (1) If a child is suspected of having an autism spectrum disorder, the following evaluations must be conducted:
    - (a) Developmental History as defined in OAR 581-015-2000 (Definitions)
  - Child's prenatal and birth history, including prenatal exposure to alcohol, prescription and non-prescription medications, or other drugs; developmental milestones; socialization/behavioral patterns; health and physical/medical history; family and environmental factors; home and educational performance; trauma or significant stress experienced by the child; and the display of characteristics of any additional learning or behavioral problems.

Evaluation – OR Rule

- OAR 581-015-2130
  - (1) If a child is suspected of having an autism spectrum disorder, the following evaluations must be conducted:
    - (b) Information from parents and other knowledgeable individuals regarding the child's historical and current characteristics that are associated with an autism spectrum disorder, including:
      - (A) Deficits in social communication and social interaction across multiple contexts as manifested by deficits in social-emotional reciprocity, nonverbal communicative behaviors used for social interaction, and developing, maintaining, and understanding relationships; and

Evaluation – OR Rule

- OAR 581-015-2130
  - (1) If a child is suspected of having an autism spectrum disorder, the following evaluations must be conducted:
    - (b) Information from parents and other knowledgeable individuals regarding the child's historical and current characteristics that are associated with an autism spectrum disorder, including:
      - (B) Restricted, repetitive patterns of behavior, interests, or activities, as manifested by stereotyped or repetitive motor movements, use of objects, or speech; insistence on sameness, inflexible adherence to routines, or ritualized patterns of verbal or nonverbal behavior; highly restricted, fixated interests that are abnormal in intensity or focus; hyper-or hypo-reactivity to sensory input or unusual interest in sensory aspects of the environment.

Evaluation – OR Rule

- OAR 581-015-2130
  - (1) If a child is suspected of having an autism spectrum disorder, the following evaluations must be conducted:
    - (c) Observations. Three observations of the child's behavior; at least one of which involves direct interactions with the child, and at least one of which involves direct observation or video of the child's interactions with one or more peers in an unstructured environment when possible, or with a familiar adult. The observations must occur in multiple environments, on at least two different days, and be completed by one or more licensed professionals knowledgeable about the behavioral characteristics of autism spectrum disorder.

Evaluation – OR Rule

- OAR 581-015-2130
  - (1) If a child is suspected of having an autism spectrum disorder, the following evaluations must be conducted:
    - (d) Social Communication Assessment. Assessments conducted by an SLP licensed by the SBE for Speech-Language Pathology and Audiology or the Teacher Standards and Practices Commission, in reference to developmental expectations and that address the characteristics of autism spectrum disorder to develop a profile of:
      - (A) Functional receptive and expressive communication, encompassing both verbal and nonverbal skills;
      - (B) Pragmatics across natural contexts; and
      - (C) Social understanding/behavior, including social-emotional reciprocity

Evaluation – OR Rule

- OAR 581-015-2130
  - (1) If a child is suspected of having an autism spectrum disorder, the following evaluations must be conducted:
    - (e) Standardized Autism Identification Tool. One or more valid and reliable standardized rating scales, observation schedules, or other assessments that identify core characteristics of autism spectrum disorder.

Evaluation – OR Rule

- OAR 581-015-2130
  - (1) If a child is suspected of having an autism spectrum disorder, the following evaluations must be conducted:
    - (f) Medical Examination or Health Assessment. A medical examination or health assessment shall be completed for children age birth to five for initial eligibility determinations, and may be completed for children above age five, as determined necessary by the team. The purpose of a medical examination or health assessment is to ensure consideration of other health and/or physical factors that may impact the child's developmental performance for a child age 3-5 or the child's educational performance for a child age 5-21. A medical diagnosis of autism spectrum disorder is not required to determine eligibility.

Evaluation – OR Rule

- OAR 581-015-2130
  - (1) If a child is suspected of having an autism spectrum disorder, the following evaluations must be conducted:
    - (g) Vision and Hearing Screening. Review existing screening, or if none conduct a new screening.

Evaluation – OR Rule

- OAR 581-015-2130
  - (1) If a child is suspected of having an autism spectrum disorder, the following evaluations must be conducted:
    - (h) Other.
      - (A) Any additional assessments that may include, measures of cognitive, adaptive, academic, behavioral-emotional, executive function/self-regulation, or sensory processing necessary to determine the impact of the suspected disability:
        - (i) On the child's developmental progress for a child age 3 to 5; or
        - (ii) On the child's educational performance for a child age 5 to 21.
      - (B) Any additional evaluations or assessments necessary to identify the child's educational needs.

Evaluation – OR Rule

- OAR 581-015-2130
  - (1) If a child is suspected of having an autism spectrum disorder, the following evaluations must be conducted:
    - (h) Other.
      - (A) Any additional assessments that may include, measures of cognitive, adaptive, academic, behavioral-emotional, executive function/self-regulation, or sensory processing necessary to determine the impact of the suspected disability:
        - (i) On the child's developmental progress for a child age 3 to 5; or
        - (ii) On the child's educational performance for a child age 5 to 21.
      - (B) Any additional evaluations or assessments necessary to identify the child's educational needs.

Evaluation – OR Rule

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  - (1) If a child is suspected of having an autism spectrum disorder, the following evaluations must be conducted:
    - (h) Other.
      - (A) Any additional assessments that may include, measures of cognitive, adaptive, academic, behavioral-emotional, executive function/self-regulation, or sensory processing necessary to determine the impact of the suspected disability:
        - (i) On the child's developmental progress for a child age 3 to 5; or
        - (ii) On the child's educational performance for a child age 5 to 21.
      - (B) Any additional evaluations or assessments necessary to identify the child's educational needs.

Evaluation – Summary

1. Ninth Circuit places high value on conducting assessments for autism
2. Schools cannot defer its responsibility for conducting the evaluation
3. Evaluation needs to contain standardized assessments, in addition to informal observations that may be included
4. Oregon rules provide a good example for a comprehensive assessment plan

IDEA Eligibility for Autism

- The IDEA defines autism as "a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age 3, that adversely affects a child's educational performance." 34 C.F.R. § 300.8
- Other characteristics of autism include "engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences." 34 C.F.R. § 300.8

IDEA Eligibility for Autism

- A student does not qualify as a child with autism if his educational performance is adversely affected primarily because the child has an emotional disturbance. 34 C.F.R. § 300.8.

Autism Eligibility Criteria

- Special Oregon Rule
  - To be eligible as a child with an autism spectrum disorder, the child must meet all of the following minimum criteria:
    - (a) The team must have documented evidence that the child demonstrates a pattern of characteristics defined as all three social communication deficits, and at least two of the four restricted, repetitive patterns of behavior, interests, or activities contained in this section:
      - (A) Child demonstrates persistent deficits in social communication and social interaction across multiple contexts, as evidenced by the all of the following, currently or by history (examples are illustrative, not exhaustive):
        - (i) Deficits in social-emotional reciprocity, ranging, for example, from abnormal social approach and failure of normal back-and-forth conversation; to reduced sharing of interests, emotions, or affect; to failure to initiate or respond to social interactions;
        - (ii) Deficits in nonverbal communicative behaviors used for social interaction, ranging, for example, from poorly integrated verbal and nonverbal communication; to abnormalities in eye contact and body language or deficits in understanding and use of gestures; to a total lack of facial expressions and nonverbal communication; and
        - (iii) Deficits in developing, maintaining, and understanding relationships, ranging, for example, from difficulties adjusting behavior to suit various social contexts; to difficulties in sharing imaginative play or in making friends; to absence of interest in peers.

Autism Eligibility Criteria

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  - To be eligible as a child with an autism spectrum disorder, the child must meet all of the following minimum criteria:
    - (a) The team must have documented evidence that the child demonstrates a pattern of characteristics defined as all three social communication deficits, and at least two of the four restricted, repetitive patterns of behavior, interests, or activities contained in this section:
      - (B) Restricted, repetitive patterns of behavior, interests, or activities, as evidenced by at least two of the following, currently or by history (examples are illustrative, not exhaustive):
        - (i) Stereotyped or repetitive motor movements, use of objects, or speech (e.g., simple motor stereotypes, lining up toys or flipping objects, echolalia, idiosyncratic phrases);
        - (ii) Insistence on sameness, inflexible adherence to routines, or ritualized patterns of verbal or nonverbal behavior (e.g., extreme distress at small changes, difficulties with transitions, rigid thinking patterns, greeting rituals, need to take the same route or eat the same food every day);
        - (iii) Highly restricted, fixated interests that are abnormal in intensity or focus (e.g., strong attachment to or preoccupation with unusual objects, excessively circumscribed or perseverative interests); or(iv) Hyper- or hypo-reactivity to sensory input or unusual interest in sensory aspects of the environment (e.g., apparent indifference to pain/temperature, adverse response to specific sounds or textures, excessive smelling or touching of objects, visual fascination with lights or movement).

Autism Eligibility Criteria

- Special Oregon Rule
  - To be eligible as a child with an autism spectrum disorder, the child must meet all of the following minimum criteria:
    - Characteristics are generally evident before age three but may not have become fully evident until social demands exceed limited capacities, or may be masked by learned strategies.
    - The characteristics of autism spectrum disorder are not better described by another established or suspected eligibility for special education services.
    - To be eligible for special education services as a child with an autism spectrum disorder, the eligibility team must also determine that:
      - (a) For a child age 3 to 5, the child's disability has an adverse impact on the child's developmental progress; or
      - (b)For a child age 5 to 21, the student's disability has an adverse impact on the student's educational performance.
      - (c) The child needs special education services as a result of the disability.
      - (d) The team has considered the child's special education eligibility, and determined that the eligibility is not due to a lack of appropriate instruction in reading, including the essential components of reading instruction (phonemic awareness, phonics, vocabulary development; reading fluency/oral reading skills; and reading comprehension strategies); and is not due to a lack of appropriate instruction in math; and is not due to limited English proficiency.

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  - To be eligible as a child with an autism spectrum disorder, the child must meet all of the following minimum criteria:
    - Characteristics are generally evident before age three but may not have become fully evident until social demands exceed limited capacities, or may be masked by learned strategies.
    - The characteristics of autism spectrum disorder are not better described by another established or suspected eligibility for special education services.
    - To be eligible for special education services as a child with an autism spectrum disorder, the eligibility team must also determine that:
      - (a) For a child age 3 to 5, the child's disability has an adverse impact on the child's developmental progress; or
      - (b)For a child age 5 to 21, the student's disability has an adverse impact on the student's educational performance.
      - (c) The child needs special education services as a result of the disability.
      - (d) The team has considered the child's special education eligibility, and determined that the eligibility is not due to a lack of appropriate instruction in reading, including the essential components of reading instruction (phonemic awareness, phonics, vocabulary development; reading fluency/oral reading skills; and reading comprehension strategies); and is not due to a lack of appropriate instruction in math; and is not due to limited English proficiency.

Least Restrictive Environment

- Schools must ensure that children with disabilities are educated alongside their non-disabled peers "[t]o the maximum extent appropriate." 20 U.S.C. § 1412(a)(5)(A).
- School officials may remove a disabled child from the regular classroom "only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." *Id.*
- Strong preference for educating children with disabilities in a regular classroom environment.

Least Restrictive Environment

- Four-Factor Analysis
  1. Comparison of the academic benefits a child receives from placement in the regular classroom with the academic benefits available in a special education classroom.
  2. Non-academic benefits a disabled child derives from being educated in a regular classroom
  3. Potential negative effects a disabled child's presence may have on the education of other children in the classroom.
  4. Costs to the school district of providing the supplementary aids and services necessary to educate a disabled child in the regular classroom.

Least Restrictive Environment

- D.R. v. Redondo Beach Unified Sch. Dist. (9th Cir. 2022)
  - D.R.'s parents and school agreed D.R. would spend 75% of his school day in the regular classroom with appropriate supplementary aids and services to support his academic progress.
    - Full-time behavioral aide who worked one-on-one with D.R. in the regular classroom
    - Four hours per week of special education instruction outside the regular classroom
  - Midway through year, school believed D.R. required more direct instruction by a credentialed special education teacher to make adequate academic progress.
    - Blended program in which D.R. would remain in the regular classroom during the morning but spend the afternoon in a special education classroom
    - Parents objected and school did not implement

Least Restrictive Environment

- D.R. v. Redondo Beach Unified Sch. Dist. (9th Cir. 2022)
  - Fourth grade
    - IEP team agreed that D.R. had made considerable social and academic progress during the prior school year.
    - School reiterated their concerns that the regular classroom environment did not adequately serve D.R.'s needs,
    - Recommended Special Day Class for 56% of the school day
    - Parents objected and school did not change the IEP

Least Restrictive Environment

- D.R. v. Redondo Beach Unified Sch. Dist. (9th Cir. 2022)
  - Fifth grade
    - D.R. had met four of his six academic goals for the fourth-grade year and that he had made progress on the remaining two.
    - School believed D.R. was not making adequate progress, noting he was performing below grade level.
    - Spent most of his time in the regular classroom working one-on-one with his aide on assignments that were tied to a heavily modified general education curriculum.
    - Outcome was that D.R. often followed the general class schedule--for example, practicing grammar skills at the same time as his non-disabled peers--but not the actual class lessons in the core subjects
    - School proposed the blended placement, parents ended the meeting

Least Restrictive Environment

- D.R. v. Redondo Beach Unified Sch. Dist. (9th Cir. 2022)
  - Dispute centered around first factor
    2. Significant non-academic benefits, became close friends with several non-disabled peers
    3. Presence did not impede his teachers' ability to instruct other students
    4. School does not contend costs were an issue

Least Restrictive Environment

- D.R. v. Redondo Beach Unified Sch. Dist. (9th Cir. 2022)
  - Ninth Circuit had two main points
    - D.R. was making substantial progress toward meeting the academic goals established in his IEP.
    - The fact that a child receives academic benefits in the regular classroom as a result of supplementary aids and services is irrelevant to the analysis required under the first Rachel H. factor.

Least Restrictive Environment – Summary

1. Is the student making progress?
2. Is the student isolated or are there some things happening that you can't measure?
3. Are behaviors an issue?

Strategies for Students with Autism

- Texas rules require IEP teams to consider 11 strategies during every IEP meeting
  1. Extended educational programming
  2. Daily schedules reflecting minimal unstructured time
  3. In-home and community-based training
  4. Positive behavior support strategies
  5. Futures planning for integrated learning and training
  6. Parent-family training and support

Strategies for Students with Autism

- Texas rules require IEP teams to consider 11 strategies during every IEP meeting
  7. Suitable staff-to-student ratio
  8. Communication interventions
  9. Social skills supports
  10. Professional educator/staff support
  11. Teaching strategies based on peer-reviewed, research-based practices

Extended School Year

- Are provided to a child with a disability
  - Beyond the normal school year of the public agency;
  - In accordance with the child's IEP; and
  - At no cost to the parents of the child; and
- Meet the standards of the state educational agency
- 34 C.F.R. § 300.106(b)

Extended School Year

- *N.B. v. Hellgate* (9th Cir. 2008)
  - Student with autism, speech/language deficits, motor skill deficits, mild cognitive deficits, atypical behaviors
  - Hellgate Elementary did not recommend ESY during the summer

Extended School Year

- *N.B. v. Hellgate* (9th Cir. 2008)
  - IEP team looked at Montana's seven factors for ESY eligibility, in addition to the required regression/recoupment
    1. Nature and severity of student's disability
    2. Ability of student's parents to provide educational structure in the home
    3. Behavioral and physical impediments
    4. Ability of the student to interact with peers
    5. Student's vocational needs
    6. Availability of alternative resources
    7. Emerging skills and breakthrough opportunities

Extended School Year

- *N.B. v. Hellgate* (9th Cir. 2008)
  - Staff testified student was making steady progress
  - Data collection indicated very little regression
  - A parent seeking an ESY program must satisfy an even stricter test than providing a denial of FAPE.
  - ESY is the exception and not the rule
  - Only necessary to a FAPE when the benefits a disabled child gains during a regular school year will be significantly jeopardized if he is not provided with an educational program during the summer months."

ESY – State Standards (Washington)

1. Extended school year services means services meeting state standards contained in this chapter that are provided to a student eligible for special education services:
   a. Beyond the normal school year;
   b. In accordance with the student's IEP; and
   c. Are provided at no cost to the parents of the student.

ESY – State Standards (Washington)

2. School districts must ensure that extended school year services are available when necessary to provide a FAPE to a student eligible for special education services.
3. Extended school year services must be provided only if the student's IEP team determines on an individual basis that the services are necessary for the provision of FAPE to the student.

ESY – State Standards (Washington)

4. A school district may not limit extended school year services to particular categories of disability or unilaterally limit the type, amount or duration of those services.
5. The purpose of extended school year services is the maintenance of the student's learning skills or behavior, not the teaching of new skills or behaviors.

ESY – State Standards (Washington)

6. School districts must develop criteria for determining the need for extended school year services that include regression and recoupment time based on documented evidence, or on the determinations of the IEP team, based upon the professional judgment of the team and consideration of factors including the nature and severity of the student's disability, rate of progress, and emerging skills, with evidence to support the need.

ESY – State Standards (Washington)

7. For the purposes of subsection (6) of this section:
   a. Regression means significant loss of skills or behaviors if educational services are interrupted in any area specified on the IEP;
   b. Recoupment means the recovery of skills or behaviors to a level demonstrated before interruption of services specified on the IEP.

ESY – State Standards (Washington)

- Kent School District's Criteria
  1. Regression/recoupment analysis that considers the amount of regression a student experiences as a result of an interruption in educational services with the amount of time required to regain the prior level of skill.
  2. Degree of progress on the IEP goals and objectives.
  3. Exceptional circumstances that includes issues preventing the student from receiving some meaningful benefit from the regular education school year program.

ESY – State Standards (Washington)

- Sultan Sch. Dist. (Special Education Complaint, April 2025)
  - Parent argued that school failed to provide ESY in summer 2024
  - State investigator noted:
    - IEP amendment notes regression in bathroom routine
    - Lack of skill maintenance in area of communication
    - Regression, coupled with increased dysregulation, severe enough to warrant a shortened school day
    - Sufficient to entitle student to ESY
    - Homebound PWN noted the Student "thrives with in-home services and skills increase," which indicates emerging skills, which alludes to a critical learning phase in process which should have been consideration for ESY services.

ESY – State Standards (Washington)

- Bethel Sch. Dist. (WA Complaint Investigation, June 2024)
  - March 2023 IEP did not provide the Student with ESY.
  - Investigator made the following observations:
    - March 5, 2024 IEP showed the Student had made some progress on the Student's March 2023 communication goal and fine motor goal;
    - The exact nature of the Student's ability in OT appeared to be somewhat unclear;
    - The grades document showed the Student was struggling in the academic areas of math, reading, science, and social studies.

ESY – State Standards (Washington)

- Bethel Sch. Dist. (WA Complaint Investigation, June 2024)
  - School district did not have data on regression
  - While generally an IEP team should not need to conduct a full reevaluation to determine a need for ESY, rather a team should have progress data that should help show whether there is regression or a lack of recoupment.
  - However, on the basis of the foregoing, it was reasonable for the IEP team to determine it needed to conduct a reevaluation to gather more data before it could properly determine whether the Student required ESY.

ESY – State Standards (Washington)

- North Franklin Sch. Dist. (WA Complaint Investigation June 2024)
  - December 2022 IEP indicated decision on ESY would be determined by May 1.
  - On May 17 the school issued PWN proposing to initiate ESY services.
  - Parent declined ESY services.
  - OSPI found a violation regarding the determination of ESY as the school made its decision without the parent.

ESY – State Standards (Washington)

- Shoreline Sch. Dist. (WA Complaint Investigation, September 2023)
  - The Student's IEP team never determined that he needed ESY
  - The Student advanced from grade to grade in math and the evidence does not demonstrate that his ability to benefit from his instruction was jeopardized due to lack of ESY.
  - The Student began each school year relatively on par with the other students and did not demonstrate summer regression that was out of the ordinary.

ESY – State Standards (Washington)

- Shoreline Sch. Dist. (WA Complaint Investigation, September 2023)
  - At the start of ninth grade, he scored a 28.5 out of 32 on his first assessment.
  - While his iReady scores did indicate a pattern of low scores at the start of the school year and increased scores as the year progressed, that is not enough evidence from which to conclude that the Student regressed so much as to have required ESY in order to receive FAPE.

ESY – State Standards (Washington)

- Freeman Sch. Dist. (WA Complaint Investigation, January 2021)
  - Parent made a request that the Student be provided with some type of service over the summer.
  - Parent's advocate requested some type of summer service to account for the schooling disruptions caused by COVID in the spring of 2020
  - The decision to not provide the Student with ESY services during the summer of 2020 was based on relevant, sufficient Student-specific data on the Student's needs resulting from the Student's disability--in particular, progress reporting data from the 2019-2020 school year showed that the Student did not suffer significant regressions in performance following school breaks

ESY – State Standards (Washington)

- Sultan Sch. Dist. (WA Due Process, January 2021)
  - PWN said the District does not provide ESY past the fifth grade
  - Hearing officer ordered financial reimbursement for summer course

ESY – State Standards (Oregon)

- ORS 581-015-2065
  - ESY services are provided for the maintenance of the child's learning skills or behavior, not the teaching of new skills or behavior
  - Schools must develop criteria but regression and recoupment be considered when making an ESY determination.
  - Documented evidence or, if no documented evidence, on predictions according to the professional judgment of the [IEP] team.
  - "Regression" is defined as "significant loss of skills or behaviors in any area specified on the IEP as a result of an interruption in education services."
  - "Recoupment" is "the recovery of skills or behaviors specified on the IEP to a level demonstrated before the interruption of services."

ESY – State Standards (Oregon)

- Portland Public Schools' ESY Criteria
  - Reasonable recoupment periods
    - 4-6 weeks following summer
    - 3-5 instructional days for a two-week break
    - 2-3 instructional days for a one-week break

ESY – State Standards (Oregon)

- Hillsboro School District ESY Criteria
  - Criteria for ESY eligibility MUST include regression and recoupment data, preferably as it relates to the summer break.
  - If that data is not available, then regression and recoupment data related to the winter break may be used.
  - (Please note: Spring break does not provide a significant enough disruption in school services to be meaningful in determination of ESY eligibility. Please use it only as a last resort.)

ESY – State Standards (Oregon)

- Portland Sch. Dist. (OR Complaint Investigation September 2021)
  - IEP team met to consider ESY
  - School staff stated they were seeing a plateau but not regression
  - No solid data of regression and recoupment
  - District staff said no progress data was used in the decision

ESY – State Standards (Oregon)

- Portland Sch. Dist. (OR Complaint Investigation September 2021)
  - Complaint investigator was able to identify six data points that could have been considered
    - May 28, 2020 IEP meeting (present levels statement),
    - The progress reports for the November 6, 2020 reporting period could serve to provide information for the post-summer break recoupment and pre-Thanksgiving break period,
    - The progress reports for the January 30, 2021 reporting period,
    - The progress reports for the April 9, 2021 reporting period,
    - The October 26, 2020 amended IEP in which the IEP team updated the present levels for the Student.

ESY – State Standards (Oregon)

- Portland Sch. Dist. (OR Complaint Investigation September 2021)
  - While a further review and consideration of the data may have led the IEP team or the District to make a final determination that the Student continues to not qualify for ESY services, the decision should have been based on the data that had been collected and available in the Student's file.

ESY – State Standards (Oregon)

- Forest Grove Sch. Dist. v. Student (Oregon Dist. Ct. 2018)
  - Under the District's policy, a student must show greater than ten percent regression to be eligible for ESY services.
  - IEP meeting in June to discuss ESY for the summer
  - School used pre-break data as the baseline and post-break monitoring over two-week period
  - Parent proposed school consider regression and recoupment by comparing present levels in March 2011 IEP with November 2011 IEP.

ESY – State Standards (Oregon)

- Forest Grove Sch. Dist. v. Student (Oregon Dist. Ct. 2018)
  - Parent wanted the regression/recoupment data to be collected over the summer break as a "best practice," and disagreed with the school's policy of collecting regression/recoupment data over winter and spring breaks.
  - However, the collection and calculation of regression and recoupment data is a matter of educational policy and methodology, and absent tangible data for the school's consideration, the school was not obligated to consider parent's request to calculate regression a different way.

ESY – State Standards (Oregon)

- Forest Grove Sch. Dist. v. Student (Oregon Dist. Ct. 2018)
  - Student's AGs and STOs are less ambitious with each IEP, Student's academic focus changed from year-to-year.
  - The focus of Student's reading curriculum shifted from simple reading skills to reading comprehension and later to drawing inferences from a reading passage.
  - Student's declining reading level as indicated in her AGs and STOs from year to year merely reflects the fact that Student's reading abilities are lower as the complexity of the reading task increases.

ESY – State Standards (California)

- Cal. Code Regs. Title 5, § 3043
  - Such individuals shall have disabilities which are likely to continue indefinitely or for a prolonged period, and interruption of the pupil's educational programming may cause regression, when coupled with limited recoupment capacity, rendering it impossible or unlikely that the pupil will attain the level of self-sufficiency and independence that would otherwise be expected in view of his or her disabling condition.
  - The lack of clear evidence of such factors may not be used to deny an individual an extended school year program if the IEP team determines the need for such a program and includes extended school year in the IEP.

ESY – State Standards (California)

- Cal. Code Regs. Title 5, § 3043
  a. Extended year special education and related services shall be provided by a school district, SELPA, or county office offering programs during the regular academic year.
  b. Individuals with exceptional needs who may require an extended school year are those who:
     1. Are placed in special classes; or
     2. Are individuals with exceptional needs whose IEPs specify an extended year program as determined by the IEP team.

ESY – State Standards (California)

- Cal. Code Regs. Title 5, § 3043
  c. The term "extended year" as used in this section means the period of time between the close of one academic year and the beginning of the succeeding academic year. The term "academic year" as used in this section means that portion of the school year during which the regular day school is maintained, which period must include not less than the number of days required to entitle the district, special education services region, or county office to apportionments of state funds.

ESY – State Standards (California)

- Cal. Code Regs. Title 5, § 3043
  d. An extended year program shall be provided for a minimum of 20 instructional days, including holidays.
  e. An extended year program, when needed, as determined by the IEP team, shall be included in the pupil's IEP.

ESY – State Standards (California)

- Cal. Code Regs. Title 5, § 3043
  f. In order to qualify for average daily attendance revenue for extended year pupils, all of the following conditions must be met:
  1. Extended year special education shall be the same length of time as the school day for pupils of the same age level attending summer school in the district in which the extended year program is provided, but not less than the minimum school day for that age unless otherwise specified in the IEP to meet a pupil's unique needs.
  2. The special education and related services offered during the extended year period are comparable in standards, scope and quality to the special education program offered during the regular academic year.

ESY – State Standards (Hawaii)

- HAR § 8-60-7
  - IEP team must determine if a student needs a program that extends beyond the regular school year
  - Critical question is whether the student's learning in the regular school year will be significantly impacted if ESY is not provided
  - First consider the amount of regression and rate of recoupment
  - Will the student's difficulties with regression and recoupment make it unlikely that the student will maintain the skills and behaviors relevant to IEP goals and objectives
  - Will the regression and recoupment impact his/her ability to receive FAPE?

ESY – State Standards (Hawaii)

- HAR § 8-60-7
  - It is not necessary for student to first experience regression during an interruption to receive ESY services
  - Nature and severity of disability (does student require a highly structured consistent program)
  - Areas of leaning crucial to attaining the goal of self-sufficiency and independence from caregivers

ESY – State Standards (Montana)

- IEP teams shall use recoupment and regression as the criteria for determining eligibility for extended school year services.
- In the absence of the opportunity to collect data to determine regression, the IEP team may conclude that ESY services are necessary based on data that research has shown to predict regression and difficulty with recoupment.

ESY – State Standards (Texas)

- The need for ESY services must be documented using data collected by the district and the student's parents using formal or informal assessments.
- The documentation must demonstrate that in one or more critical areas addressed in the current individualized education program (IEP) where the student has previously demonstrated acquired progress, the student has exhibited, or reasonably may be expected to exhibit, severe or substantial regression that cannot be recouped within a reasonable period of time.
- Severe or substantial regression means that the student has been, or will be, unable to maintain previously acquired progress in one or more critical IEP areas in the absence of ESY services.

ESY – State Standards (Texas)

- A skill is critical when the loss of that skill results, or is reasonably expected to result, in any of the following occurrences during the first eight weeks of the next regular school year:
  - (A) placement in a more restrictive instructional arrangement;
  - (B) significant loss of acquired skills necessary for the student to appropriately progress in the general curriculum;
  - (C) significant loss of self-sufficiency in self-help skill areas as evidenced by an increase in the number of direct service staff and/or amount of time required to provide special education or related services;
  - (D) loss of access to community-based independent living skills instruction or an independent living environment provided by noneducational sources as a result of regression in skills; or
  - (E) loss of access to on-the-job training or productive employment as a result of regression in skills.

ESY – Summer Schedule

- *Is it permissible to have "standard," district-wide ESY schedule?*

2025 ESY Site-Based Model (Grades K-12 and Transition Age):
For K-12 and Transition age students whose IEP team determines ESY through a Site-Based model, ESY is offered 3 days a week (Tuesday-Wednesday-Thursday) for 4 weeks in June:
June 3, 4, 5
June 10, 11, 12
June 17, 18 (There will be no ESY on June 19 in observance of Juneteenth)
June 24, 25, 26

Program Time: 8:30 am - 1:30 pm

Please note: IEP teams should make ESY determinations based on the unique needs of each student. ESY services could be provided in a site-based model, as itinerant services, or other individualized frequency and duration of services.

ESY – Summer Schedule

- *Is it permissible to have "standard," district-wide ESY schedule?*

Extended School Year (ESY) Program

Extended School Year is our popular summer program run by our Special Education Department for 19 days after the close of the school year. It's a fun and rewarding program in which educators can work alongside our talented Special Education staff to support students with special needs.

If you are looking for a fun and challenging opportunity to earn some extra money while supporting our incredible students, this is a great program to work for!

Program Dates: June 17th – July 15th (no work on June 19th or July 4th)

Paid training day: June 17th 8:30 – 3:00

Program hours: 8:30 – 1:00pm

- Para's will work approximately 8:15 – 12:45
- Teachers and Service Providers will work approximately 8:00 – 1:00
- Student Class Start and End Time: 8:30am -12:30pm

ESY – Summer Schedule

- *Is it permissible to have "standard," district-wide ESY schedule?*
  - "What individualizes an ESY program are the goals and objectives . . .
  - "This is not to be construed as meaning that a school district should not consider adding additional days or weeks to a student's ESY program."

- Student v. Sch. Dist. of Philadelphia, 115 LRP 2750 (2014)

ESY – Summer Schedule

- *Is it permissible to have "standard," district-wide ESY schedule?*
  - Alaska Complaint Investigation, June 2025
    - School sent out a flyer to parent that set out dates and times for ESY
    - The May 2024 IEPs indicated that the that the Student was eligible for ESY services under the emerging skills and self-sufficiency criteria.
    - There was no indication on the IEP or PWN developed for those meetings that type, amount or duration of services needed by the Student were discussed.
    - The investigator conducted an interview with the general education teacher. She did not remember discussing type, amount or duration of ESY services at the May meetings.

ESY – Summer Schedule

- *Is it permissible to have "standard," district-wide ESY schedule?*
  - Alaska Complaint Investigation, June 2025
    - The investigator concludes that the District unilaterally determined the type, amount, or duration of ESY services for this Student.
    - By September 30, 2025, the District must submit 10 IEPs documenting the individualized decisions made by each student's IEP team regarding the type, amount, or duration of ESY services the student received during the summer of 2025; if the Student who is the subject of this investigation received ESY services during the summer of 2025, this Student's IEP must be one of the IEPs submitted.

ESY – Least Restrictive Environment

- *Can we put all the special education students together?*
  - *T.M. ex rel. A.M. v. Cornwall Cent. Sch. Dist.*, 752 F.3d 145, 163 (2nd Cir. 2014)
    - School district offered a mainstream student a summer ESY program
    - Placement was in a self-contained special education classroom
    - "In order to comply with the LRE requirement, for the ESY component of a twelve-month educational program as for the school-year component, a school district must consider an appropriate continuum of alternative placements, and then must offer the student the least restrictive placement from that continuum that is appropriate for the student's disabilities."

ESY – Least Restrictive Environment

- *Can we put all the special education students together?*
  - M.C. v. LAUSD (California Dist. Ct. 2023)
    - Student with down syndrome and intellectual disability
    - Placed in a regular second grade class with modified curriculum
    - LAUSD did not operate regular classes during ESY for elementary children

ESY – Least Restrictive Environment

- *Can we put all the special education students together?*
  - M.C. v. LAUSD (California Dist. Ct. 2023)
    - LAUSD only operated special education programs comprised of solely disabled students during the summer.
    - The two Special Day classes offered were a core curriculum class and an alternate curriculum class.
    - Thus, in determining placement options for M.C., the IEP team only considered these two options, neither of which met M.C.'s LRE.
    - The IEP team ultimately placed M.C. in the more restrictive class for a duration of twenty days or four weeks during the 2019 ESY.

ESY – Least Restrictive Environment

- *Can we put all the special education students together?*
  - M.C. v. LAUSD (California Dist. Ct. 2023)
    - LAUSD argues that to offer the full continuum of placement options during ESY would require LAUSD to establish programs for nondisabled students for the sole purpose of being able to implement the LRE provision for students with disabilities.
    - However, under the IDEA, LAUSD is required to consider whether there were other placements that could have provided M.C. with mainstreaming opportunities, including placements with other public or private agencies.

ESY – Least Restrictive Environment

- *Can we put all the special education students together?*
  - M.C. v. LAUSD (California Dist. Ct. 2023)
    - The LRE requirement applies in the same way to ESY placements as it does to school year placements and is therefore not limited to programs that a school district already offers.
    - It then must offer the disabled student the LRE placement from that continuum that is appropriate for his or her needs.
    - A school district need not itself operate all of the educational programs on this continuum; rather it may include other public agencies or private schools.

ESY – Summary

1. Look first to what your state has developed
2. If state requires the school to develop criteria, ensure the school has criteria in place
3. Data collection is key to making the determination
4. Every student regresses… the question is usually whether that regression can be recouped
5. Keep in mind LRE
6. Standard schedules are fine, to a point

Parent Training

- 34 C.F.R. § 300.34
  - "Related services also include school health services and school nurse services, social work services in schools, and parent counseling and training."

Parent Training

- 34 C.F.R. § 300.34
  - Parent counseling and training means:
    - Assisting parents in understanding the special needs of their child;
    - Providing parents with information about child development; and
    - Helping parents to acquire the necessary skills that will allow them to support the implementation of their child's IEP or IFSP.

Parent Training

- Texas rules require the IEP team to address two areas related to in-home supports:
  - In-home and community-based training that facilitate maintenance and generalization of such skills from home to school, school to home, home to community, and school to community;

Parent Training

- Texas rules require the IEP team to address two areas related to in-home supports:
  - Parent/family training and support, provided by qualified personnel with experience in autism, that, for example:
    - (A) provides a family with skills necessary for a student to succeed in the home/community setting;
    - (B) includes information regarding resources (for example: parent support groups, workshops, videos, conferences, and materials designed to increase parent knowledge of specific teaching/management techniques related to the student's curriculum); and
    - (C) facilitates parental carryover of in-home training (for example: strategies for behavior management and developing structured home environments and/or communication training so that parents are active participants in promoting the continuity of interventions across all settings);

Parent Training

- Kent Sch. Dist. (WA Complaint Investigation, January 2025)
  - Student's IEP required a behavior technician in the IEP
  - Parent alleged frequent turnover, inconsistent provision resulting in missed days of instruction
  - OSPI found no evidence that the District considered an FBA or BIP as strategies for addressing the BT and inconsistent attendance issues, nor was there evidence that the District conducted an FBA or developed a BIP to address the impact of the inconsistent BTs on the Student's behaviors or how and why this and transportation was escalating the Student's behaviors.

Parent Training

- Kent Sch. Dist. (WA Complaint Investigation, January 2025)
  - A plan to identify an appropriate placement for the Student to provide the Student with his current service minutes.
  - A plan for an interim alternative education setting either in his home or a District school until a new placement is established for the Student. Such a program shall also include any classified staffing, such as BT or paraeducator services necessary to meet the Student's needs.
  - Obtain consent to conduct an FBA to address the Student's aversion to transportation services and other behaviors impacting his education.
  - Determine whether any parent training and education may be necessary to assist the Parent with the provision of behavioral support to the Student at home and when preparing him to engage in district-provided education.

Parent Training

- Spokane Sch. Dist. (WA Complaint Investigation, June 2022)
  - Parent alleged school did not implement IEP and BIP
  - School recommended an FBA, but parent wanted to wait
  - School was able to show implementation of student's IE
  - School made attempts to address these behaviors, although the behaviors continued.
  - OSPI recommends that if the school refusal behavior continues the IEP team consider both conducting a functional behavioral assessment (FBA) and providing any necessary supplementary aids and services, including but not limited to parent training, to address those refusals.
  - OSPI recommends the District consider using the "School Refusal Assessment Scale-Revised."

Parent Training

- Sequim Sch. Dist. (WA Complaint Investigation, August 2024)
  - Parent alleged student's placement did not provide access to student's peers, and that placement was changed without an IEP meeting
  - OSPI found that the parent was confused.
  - OSPI *recommends* the District provide the Parent with training to better understand the placement process.

Parent Training

- Seattle Sch. Dist. (WA Due Process Hearing, May 2024)
  - Student was placed by IEP team in a residential facility
  - Hearing officer found prior to that time that student was denied a FAPE due to failure to implement IEP
  - Parent's expert said upon student's discharge he will need ABA support, parent training, SLP, OT, social skills

Parent Training

- California Due Process Hearing
  - Redlands Unif. Sch. Dist. (CA Due Process Hearing, March 2008)
    - Student began exhibiting behavioral issues at home in the summer of 2004
    - Student often returned home from school crying because no one wanted to play with him.
    - Student had hid from his mother in an attempt to avoid going to school.
    - Based upon the concerns of Student's mother that Student had difficulty transitioning to school, and had a tendency to wander off, the IEP team was concerned about Student's ability autonomously to get off the bus and go to class.
    - IEP team added that an aide would walk Student from the school bus to his classroom.

Parent Training

- California Due Process Hearing
  - Redlands Unif. Sch. Dist. (CA Due Process Hearing, March 2008)
    - Low attention span, couldn't redirect attention, leaving seat, appeared stressed, avoided interactions with classmates
    - Started to not use the bathroom or eat at school, didn't complete work, hid under furniture
    - Parents requested a one-on-one aide
    - School requested a behavior specialist to come observe

Parent Training

- California Due Process Hearing
  - Redlands Unif. Sch. Dist. (CA Due Process Hearing, March 2008)
    - Behavior specialist recommended a behavior support plan, but parents did not agree with the plan
    - School agreed to one-on-one aide, but….
    - Teacher and aide had no training in teaching students with autism
    - Behaviors continued to get worse, resulting in a denial of FAPE

Parent Training

- California Due Process Hearing
  - Redlands Unif. Sch. Dist. (CA Due Process Hearing, March 2008)
    - Parent's expert made several key points
      1. Behavior observations were not a substitute for a behavior assessment, the purpose of which was to determine the antecedents of the behavior and methods of addressing the behavior
      2. The BSP required student to learn to manage behavior, with no method or program to teach him how
      3. BSP did not require data collection of Student's behaviors
      4. BSP did not define alternate behaviors the School would teach
      5. BSP failed to focus on positive reinforcement of positive behaviors
      6. Student's parents needed behavior training so that they could be consistent with the behavior interventions

Parent Training

- California Due Process Hearing
  - Redlands Unif. Sch. Dist. (CA Due Process Hearing, March 2008)
    - Hearing officer ordered
      - An hour per day of one-on-one instruction for a period of 86 weeks (two school years, less periods of non-instruction, plus two five-week sessions of ESY), for a total of 430 hours. The instructor for the one-on-one instruction shall be either a Board Certified Educational Therapist, or a teacher who has a California credential to teach elementary school mathematics and writing or language arts.
      - 50 weeks of ABA in-home services for 25 hours a week, for the 2008-2009 school year.
      - 10 hours per month of supervision, and three hours per month of parent training.

Parent Training

- Hatboro-Horsham Sch. Dist. (PA Due Process Hearing, Oct. 2014)
  - Student clearly needs to learn to transfer learned skills to other settings, and has great difficulty in doing so.
  - Student requires explicit instruction in order to generalize skills and has not been provided with the opportunity to use and apply learned skills, such as social and pragmatic language, to other settings.
  - Parents need some form of training going forward in order to be prepared to support Student's ability to generalize skills into the home and community
  - School was ordered to provide the Parents with training to assist in Student's generalization of social and pragmatic language skills by a qualified BCBA who is familiar with Student.

Parent Training

- D.C. Public Schools (D.C. Due Process Hearing, February 2023)
  - Student with autism who was having trouble going to school
    - Resistant to environmental changes;
    - Rigidity to establish routines;
    - Difficulty building relationships
  - "It is the duty of the IEP team to provide special education and related services directed to improving attendance, where the child's nonattendance is related to his/her disability."
  - The proposed IEP did not contain any related services, such as Behavioral Support Services or parent training, calculated to get Student to come to school.

Parent Training – Conclusion

1. Comes up frequently during periods of transition
2. Home-to-school
3. Residential-to-public
4. Can come up when parent does not understand special education law/procedure

Positive Behavior Interventions

- 34 C.F.R. § 300.324(a)(2)(i)
  - In the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior

Positive Behavior Interventions

- Texas Rule
  - IEP team must consider for students with Autism:
    - Positive behavior support strategies based on relevant information, for example:
      - (A) antecedent manipulation, replacement behaviors, reinforcement strategies, and data-based decisions; and
      - (B) Behavioral intervention plan developed from a functional behavioral assessment that uses current data related to target behaviors and addresses behavioral programming across home, school, and community-based settings

Positive Behavior Interventions – OR Rule

- ORS 343.154
  - "Functional behavioral assessment" means an individualized assessment of a student that results in a hypothesis about the function of a student's behavior and, as appropriate, recommendations for a behavior intervention plan.

Positive Behavior Interventions

- ORS 343.154
  - A school district must conduct a functional behavioral assessment and develop, review or revise a behavior intervention plan within 45 school days of receiving parental consent to conduct the assessment for every student who has:
    - An individualized education program or a 504 Plan; and
    - Placed the student, other students or staff at imminent risk of serious bodily injury as a result of the student's behavior.

Positive Behavior Interventions

- ORS 343.154
  - When a behavior intervention plan is developed, reviewed or revised as required by the mandatory FBA, the school district must:
    - Ensure that the behavior intervention plan is based on a functional behavioral assessment that was conducted by a qualified person;
    - Ensure that the behavior intervention plan appropriately addresses the student's needs;

Positive Behavior Interventions

- ORS 343.154
  - When a behavior intervention plan is developed, reviewed or revised as required by the mandatory FBA, the school district must:
    - Allow service providers involved in the incident when the student, other students or staff were at imminent risk of serious bodily injury to provide meaningful input into the development, review or revision;
    - Inform the service providers about any portions of the behavior intervention plan that are relevant to the service providers and about any training opportunities for the service providers;
    - Ensure that the behavior intervention plan was correctly implemented before making any revisions.

Positive Behavior Interventions/FBAs

- Crook Cty. Sch. Dist., Oregon State Investigation 2024
  - Parent signed consent for FBA in December 2023
  - Subsequently student placed on shortened school day due to behavior
  - Remained on shortened school day for six months without revision to BIP
  - Student returned to full time attendance with an outdated BIP
  - Behavioral issues continued, school still hadn't completed FBA
  - State ordered an expedited FBA and determination of compensatory education

Positive Behavior Interventions/FBAs

- E.S. v. Conejo Valley Unified School Dist. (Cal. 2018)
  - School district did not conduct an FBA as part of initial evaluation
  - If District had included a functional behavior assessment in the battery of assessments it administered to Student in spring 2016, the IEP team would likely have had valuable information about Student's behavior patterns and antecedents to his aggressive behaviors.
  - The absence of results, findings and recommendations from a functional behavior assessment at the April 2016 IEP meeting impeded Parents' opportunity to participate in the decision-making process regarding the provision of FAPE to Student.

Positive Behavior Interventions/FBAs

- San Jose Unified Sch. Dist. v. H.T. (N.D. Cal. 2022)
  - School filed a due process hearing to show FBA was appropriate
  - BCBA assigned to the FBA
  - Observation of student, interviews with teachers, and review of records
  - BCBA called parent for input, parent didn't call back

Positive Behavior Interventions/FBAs

- San Jose Unified Sch. Dist. v. H.T. (N.D. Cal. 2022)
  - Parent later called school and said he preferred to not discuss son's confidential information
  - School advised BCBA not to attempt more contacts with parent
  - BCBA later made minor revisions based on a review of records as to parent concerns
  - ALJ said the school's FBA was not appropriate because it unreasonably failed to obtain parent input

Positive Behavior Interventions/FBAs

- San Jose Unified Sch. Dist. v. H.T. (N.D. Cal. 2022)
  - District court upheld the ALJ decision
  - "The ALJ stated that parental involvement is so important that the District was obligated to use reasonable efforts to obtain Parent's input even if the District perceived Parent as difficult."

Positive Behavior Interventions/FBAs

- W.A. v. Panama-Buena Vista Union Sch. Dist. (Cal. 2024)
  - School conducted an FBA
  - Parent expert said the FBA had *too much* information
    - Extraneous quantifiable data
    - Failed to derive the most significant data
    - Lacked the data and calculations required by BCBA standards to support its "most likely" probability findings
    - Relied on frequency rather than rate of behavior

Positive Behavior Interventions/FBAs

- W.A. v. Panama-Buena Vista Union Sch. Dist. (Cal. 2024)
  - School's FBA contained:
    - Records review
    - Interview with parent/grandparent
    - Staff interviews
    - Observations of student on five different days over three-week period
    - Environmental analysis
    - Data collection
    - Identification of problem behavior
    - Recommendations on goals and replacement behaviors

Positive Behavior Interventions/FBAs

- W.A. v. Panama-Buena Vista Union Sch. Dist. (Cal. 2024)
  - Court rejected parent's expert opinions for several reasons
    - Interview with mother, grandmother, and student lasted 30-45 minutes
    - Did not reach out to teachers or school assessors
    - Information he relied upon in testimony was not in his evaluation
    - No reason to doubt the accuracy of the information in the FBA
    - Behaviors he labeled as escape could also be labeled as access

Positive Behavior Interventions/BIPs

- *Boone v. Rankin County Public School District* (5th Cir. 2025)
  - Teenage male with severe autism
  - Obsessive-compulsive tendencies, aggression, self-harm, elopement
  - Placed at a therapeutic school for students with autism
  - Running from staff, smearing fecal matter, physical aggression
  - School proposed to move student from therapeutic school to middle school

Positive Behavior Interventions/BIPs

- *Boone v. Rankin County Public School District* (5th Cir. 2025)
  - Was the IEP individualized?
    - School had a behavior intervention plan to address elopement
    - During the hearing an employee testified that there was "nothing in the transition plan" where the school would begin using certain services or modifications in his BIP to address elopement.
    - Indications that the school knew what accommodations were required but did not plan to implement them.

Positive Behavior Interventions/BIPs

- *Boone v. Rankin County Public School District* (5th Cir. 2025)
  - Did the student benefit?
    - Principal letter said therapeutic school was not equipped to handle student
    - Principal noted student went from a seven-year-old at a first-grade level to a fourteen-year-old at a kindergarten level

Positive Behavior Interventions

- *Student v. Santa Monica-Malibu Unif. Sch. Dist.* (CA 2020)
  - Student's positive behavior support plan used evidence-based procedures to address his need to request access to tangible items, and his escape and elopement behavior.
  - Differential reinforcement of alternative behavior, functional communication response, combined with choices, stimulus fading in, and use of multiple schedules of reinforcement to create the setting for Student to request a break from tasks.
  - "Work first" picture card on the table, and then tell Student to work first, before a break.

Positive Behavior Interventions

- *Student v. Santa Monica-Malibu Unif. Sch. Dist.* (CA 2020)
  - Picture cards with two preferred activities, and Student could choose one after he completed his task.
  - "Errorless learning," a method of teaching procedures designed so the learner does not make mistakes
  - Praise Student for each correct response and give him a token.
  - Encourage Student to ask for a break.
  - Behavior log and graphs to monitor Student's progress.

Positive Behavior Interventions

- *Kimball Area Public Schools v. I.R.M.* (Minnesota 2025)
  - Eleven-year-old student with autism and other disabilities
  - Triggered by environment such as buses, coughing and paper being torn; being asked to wait
  - Self-injurious behaviors, aggression towards others, sometimes elopes
  - Hearing officer ruled that student needed a service dog to access FAPE

Positive Behavior Interventions

- *Kimball Area Public Schools v. I.R.M.* (Minnesota 2025)
  - Were there positive behavior supports?
    - PBSP based on an FBA, which identified biting and self-injurious behavior as a function of the behavior
    - Similar functions as identified by ABA provider
    - IEP includes similar instructional strategies used by ABA provider
    - Teaching replacement behaviors
    - Court found school created a "cohesive behavioral management plan"

Positive Behavior Interventions

- *Kimball Area Public Schools v. I.R.M.* (Minnesota 2025)
  - Was the dog required for FAPE as requested by parent?
    - Although parent maintains Delta is necessary to prevent elopement, Student rarely attempts to elope
    - School demonstrated in the IEP that Student can be redirected with verbal commands, light-up toy

Positive Behavior Interventions – Elopement

- One of the ways autism manifests is through elopement
- BCBA testified that it is the most difficult behavior to address

Positive Behavior Interventions – Elopement

- *North East Ind. Sch. Dist. v. I.M.*
  - I.M. is a student in San Antonio with Autism and Intellectual Disability
  - In elementary school he had issues with elopement and toileting
  - Parent requested year-round ESY to address these issues
  - IEP team determined I.M. needed ESY during the summer for six out of nine weeks
  - In fall semester he had roughly 10-15 elopements, including one where he ran off campus

Positive Behavior Interventions – Elopement

- North East Ind. Sch. Dist. v. I.M.
  - Was the IEP appropriately individualized?
    - IEP Goal
      - By the next annual ARD, when provided with AAC communication options, positive behavior supports, a transitioning visual schedule, and visual expectations, I.M. will stay with a designated staff member when transitioning and with within a designated setting 100% of the school days tracked

Positive Behavior Interventions – Elopement

- North East Ind. Sch. Dist. v. I.M.
  - Was the IEP appropriately individualized?

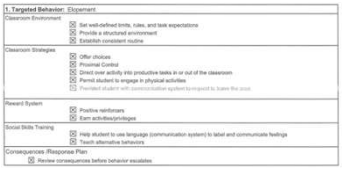
ACCOMMODATION	SUBJECT						
	Rdg	ELA	Math	SC	SS	SPL	APE
Behavior Support							
Allow for breaks	X	X	X	X	X	X	X
Establish rapport	X	X	X	X	X	X	X
First then/premack principle	X	X	X	X	X	X	X
Offer choices	X	X	X	X	X	X	X
Positive reinforcement	X	X	X	X	X	X	X
Provide directives in a variety of ways	X	X	X	X	X	X	X
Provide increased opportunities for movement	X	X	X	X	X	X	X
Provide structure and consistent classroom routine	X	X	X	X	X	X	X
Provide visual supports	X	X	X	X	X	X	X
Token economy system	X	X	X	X	X	X	
Use a visual schedule	X	X	X	X	X	X	X

Positive Behavior Interventions – Elopement

- North East Ind. Sch. Dist. v. I.M.
  - Was the IEP appropriately individualized?
    - ESY
      - Four weeks in 2020
      - Six weeks in 2021

Positive Behavior Interventions – Elopement

- North East Ind. Sch. Dist. v. I.M.
  - Was the IEP appropriately individualized?
    - Behavior Intervention Plan



1. Targeted Behavior: Elopement	
Classroom Environment	☒ Set well-defined limits, rules, and task expectations ☒ Provide a structured environment ☒ Establish consistent routine
Classroom Strategies	☒ Offer choices ☒ Proximal Control ☒ Direct over activity into productive tasks in or out of the classroom ☒ Permit student to engage in physical activities ☐ Provided student with communication system to request to leave the room
Reward System	☒ Positive reinforcers ☒ Earn activities/privileges
Social Skills Training	☒ Help student to use language (communication system) to label and communicate feelings ☒ Teach alternative behaviors
Consequences /Response Plan	☒ Review consequences before behavior escalates

Positive Behavior Interventions – Elopement

- North East Ind. Sch. Dist. v. I.M.
  - Was the IEP appropriately individualized?
    - Classroom environment
      - Well-defined limits
      - Removal of distractions
      - Structured environment
      - Consistent routine
      - Quiet place to regain control
      - Choices
      - Verbal reminders
      - Transitioning visual daily schedule
      - Each activities/privileges

Positive Behavior Interventions – Elopement

- North East Ind. Sch. Dist. v. I.M.
  - Was the IEP appropriately individualized?
    - Staff-to-Student Ratio

Learning new skills (acquisition)	1 : 3
Guided practice (fluency)	1 : 4
Maintenance/Generalization of skills	1 : 4
Unstructured times (i.e. lunch, recess)	1 : 2
Transition between activities	1 : 2
Transition between room/environments	2 : 1

Positive Behavior Interventions – Elopement

- North East Ind. Sch. Dist. v. I.M.
  - Was the IEP appropriately individualized?
    - Offered an in-home training evaluation
    - FBA identified elopement as occurring for sensory stimulation; parent agreed
    - Bus harness

Positive Behavior Interventions – Elopement

- North East Ind. Sch. Dist. v. I.M.
  - Was the IEP appropriately individualized?
    - SEHO
      - Failed to consider Student's need for ESY services appropriately.
      - When developing Student's IEP and BIP, the District also failed to consider all potential behavioral strategies, including providing additional ESY services to maintain critical behavioral skills.
      - The District recognized elopement was a critical skill for Student by providing and by conducting an FBA.
      - Student experienced significant regression in these two critical skills without recouping Student's losses in a reasonable time. Moreover, the failure to provide more ESY services puts Student at risk of substantial harm.

Positive Behavior Interventions – Elopement

- North East Ind. Sch. Dist. v. I.M.
  - Was the IEP appropriately individualized?
    - District Court
      - I.M.'s IEP clearly and thoroughly details I.M.'s academic progress, and includes measurable academic goals for speech, math, and written expression.
      - In this case, it was clearly documented that I.M. experienced regression on breaks longer than several days. Therefore, the Court concludes that, given I.M.'s circumstances--including his toileting and alarming elopement behaviors--his IEP was not sufficiently individualized to address his regression after school breaks and did not allow him to progress on these core non-academic goals.

Positive Behavior Interventions – Conclusion

1. Be proactive about conducting behavioral assessments
2. Involve parents in the assessments
3. The more significant the needs, the more intensive the supports/data collection

Teaching Strategies

- Texas Rule
  - Teaching strategies based on peer reviewed, research-based practices for students with autism
    - Those associated with discrete-trial training
    - Visual supports
    - Applied behavior analysis
    - Structured learning
    - Augmentative communication
    - Social skills training

Teaching Strategies

- Applied Behavior Analysis
  - Positive reinforcement to teach and promote social skills, communication abilities, learning and academic skills, and self-care habits.

Teaching Strategies

- Hawaii Disability Rights Center v. Kishimoto (9th Cir. 2024)
  - HDRC represents families of students with disabilities
  - Allege that the DOE and DHS deny students with autism with ABA therapy from clinicians
  - The state agencies limit the provision of in-school therapeutic services for such students to only those services deemed educationally relevant by DOE and to only those students approved by DOE.
  - So, unless DOE independently determines a student requires ABA for educational purposes and provides DOE-approved personnel for that purpose, a student with autism who has been medically prescribed ABA services will not receive services during the school day.

Teaching Strategies

- Hawaii Disability Rights Center v. Kishimoto (9th Cir. 2024)
  - Pursuant to the IDEA, DOE determines the need for educationally necessary ABA services to be provided during the school day.
  - DOE's policy is that these services "are to be provided by DOE and/or DOE contracted providers and may not be provided by a parent or parent's representative."
  - DOE's policy effectively bans *medically* prescribed ABA services from taking place at school, unless they are also deemed educationally necessary, even if the services are available without cost to DOE.
  - Also, DOE policy does not ensure that ABA or ABA-like services in school are provided by licensed providers.

Teaching Strategies

- Hawaii Disability Rights Center v. Kishimoto (9th Cir. 2024)
  - District Court dismissed the complaint
  - Ninth Circuit determined the IDEA claims were subject to exhaustion, but not the claims under Section 504 or the ADA
  - Case is now pending back in District Court

Teaching Strategies

- S.M. v. Hawai'I Dept. of Educ. (Hawaii Dist. Ct. 2011)
  - Parent filed a due process complaint against DOE
  - Main complaint is that the IEP did not specify the use of a particular methodology (Applied Behavior Analysis)
  - IEP says that school will use strategies consistent with Applied Behavioral Analysis methodology will be used

Teaching Strategies

- S.M. v. Hawai'I Dept. of Educ. (Hawaii Dist. Ct. 2011)
  - Educational methodologies are up to the DOE
  - "…once a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the States."
  - Parent was unable to show that the IEP can *only* be sufficient if it expressly specifies that ABA will be employed

Teaching Strategies

- *E.E. v. Norris School District* (Cal. 2023)
  - Parent filed due process complaint arguing ABA should be in the IEP
  - Hearing officer determined that issues of methodology is up to the school
    - "Student cited to no authority that requires a school district to specify in an IEP the qualifications of staff assigned to work with students."

Teaching Strategies

- *E.E. v. Norris School District* (Cal. 2023)
  - Parent appealed to federal court
  - Court said in some circumstances schools should specify a teaching methodology
  - "Case law establishes the need to specify a specific methodology when the record shows a consensus on the issue."
  - Four assessors were confident student needed a one-on-one aide trained in ABA

Teaching Strategies

- *Rogich v. Clark County School District* (Nev. 2021)
  - Student with a specific learning disability
  - Parent argued student needed an Orton-Gillingham program noted in the Student's IEP

Teaching Strategies

- *Rogich v. Clark County School District* (Nev. 2021)
  - Court made several key findings
    1. IEP team did not adequately review the evaluations or meaningfully consider Plaintiffs' concerns for enhancing the education of their child
    2. Ignored central findings of independent evaluations which stressed the importance of the delivery mechanism
    3. Student required a specific methodology that was (a) research-based, (b) systemic, (c) cumulative, and (d) rigorously implemented
    4. School did not have a program that was even close

Teaching Strategies – Conclusion

1. ABA can be a frequent area of discussion, but not always needed
2. Student may not require ABA for FAPE, but collaborating with student's private provider for recommendations on things they're working on in the clinic is good for:
   A. Consistency
   B. Collaboration
3. Principles of ABA?

Staff-to-Student Ratio

- Texas Rule
  - Suitable staff-to-student ratio appropriate to identified activities and as needed to achieve social/behavioral progress based on the student's developmental and learning level (acquisition, fluency, maintenance, generalization) that encourages work towards individual independence as determined by, for example:
    - (A) adaptive behavior evaluation results;
    - (B) behavioral accommodation needs across settings; and
    - (C) transitions within the school day

Staff-to-Student Ratio

- Examples:

Learning new skills (acquisition)	1 : 3
Guided practice (fluency)	1 : 4
Maintenance/Generalization of skills	1 : 4
Unstructured times (i.e. lunch, recess)	1 : 2
Transition between activities	1 : 2
Transition between room/environments	2 : 1

Staff-to-Student Ratio

- Examples:

Learning new skills (acquisition)	1 : 2
Guided practice (fluency)	1 : 2
Maintenance/Generalization of skills	1 : 2
Unstructured times (i.e. lunch, recess)	1 : 1
Transition between activities	1 : 2
Transition between room/environments	1 : 2

Suitable staff-to-student ratio appropriate to identified activities and as needed to achieve social/behavioral progress based on developmental and learning level*	Needed
is enrolled in a self-contained classroom not to exceed 13 students and three adults.	☑ Yes ☐ No

Staff-to-Student Ratio

- *Student v. Fremont Union Sch. Dist.* (California 2025)
  - Did student require one-on-one instruction?
    - Student did not require individual instruction but could benefit from specialized academic instruction in a group setting, with a one-to-one aide supporting him.
    - Progress Student had made over the previous school years while receiving group instruction.
      - Reduction in disruptive behaviors;
      - Working toward completing tasks more independently

Staff-to-Student Ratio

- *Banta v. Hayashi* (9th Cir. 2025)
  - Did school deny FAPE when current RBT was on maternity leave?
    - Student qualifies for special education with Autism
    - Delays in communication, motor skills, functional skills, social skills, academics, and coping skills impact his ability to participate fully and progress in a general education setting.
    - A Registered Behavior Technician ("RBT") was assigned to work with Student to provide one-to-one Applied Behavior Analysis ("ABA") services, implement the strategies in I.B.'s behavior intervention plan ("BIP"), and take data on I.B.'s behavior.
    - A Board-Certified Behavior Analyst frequently observed and supervised the RBT.
    - RBT went on maternity leave between August and November 2022
    - Hearing officer found a failure to implement the IEP

Staff-to-Student Ratio

- *Banta v. Hayashi* (9th Cir. 2025)
  - Did school deny FAPE when current RBT was on maternity leave?
    - The preferred course would have been to reconvene the IEP team.
    - There was no evidence that his aggressive behaviors at school increased during the RBT's maternity leave
    - Student continued to receive individualized support from other staff members and continued to make academic progress.

Staff-to-Student Ratio – Summary

1. Students may need a one-on-one support
2. Might not need it at all times
3. Does the data indicate problems during specific periods of time?

Transition Services – IDEA Rules

- *Transition services* means a coordinated set of activities for a child with a disability that—
  - (1) Is designed to be within a results-oriented process, that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child's movement from school to post-school activities, including postsecondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation;

Transition Services – IDEA Rules

- *Transition services* means a coordinated set of activities for a child with a disability that—
  - (2) Is based on the individual child's needs, taking into account the child's strengths, preferences, and interests; and includes—
    - (i) Instruction;
    - (ii) Related services;
    - (iii) Community experiences;
    - (iv) The development of employment and other post-school adult living objectives; and
    - (v) If appropriate, acquisition of daily living skills and provision of a functional vocational evaluation.
      - 34 C.F.R. § 300.43

Transition Services – IDEA Rules

- The definition of transition services is written broadly to include a range of services, including vocational and career training that is needed to meet the individual needs of a child with a disability. The definition states that decisions regarding transition services must be made on the basis of the child's individual needs, taking into account the child's strengths, preferences, and interests. 71 Fed. Reg. 46,579 (2006).

Transition Services – IDEA Rules

- Beginning not later than the first IEP to be in effect when the child turns 16, or younger if determined appropriate by the IEP Team, and updated annually, thereafter, the IEP must include—
  - (1) Appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and
  - (2) The transition services (including courses of study) needed to assist the child in reaching those goals.
    - 34 C.F.R. § 300.320

Transition Services

- Special Texas Rule
  - For all students, transition services must be considered when the student turns 14 years of age. 19 T.A.C. § 89.1055(k).
  - For students with autism, the IEP team must consider beginning at any age. . . futures planning for integrated learning and training, living, work, community, and educational environments that considers skills necessary to function in current and post-secondary environments, including self-determination and self-advocacy skills.

Transition Services – IDEA Rules

- IEP Team Membership
  1. Whenever appropriate, the public agency must invite a child with a disability to attend the child's IEP Team meeting if a purpose of the meeting will be the consideration of the postsecondary goals for the child and the transition services needed to assist the child in reaching those goals under § 300.320(b).
  2. If the child does not attend the IEP Team meeting, the public agency must take other steps to ensure that the child's preferences and interests are considered.
  3. To the extent appropriate, with the consent of the parents or a child who has reached the age of majority . . . the public agency must invite a representative of any participating agency that is likely to be responsible for providing or paying for transition services.

Transition Services

- IEP Team Membership – Special Washington Rule
  1. ~~Whenever appropriate~~, the public agency must invite a child with a disability to attend the child's IEP Team meeting if a purpose of the meeting will be the consideration of the postsecondary goals for the child and the transition services needed to assist the child in reaching those goals under § 300.320(b).

Transition Services – Revising the IEP

- Revising the IEP
  1. If a participating agency, other than the public agency, fails to provide the transition services described in the IEP the public agency must reconvene the IEP Team to identify alternative strategies to meet the transition objectives for the child set out in the IEP.
  2. Nothing in this part relieves any participating agency, including a State vocational rehabilitation agency, of the responsibility to provide or pay for any transition service that the agency would otherwise provide to children with disabilities who meet the eligibility criteria of that agency.

Transition Services

- Renee J. v. Houston ISD
  - Court said that student's autism made student's desire to be police officer "improbable."
  - Student's primary area of interest
  - Goals included researching careers in law enforcement and work habits necessary to be successful
  - Identify colleges with law enforcement programs
  - Goals also included daily living activities

Transition Services

- Butte Sch. Dist. No. 1 v. C.S. (9th Cir. 2020)
  - Age-appropriate transition assessments
  - Student given a career survey
  - Goals include determining which educational program will be right for him, adult placement setting up employment, and choosing adult services
  - Goals were measurable and appropriate for student
  - Job training, instruction in and use of public transportation, grocery shopping, cooking, laundry, community service projects, swimming at the public pool, personal fitness at the gym, setting up and tearing down school events and helping the custodian

Transition Services

- C.M.E. v. Shoreline Sch. Dist. (9th Cir. 2023)
  - Parent objected to transition assessment
  - School initiated a due process hearing
  - The School District reasonably included both the age appropriate transition assessment and the interview in its proposed initial evaluation

Transition Services

- C.M.E. v. Shoreline Sch. Dist. (9th Cir. 2023)
  - The School District was legally required to include an age appropriate transition assessment because W.P.B. was over the age of sixteen.
  - Parent objected to the interview because Student had a traumatic experience with a prior interview. In response, the School District asked to review "medical records containing a diagnosis or other information" which would affect Student's ability to participate in the interview and the transition assessment.

Transition Services

- Student v. Torrance Unified Sch. Dist. (2019)
  - Parent argued school failed to develop a transition plan for student with an intellectual disability
  - IEPs addressed Student's goals for potential post-secondary training or education, employment, and independent living, and connected those transition goals to Student's IEP goals.
  - The documents reflected Student's limited strengths, and the impairments that presented challenges to Student's post-secondary life.

Transition Services

- Student v. Torrance Unified Sch. Dist. (2019)
  - The IEP team reasonably anticipated that Student would enter an adult day program with community-based instruction and engaged in detailed planning for that transition.
  - The team formulated a tentative visitation and transition plan to an adult day program starting with initial meet and greet visits, and progressing to part-day visits with the goal of full transition to an adult day program by the time of Student's exit from the IDEA.

Transition Services

- S.G.W. v. Eugene Sch. Dist. (D. Ore. 2017)
  - Student with autism and emotional disturbance
  - Student's IEP set transition goals such as learning skills related to a job in the law, acquiring a part-time job in a legal office, and learning to cook, maintain an apartment, and make a budget.
  - The ALJ found those goals, while appropriate and measurable, were not based on age-appropriate transition assessments as required by the law.

Transition Services

- S.G.W. v. Eugene Sch. Dist. (D. Ore. 2017)
  - The IEP stated that student would take two "transitions" classes (finance and career), participate in a career day, and visit a local community college.
  - The ALJ found those recommendations insufficient because the courses were generally available to all students and thus not individualized to meet student's needs.
  - The ALJ also found the services actually provided were inadequate. Student never took the career transitions class and it is unclear whether student visited the community college. Although the career day was an appropriate transition service, the ALJ concluded it was insufficient, standing alone, to fulfill the IDEA's requirements.

Transition Services

- S.G.W. v. Eugene Sch. Dist. (D. Ore. 2017)
  - A school district must do more than enroll a student in generally available courses and send the student to one career day to comply with the IDEA's transition services requirement.
  - Showing educational harm is necessarily difficult to do with respect to transition services, which prepare a student for what will happen in the future. Academic and social success in high school is weak evidence that a student will succeed in the less structured environments of work and college. In view of the special difficulty of showing educational harm vis-a-vis a student's readiness to navigate a future transition, I conclude the ALJ reasonably relied on the only evidence available: the extent to which the transition services were individually tailored to meet student's needs.

Transition Services

- Forest Grove Sch. Dist. v. Student (D. Ore. 2014)
  - Student reading at a 2nd to 4th grade reading level.
  - IEP when student turned 16 contained no reference to transition plan
  - IEP when student was 17 states Student will access transition services during the senior year
  - That statement is inappropriate in this case where Student learns slowly, needs to be given small amounts of information at a time, and needs frequent repetition to retain information.

Transition Services

- Forest Grove Sch. Dist. v. Student (D. Ore. 2014)
  - Transition plan had goals for attending community college and driving
  - Educational curriculum focused on functional skills, cooking
  - District failed to base the transition plan on age-appropriate transition assessments. The only assessment the District conducted before finalizing the March 2011 IEP was a brief discussion between Student and a member of the IEP team about Student's "interests in employment, living arrangements, and transportation."

Transition Services

- *P.H. v. Seattle Public Schools* (Washington 2024)
  - Student has Autism
  - IEP team conducted FBAs and developed BIPs
  - Family worked with private providers on ABA therapy
  - Behavioral technician worked with Student and attended school with Student
  - In January 2020 IEP team determined Student no longer needed FBA or BIP.
  - Then COVID happened……

Transition Services

- *P.H. v. Seattle Public Schools* (Washington 2024)
  - Student returned in 2021-22
  - Frequent occurrences of aggressive behavior and school refusal
  - IEP team met
    - Added one-on-one behavioral technician
    - Bus monitor
    - One-on-one instructional assistant
  - Clinical psychologist discussed with family the possibility of residential placement
  - Outside provided determined they could not serve Student

Transition Services

- *P.H. v. Seattle Public Schools* (Washington 2024)
  - School held an IEP to discuss P.H.'s school-refusal behavior.
  - The IEP developed at the meeting provided for increased BT and BCBA support during the day and in the mornings at home to support P.H. with school refusal behaviors, as well as direct BCBA services.
  - School also offered to try different transportation for P.H., easing back to school using SCC, having a BT from SCC assist at home in the morning before school, and having an ABA agency assist the family.
  - School also recommended starting a new FBA and BIP to address the school-refusal behavior.

Transition Services

- *P.H. v. Seattle Public Schools* (Washington 2024)
  - Student continued with school refusal
  - School completed updated FBA and BIP
    - Interventions to include functional communication, gradual reinforcement of steps toward desired behavior
    - Reducing demands
    - Choice of activities
  - Student had mixed attendance record after

Transition Services

- *P.H. v. Seattle Public Schools* (Washington 2024)
  - Parents' expert noted the BIPs from October 2021 to May 2022 included strategies and interventions approaches that were well thought out, based on best practices in the field of behavior analysis, and explained in such a way that most paraprofessionals and direct care staff would understand.

Transition Services

- *P.H. v. Seattle Public Schools* (Washington 2024)
  - Given the limited period of time the BIP had been in place, there was inadequate data to confirm whether the FBA and BIP were failing or inadequate.
  - Critically, the goal of the BIP was not for P.H. to attend school on the first day, but to reinforce steps towards school reengagement given that immediate reattendance was too great a goal. There is evidence in the record that P.H. was making such steps in the limited window during which the BIP was in place.

Transition Services

- *S.G. v. San Dieguito Union High Sch. Dist.* (S.D. Cal. 2024)
  - Denial of FAPE for not taking into account student's transitional needs
  - Evidence was clear that student responded poorly to transitions
  - School's plan to immediately transfer student from residential facility to public school denied FAPE

Transition Services

- *Ross Valley Sch. Dist.* (CA Due Process Hearing 2014)
  - Student transitioning from private school to public school
  - Public school offered IEP that included:
    - General education placement for half the day
    - Behavioral services
    - Access to counseling on request
    - One-on-one aide
  - Change to a larger classroom could have detrimental effects on the child's mental health

Transition Services – Conclusion

1. Transitions can be important for students to connect them to public agencies/employment
2. Ensure student participation in the process
3. No "one size fits all" programs
4. Keep in mind students' needs for day-to-day transitions

Workshop 6

Dyslexia Eligibility, Goals and Services

By:

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Pacific Northwest Institute on Special Education and the Law
October 27-29, 2025
Bellevue, Washington

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Dyslexia Eligibility, Goals and Services

2025 PNW Institute

Presented by: Jan E. Tomsky

What We'll Cover . . .

- Dyslexia: Background and Definition
- Law and Guidance
  - Definition of "Specific Learning Disability"
  - SLD Eligibility Criteria
  - U.S. Department of Education Guidance
- Issues and Cases Related to Dyslexia
  - Child Find and Eligibility
  - Assessments
  - Goals, Methodology and Services

Background and Definition

Dyslexia vs. SLD: Distinction with a Difference?

Crofts v. Issaquah Sch. Dist. No. 411 (9th Cir. 2022) 80 IDELR 61

Facts

- Parents requested evaluation, believing student had dyslexia, based, in part, on independent assessment's conclusions
- District found student eligible under SLD category, with assessment report also citing to parents' assessor's findings
- Parents claimed district should have formally evaluated for dyslexia
- Parents asserted that district's evaluations was deficient because it did not use the term "dyslexia" in manner they preferred; sought IEE at public expense

Dyslexia vs. SLD: Distinction Without a Difference?

Crofts v. Issaquah Sch. Dist. No. 411 (9th Cir. 2022) 80 IDELR 61

Decision

- 9th Circuit upheld district's assessment, finding that it met all legal requirements (also finding that district's IEPs were appropriate); denied request for IEE
- District conducted battery of assessments to evaluate student's reading and writing skills areas that dyslexia could impact
- Insistence that district should have evaluated student for dyslexia rather than her difficulties with reading, writing, and spelling under the broader SLD category was "based on a distinction without a difference"

The Numbers

- 15-20% of the population has a language-based learning disability
- Of the students with specific learning disabilities receiving special education services, 70-80% have deficits in reading

(International Dyslexia Association, "About Dyslexia" (updated 2021); Decoding Dyslexia CA, "Frequently Asked Questions" (updated 2021))

Characteristics

- Specific reading disorder
- Does not reflect low intelligence
- Hereditary
- Affects individuals from different cultural, ethnic and socioeconomic backgrounds nearly equally

(International Dyslexia Association, "About Dyslexia" (updated 2021))

Definition

- "Specific learning disability that is neurobiological in origin"
- "Characterized by difficulties with accurate and/or fluent word recognition and by poor spelling and decoding abilities"
- "Deficit in the phonological component of language that is often unexpected in relation to other cognitive abilities and the provision of effective classroom instruction"

Definition (cont'd)

- "Secondary consequences may include problems in reading comprehension and reduced reading experience that can impede growth of vocabulary and background knowledge"
- International Dyslexia Association's definition has been cited verbatim by in due process decisions numerous occasions

(International Dyslexia Association, "About Dyslexia" (2021))

Dyslexia: The Law and Guidance

Definition of Specific Learning Disability

Disorder in one or more of the basic psychological processes involved in understanding or using spoken or written language, which manifests itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations

(34 C.F.R. § 300.8(c)(10))

Definition of Specific Learning Disability (cont'd)

- SLD does not include learning problems that are primarily the result of visual, hearing, or motor disabilities, of intellectual disability, of emotional disturbance, or of environmental, cultural, or economic disadvantage
- SLD includes conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, **dyslexia**, and developmental aphasia

(34 C.F.R. § 300.8(c)(10))

Need for Special Education

- Don't forget! Even if student meets SLD definition, second step in determining eligibility is that student must require special education and related services as a result of student's SLD
- Without such need, student cannot be found eligible

SLD Eligibility Criteria

- Whether student has severe discrepancy between intellectual ability and achievement in:
  - Oral expression
  - Listening comprehension
  - Written expression
  - Basic reading skill
  - Reading fluency skills
  - Reading comprehension
  - Mathematical calculation
  - Mathematical reasoning

(34 C.F.R. § 300.309(a)(1))

SLD Eligibility Criteria

- District may also determine SLD eligibility if student:
  - Does not achieve adequately for student's age

    and
  - Does not make progress when using RTI process or exhibits a pattern of strengths and weaknesses in performance, achievement, or both

(34 C.F.R. § 300.309(a)(2))

SLD Eligibility Criteria

- Findings must not be primarily result of:
  - Visual, hearing or motor disability;
  - Intellectual disability;
  - Emotional disturbance;
  - Cultural factors;
  - Environmental or economic disadvantage; or
  - Limited English proficiency

(34 C.F.R. § 300.309(a))

U.S. Department of Education Guidance

- Dear Colleague Letter (OSERS 2015) 66 IDELR 188
  - Emphasized that dyslexia can be an SLD
  - Encouraged districts to "consider situations where it would be appropriate to use the terms dyslexia, dyscalculia, or dysgraphia to describe and address the child's unique, identified needs through evaluation, eligibility, and IEP documents"

U.S. Department of Education Guidance

- Letter to Unnerstall (OSEP 2016) 68 IDELR 22
  - District is only required to assess particular areas related to suspected disability
  - If evaluation process reveals that a particular assessment for dyslexia is needed to ascertain disability and educational needs, then district must conduct such assessment

Federal Law

- In 2015, Congress passed the Research Excellence and Advancements for Dyslexia ("READ") Act, which aimed to expand the participation and achievement of learners with disabilities in STEM fields
- Research should focus on identifying dyslexia in younger learners, teacher training, curriculum development, and more
- READ act requires the National Science Foundation to oversee these efforts and dedicate $5 million annually for SLD research

State Laws

- All states have adopted laws that, in various ways, are specifically designed to address dyslexia in students
- Many state laws require teachers to undergo training on indicators of dyslexia and evidence-based interventions and accommodations
- As of 2024, at least 40 states laws requiring dyslexia screening for students in early grades (K-2)

Issues and Cases Related to Dyslexia

Child Find, Evaluations and Eligibility

Legal Overview – Child Find

- Triggered when district has knowledge of – or reason to suspect – student has disability
  - Threshold for suspicion is "relatively low"
  - Appropriate inquiry: Whether student should be referred, not whether student will qualify
  - Disability is "suspected," and therefore must be assessed by district, when district has notice that student has displayed symptoms of that disability

(Department of Educ. State of Hawaii v. Cari Rae S. (D. Hawaii 2001) 35 IDELR 90)

Child Find, Evaluations and Eligibility

Legal Overview – Child Find (cont'd)

- But courts have held that poor or declining grades, without more, do not necessarily establish that district has failed in its child find obligation
- Failing classes over short period of time is generally not enough notice to district that student may need special education assessment
- "The IDEA does not require a formal evaluation of every struggling student"

(Sherman v. Mamaroneck Union Free School Dist. (2d Cir. 2003) 39 IDELR 181)

Child Find, Evaluations and Eligibility

Legal Overview – Child Find (cont'd)

- Child find does not guarantee eligibility; it is merely a locating and screening process that is used to identify those children who are potentially in need of special education and related services
- Nor does child find requirements address disputes about content/results of assessments, eligibility categories, or IEP offers after children have been located and identified

Child Find, Evaluations and Eligibility

Legal Overview – Evaluations

- Evaluation process is:
  - Collection of information from variety of sources
  - Compilation of that information
  - Analysis of that information
  - Conclusions based on that analysis
    - Eligibility, strengths, academic and functional levels, needs
    - Documented on IEP

Child Find, Evaluations and Eligibility

Legal Overview – Evaluations (cont'd)

- Conducting the evaluation
  - Use a variety of assessment tools and strategies, including records review, interviews, observations and testing
  - Gather relevant functional and developmental information
  - Include information provided by the parent

Child Find, Evaluations and Eligibility

Legal Overview – Evaluations (cont'd)

- Include information related to enabling student to be involved in and progress in general curriculum
- To determine:
  - Whether the student qualifies or continues to qualify as student with disability; and, if so,
  - The content of, or revisions to, student's IEP

(34 C.F.R. § 300.303 through 34 C.F.R. § 300.306)

Case Example #1

Facts

- District identified struggles with reading and attention of elementary student with autism during his second year of kindergarten
- By third grade, student was receiving 75 minutes of specialized reading instruction each day
- Parents claimed district's failure to classify student as having dyslexia and ADHD in addition to autism amounted to denial of FAPE
- District Court agreed and required district to reimburse parents for private reading instruction

Case Example #1

Decision

- 8th Circuit reversed District Court, holding that failure to classify student as a student with dyslexia did not result in denial of FAPE
- Student made appropriate progress in reading during his second- and third-grade years
- Court stated that classification of student's disability is largely immaterial, provided district evaluates in all areas of suspected disability and develops IEP reasonably calculated to provide FAPE

(Minnetonka Pub. Schs., Indep. Sch. Dist. No. 276 v. M.L.K. (8th Cir. 2023) 81 IDELR 123)

Case Example #1

Case Law Lesson

- There may be times when student's IDEA classification entitles student to specific services or supports under state law
- In most instances, however, the name given to student's disability is not significant; the key question is whether district met student's disability-related needs

Case Example #2

Facts

- Student received private dyslexia diagnosis and, subsequently was evaluated for special education eligibility
- After conducting "a complete battery of assessments," including review of current work samples, teacher observations, and input from general education teacher, district found no severe discrepancy between student's learning aptitude and current academic achievement
- ALJ dismissed due process complaint challenging eligibility determination

Case Example #2

Decision

- District Court upheld ALJ's ruling, concluding evaluation process was thorough and met all legal requirements
- District's finding of no severe discrepancy was not sole criteria it used to determine eligibility
- Parents' IEE diagnosing dyslexia included no recommendation that student be found eligible or conclusion that she required SDI
- Even if district had found student to have SLD, the disability did not adversely affect her educational performance to point that she needed special education and related services

(P.B. and K.F. v. Ocean Township Bd. of Educ. (D.N.J. 2022, unpublished) 81 IDELR 261)

Case Example #2

Case Law Lesson

- While medical diagnosis may provide useful information during evaluation process, this case reinforces lesson that it doesn't entitle student to IDEA services unless student needs special education
- By highlighting that this student received good grades and improved her reading skills with minimal interventions, district demonstrated that the student's dyslexia did not adversely impact her educational performance and that she could succeed with Section 504 plan rather than IEP

Case Example #3

Facts

- District screened student for dyslexia in second grade and in fourth grade; test results did not indicate dyslexia
- Parents obtained IEE that diagnosed student with SLD in dyslexia
- District then evaluated student for Section 504 plan and implemented dyslexia RTI program
- Student was screened two more times and exited from program after eighth grade
- In ninth grade, parents requested special education evaluation, which district denied; parents then alleged that district violated child find

Case Example #3

Decision

- ALJ found in favor of parents – up until third grade, screening results did not reflect characteristics of dyslexia
- However, in fourth grade, IEE signaled that the student might qualify for special education
- District attempted to meet student's needs by enrolling her in dyslexia RTI program, but if RTI process fails, IDEA requires an initial evaluation
- District failed to meet its child find obligation when it received the IEE and did not evaluate
- Instead, it placed student in same program intended for students who failed its screening and applied "one-size-fits-all" dyslexia program

(Vilonia Sch. Dist. (SEA AR 2024) 124 LRP 35905)

Case Example #3

Case Law Lesson

- Although this district was "diligent" in administering several dyslexia screenings and implementing a "one-size-fits-all" dyslexia RTI program for several years, those measures, and Section 504 plan, did not meet IDEA's "low threshold" child find requirement
- IEE's diagnosis should have triggered evaluation meeting to determine areas of weakness, any educational impact, and whether district needed to remediate "surface dyslexia"

Goals

Legal Overview – Goals

- Every IEP must include statement of measurable annual goals, including academic and functional goals, designed to:
  - Meet needs of student that result from the disability to enable student to be involved in and make progress in general education curriculum; and
  - Meet each of other educational needs of student that result from student's disability

(34 C.F.R. § 300.320)

Goals

Legal Overview – Goals (cont'd)

- Each IEP also must contain description of how student's progress toward meeting annual goals will be measured and when periodic reports on such progress will be provided
  - Includes progress toward meeting postsecondary transition planning goals

(34 C.F.R. § 300.320)

Goals

Legal Overview – Goals (cont'd)

- Annual goals are statements that describe what student can reasonably be expected to accomplish within 12-month period
- IEP team must write IEP goals in way that allows for objective measurement of progress toward achieving those goals
- Annual IEP goals should be aligned with state academic content standards for grade in which student is enrolled

(Letter to Butler (OSERS 1988) 213 IDELR 118; 71 Fed. Reg. 46662 (2006))

Goals

Legal Overview – Goals (cont'd)

- Goals provide "a mechanism for determining
  - Whether the anticipated outcomes for the child are being met (i.e., whether the child is progressing in the special education program) and
  - Whether the placement and services are appropriate to the child's special learning needs

(Letter to Hayden (OSEP 1994) 22 IDELR 501)

Goals

Legal Overview – Goals (cont'd)

- Each IEP goal should have corresponding items of instruction or services
- Having goals without related programming indicates that district is not providing FAPE
- "Stranger test": Person in another district who is unfamiliar with student's IEP would be able to implement goal, assess student's progress on goal, and determine whether progress was satisfactory

(Sacramento City Unified Sch. Dist. v. R.H. (E.D. Cal. 2016) 68 IDELR 220; Mason City Community Sch. Dist. (SEA IA 2006) 46 IDELR 148)

Case Example #1

Facts

- In addition to providing student with 100 minutes a week of specialized instruction in reading to student with autism and dyslexia, district's IEPs included annual goals relating to executive functioning and social communication.
- Parent obtained private Lindamood-Bell tutoring to supplement reading instruction her son received at school, but it necessitated student being removed from classroom for portion of each day

Case Example #1

Decision

- Court reversed SRO's decision, determining that district's program allowed the student to make appropriate progress
- Private Lindamood-Bell tutoring, which required student to miss several hours of school each day, impeded progress in other areas
- "[The student's] goals in social communication and executive functioning, for example, are not advanced and are likely harmed by intensive [Lindamood-Bell] tutoring taking [him] out of the classroom"

(C.K. v. Board of Educ. of Sylvania City Sch. Dist. (N.D. Ohio 2021) 78 IDELR 65, aff'd in part, (6th Cir. 2022) 81 IDELR 212)

Case Example #1

Case Law Lesson

- In some instances, parents of students with disabilities may become so focused on their children's deficits in specific areas that they may lose sight of other agreed-upon IEP goals
- In such instances, it is important for IEP teams to remind parents of team's responsibility to develop and implement goals that address all of student's disability-related needs

Case Example #2

Facts

- District's IEP for high school Student with dyslexia contained two reading goals
- "Oral reading" goal: "By August 19, 2017, [Student] will read grade level text orally with 80% accuracy, at a fluency rate of 100 words per minute, and expression on successive readings as measured with 80 percent accuracy in 4 out of 5 trials by student work samples/teacher charted records"
- "Reading" goal: "By August 19, 2017, when given commonly used academic vocabulary words from core classes, [Student] will accurately read those words with 90 percent accuracy in 3 out of 4 trials."
- IEP also contained spelling goal

Case Example #2

Decision

- ALJ: Goals proposed by District failed to meet required standards
- Oral reading goal overlooked fact that Student's inability to read fluently was result of his inability to decipher words as he read
- Goal was not measurable and failed to show direct relationship between present levels of performance and services to be provided
- Other reading goal was essentially based on memorization and did not meet Student's need to learn how to decode unfamiliar words
- Spelling goal failed to address fundamental spelling deficits

(Liberty Union High Sch. Dist. (SEA CA 2017) 71 IDELR 49)

Case Example #2

Case Law Lesson

- IEP goals must be measurable and designed to enable student to make progress
- To develop appropriate goals, IEP team first must recognize student's unique needs and write goals capable of tracking the student's improvement through provision of specialized instruction
- Here, goals did not address student's unique needs because drafter of goals was operating on a mistaken belief that district had no obligation to provide fundamental skills remediation at the high school level

IEPs, Services and Endrew F. Standard of FAPE

Legal Overview – FAPE Standard (cont'd)

- In order to meet their substantive obligation to provide FAPE under IDEA, districts must offer IEPs that are "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"
- Program must be "appropriately ambitious"
- Supreme Court declined to establish any "bright-line" standards for IEPs
- "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created"

(Endrew F. v. Douglas County Sch. Dist. RE-1 (2017) 69 IDELR 174)

IEPs, Services and Endrew F. Standard of FAPE

Legal Overview – FAPE Standard (cont'd)

- "The 'reasonably calculated' qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials"
- "The [IDEA] contemplates that this fact-intensive exercise will be informed not only by the expertise of school officials, but also by the input of the child's parents. . . ."

(Endrew F. v. Douglas County Sch. Dist. RE-1 (2017) 69 IDELR 174)

IEPs, Services and Endrew F. Standard of FAPE

Legal Overview – FAPE Standard (cont'd)

- Courts should not "substitute their own notions of sound educational policy for those of the school authorities which they review"
- "By the time any dispute reaches court, school authorities will have had a complete opportunity to bring their expertise and judgment to bear on areas of disagreement. A reviewing court may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances"

(Endrew F. v. Douglas County Sch. Dist. RE-1 (2017) 69 IDELR 174)

Case Example #1

Facts

- When IEP team convened in student's second-grade year, student was reading and writing at kindergarten level despite having received full year of specialized instruction using SPIRE reading method
- Student's special education teacher identified orthographic processing as his "biggest challenge"
- District proposed incremental increases in amount of specialized instruction and did not further evaluate his orthographic issues or reconsider type of specialized reading instruction he might need

Case Example #1

Decision

- 1st Cir: District denied FAPE when it failed to adjust educational methodology in response to student's lack of appropriate progress
- Methodologies used by district did not allow student to make progress in light of his circumstances
- Although IEP team amended IEP to include Lindamood-Bell instruction after private evaluators indicated student needed that methodology to make progress, special education teacher could not implement that program without assistance

(Falmouth Sch. Dept. v. Mr. and Mrs. Doe (1st Cir. 2022) 81 IDELR 151)

Case Example #1

Case Law Lesson

- While districts have substantial leeway in deciding which educational methodology to use, if student is not making appropriate progress with a particular methodology, district should reconvene IEP team to discuss whether different methodology would be more effective
- In this case, evaluative data indicated student needed Lindamood-Bell instruction to address ongoing deficits with orthographic processing
- Had district included that methodology in student's IEP and provided that instruction faithfully, student might have made appropriate progress despite his significant deficits

Case Example #2

Facts

- High-school student with dyslexia relied on artificial intelligence bots and text-to-speech programs to complete assignments
- Student had 3.4 GPA and was on track to graduate high school with his peers
- Student's teachers repeatedly expressed concerns about his inability to read or even spell his name consistently
- District's IEPs, however, focused on fluency and expression instead of basic reading concepts like phonetics and letter recognition

Case Example #2

Decision

- District court upheld an ALJ's decision that district's failure to address student's lack of basic reading skills amounted to denial of FAPE
- Tennessee's "Say Dyslexia Act" requires districts to provide dyslexia-specific interventions to any student suspected of having dyslexia
- District did not provide goals/services related to foundational reading skills
- Student's academic success stemmed from use of assistive technology and AI as opposed to improvement in his reading abilities
- Court upheld ALJ's award of 888 hours of Wilson Reading System

(W.A. v. Clarksville-Montgomery Co. Sch. Sys. (M.D. Tenn. 2024) 124 LRP 16411)

Case Example #2

Case Law Lesson

- Although student in this case was unable to read, district did not develop any goals or offer any services related to foundational reading skills
- District might have satisfied its FAPE obligation had it prioritized dyslexia-specific interventions instead of allowing student to become wholly dependent on assistive technology

Case Example #3

Facts

- District provided sixth-grade student with dyslexia with reading instruction that used structured literacy methodology
- Student earned passing marks, progressed from grade to grade, and accessed the general education curriculum at her grade level.
- Parents claimed district denied student FAPE by failing to adopt specific recommendations in IEE report, which resulted in student's failure to make appropriate progress in reading, writing and math

Case Example #3

Decision

- Court agreed with ALJ that IEP in this case was reasonably calculated to provide student with FAPE
- District provided the student with reading instruction that used structured literacy methodology -- the same type of program independent evaluator had recommended
- "Although [parents] prefer that [student's] IEP include the specific recommendations outlined in [the independent evaluator's] report, [the] IEP need not necessarily provide the particular 'optimal level of services' that her parents might desire"

(M.S. v. Scotch Plains Fanwood Reg'l Bd. of Educ. (D.N.J. 2024) 124 LRP 15618)

Case Example #3

Case Law Lesson

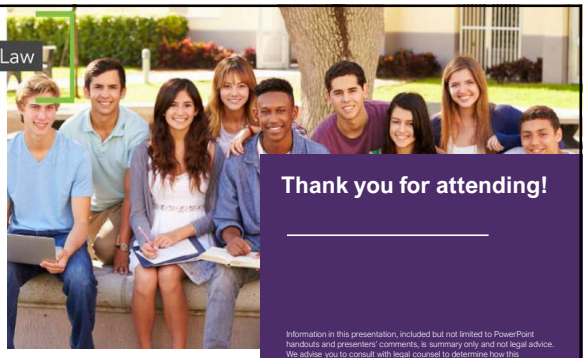
- So long as district can show student's progress was appropriate in light of student's circumstances under Endrew F. standard, it should be able to prove that it satisfied its FAPE obligations
- This district demonstrated that student's reading decoding scores improved each year, and that she performed above proficiency level in sixth grade, which undercut IEE's opinion that student could have made even greater progress if district had provided more intensive reading program

Final Thoughts

- Cases discussed today illustrate key issues in determining eligibility and providing appropriate services to students with dyslexia
- But it's also essential to establish and maintain a collaborative relationship with parents
- Develop and foster a culture that places priority on students and their needs!

Questions?

F3 Law



Thank you for attending!

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Workshop 7

Thoughts on Distinguishing DEI from Legal Compliance under IDEA and Section 504

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Pacific Northwest Institute on Special Education and the Law
October 27-29, 2025
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Thoughts on Distinguishing DEI from Legal Compliance under IDEIA and Section 504

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A little housekeeping…

- **The slides and the presentation are not legal advice.** Facts, state law, and local policy can make a tremendous difference. Consult with your school attorney before changing your policies and practices.
- The issues and dynamics involved in this presentation are subject to multiple opinions and interpretations. This presentation and materials are Dave's thoughts. Again, consult with your school attorney before changing your policies and practices.
- The slides are intended as a comprehensive analysis of these issues and dynamics. The slides and presentation are designed to lay out the relevant issues and challenges as viewed by the author. Internal citations in quotations are omitted for ease of reading.
- Language in bold is emphasis added by Dave
- While the actions and events relevant to this topic are changing constantly, **these materials were prepared in mid-August 2025 to meet the conference deadline.**

A little housekeeping…

- Dave will do his best to suppress personal opinion with respect to the changes in priorities and enforcement. Please do the same.
- **Whether the administration's approach to DEI, the transformation of OCR and the shifting priorities in civil rights enforcement are good or bad, right or wrong, too much or too little, etc., is not addressed by this presentation.**
- Focus on where we are, and what to do to serve our students with disabilities.
  - **How do schools comply with federal disability law and not run afoul of the changing environment and enforcement priorities targeting DEI?**

Complexities in the Current Compliance Environment

A few priorities of the new administration impacting federal disability law compliance

- Root out DEI
- Close or minimize U.S. Department of Education (ED)
- Diminish OCR and refocus its enforcement activities

- We'll look at these factors as they intersect and impact school district compliance with IDEA and Section 504.
- We begin with civil rights and efforts to eliminate DEI impacting those rights.

A Primer on Protected Classes and Civil Rights

Civil Rights Law Basics

Civil rights or nondiscrimination laws inherently require a change in behavior toward an identified class of protected people.

- Civil rights laws are created to protect minority populations from what is often referred to as "the tyranny of the majority."
- When a group has been subjected to historical discrimination but lacks the numbers to protect itself at the polls, civil rights laws make discriminatory behavior illegal.
- **That government says "stop" doesn't quickly change prejudices and discriminatory thinking.**

Civil Rights & Changing Behavior
https://www.justice.gov/crt/federal-protections-against-national-origin-discrimination-1

The U.S. Department of Justice (DOJ) identifies various protective classes as follows:

- "Federal laws prohibit discrimination based on a person's national origin, race, color, religion, disability, sex, and familial status."

A Little Dave Commentary: We begin with a look at *Brown v. Bd of Topeka.* Note that the basis of discrimination differs among the protected classes.

Public Education & "Separate but Equal"
Brown v. Topeka Bd. of Educ., 107 LRP 36247, 347 U.S. 483 (1954).

A landmark ruling on race discrimination in education in 1954:

- "Today, education is perhaps the most important function of state and local governments….
- "Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."
- **"Separate but equal has no place. Separate educational facilities are inherently unequal."**

Public Education & "Separate but Equal"
Brown v. Topeka Bd. of Educ., 107 LRP 36247, 347 U.S. 483 (1954).

- The emotion or feelings that motivate discrimination is not easily "legislated away."
  - "With the decision in *Brown*, the war against segregation began but did not end in the courts. **Throughout the country, there was resistance, often massive resistance…** often backed by political leaders and battle after battle would have to be fought to overcome it."

See John F. Kennedy Presidential Library and Museum. *50th Anniversary of Brown v. Board of Education.* (2004). Retrieved from *https://www.jfklibrary.org/events-and-awards/kennedy-library-forums/past-forums/transcripts/50th-anniversary-of-brown-v-board-of-education.*

Public Education & Disability
§ 504 of the Rehabilitation Act of 1973

- In the Rehabilitation Act of 1973, **persons with disability were recognized by Congress as a protected class** and provided with nondiscrimination protection.
  - "No otherwise qualified individual with a disability in the United States… shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination **under any program or activity receiving Federal financial assistance** ...." 29 USC 794(a).

Section 504 was required due to Indifference
Alexander v. Choate, 556 IDELR 293, 469 U.S. 287 (1985).

- "Discrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of **thoughtlessness and indifference**—of **benign neglect."**
- "Thus, Representative Vanik, introducing the predecessor to § 504 in the House, described the **treatment of the handicapped as one of the country's 'shameful oversights,'** which caused the handicapped to live among society 'shunted aside, hidden, and ignored.'"

Section 504 was required due to Indifference
Alexander v. Choate, 556 IDELR 293, 469 U.S. 287 (1985).

- "Federal agencies and commentators on the plight of the handicapped similarly have found that **discrimination against the handicapped is primarily the result of apathetic attitudes rather than affirmative animus."**
- *A Little Dave Commentary:* Note that neglect sadly appears in much of 504's history and seems to grow more freely post-pandemic.

Congressional Findings giving rise to § 504

- In 1973, "Congress finds that—
  - (1) millions of Americans have one or more physical or mental disabilities and the number of Americans with such disabilities is increasing;
  - (2) individuals with disabilities constitute one of the most disadvantaged groups in society….
  - "(5) individuals with disabilities continually encounter various forms of discrimination in such critical areas as **employment,** housing, **public accommodations, education,** transportation, communication, recreation, institutionalization, health services, voting, and public services;"

Congressional Findings giving rise to § 504

In 1973, "Congress finds that—

- "(6) the goals of the Nation properly include the goal of providing individuals with disabilities with the tools necessary to—
  - (A) make informed choices and decisions; and
  - (B) **achieve equality of opportunity, full inclusion and integration in society**, employment, independent living, and economic and social self-sufficiency, for such individuals…."

In 1990, Congress passed the **Americans With Disabilities Act (ADA)** which adopted the Section 504 civil rights approach and broadened the reach beyond recipients of federal funds. The ADA was amended in 2008 by the **Americans With Disabilities Act Amendments Act.**

Special Ed: Protections Beyond Civil Rights

- The IDEIA or Special Ed is sometimes referred to as a civil rights law even though **it does not follow the pattern of focusing on equality of opportunity to participate and benefit.** Instead, **it focuses on providing specially designed instruction to eligible students.**
- The author sees it more as an entitlement statute, as the IDEIA FAPE is not a comparison to nondisabled peers (equality is not the test for FAPE) but instead, special ed FAPE is focused on the student at issue and the creation of an IEP for that student that is calculated to provide meaningful benefit in light of that student's circumstances.
- While the elimination of DEI is focused on civil rights law, special ed students by receiving services, rights and benefits exclusive to students with disabilities, can be impacted by DEI concerns as well.

Congressional Findings giving rise to Special Ed
20 U.S.C. § 1400(c)(2)

"Before the date of enactment of the Education for All Handicapped Children Act of 1975 (Public Law 94–142), the educational needs of millions of children with disabilities were not being fully met because—

(A) the children did not receive appropriate educational services;
(B) the children were excluded entirely from the public school system and from being educated with their peers;
(C) undiagnosed disabilities prevented the children from having a successful educational experience; or
(D) a lack of adequate resources within the public school system forced families to find services outside the public school system."

U.S. Supreme Court: "Reverse Discrimination"
Ames v. Ohio Department of Youth Services, 125 LRP 17312 (U.S. 2025).

The Facts (as recited by the Supreme Court):

- "The Ohio Department of Youth Services operates the State's juvenile correctional system. In 2004, the **agency hired petitioner Marlean Ames, a heterosexual woman, to serve as an executive secretary.** Ames was **eventually promoted to program administrator** and, in 2019, **applied for a newly created management position** in the agency's Office of Quality and Improvement. Although the agency interviewed her for the position, **it ultimately hired a different candidate—a lesbian woman—to fill the role."**

U.S. Supreme Court: "Reverse Discrimination"
Ames v. Ohio Department of Youth Services, 125 LRP 17312 (U.S. 2025).

The Facts (as recited by the Supreme Court):

- **"A few days after Ames interviewed for the management position, her supervisors removed her from her role as program administrator. She accepted a demotion** to the secretarial role she had held when she first joined the agency--a move that resulted in a significant pay cut.
- **The agency then hired a gay man to fill the vacant program-administrator position.** Ames subsequently filed this lawsuit against the agency under Title VII, alleging that she was denied the management promotion and demoted because of her sexual orientation."

U.S. Supreme Court: "Reverse Discrimination"

Ames v. Ohio Department of Youth Services, 125 LRP 17312 (U.S. 2025).

How does Title VII work?

"Title VII's disparate-treatment provision bars employers from intentionally discriminating against their employees on the basis of race, color, religion, sex, or national origin. In *McDonnell Douglas,* this Court laid out a three-step burden-shifting framework for evaluating claims arising under that provision.

The McDonnell Douglas framework aims to 'bring the litigants and the court expeditiously and fairly to th[e] ultimate question' in a disparate-treatment case—namely, whether 'the defendant intentionally discriminated against the plaintiff.'"

U.S. Supreme Court: "Reverse Discrimination"

Ames v. Ohio Department of Youth Services, 125 LRP 17312 (U.S. 2025).

The District Court & 6th Circuit ruling:

The court reasoned that Ames, as a straight woman, was required to make this showing 'in addition to the usual ones for establishing a prima-facie case.' And it explained that **plaintiffs can typically satisfy this burden, where applicable, by presenting 'evidence that a member of the relevant minority group (here, gay people) made the employment decision at issue, or with statistical evidence showing a pattern of discrimination ... against members of the majority group.'**

The panel concluded that the agency was entitled to summary judgment because Ames had failed to present either type of evidence."

U.S. Supreme Court: "Reverse Discrimination"

Ames v. Ohio Department of Youth Services, 125 LRP 17312 (U.S. 2025).

The District Court & 6th Circuit ruling:

"Like the District Court, the Sixth Circuit held that Ames had failed to meet her prima facie burden because she had not shown **'background circumstances** to support the suspicion that the defendant is that unusual employer who discriminates against the majority.'"

U.S. Supreme Court: "Reverse Discrimination"

Ames v. Ohio Department of Youth Services, 125 LRP 17312 (U.S. 2025).

The Law:
"Title VII's disparate-treatment provision bars employers from intentionally discriminating against their employees on the basis of race, color, religion, sex, or national origin. For most plaintiffs, the first step of the McDonnell Douglas framework—stating a prima facie case of discrimination—is 'not onerous.'

The Sixth Circuit's 'background circumstances' rule requires plaintiffs who are **members of a majority group to bear an additional burden at step one.** But the text of Title VII's disparate-treatment provision draws no distinctions between majority-group plaintiffs and minority-group plaintiffs. The provision focuses on individuals rather than groups, barring discrimination against 'any individual' because of protected characteristics. Congress left no room for courts to impose special requirements on majority-group plaintiffs alone.'"

U.S. Supreme Court: "Reverse Discrimination"

Ames v. Ohio Department of Youth Services, 125 LRP 17312 (U.S. 2025).

Supreme Court ruled:

"The Sixth Circuit's 'background circumstances' rule—which requires members of a majority group to satisfy a heightened evidentiary standard to prevail on a Title VII claim—cannot be squared with the text of Title VII or the Court's precedents."

U.S. Supreme Court: "Reverse Discrimination"

Ames v. Ohio Department of Youth Services, 125 LRP 17312 (U.S. 2025).

A Little Dave Commentary: While *Ames* is clearly not a school case, it provides interesting insight into a changing focus of civil rights law.

- Civil rights laws are based on the idea that a particular population or group is subjected to historical discrimination and lacks the ability to protect itself due to limited political power (the group is a numerical minority, for example).
- The assumption in civil rights law is that individuals who are not part of the anticipated protected class are not in need of legal protection from the civil rights law—hence an additional requirement for a member of a majority group (here, heterosexuals) seeking protection.
- The rejection of the additional pleading requirement (here, the background circumstances rule) is a signal that the minority group may no longer need protection and/or that the law is causing discrimination against majority groups.

U.S. Supreme Court: "Reverse Discrimination"

Ames v. Ohio Department of Youth Services, 125 LRP 17312 (U.S. 2025).

A Little More Dave Commentary:

- The most striking thing about the case, in the author's opinion is that it seems to accept *a premise* of current efforts to eradicate DEI.
- **The question: At what point does a nondiscrimination law intended to address the rights of a protected minority group become discriminatory against members of a majority group?**

Efforts to Eliminate Diversity, Equity and Inclusion (DEI)

What is DEI? A Few Words About Words

- DEI is not defined in law nor is a definition provided by Executive Orders designed to eliminate it. Undisputed is that the acronym DEI is comprised of the words "diversity," "equity" and "inclusion."
- When grouped together under the acronym DEI, the three words now label actions, policy or thinking that violates civil rights and must be eliminated.
- **The result can be confusing to public educators attempting to comply with federal disability law.** For example, in the disability world, the terms "equity" and "inclusion" (and related terms like "equality" and "mainstreaming") have been utilized for years in both IDEA and Section 504/ADA.

What is DEI? A Few Words About Words

Until recently, each of the three words was viewed as something acceptable and worth pursuing in the context of civil rights.

- **"Diversity"** per Merriam-Webster, is defined as **"**the condition of having or being composed of differing elements**:** VARIETY *especially***:** the inclusion of people of different races."
- Per Merriam-Webster, the first definition of **"equity"** is "fairness or justice in the way people are treated." Equality of opportunity to participate and benefit is central to Section 504's mandate and language.
- Per Merriam-Webster, the first definition of **"inclusion"** is "the act of including: the state of being included." Section 504 expressly requires that students with disability are "not excluded from participation" in the school's programs and activities. IDEIA's LRE mandate identifies the regular education classroom as the student's default placement.

What is DEI? A Few Words About Words

A Little Dave Commentary:

- In summary, while independently the words "diversity," "equity" and "inclusion" seem innocuous, taken together they identify a movement or philosophy that, according to Executive Orders #14151, #14173 & #14168 must be eliminated from government to prevent discrimination.
- Analysis of these Executive Orders and actions undertaken by the administration to eliminate DEI can provide a working definition of DEI to help schools chart a safe path.
- Perhaps the best starting place for answers is in the administration's Executive Order #14151 "Ending Radical and Wasteful Government DEI Programs."

Executive Order #14151: Eliminating DEI

Ending Radical And Wasteful Government DEI Programs And Preferencing, Executive Order 14151, 90 Fed.Reg. No. 18, p. 8339 (January 20, 2025).

- "Section 1. Purpose and Policy. The Biden Administration forced illegal and immoral discrimination programs, going by the name ''diversity, equity, and inclusion'' (DEI), into virtually all aspects of the Federal Government, in areas ranging from airline safety to the military. **This was a concerted effort stemming from President Biden's first day in office, when he issued Executive Order 13985, 'Advancing Racial Equity and Support for Under-served Communities Through the Federal Government.'**
- Pursuant to Executive Order 13985 and follow-on orders, **nearly every Federal agency and entity submitted 'Equity Action Plans' to detail the ways that they have furthered DEI's infiltration of the Federal Government.** The public release of these plans demonstrated immense public waste and shameful discrimination. **That ends today."**

Executive Order #14151: Eliminating DEI

Ending Radical And Wasteful Government DEI Programs And Preferencing, Executive Order 14151, 90 Fed.Reg. No. 18, p. 8339 (January 20, 2025).

Implementation. The Attorney General and various others are directed to "**coordinate the termination of all discriminatory programs,** including illegal DEI and 'diversity, equity, inclusion, and accessibility' (DEIA) mandates, policies, programs, preferences, and activities in the Federal Government, under whatever name they appear."

- To that end, the AG and others "shall review and revise, as appropriate, all existing Federal employment practices, union contracts, and training policies or programs to comply with this order.
- **Federal employment practices,** including Federal employee performance reviews, **shall reward individual initiative, skills, performance, and hard work and shall not under any circumstances consider DEI or DEIA factors, goals, policies, mandates, or requirements."**

Executive Order #14151: Eliminating DEI

Ending Radical And Wasteful Government DEI Programs And Preferencing, Executive Order 14151, 90 Fed.Reg. No. 18, p. 8339 (January 20, 2025).

Implementation (cont'd). "Each agency, department, or commission head… shall take the following actions within sixty days of this order:

- "**terminate, to the maximum extent allowed by law, all DEI, DEIA, and 'environmental justice' offices and positions** (including but not limited to 'Chief Diversity Officer' positions); all 'equity action plans,' 'equity' actions, initiatives, or programs, 'equity-related' grants or contracts; and all DEI or DEIA performance requirements for employees, contractors, or grantees."
- Among other actions consistent with the elimination order, agencies and departments were also required to **provide a list** of positions, programs, services, activities, and expenditures that "have been **misleadingly relabeled** in an attempt to preserve their pre-November 4, 2024 function[.]"

Executive Order #14151: Eliminating DEI

Ending Radical And Wasteful Government DEI Programs And Preferencing, Executive Order 14151, 90 Fed.Reg. No. 18, p. 8339 (January 20, 2025).

"General Provisions.

(a) Nothing in this order shall be construed to impair or otherwise affect:

- **(i) the authority granted by law to an executive department or agency, or the head thereof;** or
- (ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations."

Executive Order #14173: End Discrimination, Restore Merit

Ending Illegal Discrimination and Restoring Merit-Based opportunity, Executive Order 141173, 90 Fed.Reg. No. 20, p. 8633 (January 21, 2025).

"Longstanding Federal civil-rights laws protect individual Americans from discrimination based on race, color, religion, sex, or national origin. These civil-rights protections serve as a bedrock supporting equality of opportunity for all Americans….

Yet today, roughly 60 years after the passage of the Civil Rights Act of 1964, **critical and influential institutions of American society,** including the Federal Government, major corporations, financial institutions, the medical industry, large commercial airlines, law enforcement agencies, and institutions of higher education **have adopted and actively use dangerous, demeaning, and immoral race- and sex-based preferences under the guise of so-called 'diversity, equity, and inclusion' (DEI) or 'diversity, equity, inclusion, and accessibility'(DEIA)** that can violate the civil-rights laws of this Nation."

Executive Order #14173: End Discrimination, Restore Merit

Ending Illegal Discrimination and Restoring Merit-Based opportunity, Executive Order 141173, 90 Fed.Reg. No. 20, p. 8633 (January 21, 2025).

"Illegal DEI and DEIA policies not only violate the text and spirit of our longstanding Federal civil-rights laws, they also undermine our national unity, as they deny, discredit, and undermine the traditional American values of hard work, excellence, and individual achievement in favor of an unlawful, corrosive, and pernicious identity-based spoils system. **Hard-working Americans who deserve a shot at the American Dream should not be stigmatized, demeaned, or shut out of opportunities because of their race or sex."**

"….Yet in case after tragic case, the American people have witnessed first-hand the disastrous consequences of illegal, **pernicious discrimination** that has **prioritized how people were born instead of what they were capable of doing."**

Executive Order #14173: End Discrimination, Restore Merit

Ending Illegal Discrimination and Restoring Merit-Based opportunity, Executive Order 141173, 90 Fed.Reg. No. 20, p. 8633 (January 21, 2025).

"I therefore order all executive departments and agencies (agencies) to terminate all discriminatory and illegal preferences, mandates, policies, programs, activities, guidance, regulations, enforcement actions, consent orders, and requirements. I further order all agencies to enforce our longstanding civil-rights laws and to combat illegal private-sector DEI preferences, mandates, policies, programs, and activities."

Note: This Order rescinds a list of other Executive Orders on diversity dating back to 1965.

Executive Order #14173: End Discrimination, Restore Merit

Ending Illegal Discrimination and Restoring Merit-Based opportunity, Executive Order 141173, 90 Fed.Reg. No. 20, p. 8633 (January 21, 2025).

"The heads of all agencies, with the assistance of the Attorney General, shall take all appropriate action with respect to the operations of their agencies to **advance in the private sector the policy of individual initiative, excellence, and hard work** identified in section 2 of this order."

Agency heads were also tasked with identifying "up to nine potential civil compliance investigations of publicly traded corporations, large non-profit corporations or associations, foundations with assets of 500 million dollars or more, State and local bar and medical associations, and institutions of higher education with endowments over 1 billion dollars[.]"

Department of Justice: Race & Sex-based Preferences are DEI

Office of the Attorney General, *Implementation of Executive Orders 14151 and 14173: Eliminating Unlawful DEI Programs in Federal Operations* (DOJ March 21, 2025).

The focus these two orders is eliminating race and sex preferences.

"In those Executive Orders, President. Trump directed the immediate termination of race- and sex-based preference programs operating under the banner of 'diversity, equity, and inclusion' (DEI) throughout the federal government. As the President explained, **'dangerous, demeaning, and immoral race- and sex-based preferences under the guise of so-called "diversity, equity, and inclusion"' violate the civil rights laws of this country** and will no longer be tolerated—least of all within our own government."

Note: Implicit in the Orders is a recognition that civil rights laws protect majority populations as well. Consider *Ames v. Ohio Department of Youth Services.*

July DOJ guidance on #14151 & #14173

Eliminating Diversity, Equity and Inclusion (DEI) by Recipients of Federal Funds

A Little Dave Commentary: The lack of a specific reference to disability appears to exclude disability-based decisions from the conversation.

- Further, when DOJ states "Entities receiving federal funds must comply with applicable civil rights laws," it lists Title VI, Title VII, Title IX and the Equal Protection Clause of the 14th Amendment. While the list is not intended to be exclusive, the lack of reference to disability here seems to de-emphasize anti-DEI focus on disability-based civil rights laws. **Note that EEOC subtly includes disability in the DEI discussion (see below)**
- As noted below, IDEA and Section 504 FAPE specifically provide for exclusive placements, services and rights based on eligibility as a student with a disability.

Equal Employment Opportunity Commission on DEI

EEOC, *What You Should Know About DEI-Related Discrimination at Work*, https://www.eeoc.gov/wysk/what-you-should-know-about-dei-related-discrimination-work

- EEOC is on what constitutes illegal DEI with respect to race and sex in the workplace.
  - "Under Title VII, **DEI** initiatives, policies, programs, or practices **may be unlawful if** they involve an employer or other covered entity taking an **employment action motivated**—in whole or in part—by an employee's or applicant's race, sex, **or another protected characteristic."**

Equal Employment Opportunity Commission on DEI

EEOC is tasked with enforcing Title VII on race and sex discrimination in the workplace.

"**Do Title VII's protections only apply to individuals who are part of a 'minority group,'** (such as racial or ethnic minorities, workers with non-American national origins, 'diverse' employees, or 'historically under-represented groups'), women, or some other subset of individuals?

> **No. Title VII's protections apply equally to all workers.** Different treatment based on race, sex, or another protected characteristic can be unlawful discrimination, no matter which employees or applicants are harmed. This has been the long-standing position of the EEOC and the Supreme Court. The EEOC does not require a higher showing of proof for so-called 'reverse' discrimination claims. **The EEOC's position is that there is no such thing as 'reverse' discrimination; there is only discrimination.** The EEOC applies the same standard of proof to all race discrimination claims, regardless of the victim's race." *Id.*

So, what have we learned so far about DEI and federal disability law compliance?

1. Efforts to eliminate DEI seem focused on the protected classes of race and sex.
2. Federal disability law (IDEIA, Section 504 & ADA) are not specifically addressed but are included in EEOC's "or another protected characteristic" language.
3. Efforts to eliminate DEI seem are critical of decisions and opportunities based on preferential treatment rather than merit.
4. Federal enforcement of civil rights laws is refocusing on majority populations within a protected class.

So how does federal disability law fit into anti-DEI efforts?

DEI elimination efforts & the world of disability law

Jessica Guynn, *'Kick in the teeth': Disabled federal workers fear for their jobs after Trump remarks,* USA TODAY, online February 20, 2025, https://www.usatoday.com/story/money/2025/02/05/disabled-federal-employees-dei-trump/77976332007/

Hiring Practices. "As divers searched the Potomac River for bodies from the collision of a passenger jet and a military helicopter, President Donald Trump blamed the Federal Aviation Administration's diversity policies and hiring of disabled Americans. **In a news conference about the worst air crash in the United States in two decades, Trump claimed the agency was 'actively recruiting workers who suffer severe intellectual disabilities and psychiatric problems and other mental and physical conditions under diversity and inclusion hiring initiatives.'** The remarks, made without evidence, touched off anxiety and frustration among federal employees with disabilities, many of them military veterans, who spoke with USA TODAY on the condition of anonymity for fear of retaliation."

- *A Little Dave Commentary:* Whether targeted or not, DEI elimination efforts (and the desire to reinforce the rationale for those efforts) has and likely will continue to spread beyond race and sex.

DEI elimination efforts & the world of disability law

Metraux, *The Department of Energy is Quietly Slashing disability Rights,* MOTHER JONES online, June 13, 2025, https://www.motherjones.com/politics/2025/06/energy-department-504-federal-disability-rights/

Building accessibility. "In May, the Department of Energy quietly introduced a proposal to eliminate its longstanding requirement that new buildings receiving funds from the agency be accessible to disabled people—a rule in effect across the federal government since 1980, thanks to Section 504 of the Rehabilitation Act. According to a document published in the *Federal Register*, the final rule will become effective July 15—unless it receives 'significant adverse comments' before Tuesday, a month after the rule was proposed.

- 'It is DOE's policy to give private entities flexibility to comply with the law in the manner they deem most efficient,' part of the public document reads. 'One-size-fits-all rules are rarely the best option. Accordingly, DOE finds good reason to eliminate this regulatory provision.'"

DEI elimination efforts & the world of disability law

Texas v. Becerra, Docket No. 5:24-CV-00225 (ND Texas).

- **Seventeen states challenge constitutionality of Section 504.** Filed in September of 2024, this complaint by **the attorneys general of 17 states** sought to prevent implementation of new regulations by the Department of Health and Human Services (HHS). Specifically, the complaint was **focused on language stating that gender dysphoria may be among the disabilities** that could create eligibility **under Section 504 and the ADA.**

- Plaintiffs alleged that the provision violated the statutory exclusion of "gender identity disorders not resulting from physical impairments." For Section 504 purposes, **amidst the various requests for relief sought was this declaratory judgment: "Declare Section 504, 29 U.S.C. §794 unconstitutional."**

DEI elimination efforts & the world of disability law

Texas v. Becerra, Docket No. 5:24-CV-00225 (ND Texas).

A Little Dave Commentary: **Public reaction by individuals with disabilities and their families concerned about the possible loss of Section 504 plans and nondiscrimination protection for students under Section 504 had some impact,** possibly resulting in an interesting April change in the Plaintiff states' position despite a stay of proceedings.

- In the Joint Status Report dated April 11, 2025, the parties agreed to continue the stay, included a clarification on the relief sought. Despite the clear language of the Complaint arguing that Section 504 is unconstitutional, the Plaintiffs states now claim no desire for such a declaration. "**Plaintiffs further clarify that they have no intention to seek any relief from this Court on Count 3 [Section 504 is Unconstitutional]** of their Complaint, including that in their Demand for Relief[.]"

DEI elimination efforts & the world of disability law

Texas v. Becerra, Docket No. 5:24-CV-00225 (ND Texas).

A Little Dave Commentary:

- This litigation highlights the intersection of Section 504 with transgender issues and the potential impact of refocused OCR enforcement of Section 504 in public schools on issues involving transgender students.
- Since Section 504 and the ADA cover the same subject matter and identical eligibility standards, **why did the litigation not seek to declare the ADA unconstitutional?**
- The elimination of the Section 504 claim in a case likely to be dismissed may evidence concern by some attorneys general arising from strong public support of 504 protections. **Disability impacts folks equally across the political spectrum and is a personal issue, to some degree, in virtually every family.** What impact will this dynamic have on future events?

DEI elimination efforts & the world of disability law

Texas v. Becerra, Docket No. 5:24-CV-00225 (ND Texas).

- The same day the Status Report was filed, HHS provided the following clarification to its new regulations in the Federal Register. **"Language in the preamble** concerning gender dysphoria, which language is not included in the regulatory text, **does not have the force or effect of law.** Therefore, it cannot be enforced." 90 Federal Register 15412, April 11, 2025.
- The parties were ordered to provide a status update by July 21, 2025. That date has also been bumped due to a continuance.
- **This lawsuit continues on hold, but appears to present no further threat to Section 504.**

Efforts to Close the U.S. Department of Education Intersect with Efforts to Eliminate DEI

OCR adds eliminating DEI as part of civil rights enforcement.
Dear Colleague Letter, 125 LRP 4916 (OCR February 14, 2025).

Discrimination disguised as diversity, equity and inclusion.

> **"Educational institutions have toxically indoctrinated students** with the false premise that the United States is built upon 'systemic and structural racism' and advanced discriminatory policies and practices. Proponents of these discriminatory practices have attempted to further justify them—particularly during the last four years—under the banner of 'diversity, equity, and inclusion' ('DEI'), smuggling racial stereotypes and explicit race-consciousness into everyday training, programming, and discipline. **But under any banner, discrimination on the basis of race, color, or national origin is, has been, and will continue to be illegal."**

OCR adds eliminating DEI as part of civil rights enforcement.
Dear Colleague Letter, 125 LRP 4916 (OCR February 14, 2025).

Look beyond use of the terms diversity, equity and inclusion.

> "Although some programs may appear neutral on their face, **a closer look reveals that they are, in fact, motivated by racial considerations.** And race-based decision-making, no matter the form, remains impermissible. For example, a school may not use students' personal essays, writing samples, participation in extracurriculars, or other cues as a means of determining or predicting a student's race and favoring or disfavoring such students."

OCR adds eliminating DEI as part of civil rights enforcement.
Dear Colleague Letter, 125 LRP 4916 (OCR February 14, 2025).

Cease DEI activities and programs

- "All educational institutions are advised to: (1) ensure that their policies and actions comply with existing civil rights law; **(2) cease all efforts to circumvent prohibitions on the use of race by relying on proxies or other indirect means to accomplish such ends;** and (3) cease all reliance on third-party contractors, clearinghouses, or aggregators that are being used by institutions in an effort to circumvent prohibited uses of race.
- **Institutions that fail to comply with federal civil rights law may, consistent with applicable law, face potential loss of federal funding."**

OCR adds eliminating DEI as part of civil rights enforcement.
Dear Colleague Letter, 125 LRP 4916 (OCR February 14, 2025).

Cease DEI activities and programs

"The Department will no longer tolerate the overt and covert racial discrimination that has become widespread in this Nation's educational institutions. The law is clear: **treating students differently on the basis of race** to achieve nebulous goals such as diversity, racial balancing, social justice, or equity is illegal under controlling Supreme Court precedent."

Executive Order #14168: Gender Ideology Extremism

Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government, Executive Order #14168, 90 Fed.Reg. No. 19, p. 8615 (January 20, 2025).

"Section 1. Purpose. Across the country, ideologues who deny the biological reality of sex have increasingly used legal and other socially coercive means to permit men to self-identify as women…. my Administration will defend women's rights and protect freedom of conscience by using clear and accurate language and policies that recognize **women are biologically female, and men are biologically male."**

"…It is the policy of the United States to recognize two sexes, male and female. These sexes are not changeable and are grounded in fundamental and incontrovertible reality."

Executive Order #14168: Gender Ideology Extremism

Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government, Executive Order #14168, 90 Fed.Reg. No. 19, p. 8615 (January 20, 2025).

"Agencies shall remove all statements, policies, regulations, forms, communications, or other internal and external messages that promote or otherwise inculcate gender ideology, and shall cease issuing such statements, policies, regulations, forms, communications or other messages. Agency forms that require an individual's sex shall list male or female, and shall not request gender identity. Agencies shall take all necessary steps, as permitted by law, to end the Federal funding of gender ideology."

Note: Included in the Order is a non-exhaustive list of guidance from ED to be rescinded (next slide).

Eliminating DEI fuels efforts to Close the Department of Education

Prior ED guidance on LGBTQI+Students rescinded by Executive Order #14168

Per Executive Order #14168, ED shall rescind the following guidance:

(A) "2024 Title IX Regulations: Pointers for Implementation" (July 2024);
(B) "U.S. Department of Education Toolkit: Creating Inclusive and Non-discriminatory School Environments for LGBTQI+ Students";
(C) "U.S. Department of Education Supporting LGBTQI+ Youth and Families in School" (June 21, 2023);
(D) "Departamento de Educacion de EE.UU. Apoyar a los jovenes y familias LGBTQI+ en la escuela" (June 21, 2023);
(E) "Supporting Intersex Students: A Resource for Students, Families, and Educators" (October 2021);
(F) "Supporting Transgender Youth in School" (June 2021);
(G) "Letter to Educators on Title IX's 49th Anniversary" (June 23, 2021);
(H) "Confronting Anti-LGBTQI+ Harassment in Schools: A Resource for Students and Families" (June 2021);
(I) "Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County" (June 22, 2021);
(J) "Education in a Pandemic: The Disparate Impacts of COVID–19 on America's Students" (June 9, 2021); and
(K) "Back-to-School Message for Transgender Students from the U.S. Depts of Justice, Education, and HHS" (Aug. 17, 2021);

Executive Order # 14242: Closing the Department of Education

Improving Education Outcomes by Empowering Parents, States, and Communities, Executive Order 14242, 90 Fed.Reg. No. 56, p. 13679 (March 20, 2025).

"Sec. 2. Closing the Department of Education and Returning Authority to the States.

- (a) The Secretary of Education shall, **to the maximum extent appropriate and permitted by law,** take all necessary steps to facilitate the closure of the Department of Education and return authority over education to the States and local communities **while ensuring the effective and uninterrupted delivery of services, programs, and benefits on which Americans rely.**
- (b) Consistent with the Department of Education's authorities, the Secretary Education shall ensure that the allocation of any Federal Department of Education funds is subject to rigorous compliance with Federal law and Administration policy, including the requirement that **any program or activity receiving Federal assistance terminate illegal discrimination obscured under the label 'diversity, equity, and inclusion" or similar terms and programs promoting gender ideology."**

Executive Order # 14242: Closing the Department of Education

Improving Education Outcomes by Empowering Parents, States, and Communities, Executive Order 14242, 90 Fed.Reg. No. 56, p. 13679 (March 20, 2025).

"Sec. 3. General Provisions.

(a) **Nothing in this order shall be construed to impair or otherwise affect:**

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person."

Closing the Department of Education & Elimination of DEI

Dear Colleague Letter, 125 LRP 4916 (OCR February 14, 2025).

A Little Dave Commentary: It seems odd that the Executive Order on Closing the Department of Education made no reference to ED activities that likely run afoul of DEI elimination efforts. The rather strong language in OCR's February 3, 2025 *Dear Colleague Letter* on race discrimination states that "Educational institutions have toxically indoctrinated students."

The rescinded Title IX regulations ran afoul of the anti-DEI effort.

- "ED updated the regulations in 2024, including by changing obligations for recipient schools when addressing sexual harassment allegations and defining *sex discrimination* to include discrimination based on sexual orientation and gender identity…. Following numerous legal challenges that resulted in various preliminary injunctions against enforcement of the 2024 regulations, a federal district court vacated them in January 2025, concluding that, among other things, the regulations exceeded ED's statutory authority." https://www.congress.gov/crs-product/LSB11279

ED's Efforts to Require Title VI Certification

American Federation of Teachers, et. al. v. Department of Education, et. al, Civil Case No. SAG-25-628 (D.C. MD August 14, 2025), (Plaintiff's motion for Summary Judgment granted in part and denied in part.).

- On April 3, **ED provided SEAs and LEAs with a Requested Certification** to be executed indicating compliance with Title VI including the the State or School's cessation of DEI practices. Some schools and states refused to certify. Litigation followed.
- In a case filed by the American Federation of Teachers, *et. al.,* a Federal District Court in Maryland addressed the problem of requiring schools to certify compliance with respect to DEI activity together with the threat of losing federal funds for failure to comply.

Vagueness of DEI Terminology and Title VI Certification

American Federation of Teachers, et. al. v. Department of Education, et. al, Civil Case No. SAG-25-628 (D.C. MD August 14, 2025), (Plaintiff's motion for Summary Judgment granted in part and denied in part.).

- "The crux of the problem, in this Court's view, is that the Letter says to teachers and schools 'if you engage in DEI practices we deem impermissible, you will be punished' but does not provide any clarity on what DEI practices are impermissible. Nor does it even define what a DEI practice is. **It is impossible to determine what conduct triggers the prohibitions and sanctions of the Letter.**
- **That enables the government to enforce the Letter arbitrarily, and chills the lawful and societally beneficial speech** of regulated persons who do not understand what DEI- or race-related speech may be allowed. 'The vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech.'"
- "The Letter and Certification are held unlawful and set aside; they are vacated in their entirety."

Court identifies a gap between ED Letter & existing law

American Federation of Teachers, et. al. v. Department of Education, et. al, Civil Case No. SAG-25-628 (D.C. MD August 14, 2025), (Plaintiff's motion for Summary Judgment granted in part and denied in part.).

The Letter and Certification are legislative rules, subject to requirements for promulgating such rules.

"The Letter does not merely 'remind' regulated parties of existing duties or 'clarify' the law…. Because the Letter 'effects a substantive change in existing law or policy' by imposing new legal obligations on regulated parties, **it surpasses the bounds of an interpretive rule.** It also supplements Title VI by extending it to cover classroom speech and curriculum….

Because the Letter substantively alters the legal landscape in ways that have the force and effect of law, it must be a legislative rule. To simply 'remind' parties of existing duties, the government would have needed to limit its guidance to a restatement of existing law. The government could have outlined its new enforcement priorities well within those bounds, but it could not extend Title VI to reach new categories of conduct. **The Letter is a legislative rule, subject to all requirements for promulgating a legislative rule. "**

"So too is the Certification Requirement. Again, the writing is on the wall—**it defies logic that DOE would need every local and state educational institution in the country to certify its compliance with existing law for the second time in less than a year.** This Certification must be different. "

Court identifies a gap between ED Letter and existing law

American Federation of Teachers, et. al. v. Department of Education, et. al, Civil Case No. SAG-25-628 (D.C. MD August 14, 2025), (Plaintiff's motion for Summary Judgment granted in part and denied in part.).

The Letter and Certification do not simply restate existing law.

"This Court has already rejected the notion that the Letter merely restates existing law.[8] If anything, the government's repeated assertions that the Letter says nothing new evince that it is still either unaware or unwilling to admit that it has changed positions. The government changed its position by asserting that certain discussions of race constitute discriminatory practices that violate Title VI and *SFFA*. **Prior guidance explained that so long as all students were welcome, 'hosting meetings, focus groups, or listening sessions on race-related topics likely would not, by itself, raise concerns under Title VI.'** Similarly, prior guidance used an elementary school's requirement that all students read a book about race discrimination and racial justice and a high school requirement that students take a Mexican American history course as examples of school policies that would likely not raise Title VI concerns. **The Letter and Certification Requirement, and accompanying guidance, call these settled practices into question."**

Court identifies a gap between ED Letter & existing law

American Federation of Teachers, et. al. v. Department of Education, et. al, Civil Case No. SAG-25-628 (D.C. MD August 14, 2025), (Plaintiff's motion for Summary Judgment granted in part and denied in part.).

The Court identifies a Safe Harbor for disability law compliance in an anti-DEI environment.

Footnote 8: "At the motions hearing, **the government's presentation focused heavily on its intent to reinforce the principle that anti-discrimination law protects majority groups.** The government's briefing here repeats that point. Neither Plaintiffs nor the Court disagree, and, **had the Letter constrained itself to that point, it would not have communicated any change in existing law.** Similarly, if the aim of the Certification Requirement was to assure compliance with Title VI as it protects majority groups, the government could have plainly said that. **A change in Title VI enforcement priorities to focus on so-called 'reverse discrimination' cases is within the administration's purview.'"**

A Little Dave Commentary on why this matters. The Court is essentially identifying a safe harbor. **SEAs and LEA's strictly following established civil rights law and guidance are protected.** That the new administration is refocusing enforcement is not the problem–changing the rules without the proper process is the problem. Eliminating DEI can become law, but the process has to be followed.

The vagueness challenge DEI elimination is not new.

National Association of Diversity Officers in Higher Education v. Trump, Docket # 1:25-cv-00333 (DC MD 2/ 21/25)

- In a case attempting to enjoin enforcement of the Executive Orders, a federal judge in Maryland highlighted the vagueness problem in a Memorandum Opinion.

  "The term 'DEI,' of course, is shorthand for 'diversity, equity, and inclusion.' And ensuring equity, diversity, and inclusion has long been a goal, and at least in some contexts arguably a requirement, of federal anti-discrimination law."

  "But the administration has declared 'DEI' to be henceforth 'illegal,' has announced it will be terminating all 'equity-related' grants or contracts—whatever the administration might decide that means—and has made 'practitioners' of what the government considers 'DEI' the targets of a 'strategic enforcement plan.' **But the Challenged Orders do not define any of the operative terms, such as 'DEI' 'equity-related,' 'promoting DEI,' 'illegal DEI,' 'illegal DEI and DEIA2 policies,' or 'illegal discrimination or preferences' let alone identify the types of programs or policies the administration considers 'illegal.'"**

Efforts to Diminish OCR and Refocus its Enforcement Activities

Department of Education's Office for Civil Rights (OCR)

- Federal courts are rarely involved in the enforcement of Section 504. In the 504 world, the main source of technical assistance and enforcement is the Office For Civil Rights (OCR) in the U.S. Department of Education (ED). When litigation does involve 504, it typically arises in addition to an IDEIA claim by a student eligible for special education.
- As late as November 2024, public schools were eagerly awaiting an update to the Section 504 regs created in 1977. **By January 2025, the compliance and enforcement of Section 504 had changed dramatically.** With the new administration came silence on new regulations, and massive budget cuts and reductions in force at OCR.
- **While IDEIA-eligible students have state due process systems available in the event of dispute, many of OCR's complaints involve students with IEPs.** OCR views these complaints through the lens of Section 504.

Changed Priorities at OCR

With the new administration, OCR investigations and priorities were refocused.

- "The Education Department's civil rights office has long reviewed allegations of possible discrimination. **The agency has traditionally listed active civil right investigations on its website, but it has not been updated since Jan. 14 — the Tuesday before Trump took office. There are more than 12,000 open cases dating to 2007."**
- "Trump wants to eliminate the Department of Education, as part of his push to reduce the size of the federal government. But **since taking office, the department has been involved in dozens of investigations into school districts and universities around the country attacking local decisions regarding racial equity and the rights of transgender students, much of it through enforcement of civil rights law."** *Elwood, Education Dept. says gender policies in 5 Virginia districts violate law,* THE WASHINGTON POST, July 25, 2025.

Changed Priorities at OCR

A new administration & OCR is refocused.

- **DACA Scholarships.** "Five universities are under investigation by the US Department of Education's Office for Civil Rights for providing scholarships to undocumented immigrants enrolled in the Obama-era DACA program, according to a statement from the Department of Education Wednesday. DACA, or the Deferred Action for Childhood Arrivals program, allows hundreds of thousands of undocumented immigrants brought to the US as children to live, work and pursue an education in the country.
- The department's investigation **focuses on scholarships for DACA students** but also **includes LGBTQ+ students of color, Latin or Hispanic, African American, Native American or other minority students,** the agency said in a statement." *Hassan, Department of Education's office for Civil Rights initiates investigation into 5 universities over DACA scholarships,* CNN online, July 23, 2025.
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Changed Priorities at OCR

A new administration & OCR is refocused.

- **Antisemitism.** "Earlier this year, the Department of Education's Office for Civil Rights sent letters to dozens of colleges and universities it says are under investigation for alleged violations "relating to antisemitic harassment and discrimination," warning institutions of possible consequences if they don't take adequate steps to protect Jewish students." *Hassan, Department of Education's office for Civil Rights initiates investigation into 5 universities over DACA scholarships,* CNN ONLINE, July 23, 2025.

Reduction in Force (RIF) at OCR

- **Reductions in Force (RIF).** "The Education Department's Office for Civil Rights was slashed in half on Tuesday as part of President Trump's aggressive push to dismantle the agency, which he has called a "con job." **The firings eliminated the entire investigative staff in seven of the office's 12 regional branches,** including in Boston, Cleveland, Dallas and San Francisco, and left thousands of pending cases in limbo."
- "The layoffs struck every corner of the department, which manages federal loans for college, tracks student achievement and supports programs for students with disabilities. But education policy experts and student advocates were particularly distressed about the gutting of the civil rights office, which fielded more than **22,600 complaints from parents and students last year, an increase of more than 200 percent from five years earlier."** Bender & Nostrant, *Trump Firings Gut Education Department's Civil Rights Division,* THE NEW YORK TIMES, March 13, 2025.
- **Budget Reduction.** "For fiscal year 2026, which started July 1, the White House's proposed OCR budget is $91 million, a 35% drop."

Reduction in Force (RIF) at OCR

- "[OCR's] regional offices in New York, Cleveland, San Francisco, Boston, Philadelphia, Dallas and Chicago were closed, with their entire staffs laid off, multiple sources at the department told CNN. The expectation, employees said, is that the **civil rights cases being handled by these offices will be redistributed to the regional offices that remain open in Seattle, Denver, Atlanta, Kansas City and Washington, DC."** *Serfaty, "Students with suffer harm" Education department's civil rights office gutted by layoffs, closures",* CNN ONLINE, March 12, 2025.
- *A Little Dave Commentary on Related Litigation:* There is no shortage of pending litigation attempting to prevent the Reductions in Force at ED and the changes at OCR, including two cases that produced significant orders as these materials were written. Dave will provide a litigation update during the presentation should one be helpful.

OCR's functions potentially reassigned to the Department of Justice?

- **DOJ a better fit?** Secretary "McMahon, in her confirmation hearing in February, said that the **Office of Civil Rights' tasks might be 'better served' under the Justice Department.** When McMahon took office, she recalibrated the department's civil rights focus towards ending campus antisemitism, targeting transgender students' protections, and dismantling diversity, equity and inclusion (DEI) practices."
- *A Little Dave Commentary:* This suggestion was not entirely a surprise as the suggestion has been floated on many platforms in the last few months. The problem is the complication of Congress' assignment of 504 stewardship to OCR and the expectation that Congress, not the executive branch, must act to reassign this function.

OCR's 2025 Complaint Resolution Manual

- *A Little Dave Commentary/Speculation:* Given the administration's intentions to eliminate the Department of Education and/or move OCR's functions to the Department of Justice, **it seemed odd that, in the first few months of the new administration, OCR would go to the trouble of overhauling the Complaint Resolution Manual** that governs the processing of civil rights complaints received by OCR.
- Perhaps there was concern in the administration that these complaint resolution duties could not be reassigned to DOJ without congressional approval, or perhaps, the desire was to reduce the backlog of civil rights complaints unrelated to the administration's current focus.

What's the fate of existing OCR complaints?

Thousands of complaints dismissed. "As part of the steep cuts [ED Secretary] McMahon made, seven of the department's 12 regional civil rights offices nationwide shuttered, effectively putting into question the fate of the complaints. **By July, the department had dismissed thousands of these complaints, raising concerns about whether each case was being dutifully considered."**

Chad de Guzman, Understanding Trump's Dismantling of the Education Department—What's at Stake, TIME online, July 15, 2025, https://time.com/7302319/trump-dismantles-department-of-education/

What's the fate of existing OCR complaints?

There are additional reports (anecdotal) that **families with pending disability complaints have lost contact with OCR due to the RIF of their investigator** and/or transfer of the file from one of the seven closed offices to one of the five that remain. Whether OCR will reestablish contact at some point, and whether the complaint will be pursued is unknown.

See, for example, Wagner & Hawkins, For Decades, the Feds were the Last, Best Hope for Special Ed Kids, What Happens Now? The 74 online, August 1, 2025, https://www.the74million.org/article/for-decades-the-feds-were-the-last-best-hope-for-special-ed-kids-what-happens-now/

What's the fate of existing OCR resolution agreements?

A Little Dave Commentary: The impact of anti-DEI efforts includes a targeted review of some existing agreements in light of the changed enforcement philosophy. Consider *Rapid City (SD) Area School District 51-4,* 124 LRP 16721 (OCR 2024).

- Based on data analysis, OCR identified a number of areas where Native American students were treated differently than white students in discipline, truancy referrals, and selection for advanced classes. **Despite the disparities, "OCR found no evidence indicating District administrators examined the disparities themselves or set up any system to evaluate whether discrimination infects District practices."**
- On March of 2025, OCR nullified the resolution agreement reached during the previous administration with Rapid City Schools. **Disparate impact theory (addressed in more detail below)** drove portions of the agreement. Nissman, *Education experts predict executive order may lead to increased exclusionary discipline,* SPECIAL ED CONNECTION, April 25, 2025.
- The Executive Order that follows seems to indicate that other nullifications may follow.

Executive Order # 14280: Common Sense School Discipline

Reinstating Commonsense School Discipline Policies, Executive Order 14280, 90 Fed.Reg. No. 80, p. 17533 (April 23, 2025).

What's the fate of existing OCR resolution agreements? It depends on whether the underlying rational for the agreement is consistent with current enforcement priorities.

- "In January 2014, the Department of Education and the Department of Justice jointly issued a ''Dear Colleague'' letter regarding school discipline. In that letter, the Department of Education and the Department of Justice explained that **schools could be found to violate Title VI** of the Civil Rights Act of 1964—**and therefore could lose Federal funding—if their disciplinary decisions ran afoul of a newly imposed disparate-impact framework** under which race-neutral disciplinary policies, applied in an even-handed manner, may be improper if members of any racial groups are suspended, expelled, or referred to law enforcement at higher rates than others. **The letter effectively required schools to discriminate on the basis of race by imposing discipline based on racial characteristics, rather than on objective behavior alone."**

Executive Order # 14280: Common Sense School Discipline

Reinstating Commonsense School Discipline Policies, Executive Order 14280, 90 Fed.Reg. No. 80, p. 17533 (April 23, 2025).

What's the fate of existing OCR resolution agreements? (cont'd)

- "Following the Commission's report on December 18, 2018, the 2014 Dear Colleague letter was rescinded. In 2023, however, the previous administration's Department of Education and Department of Justice issued new guidance noting that **statistical racial disparities in student discipline may indicate violations of law,** and encouraging schools to collect, analyze, and adjust their disciplinary policies in light of racial disciplinary data. The 2023 guidance thus effectively reinstated the practice of weaponizing Title VI to promote an approach to school discipline based on discriminatory equity ideology. **As a consequence of these policies, teachers and students are suffering increased levels of classroom disorder and school violence."**

Executive Order # 14280: Common Sense School Discipline

Reinstating Commonsense School Discipline Policies, Executive Order 14280, 90 Fed.Reg. No. 80, p. 17533 (April 23, 2025).

What's the fate of existing OCR resolution agreements? (cont'd)

- The Executive Order states that within 120 days of the Order, the Secretary of Education and other officials shall submit a report "to the President, through the Assistant to the President for Domestic Policy, regarding the status of discriminatory-equity-ideology-based school discipline and behavior modification techniques in American public education. The report shall include:
  - **(i) an inventory and analysis of the nature and consequences of all Title VI discipline-related investigations since 2009[.]"**

What do we do to prevent IDEIA and Section 504 Compliance from being mistaken for DEI?

Consider these thoughts with the school attorney.

Distinguishing Federal Disability Law Compliance from DEI

Disability law in public schools has some unique characteristics not shared by other civil rights laws. Among those unique benefits for students with disabilities:

1. Pro-active child find identifies students who may be eligible and in need of services.
2. Protected class status conveyed by committee pursuant to individual evaluation.
3. Added to nondiscrimination protection are services and accommodations to provide FAPE either required in special ed or likely in Section 504.
4. Eligibility, evaluation and placement process requires committee action together with procedural protections for eligible students and their parents.
5. Possibility of exceptions to various school policies, practices and procedures

July DOJ guidance on #14151 & #14173

Eliminating Diversity, Equity and Inclusion (DEI) by Recipients of Federal Funds

In July, the Department of Justice provided guidance on eliminating DEI by recipients of federal funds prefaced with the following language on enforceability.

- "this guidance identifies **"Best Practices" as non-binding suggestions** to help entities comply with federal antidiscrimination laws and avoid legal pitfalls; **these are not mandatory requirements but rather practical recommendations to minimize the risk of violations."** *Id.*
- *A Little Dave Commentary:* Dave's focus here is avoiding dangerous territory. Some of the examples provided by DOJ, applied by analogy to disability law compliance by public schools, can help identify practices to avoid or fine-tune. **Consider these thoughts with the school attorney.**

July DOJ guidance on #14151 & #14173

Eliminating Diversity, Equity and Inclusion (DEI) by Recipients of Federal Funds

Among the Recommendations on Best Practices

- **"Ensure Inclusive Access:** All workplace programs, activities, and resources should be open to all qualified individuals, regardless of race, sex, or other protected characteristics."
- **"Focus on Skills and Qualifications:** Base selection decisions on specific, measurable skills and qualifications directly related to job performance or program participation."
- **"Document Legitimate Rationales:** If using criteria in hiring, promotions, or selecting contracts that might correlate with protected characteristics, document clear, legitimate rationales unrelated to race, sex, or other protected characteristics. Ensure these rationales are consistently applied and are demonstrably related to legitimate, nondiscriminatory institutional objectives." *Id.*

July DOJ guidance on #14151 & #14173

Eliminating Diversity, Equity and Inclusion (DEI) by Recipients of Federal Funds

Among the Recommendations on Best Practices

- **"Eliminate Diversity Quotas:** Focus solely on nondiscriminatory performance metrics, such as program participation rates or academic outcomes, without reference to race, sex, or other protected traits. And discontinue policies that mandate representation of specific racial, sex-based, or other protected groups in candidate pools, hiring panels, or final selections. **For example, replace a policy requiring 'at least one minority candidate per slate' with a process that evaluates all applicants based on merit."**
- **Final advice from DOJ:** "By prioritizing nondiscrimination, entities can mitigate the legal, financial, and reputational risks associated with unlawful DEI practices and fulfill their civil rights obligations." *Id.*

July DOJ guidance on #14151 & #14173

Eliminating Diversity, Equity and Inclusion (DEI) by Recipients of Federal Funds

Examples of Unlawful Practices

- **"Race-Based Scholarships or Programs:** A university's DEI program establishes a scholarship fund exclusively for students of a specific racial group (e.g., 'Black Student Excellence Scholarship') and excludes otherwise qualified applicants of other races, even if they meet academic or financial need criteria."
- "This extends to any **race-exclusive opportunities, such as internships, mentorship programs, or leadership initiatives that reserve spots for specific racial groups, regardless of intent to promote diversity.** Such race-exclusive programs violate federal civil rights law by discriminating against individuals based solely on their race or treating people differently based on a protected characteristic without meeting the strict legal standards required for race-conscious programs." *Id.*

Thoughts on Application of DOJ's DEI Guidance to public schools on disability law compliance

Possible DEI concerns arising from "Disability-Based Scholarships or Programs"

Applied to IDEIA and Section 504, the guidance highlights the uniqueness of students with disability as a protected class. DOJ urges that "race-exclusive programs violate federal civil rights law" yet IDEIA, 504/ADA are clearly disability-exclusive and Section 504/ADA is clearly a civil rights law.

- Congressional findings on IDEIA and Section 504 specifically recognize the need for identifying students with disability and require differences in treatment of eligible students from their noneligible peers where necessary to prevent discrimination and provide FAPE.

That Congress created these laws should mean that the programs and services provided by SEAs and LEAs to comply are not DEI so long as the programs and services themselves do not exceed the "Safe Harbor" of the legal requirements. That is, if the SEA or LEA is following established law and guidance, and not expanding the reach of Congress' mandate, there should be no DEI issue *(see previous discussion of American Federation of Teachers).*

Thoughts on Application of DOJ's DEI Guidance to public schools on disability law compliance

Possible DEI concerns arising from "Disability-Based Scholarships or Programs"

- Beware of exceeding the legal mandate. Consider this example from prior ED guidance.
  - **Equally Effective Communication guidance:** In 2014, DOJ, OCR & OSERS released a joint FAQ on IDEIA & 504's interaction with ADA's Effective Communication rules. By way of example of appropriate analysis, the following was provided: "In this case, Tommy cannot hear many of the students in the classroom, and by not hearing a student's question or comment, he does not always understand a teacher's response. The ADA Coordinator timely determined that because Tommy **cannot fully hear or understand all that is said in the classroom, he is not receiving effective communication."** *Frequently Asked Questions on Effective Communication,* 64 IDELR 180 (DOJ, OCR, OSERS November 2014)(Appendix A).
  - Note that unless the average student in the general population can hear and understand everything that is said in the classroom, the example is not applying civil rights standard. Instead, the example uses a civil rights law to create an unfair advantage.

Thoughts on Application of DOJ's DEI Guidance to public schools on disability law compliance

Beware of exceeding the legal mandate. Consider this examples from prior ED guidance.

- **Guidance on extracurricular athletics:** In a 2013 guidance letter on students with disabilities in extracurricular athletics, OCR wrote:
  - "When the interests and abilities of some students with disabilities cannot be as fully and effectively met by the school district's existing extracurricular athletic program, the school district *should* create additional opportunities for those students with disabilities….**These athletic opportunities provided by school districts *should* be supported equally, as with a school district's other athletic activities.**
  - NSBA Council of School Attorneys objected, pointing out that the guidance exceeded the legal requirements. OCR responded that the regulations only require equality of access to extracurricular athletic opportunities, "It does not mean every student with a disability has the right to be on an athletic team, and it does not mean that school districts must create separate or different activities just for students with disabilities." *Dear Colleague Letter,* 113 LRP 51638 (OCR 2013).

Thoughts on Application of DOJ's DEI Guidance to public schools on disability law compliance

Possible DEI concerns arising from "Disability-Based Scholarships or Programs"

- **Watch for places where the school ignores eligibility requirements.**
  - Where appropriate, worry about low levels of child find and eligibility, but don't create eligibility where it doesn't exist. IEP Teams determine eligibility not statistics.
  - Efforts to meet statistical eligibility standards endanger the law's focus on individualized evaluation as the foundation of eligibility—resist evaluations focused on hitting statistical targets.
- Watch for places where the **school ignores evaluation data and provides unnecessary or improperly scaled accommodations and services**
  - Too much of a good thing is not longer a good thing. See for example, *Sherman v. Mamaroneck Union Free School District,* 340 F.3d 87 (2nd Cir. 2003)(doing for the student what the student can do for herself denied FAPE); *City of Chicago School District 299,* 62 IDELR 220 (SEA IL 2013)(Technology is no replacement for direct instruction to teach the skill.)

Thoughts on Application of DOJ's DEI Guidance to public schools on disability law compliance

Possible DEI concerns arising from "Preferential Hiring or Promotion Practices"

- In a related issue, **the types of services and accommodations received by the student with disability in the accelerated class can raise concerns by competing nondisabled students.** *See for example, Hornstine v. Township of Moorestown,* 39 IDELR 64 (D.N.J. 2003)(nondisabled students and parents push district to change eligibility requirements for valedictorian honors to address alleged unfair advantage of IDEIA-eligible student with IEP).
- As more students with disabilities compete for academic honors and coveted seats in accelerated programs, anti-DEI momentum could create more conflict in this area.
  - Unfortunately, existing OCR guidance while preserving the right of students with disabilities to compete for seats while receiving their IEP or 504 plan services and accommodations has failed to address possible unfair advantage where the IEP or 504 Plan takes away essential pieces of the accelerated curriculum. *See Dear Colleague Letter: Access by Students with Disabilities to Accelerated Programs,* 108 LRP 69569 (OCR 12/26/07).

July DOJ guidance on #14151 & #14173

Eliminating Diversity, Equity and Inclusion (DEI) by Recipients of Federal Funds

Examples of Unlawful Practices

> **"Preferential Hiring or Promotion Practices:** A federally funded entity's DEI policy prioritizes candidates from "underrepresented groups" for admission, hiring, or promotion, bypassing qualified candidates who do not belong to those groups, where the preferred 'underrepresented groups' are determined on the basis of a protected characteristic like race." *Id.*

Thoughts on Application of DOJ's DEI Guidance to public schools on disability law compliance

Possible DEI concerns arising from "Preferential Hiring or Promotion Practices"

- Students aren't employees, but they do seek enrollment in advanced classes, magnet schools (accelerated classes) and exceptions to school policy and practice.
- Placement for Section 504 and special education-eligible students is based on evaluation data, and eligible students are required to meet legitimate nondiscriminatory entrance requirements to accelerated classes and programs. *See for example, Rosemount-Apple Valley-Eagan ISD #196*, 112 LRP 56386 (OCR 03/22/11).

Thoughts on Application of DOJ's DEI Guidance to public schools on disability law compliance

Possible DEI concerns & Nondiscriminatory entrance criteria, *Rosemount-Apple (cont'd)*

- "Nothing in Section 504 or Title II requires schools to admit into accelerated classes or programs students with disabilities who would **not otherwise be qualified for these classes or programs**….Section 504 and Title II require that qualified students with disabilities be given the same opportunities to compete for and benefit from accelerated programs and classes as are given to students without disabilities." *Id.*
- "The District has correctly noted that the **Student has no identified educational need that would be met by being in the advanced band** and is not entitled to placement in that band through the IEP team process."

Thoughts on Application of DOJ's DEI Guidance to public schools on disability law compliance

Possible DEI concerns & Nondiscriminatory entrance criteria, *Rosemount-Apple (cont'd)*

A Little Dave Commentary: The author is awaiting a related challenge to a student placed by IEP Team or 504 Committee onto the football, soccer or other competitive team/squad in order to provide FAPE, as alluded to in *Rosemount-Apple*. Such a placement appears to be exactly the type of exception to legitimate nondiscriminatory criteria that anti-DEI thinking would target, as the exception is limited to students with disability.

Similarly, this type of **anti-DEI approach would also look critically at manifestation determination** and the potential to take disciplinary removals off the table when a student with disability is disciplined for a serious offense.

Thoughts on Application of DOJ's DEI Guidance to public schools on disability law compliance

Possible DEI concerns & Nondiscriminatory entrance criteria

- **When legitimate nondiscriminatory entrance criteria are ignored,** not only is the student's FAPE at risk, but nondisabled students are precluded from attending the program, class or campus because of the disability-based preference. *See for example, G.B.L. v. Bellevue Sch. Dist. #405,* 60 IDELR 186 (W.D. Wash. 2013)(Despite not meeting entrance criteria for the accelerated class, student with IEP was admitted and could not get benefit even with appropriate accommodation and services).

Thoughts on Application of DOJ's DEI Guidance to public schools on disability law compliance

Possible DEI concerns arising from "Preferential Hiring or Promotion Practices"

- How will anti-DEI efforts view these policies and practices?
  - Trending across the country are **bans of possession and use of personal electronics** like cell phones during school hours. Not uncommon in these bans is an exception available based on decision of the IEP Team or Section 504 Committee.
  - Similar school policies prohibiting eating and drinking in class, attendance requirements, exceptions to grade-level curriculum and graduation requirements are **subject to disability-based exception not available to nondisabled students.**

July DOJ guidance on #14151 & #14173

Eliminating Diversity, Equity and Inclusion (DEI) by Recipients of Federal Funds

Examples of Unlawful Practices

"Access to Facilities or Resources Based on Race or Ethnicity: A university's DEI initiative designates a 'safe space' or lounge exclusively for students of a specific racial or ethnic group." *Id.*

"Implicit Segregation Through Program Eligibility: A federally funded community organization hosts a DEI-focused workshop series that requires participants to identify with a specific racial or ethnic group (e.g., "for underrepresented minorities only") or mandates sex-specific eligibility, effectively excluding others who meet objective program criteria." *Id.*

July DOJ guidance on #14151 & #14173

Eliminating Diversity, Equity and Inclusion (DEI) by Recipients of Federal Funds

Examples of Unlawful Practices

"Segregation in Facilities or Resources: A college receiving federal funds designates a 'BIPOC-only study lounge,' facially discouraging access by students of other races. Even if access is technically open to all, the identity-based focus creates a perception of segregation and may foster a hostile environment. This extends to any resource allocation-such as study spaces, computer labs, or event venues-that segregates access based on protected characteristics, even if intended to create 'safe spaces.' This does not apply to facilities that are single-sex based on biological sex to protect privacy or safety, such as restrooms, showers, locker rooms, or lodging."

Thoughts on Application of DOJ's DEI Guidance to public schools on disability law compliance

Possible DEI concerns arising from "Facilities, Resources and Segregation"

A Little Dave Commentary: These three examples provide the perfect illustration of how DEI elimination efforts are contrary to existing disability law—especially the IDEIA. These prohibitions are routinely "violated" under IDEIA when students are placed in resource classes, specialized units for students with emotional or behavioral disorders, units designed for students with autism, life skills classes, etc.

The IDEIA's requirement for evaluation prior to placement and LRE analysis required of IEP Teams should ensure that only special education eligible students are served in these exclusive settings. Nondisabled students are excluded in order to provide FAPE for the students with disability educated in the setting. "Segregation" is necessary for benefit.

So, what have we learned about DEI and federal disability law compliance?

1. Efforts to eliminate DEI seem focused on the protected classes of race and sex. While disability has been referenced generally in DEI efforts (see EEOC's "other protected classifications"), it has not been directly targeted by Executive Orders or ED pronouncements.
2. Efforts to eliminate DEI seem focused on preferential treatment, exclusive advantages and the absence of merit in decisionmaking.
3. Federal enforcement of civil rights laws is refocusing on majority populations rather than traditional minority populations within a protected class. Schools should resist the temptation to relax disability compliance in response
4. The vagueness of the acronym DEI, and rules of Administrative Procedure will likely complicate administration efforts to enforce anti-DEI orders and rule changes.
5. Strict, thoughtful and cautious IDEIA and Section 504 compliance is distinct from DEI.

Workshop 8

Executive Functioning Deficits: A Legal Overview

By:

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Bellevue, Washington

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Executive Functioning Deficits: A Legal Overview

2025 PNW Institute

Presented by: Jonathan P. Read

What We'll Cover . . .

- What Is "Executive Functioning"?
- Child Find, Assessments and Eligibility
- IEP Goals
- IEP Development, Services and Other Issues

What Is "Executive Functioning"?

Executive Functioning Defined

Executive functioning encompasses mental processes that enable students to plan, focus attention, remember instructions and handle multiple tasks successfully

Executive Functioning Defined

- Processes can include:
  - Self-awareness
  - Inhibition
  - Nonverbal working memory (short-term memory related to sensory and spatial information)
  - Verbal working memory (short-term memory related to speech and language)
  - Emotional regulation
  - Motivational regulation
  - Planning and problem-solving

Executive Functioning Defined

- Students with poor executive functioning skills can have difficulty monitoring and regulating their behaviors
- Difficulties can include monitoring and changing behavior as needed, planning future behavior when faced with new tasks and situations, and anticipating outcomes and adapting to changing situations
- Such students will often have problems interacting with others and fitting in socially

Executive Functioning Defined

- Executive function deficits can be found in students with mental health impairments including depression, OCD, PTSD, as well as students with ADD/ADHD, intellectual and learning disabilities, autism and
brain injuries
- Because frontal lobes of the brain play major role in executive functioning, students who have had frontal lobe injuries may have difficulty with higher level processing that is foundation of executive functioning

Executive Functioning: Child Find, Assessments and Eligibility

Child Find Overview

Affirmative, ongoing duty to identify, locate and evaluate all children with disabilities residing in the state who are in need of special education

(34 C.F.R. § 300.11)

Child Find Overview

- Triggered when district has knowledge of – or reason to suspect – student has disability
  - Threshold for suspicion is "relatively low"
  - Appropriate inquiry: Whether student should be referred, not whether he or she will qualify
  - Disability is "suspected," and therefore must be assessed by district, when district has notice that student has displayed symptoms of that disability

(Department of Educ. State of Hawaii v. Cari Rae S. (D. Hawaii 2001) 35 IDELR 90)

Child Find Overview

- Affirmative obligation to act
  - Not dependent on parent's request for evaluation
  - Child find not excused even when parent interferes with process
  - Passive approach – deciding not to "push" or to "wait and see" – equates to active and willful refusal to take action

(Compton Unified School Dist. v. Addison (9th Cir. 2010) 54 IDELR 71)

Executive Functioning: Child Find Case Example

Facts

- In December of senior year, student was struck by auto and sustained TBI; district was aware of accident when it occurred
- District offered Section 504 plan when student returned; plan provided accommodations focused on memory, attention, planning, organization, and executive functioning, based in part on IEE
- Another IEE indicated that it would be important for student to receive therapy focusing on executive functioning
- District subsequently assessed student, but report was not completed until after student had graduated with regular diploma

Executive Functioning: Child Find Case Example

Decision

- ALJ found child find violation
- District knew of student's TBI from outset and was aware that injuries might impact executive functioning and ability to learn
- Development of Section 504 plan was "immaterial" and did not absolve district of child find obligation
- Violation denied FAPE because it inhibited parental participation in determining student's services
- District ordered to pay $2,600 for educational tutoring; also ordered to provide independent vocational and AT assessments

(Newport-Mesa Unif. Sch. Dist. (SEA CA 2014) 114 LRP 6941)

Executive Functioning: Child Find Case Example

Case Law Lesson

- While district may have correctly believed that parent was not interested in special education in the months following the accident, it was less clear that parent comprehended ramifications of postponing an assessment
- In any case, it is not parent's duty to "make the call" as to whether a special education assessment plan should be presented
- ALJ: "The Child Find obligation is fulfilled when the District presents Mother with a special education assessment plan, and explains what is being offered. This simply didn't occur."

Eligibility Overview

(a) Identified by an individualized education program team as a child with a disability; and

(b) _____

Eligibility Overview

(a) _____

(b) Impairment requires instruction and services that cannot be provided with modification of the regular school program

Eligibility Overview

Student may not be found eligible if –

- Determinant factor is:
  - Lack of appropriate instruction in reading or math; or
  - Limited English proficiency; and
- Student does not otherwise meet the eligibility criteria under 34 C.F.R. § 300.8(a)
- if it is determined … that a child has one of the disabilities identified in paragraph (a)(1) of [section 300.8] but only needs a related service and not special education, the child is not a child with a disability under this part.

Practical Pointers: Eligibility

- Determining whether executive functioning deficits meet the legal definition of one or more eligibility categories is only part of analysis
  - In order to be eligible for special education, student must also require special education
- When making eligibility determinations, look to whether there is nexus between student's executive functioning issues and overall educational performance
  - Remember that "educational benefit" to be provided to student requiring special education is not limited solely to addressing student's academic needs

Evaluations Overview

- Evaluations under IDEA serves two purposes:
  - (1) Identifying students who need specialized instruction and related services because of an IDEA-eligible disability; and
  - (2) Helping IEP teams identify the special education and related services the student requires

Evaluations Overview

- Evaluations must conform to the procedural requirements set out in IDEA regulations, which contain detailed provisions governing:
  - Initial evaluations (34 C.F.R. § 300.301)
  - Evaluation procedures (34 C.F.R. § 300.304)
  - Determination of needed evaluation data (34 C.F.R. § 300.305)
  - Determination of eligibility (34 C.F.R. § 300.306(a) through 34 C.F.R. § 300.306(b))
  - Procedures for determining eligibility and placement (34 C.F.R. § 300.306 (c))
  - Reevaluations (34 C.F.R. § 300.30)

Practical Pointers: Evaluations

- Be aware of the facets of a thorough assessment for executive functioning issues that may point to the need for special education
  - Records review (look at student's work samples and work habits)
  - Teacher interviews (what areas of executive function present struggles for student)
  - Standardized assessments that include executive functioning scale
  - Rating scales (by teachers and parents)
  - Direct observations (watch for on-task and off-task behaviors both in and out of classroom; structured and unstructured activities)

Executive Functioning: Evaluations Case Example

Facts

- District conducted triennial reevaluation of high school student with SLD
- Parent alleged that district's reevaluation failed to assess student in all areas of suspected need, specifically in areas of oral language and executive functioning
- Parent also asserted that district should have assessed student's functional vocational skills and adaptive skills
- Parent filed for due process, seeking IEEs

Executive Functioning: Evaluations Case Example

Decision

- ALJ found district's reevaluation was appropriate
- District records indicated that school psychologist conducted formal assessments in both oral language and executive functioning
- District documented that reevaluation team reviewed student's existing records, parent input, and teacher observations to assess his progress in oral language and executive functioning
- ALJ rejected parent's contention that district should have assessed student's functional vocational skills and adaptive skills, as neither student's teachers nor parents identified any issues in those areas

(Longview Sch. Dist. (SEA WA 2021) 79 IDELR 294)

Executive Functioning: Evaluations Case Example

Case Law Lesson

- When it's time for student's triennial reevaluation, district should ensure its reevaluation is as comprehensive as possible and properly document all assessments administered during process
- This can help establish that reevaluation is appropriate if district subsequently receives an IEE request
- Here, district submitted thorough records showing that it formally assessed student's oral language and executive functioning skills and took into account student's progress in both areas

Executive Functioning: IEP Goals

Goals and Goal Reporting Overview

- Goals provide "a mechanism for determining
  - Whether the anticipated outcomes for the child are being met (i.e., whether the child is progressing in the special education program) and
  - Whether the placement and services are appropriate to the child's special learning needs

(Letter to Hayden (OSEP 1994) 22 IDELR 501)

Goals and Goal Reporting Overview

Goals are intended to determine, over a 12-month period, "whether the totality of services provided pursuant to the student's IEP – including special education, related services, and supplementary aides and services – is appropriate to the student's unique needs."

(Letter to Butler (OSERS 1988) 213 IDELR 118)

Goals and Goal Reporting Overview

- Goals must be "appropriately ambitious"
- U.S. Supreme Court: Absence of such bright-line rule should not be mistaken for "an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review"

(Endrew F. v. Douglas County Sch. Dist. RE-1 (U.S. 2017) 69 IDELR 174)

Executive Functioning: Goals Case Example #1

Facts

- District designed several goals for grade-schooler with ADHD that addressed task initiation and "avoidance behavior,"
- IEPs also included goals for writing and reading comprehension, which were intended in part to address student's issues with organizing his thoughts and executing his assignments
- Parents alleged that IEPs were procedurally deficient and denied student FAPE by inadequately addressing student's executive functioning needs

Executive Functioning: Goals Case Example #1

Decision

- Court found no denial of FAPE – IEPs included goals addressing individual executive functioning skills and teachers provided the student substantial support for those skills
- Fact that IEPs did not specifically refer to executive functioning as an annual measurable goal did not violate IDEA
- District provided student with substantial instruction throughout his fourth and fifth grade years addressing executive functioning skills, enabling student to make progress

(Benjamin A. v. Unionville Chadds Ford Sch. Dist. (E.D. Pa. 2017) 70 IDELR 150)

Executive Functioning: Goals Case Example #1

Case Law Lesson

- There is no IDEA requirement that annual goals use specific words to describe a skill area, such as “executive functioning”
- As long as the goals identify and address the skills for which the student requires specialized instruction or related services, the IEP isn't deficient because it lacks a more expansive term

Executive Functioning: Goals Case Example #2

Facts

- Executive functioning goal for 17-year-old student with ED stated that student would meet with case manager to review missing assignments (defined as items appearing in a grade report as missing or with a score of zero) and develop plan to complete them
- To measure the goal, case manager would “monitor and chart progress” by reviewing student’s grade reports to determine number of missing assignments
- Parent asserted that goal was not measurable and that district denied parental participation in IEP process

Executive Functioning: Goals Case Example #2

Decision

- State ED found in district’s favor – Goal’s measurement relied on objective data, such that individual not familiar with student’s IEP would still be able to collect number of missing assignments, as defined in goal and chart whether Student was making progress toward reducing the number of missing assignments over time
- ED also rejected denial of participation claim, as following the description of goal at IEP team meeting, case manager discussed with parent how such goal would work in practice, and case manager invited parent to ask questions regarding this proposed goal

(El Paso Sch. Dist. (SEA CO 2024) 124 LRP 34291)

Executive Functioning: Goals Case Example #2

Case Law Lesson

- Districts must include parents in making informed decisions regarding student's services
- IEP team's notes and description established that her concerns were "directly reflected in the annual goals adopted by the IEP team"
- Test is whether goals objectively allow team to evaluate throughout the year whether services are appropriate

Practical Pointers: Goals

- Goals must be explicitly taught!
- IDEA does not require IEP team use specific words to describe any particular deficit area, such as "executive functioning"
- Too many goals can complicate full implementation of student's IEP; goals are not curriculum or treatment plan
- Districts are not required to include annual goals that relate to areas of general curriculum in which student's disability does not affect his or her performance
- Lesson from Endrew F. is not to repeat goals from previous IEPs without addressing "why" – and then doing something

Executive Functioning: IEP Development, Services and Other Issues

IEP Development and Implementation

"By the time any dispute reaches court, school authorities will have had a complete opportunity to bring their expertise and judgment to bear on areas of disagreement. A reviewing court may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances"

(Endrew F. v. Douglas County Sch. Dist. RE-1 (U.S. 2017) 69 IDELR 174)

Connect the Dots - Where Does Executive Functioning Fit?

- **Present Levels**
- **Areas of Educational Need**
  - For which special education is required
  - Maybe related services
- **Goals**
- **Placement (Special Education)**
- **Supplementary Aids and Services**
  - Supports for General/Special Education
  - Related Services
  - Supplementary Aids and Services; Accommodations/Modifications

Executive Functioning: IEPs Case Example #1

Facts

- District developed IEPs for the unilaterally placed private school student with multiple disabilities
- IEPs contained two reading goals and 15 hours per week of specialized instruction in a structured classroom setting with limited distractions when being introduced to new skills
- Parents challenged IEPs, asserting that IEPs should have included Orton-Gillingham reading methodology and exact specifications as to how executive functioning deficits would be addressed

Executive Functioning: IEPs Case Example #1

Decision

- Court found in favor of district
- Although IEPs did not include specific goals and specialized instruction for student's executive functioning needs, those needs were adequately addressed elsewhere in proposed IEPs, with various accommodations
- Court stated that school officials responsible for student's education should be afforded deference under Endrew F.
- Thus, how the district sought to address executive functioning supports within its IEPs was its prerogative

(H.R. V. District of Columbia (D.D.C. 2024) 124 LRP 28849)

Executive Functioning: IEPs Case Example #1

Case Law Lesson

- Districts are not required to specify a particular instructional methodology within student's IEP, unless student requires specific methodology to receive FAPE
- This district established it could address student's executive functioning needs with accommodations for chunking, paper adjustments, seating options, checklists, and visual timers rather than with goals and specialized instruction under reading methodology parents preferred

Executive Functioning: IEPs Case Example #2

Facts

- Due to his autism and ADHD, student presented significant deficits in executive functioning
- To address this area of need, IEP required student and staff to use Schoology habit tracker, and agenda to review and check status of class assignments daily
- In early 2024, student was appropriately utilizing his daily habit tracker without prompts 76 percent of the time; however, by late spring, progress report showed that the student's appropriate use of the daily habit tracker deteriorated from 76 percent to 0 percent

Executive Functioning: IEPs Case Example #2

Decision

- State ED held that district failed to appropriately implement IEP
- District acknowledged that staff failed to consistently use and update habit tracker and agenda as required to address executive functioning
- Deviation from IEP caused the student to regress in his skills and contributed to student's difficulties with organization
- As a result, IEP implementation failure denied FAPE
- District was ordered to provide student with 15 hours of compensatory education and conduct staff training

(In re: Student with a Disability (SEA DE 2024) 124 LRP 35127)

Executive Functioning: IEPs Case Example #2

Case Law Lesson

- Substantial deviation from student's IEP, even if unintentional, can impede student's educational progress or cause skills to regress
- District should periodically review IEP to ensure staff understand their responsibilities
- In this case, had teachers used and updated student's habit tracker and assignment agenda on daily basis as required by his IEP, student may have mastered his annual executive functioning goals instead of falling further behind

Executive Functioning: IEPs Case Example #3

Facts

- Student was eligible under the categories of SLD and OHI
- District placed student in general education class; offered special education and related services on push-in and/or pull-out basis.
- Parents challenge three IEPs, claiming, among other allegations, that IEPs denied FAPE to student by failing to offer services to address student's executive functioning needs
- Parents contended that special education should have included instruction to address executive functioning deficits, based upon results of their independent evaluation

Executive Functioning: IEPs Case Example #3

Decision

- ALJ upheld district's services to address Student's executive function deficits – November 2018 and December 2018 IEPs included appropriate accommodations to address executive functioning, including repeated or simplified instructions, breaking down information in manageable chunks, asking student to paraphrase back in his own words to check for understanding, etc.
- By 2019, student made meaningful progress without any separate targeted program and November 2019 IEP team had no reason to believe that he needed any such program

(San Marcos Unif. Sch. Dist. (SEA CA 2021) 121 LRP 24503)

Executive Functioning: IEPs Case Example #3

Case Law Lesson

- This decision emphasizes that IDEA does not require schools to maximize a student's potential
- Citing to Endrew F., ALJ stated that for child fully integrated in regular classrooms, IEP typically should enable passing grades and advancement from grade to grade
- Here, this student's academic performance and progress on goals demonstrated the appropriateness of student's program, including manner in which district addressed student's executive functioning needs

Executive Functioning: IEPs Case Example #4

Facts

- District reevaluated 9th-grader and offered placement in out-of-district program
- IEP team believed that to make effective progress, student required small language-based program with similar peers where interventions were implemented throughout school day
- Placement offered therapeutic milieu to address attentional and executive functioning deficits, as well as behavioral, reading, speech, language, and counseling consultations
- After parent objected, district filed for due process

Executive Functioning: IEPs Case Example #4

Decision

- IHO determined district's IEP and proposed placement in out-of-district school was appropriate and necessary to provide FAPE
- Director of Pupil Services persuasively testified that Student required small group setting with similar peers who had executive functioning challenges
- District established that student's IEP could be most appropriately implemented in small therapeutic setting with consistent strategies throughout the school day, across all settings

(North Attleboro Pub. Schs. (SEA MA 2023) 123 LRP 29768)

Executive Functioning: IEPs Case Example #4

Case Law Lesson

- Parent sought a "full inclusion, out-of-district private language-based program" to address deficits, including executive functioning
- IHO stated that there is "no such thing . . . it is one or the other. By definition, a full inclusion special education program can only be offered in a public-school setting. A program that is out of district cannot be full inclusion. Out-of-district, language-based programs offer special education in a more restrictive setting than inclusion programs provided in a public-school setting, as the former generally removes a student to a smaller setting in which all participants present with similar deficits"

Practical Pointers: IEP Development

- Ensure IEP team, staff members know how executive functioning differences might manifest
- Make use of IEP team members' expertise and experience
- Identify student's specific constellation of strengths and needs, which can change over time
- Consider needed accommodations, or whether executive functioning requires more specific instruction
- Develop plan to support student's independence as student ages and educational responsibilities shift

Practical Pointers: IEP Development

- Bring current data on executive functioning issues to IEP team meeting to determine present levels; information that is not current can lead to flawed IEP
- Check to make sure that for every goal, there is corresponding remark in present levels of performance that provides data and explains where student currently stands on that particular skill (a baseline)
- Use "connect the dots" approach for IEPs

Other Issues: Postsecondary Transition

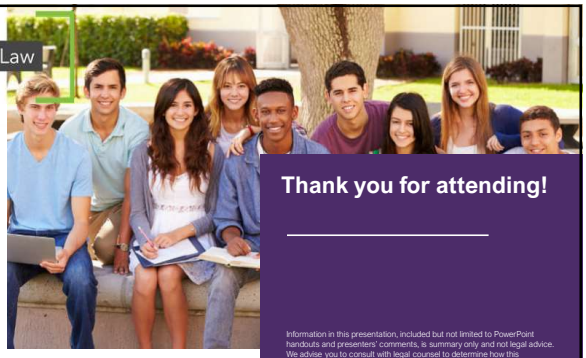
- District transition assessments need to include all areas of suspected disability (e.g., executive functioning skills, learning-to-learn skills, pragmatics)
- Identify specific transition needs (e.g., driver license, job application, pay bills, etc.) and design a statement accurately summarizing those needs
- State transition goals completely and carefully, but realistically, and describe progress student has made toward achieving goals
- Design clear and concise statement of transition services

Take Aways . . .

- Executive functioning deficits can be present in connection with several underlying disabilities
- Districts should:
  - **Recognize** characteristics associated with executive functioning deficits
  - **Assess** when needed, using appropriate tests and observational tools
  - **Address** executive functioning deficits through IEP goals, services and accommodations to enable student to make progress in light of student's circumstances

Questions?

F3 Law



Thank you for attending!

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- Inland Empire
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- San Diego

Workshop 9

Developing an IEP to Address School Avoidance

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Pacific Northwest Institute on Special Education and the Law
October 27-29, 2025
Bellevue, Washington

DEVELOPING AN IEP TO ADDRESS SCHOOL AVOIDANCE

MANDY FAVALORO
PACIFIC NORTHWEST INSTITUTE ON SPECIAL EDUCATION AND THE LAW 2025

MANDY FAVALORO, ESQ.

- I'm an attorney who has exclusively practiced special education law in California for 20 years. I represent families at IEP meetings, manifestation determination reviews, mediations, due process hearings and in federal court.
- I am on the Board of Directors for the Council of Parent Attorneys and Advocates and serve as Co-Chair of the Conference Committee.
- I previously taught the Special Education Advocacy Training ("SEAT") course for five years and I've been giving presentations for more than 15 years.

OVERVIEW

- School Avoidance
- Advocacy
- Assessments
- Discipline issues
- IEPS and 504 Plans

SCHOOL AVOIDANCE

SCHOOL AVOIDANCE

- Refuses to attend school or difficulty remaining in school the entire day
- Student attending school but eloping during the day or skipping classes
- Chronically late
- Attending school only after attempting to miss school
- Attends under distress

SCHOOL AVOIDANCE

- Who?
  - –Students transitioning to new school building – Kindergarten, middle school, high school
  - –5-28% of school aged youth
  - –Equal across gender, race and income groups

SCHOOL AVOIDANCE

SYMPTOM NOT A DIAGNOSIS

SCHOOL AVOIDANCE

- Diagnoses
  - –Social Anxiety Disorder
  - –Phobias
  - –Depression
  - –Generalized Anxiety Disorder
  - –Oppositional Defiant Disorder
  - –PTSD
  - –Adjustment Disorder
  - –Learning Disability

SCHOOL AVOIDANCE

- Events
  - –Death in family
  - –Changes at school
  - –Prolonged Absences
  - –Feeling unsafe

SCHOOL AVOIDANCE

SCHOOL AVOIDANCE

FUNCTION = AVOIDING SCHOOL BASED STIMULI

- Avoiding parts of campus
- Avoiding people
- Avoiding events
- Avoiding classwork

SCHOOL AVOIDANCE

FUNCTION = ESCAPE

- Reading out loud in class
- Tests
- Class presentation

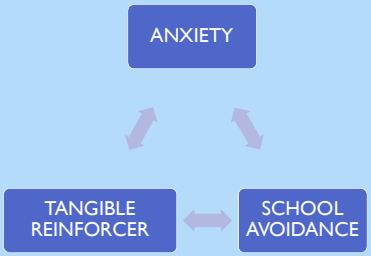
SCHOOL AVOIDANCE

FUNCTION = ATTENTION

- Hard time separating from family member
- Feeling needed by a family member

SCHOOL AVOIDANCE

FUNCTION = TANGIBLE REINFORCER



SCHOOL AVOIDANCE

SCHOOL AVOIDANCE

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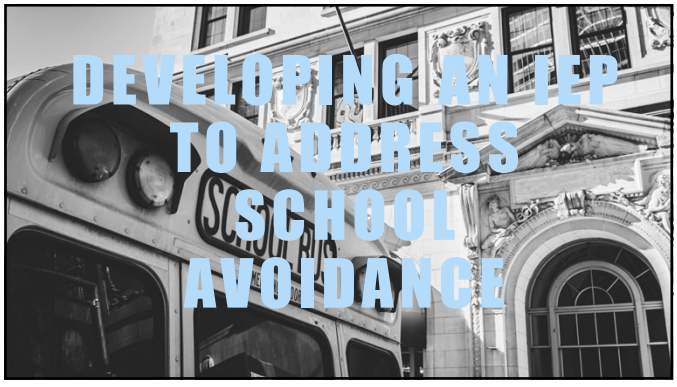
TRUANCY

SCHOOL AVOIDANCE

- *District of Columbia Public Schools*, 120 LRP 176 (SEA DC 10/13/19)
  - 108 absences
  - "significant effort" from the District
  - HO found unwillingness to attend school was reason for lack of progress
- Document efforts to work with the LEA to get student to school!

SCHOOL AVOIDANCE

- *A.W. v. Middletown Area School District,* 68 IDELR 247 (M.D. Pa. 2016)
  - 504 Plan
  - 103 absences in one year
  - Court found absences were a direct result of avoidance behaviors and phobias that had not been addressed by the District
  - District had to provide 949 hours of compensatory education
- Need to make causal connect between the absences and eligibility!



DEVELOPING AN IEP

Request Assessments

or

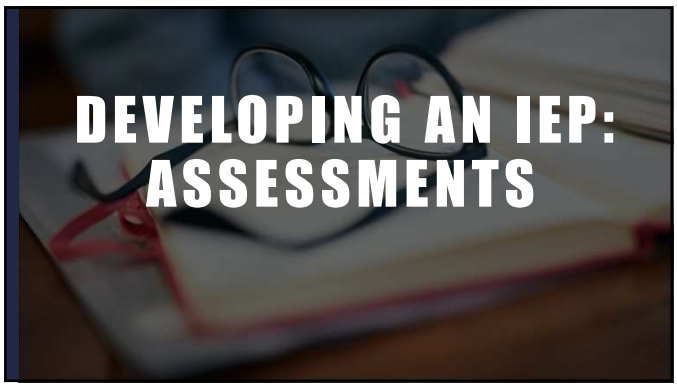
Request an IEP

DEVELOPING AN IEP

- District may be obligated to assess via "child find."
- What might trigger "child find" in cases of school avoidance?
  - Chronic Absenteeism
  - Contact with mental health provider at school
  - Decline in academic performance

DEVELOPING AN IEP

- Types of Assessments
- Eligibility
- IEP or 504 Plan
  - Goals
  - BSP
  - Accommodations and/or modifications
  - Services
  - Change in placement



DEVELOPING AN IEP: ASSESSMENTS

ASSESSMENTS

- Components
  - –Structured diagnostic interviews
  - –Questionnaires
  - –Behavioral observations
  - –Review of records
- Multiple methods and sources of information

ASSESSMENTS

- Psychoeducational Assessment
  - –Review of school-based records
  - –Interviews with school staff, student and parents
  - –Questionnaires for parents and teachers
  - –Information from mental health provider or medical personnel
  - –Structured Interview – Anxiety Disorders Interview Schedule for DSM-IV: Child and Parent Versions

ASSESSMENTS

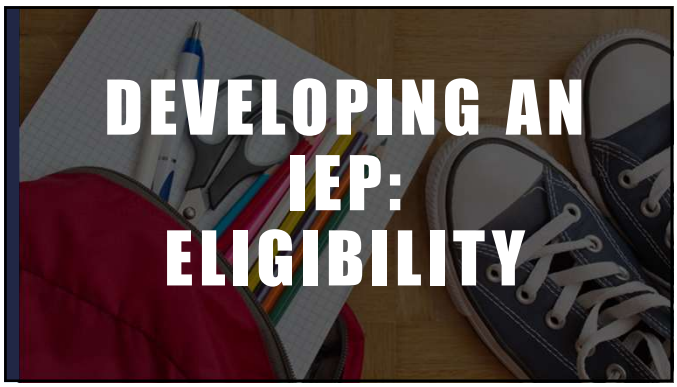
- Functional Behavior Assessment
  - Focuses on understanding the purpose or "function" of a behavior for a student
  - Should be conducted by an individual with expertise in providing individualized behavior support
- Purpose
  - Isolate target behaviors and develop hypothesis regarding the function of the target behavior
- Components
  - Interview
  - Review of records
  - Rating Scales
  - Direct observations

ASSESSMENTS

- Validated Measures
  - School Refusal Assessment Scale – Revised
  - School Anxiety Scale – Teacher Report
  - School Anxiety Inventory
  - School Refusal Evaluation Scale
- Provide insight as to whether school refusal was due to negative situations at school, reluctance to leave home, or perception that another setting was more rewarding than school.

ASSESSMENTS

- *District of Columbia Public Schools*, 119 LRP 42427 (SEA DC 9/6/19)
  - District waited nearly a year before conducting an FBA
  - HO found the failure to conduct an FBA and develop a BIP was a denial of FAPE
  - HO ordered 150 hours of academic tutoring and 50 hours of independent counseling as comp ed
  - HO ordered amending IEP to add SAI.
- FBA can inform services and interventions!

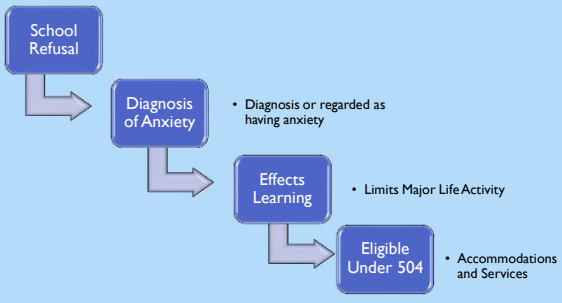


ELIGIBILITY

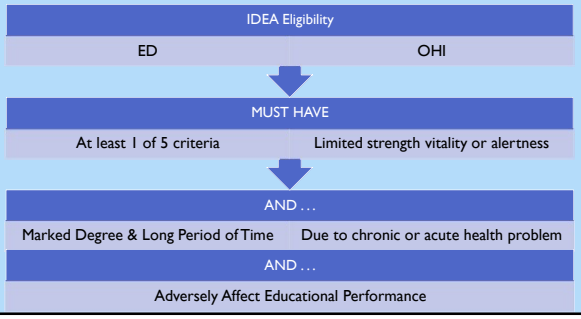
Section 504 Eligibility

- Student must
  - Have a physical or mental impairment that substantially limits one or more major life activities OR
  - Have a record of such an impairment OR
  - Be regarded as having such an impairment

ELIGIBILITY



ELIGIBILITY



ELIGIBILITY

- *Independent School District No. 283 v. E.M.D.H.*, 76 IDELR 203 (8th Cir. 2020)
  - District found Student ineligible due to above average academic performance
  - Court found her anxiety and depression prevented her from accessing her general education curriculum
  - District knew absences stemmed from mental health issues and that she had earned course credits
- LEA needs to consider more than academic ability when determining the effect on education

ELIGIBILITY

- *M.S. and D.S. v. Randolph Board of Education*, 75 IDELR 103 (D.N.J. 2019)
  - Teenager with GAD and excessively absent was not eligible
  - Court affirmed ALJ's decision that the Student's anxiety did not adversely affect his educational performance
  - Court pointed to the fact that he had no attendance problems or anxiety until he was 17 and therefore simply did not want to attend school
- Document any issues early on to provide a history if it becomes necessary!

ELIGIBILITY

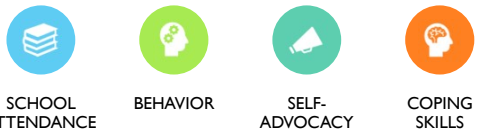
- Also consider SLD!
  - Root issue of school avoidance could be based on an untreated SLD

DEVELOPING AN IEP OR 504 PLAN

IEP

- *Canon-McMillan School District*, 114 LRP 39912 (SEA PA 8/26/14)
  - IHO found that District had reason to believe Student's anxiety was manifesting through school avoidance that should have been addressed in the IEP
  - Not all excessive absenteeism impedes learning "but where a student is unable to attend punctually, if at all, and parents shared with the school district that social/emotional/anxiety stressors in the school environment are the reason, that is a different matter."
  - Issue should have been taken up the IEP team

IEP: GOALS



IEP: GOALS

- *Parent v. Temecula Valley Unified School District*, et al (OAH No. 2011060230)
  - Student exhibited chronic absenteeism and school avoidance behaviors
  - IEP goal that was responsibility of parent
  - No BSP
  - ALJ found that the District's program was only appropriate in abstract
- Goals can be important in determining if the program is appropriate!

IEP: BSP

- IEP team is mandated to consider the use of positive behavioral interventions and supports
- BSP should include interventions designed to address the underlying issue
- Avoidance/escape
  - Interventions to address student's anxiety as relates to school or returning to school
- Attention
  - Interventions designed to address their need to be acknowledged
- Tangible Reinforcer
  - Rewards based program

IEP: BSP

- District of Columbia Schools. 119 LRP 37665 (SEA DC 8/26/19)
  - –District had recently developed a BIP to address severe absenteeism, granted request to attend a school with vocational program, and attempted home visits
  - –HO found that due to the efforts they made the District did not violate the IDEA by not updating the BIP
  - –The District made significant efforts to address the issue

IEP: ACCOMMODATIONS & MODIFICATIONS

Accommodation	Modification
• Changes in *how* a student accesses the curriculum	• Changes in *what* a student is expected to learn

IEP: ACCOMMODATIONS & MODIFICATIONS

Accommodations	Modifications
• Accommodated Schedule • Accommodations to address missed class time • Related to test anxiety • Access to counselor	• Curricular modifications

IEP: RELATED SERVICES

- IDEA – supportive services provided to students with disabilities to assist them in benefitting from special education
- Section 504 – does not define the term "related aids and services" but generally understood to include the same related services under the IDEA
- Must be provided to the extent that they enable the LEA to meet the individual educational needs of a student with a disability as adequately as it meets the needs of nondisabled students

IEP: RELATED SERVICES

- Counseling or mental health services
  - –Exposure therapy, cognitive behavioral therapy, dialectical behavioral therapy
- Social Skills
- Academic Support
- Parent Counseling and Training
- Behavior support – at home or at school

IEP: RELATED SERVICES

- Implementation of Services
  - –Remote services
  - –Homebound services
- Follow Up
  - –Transition plan to return to school
  - –Additional IEP meeting

IEP: CHANGE IN LOCATION

- *In re: Student with a Disability*, 125 LRP 14199 (SEA NH 4/23/25)
  - Student failed to make progress on school participation goal after transitioning to a larger campus
  - District did not adjust placement or reevaluate her needs despite significant decline in class participation
- *District of Columbia Public Schools*, 125 LRP 13705 (SEA DC 02/28/25)
  - Student did not attend school for an entire school year but the District did not adjust placement or her transition plan
  - IHO found that the district should have considered how the school size and environment impacted her anxiety

IEP: PLACEMENT

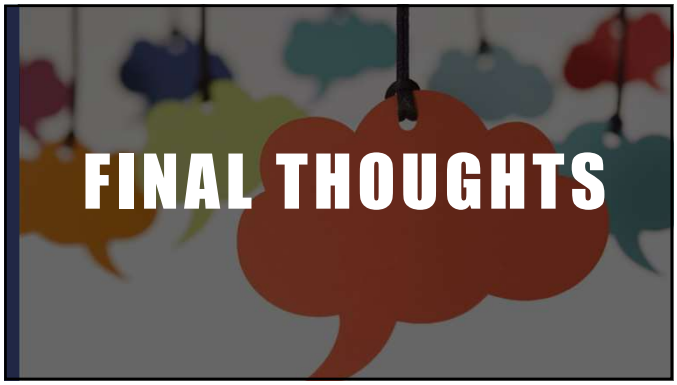
- Increase in SAI
- Move to a more restrictive placement
- Move to an RTC

IEP: PLACEMENT

- *Lexington County School District One v. Frazier, et al,* 57 IDELR 190 (D.S.C. 2011)
  - Student had anxiety and autism and refused to attend school or became overwhelmed at school
  - Parents placed in a RTC and sought reimbursements
  - Parents awarded reimbursement because placement was to find a setting where the student would respond to education

IEP: PLACEMENT

- *J.H. and D.H. v. Seattle Public Schools*, 124 LRP 7203 (W.D. Washington 2024)
  - Student's BIP was found to be appropriate even though student only attended 4/16 days of school
  - Student was getting dressed for school
  - Interventions may have worked if parents given more time to implement services



FINAL THOUGHTS

School Avoidance

Assessments	Eligibility	Develop or Revise IEP or 504 Plan

If IEP Team won't address issue Parents may want to consider strategies such as IEEs, Due Process or Unilateral Placement


QUESTIONS

Workshop 10

Ensuring Meaningful Parental Participation

By:

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Pacific Northwest Institute on Special Education and the Law
October 27-29, 2025
Bellevue, Washington

F3 Law

Ensuring Meaningful Parent Participation

2025 PNW Institute

Presented by: Jan E. Tomsky

What We'll Cover . . .

- Background and Overview
- Who Is a Parent
  - Participation by Divorced Parents
- IEP Team Meeting Issues
  - Right to Request and Attend Meetings
  - Conducting Meetings Without Parents
  - Other Parent Rights
- Formulating and Implementing the IEP
  - Predetermination
  - Other Parent Rights, Including Duty to Consider IEEs and Consent Requirements

Background and Overview

Introduction

- One of the cornerstones of special education law is maximum practical participation by parents in development of each student's IEP
- Many protections are built into IDEA to facilitate this participation
- Due process filings and state compliance complaints alleging that parents were excluded from IEP process have increased tremendously over past 10 years (e.g., predetermination claims)
- Issue for administrative officers and courts: whether any lack of parental participation was a procedural violation of the IDEA resulting in a denial of FAPE

Demonstrating FAPE -- The Rowley Standard

- Two-prong test for determining whether a student was offered FAPE
  - Procedural: Has the district complied with the procedures set forth in the IDEA?
  - Substantive: Is the IEP reasonably calculated to enable the student to obtain some educational benefit? (e.g., achieve passing marks and advance from grade to grade)?

(Board of Ed. of Hendrick Hudson Central School Dist. v. Rowley (1982) 458 U.S. 176)

Test of Procedural Compliance

1. Impeded right to FAPE;
2. Significantly impeded parents' right to meaningfully participate in the decision-making process; or
3. Caused educational deprivation

(34 C.F.R. § 300.513(a)(2))

Who Is a Parent?

IDEA Definition of "Parent"

- Biological or adoptive parent
- Foster parent (unless state law, regulation or contractual obligations with state or local entity prohibit foster parent from acting as parent)
- Guardian generally authorized to act as child's parent, or authorized to make educational decisions for the child (but not the state, if the child is a ward of the state
- Individual acting in place of biological or adoptive parent (including grandparent, stepparent or other relative) with whom the child lives, or individual legally responsible for child's welfare
- Duly appointed surrogate parent

(34 C.F.R. § 300.30)

IDEA Definition of "Parent"

- When more than one party is qualified, biological or adoptive parent (when attempting to act as parent) must be presumed to be the parent unless:
  - Judicial decree or order identifies another person or persons to act as "parent" or to make educational decisions

(34 C.F.R. § 300.30)

Divorced Parents

- IDEA rights, including right to attend IEP meetings and participate in IEP development, apply to both parents, unless court order specifies otherwise

(34 C.F.R. § 300.30; 71 Fed. Reg. 46568 (2006))

Case Example

Oxnard Union High School Dist. (SEA CA 2008)

- Parents divorced and shared joint custody
- Only father attended IEP meeting at which student was found eligible for special ed
- Mother not allowed to participate in IEP meeting before services began (Father misled district about his authority to make educational decisions)
- ALJ: District failed to afford mother meaningful participation; ordered all assessments expunged and that student be removed from special ed

(Oxnard Union High School Dist. (SEA CA 2008) 108 LRP 23943)

Practice Pointers: Divorced Parents at IEP Team Meeting

- Obtain copy of current court decrees that might affect parents' right to participate/make educational decisions
- Speak with each parent prior to meeting to answer any questions and determine if issues other than those related to IEP might arise

IEP Team Meeting Issues

What Is (and What Is Not) an IEP Team Meeting?

Three situations that do not require parental participation:

- Informal, unscheduled conversations among staff
- Staff discussions on issues such as teaching methodology, lesson plans or coordination of services
- Preparatory activities to develop proposal or response to parent proposal that will be discussed at later meeting

(34 C.F.R. § 300.501(b)(3))

IEP Team Meeting Notice

Content:

- Purpose, time and place of meeting
- Who will be attending
- Inform parents of right to bring individuals with knowledge or special expertise about student
- Note: Special rules apply for notice of meetings to discuss postsecondary transition services

(34 C.F.R. § 300.322)

IEP Team Meeting Notice

Timing:

- Early enough to ensure parents will have opportunity to attend
- OSEP suggests 10-day advance notice, but no formal requirement

(34 C.F.R. § 300.322; Letter to Constantian (OSEP 1990) 17 IDELR 118)

Deficient Notice as Denial of FAPE

- If faulty (or tardy) notice deprives parent of ability to participate in IEP process, it can be basis for finding of denial of FAPE
- But when parents are still able to participate fully despite faulty notice, procedural violation generally will not be sufficient to deny FAPE

Practice Pointers: IEP Team Meeting Notice

- Case decisions on improper notice have focused on the following issues:
  - Providing sufficient time in advance of meeting
  - Listing individuals being invited to attend
  - Stating purpose of meeting
  - Accurately identifying time, date and location
- Document and make copies of all notices sent, as paper trail may be important

Practice Pointers: IEP Team Meeting Notice

- When district intends to hold virtual IEP team meeting, be sure meeting notice includes name of virtual platform (with instructions on how to participate)
- Send parents link to meeting on same day you send notice, as well as on day before meeting as reminder

Scheduling IEP Team Meetings

- "Mutually agreed time and place"
- Standard of reasonableness should apply
- Not unreasonable to schedule team meetings during regular business hours
- But there might be circumstances where parents' employment situation restricts availability; districts should be flexible in those instances

(34 C.F.R. § 300.322(a)(2); Letter to Thomas (OSEP 2008) 51 IDELR 224)

Case Example

Gwinnett County Sch. Dist. (SEA GA 2012)

- Student's IEP team meetings typically lasted several hours
- Principal attempted to schedule meeting beginning at 8 a.m., but parent informed district that no meeting could start before 3 p.m. and insisted on multiple meetings from 3 p.m. to 4 p.m.
- Principal advised that parent's plan was impractical and offered meetings beginning at 1 p.m. or 2 p.m.
- ALJ: District made sufficient good faith effort to schedule meeting time and proposals to compromise were "eminently reasonable"

(Gwinnett County School Dist. (SEA GA 2012) 112 LRP 51134)

Alternative Means of Participation

- Parents and district may agree to use alternative means of participation for IEP team meetings, including video conferencing and conference calls
- Both parties must consent
- If additional costs result, district is responsible

(34 C.F.R. § 300.328; 71 Fed. Reg. 46687 (2006))

Case Example

Drobnicki v. Poway Unified School Dist. (9th Cir. 2009)

- District scheduled IEP team meeting without inquiring about parents' availability
- Parents said they were not sure if they could attend and asked for meeting to be rescheduled
- District offered to allow parents to participate by phone
- Court: Denial of FAPE; phone offer was of no consequence because it can only be used if neither parent can attend
- Parents did not refuse to attend; they asked to reschedule meeting

(Drobnicki v. Poway Unified School Dist. (9th Cir. 2009, unpublished) 53 IDELR 210)

Conducting IEP Team Meetings Without Parents

- Parents have absolute right to attend all IEP team meetings (even when districts are certain they will reject proposed course of action)
- District must make every effort to secure presence of parents

(Shapiro v. Paradise Valley Unified School Dist. (9th Cir. 2003) 38 IDELR 91)

Conducting IEP Team Meetings Without Parents

- Meetings may be conducted without parents only if district "is unable to convince parents that they should attend"
- Must keep records of attempt to arrange meeting
  - Log of phone calls
  - Copies of correspondence
  - Document visits to home/work

(34 C.F.R. § 300.322(d))

Conducting IEP Team Meetings Without Parents

Circumstances where districts may hold meetings without parents are decided on case-by-case basis, taking into account actions by both parties before (and sometimes after) IEP team meeting

Case Example

Doug C. v. Hawaii Dep't of Educ. (9th Cir. 2013)

- School wanted to hold IEP meeting before annual review deadline
- Parent could not be present during various dates proposed by team (and did not want to participate by phone), so meeting proceeded without him
- Failure to include Parent infringed on ability to participate, denied FAPE
- 9th Circuit: "Under the circumstances of this case, the [school's] decision to prioritize strict deadline compliance over parental participation was clearly not reasonable"

(Doug C. v. State of Hawaii Dep't of Educ. (9th Cir. 2013) 61 IDELR 91)

Case Example

Southfield Pub. School Dist. (SEA MI 2015)

- Parent advised district that she was unable to attend previously scheduled IEP team meetings
- District staff member stated she phoned parent and obtained permission to hold meeting as scheduled in parent's absence
- Staff member did not document telephone conversation
- Parents claimed district violated IDEA by holding meeting without her; district claimed parent refused to attend
- State ED agreed with parent, finding no documentation to support district's contention

(Southfield Public School Dist. (SEA MI 2015) 115 LRP 31270)

Case Example

Corona-Norco Unif. School Dist. (SEA CA 2010)

- District scheduled student's IEP meeting three times but parents requested postponement on each occasion
- District finally let Parents choose date for meeting, but again parents asked for postponement
- District ultimately met without parents after student had been without a current IEP for almost a year
- ALJ: No violation; ". . . There comes a point where a district must hold a meeting without the parents in order to meet its duty to the child"

(Corona-Norco Unified School Dist. (SEA CA 2010) 110 LRP 15982)

Practice Pointers: Conducting IEP Team Meetings Without Parents

- Be sure to comply with legal requirements to document efforts to persuade parents to attend
- Explore other means of participation
- Send copy of any IEP developed without parents
- Offer to reconvene IEP team when parents are available

Interpreters at IEP Team Meetings

- Districts must take whatever steps are necessary to ensure parents understand proceedings of meeting
  - Includes arranging for interpreter for parents with deafness or whose native language is other than English
  - OCR: Failure to provide interpreter and written translation during IEP process may violate Section 504

(34 C.F.R. § 300.322(e); Victor Valley (CA) Unified School Dist. (OCR 2007) 50 IDELR 141)

Recording IEP Team Meetings

- OSEP: State educational agency or public agency has the option to require, prohibit, limit, or otherwise regulate the use of recording devices at IEP meetings
- If a public agency or SEA has policy that limits or prohibits use of recording devices at IEP meetings, policy must provide for exceptions that ensure that parent understands IEP or IEP process
- State laws vary: In Washington, for example, parent may request consent to record meetings in accordance with applicable district policy; any recording that is maintained by district is "education record" within meaning of FERPA

(Letter to Anonymous (OSEP 2003) 40 IDELR 70; WAC 392-172A-05001)

Right to Representation at IEP Team Meetings

- OSEP has acknowledged that both districts and parents may invite their attorneys to IEP team meeting as part of team if attorneys "possess knowledge or special expertise regarding the child"
- OSEP: "An attorney's presence would have the potential for creating an adversarial atmosphere that would not necessarily be in the best interests of the child. Therefore, the attendance of attorneys at IEP meetings should be strongly discouraged"

(Letter to Clinton (OSEP 2001) 37 IDELR 70)

Formulating and Implementing the IEP

Predetermination

- Occurs when districts decide on IEP content/issues prior to IEP team meeting precluding meaningful parental participation
- Allegations of predetermination frequently arise with respect to:
  - Preparatory meetings
  - Draft IEPs
  - (Lack of) meaningful discussion at IEP meeting

Preparatory Meeting

- Districts may engage in preparatory activities to develop a proposal or response to parent proposal that will be discussed at later meeting
- Example: Staff may review assessment recommendations or placement options in advance of meeting, but must discuss those options with parents and make decisions at the IEP meeting
- Difference between preparation and predetermination is sometimes hazy

(34 C.F.R. § 300.501(b))

Case Example

T.P. and S.P. v. Mamaroneck Union Free School Dist. (2d Cir. 2009)

- District retained behavior consultant who (possibly) discussed recommendations with IEP chairperson before meeting
- Parents claimed consultant's notes set limits of ABA services district would provide
- 2d Cir: Parents failed to show team did not have open mind
- Pre-meeting consideration is allowed by law
- There was no decided-upon arrangement for ABA services
- Parents meaningfully participated in program development

(T.P. and S.P. v. Mamaroneck Union Free School Dist. (2d Cir. 2009) 51 IDELR 176)

Draft IEPs

- Permissible to develop draft IEP
  - Share with parents before or during meeting
  - Must be used for discussion purposes only
  - Cannot be presented as completed document
- OSEP: If draft IEP is developed, district should:
  - Make clear to parents at outset of meeting that it is preliminary recommendation for review and discussion
  - Provide parents with copy

(Letter to Helmuth (OSEP 1990) 16 IDELR 503; 71 Fed. Reg. 46678 (2006))

Case Example

Mercer Island School District (SEA WA 2021)

- Parents requested to change student's placement focusing on long-term goal of 100 percent inclusion in general education setting
- At parents' request, district provided draft IEP prior to annual IEP review
- Draft discontinued paraeducator support and noted that student would spend 85.9 percent of his time in general education setting
- Parents filed complaint alleging predetermination
- State DOE rejected claim, noting that existence of draft IEP does not alone indicate predetermination
- Parents raised no concerns after receiving draft IEP, nor did they object during two facilitated IEP meetings lasting almost seven hours going through details of draft IEP

(Mercer Island School Dist. (SEA WA 2021) 78 IDELR 299)

Practice Pointers: Draft IEPs

Consider the following to avoid any appearance of predetermination when using draft IEPs

- Stamp or write "DRAFT" on each page
- Ask for parent feedback throughout meeting
- Keep detailed notes and handwrite changes on draft
- Do not complete FAPE offer portion of draft IEP prior to meeting
- Consider saving draft with handwritten notations to allow comparisons with final IEP

Meaningful Discussion

- Parents' presence at meeting is not enough
  - Must have opportunity to voice concerns
  - Must have their input considered by the team
  - Must have opportunity to ask questions and be provided with meaningful answers
- "Take it or leave it approach" evidences predetermination

Case Example

Deal v. Hamilton Co. Bd. of Educ. (6th Cir. 2004)

Progenitor of virtually all subsequent predetermination claims

- IEP team discussed IEP for Student with autism with Parents without mentioning the Lovaas-style ABA as possible methodology
- District had consistently rejected providing Lovaas-based ABA services all students, rejecting validity of Lovaas
- District staff told Parents that they could not ask questions during IEP team meeting at which methodology was discussed
- District's proposed IEP included teaching methods that would encompass one-to-one discrete trial teaching

Case Example

Deal v. Hamilton Co. Bd. of Educ. (6th Cir. 2004) (cont'd)

- Sixth Circuit found that District denied Parents opportunity to meaningfully participate in IEP process
- Parents' involvement was merely "matter of form" and "after the fact," because district had pre-decided student's program and services
- District had unofficial policy of refusing to provide 1:1 ABA programs because it had previously invested in another methodology program
- District's predetermination violation caused student substantive harm and therefore denied him FAPE

(Deal v. Hamilton Co. Bd. of Educ. (6th Cir. 2004) 42 IDELR 109, cert. denied, (2005) 546 U.S. 936)

Case Example

In re: Student with a Disability (SEA WA 2023)

- IEP team decided to remove specialized math and writing instruction from student's January 2023 IEP
- Vice principal also allegedly brought to IEP team meeting a list of accommodations and modifications student would receive
- State DOE rejected parents' predetermination claim: Parents had opportunities to ask questions concerning student and provided significant input during evaluation process
- There also was "a fairly extensive back-and-forth regarding appropriate accommodations and modifications"
- Final IEP also included several accommodations recommended by parents indicating that district team members were receptive to parents' input

(In re: Student with a Disability (SEA WA 2023) 123 LRP 17943)

Case Example

G.A. and W.A. v. Williamson County Bd. of Educ. (M.D. Tenn. 2022)

- Parent of seventh grader with autism who attended private school considered enrolling student in district and asked for evaluation
- Parent claimed district predetermined placement when developing IEP and re-enrolled student in private school
- Court found that district had prepared many materials in advance of IEP meeting that listed district as student's educational setting before parent had reached decision to enroll student
- But such pre-preparation did not inhibit parent's participation
- IEP team members came to meeting with open minds, listened to parent's concerns and "took her input seriously"

(G.A. and W.A. v. Williamson County Bd. of Educ. (M.D. Tenn. 2022) 80 IDELR 255)

Practice Pointers: Meaningful Discussion

Consider these tips to ensure meaningful participation

- Explain purpose and reason behind any preparatory meeting
- Be careful of statements at IEP meeting suggesting: "Here's what we decided"
- When option is proposed, seek parents' input/response
- Give parents enough information about all possible placements so that they can take part in discussions
- Ensure enough time for questions

Other Parent Rights Re: IEP Development

- Documenting Parent Concerns and Objections
  - IDEA requires team to consider concerns for enhancing education of student
  - Team should specifically ask parent about concerns and indicate on IEP document that it has done so
- Right to Copy of IEP Document
  - IDEA requires district to provide IEP copy at no cost

(34 C.F.R. § 300.324(a)(1); 34 C.F.R. § 300.322(f))

Other Parent Rights Re: IEP Development

- Right to Be Informed of Student's Progress
  - Each IEP must include description of how and when parents will be informed of progress student is making toward meeting annual goals (such as through use of quarterly or other periodic reports, concurrent with issuance of report cards)
  - Includes progress reporting on postsecondary goals

(34 C.F.R. § 300.320(a)(3); Letter to Pugh (OSEP 2017) 69 IDELR 135))

Other Parent Rights Re: IEP Development

- Right to Have IEP Team Consider IEE
  - IEP team has duty to consider any IEE shared by parents, if IEE meets district criteria
  - Duty to consider does not equate to duty to accept recommendations
  - No IDEA provision setting parameters for what it means to "consider"

(34 C.F.R. § 300.502(c))

Practice Pointers: Considering IEEs

Document the following in IEP team meeting comments as evidence that team members discussed and considered IEE

- That IEP team considered the report
- That IEP team discussed the report
- Whether IEP team members agreed or disagreed with the facts, opinions, conclusions and recommendations contained in the report

Obtaining Parent's Consent to IEP

- Consent means that parent:
  - Has been fully informed of relevant information
  - Understands and agrees in writing to the carrying out of the activity for which consent is sought
  - Understands that granting consent is voluntary and may be revoked at any time

(34 C.F.R. § 300.9)

Obtaining Parent's Consent to IEP

- Consent to Initial Services
  - District must obtain informed consent before initial provision of services outlined in IEP
  - If Parent refuses to consent or fails to respond, district should not provide services
  - Cannot attempt to override lack of consent to services by filing for due process
  - District does not violate FAPE obligation and is not required to develop IEP if no consent obtained

(34 C.F.R. § 300.300(b)(2))

Obtaining Parent's Consent to IEP

- Revocation of Consent
  - District must cease providing services
  - May not seek due process to override revocation
  - No longer has obligation to develop IEP
  - No limit on number of times Parent may revoke consent and then request reinstatement

(34 C.F.R. § 300.300(b)(4))

Obtaining Parent's Consent to IEP

- Letter to Cox (OSEP 2009)
  - One parent's authorized written revocation of consent is sufficient to trigger cessation of services even if the other parent disagrees
  - Neither a district nor the parent who wishes services to continue may file a due process complaint to overcome the revocation
  - Subsequent evaluation request by either parent must be treated as a request for an initial evaluation, not a reevaluation
  - "OSEP acknowledges that disputes between parents who share the right to make educational decisions for their child, and who disagree about the provision of special education and related services for their child, may place an LEA in a difficult situation"

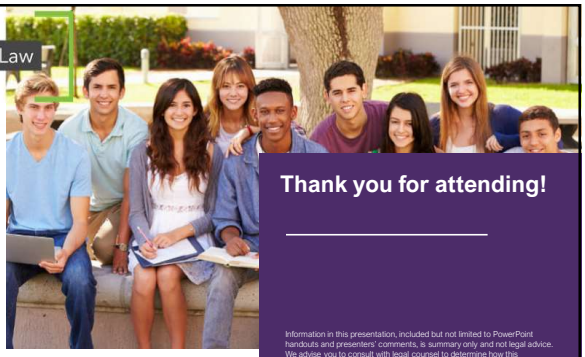
(Letter to Cox (OSEP 2009) 54 IDELR 60)

Take Aways . . .

- Understand broad range of responsibilities to ensure meaningful parent participation in IEP process
- Attempt to develop ongoing and collaborative relationship with parents
- Emphasize meaningful participation as the standard for IEP team meetings and entire IEP development process

Questions?

F3 Law



Thank you for attending!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Workshop 11

Navigating the Legal Crossroads: The Complex Intersection of Title IX and the IDEA

By:

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Garrett Hemann Robertson P.C.
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Pacific Northwest Institute on Special Education and the Law
October 27-29, 2025
Bellevue, Washington

Navigating the Legal Crossroads

The Complex Intersection of Title IX and the IDEA

Elizabeth L. Polay

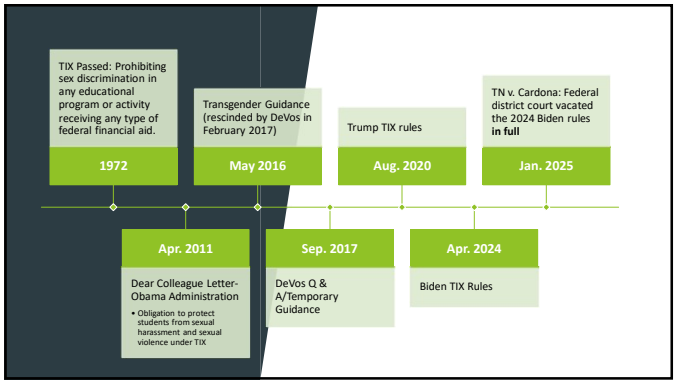
GARRETT HEMANN ROBERTSON P.C.

Pacific Northwest Institute on Special Education and the Law

October 29, 2025

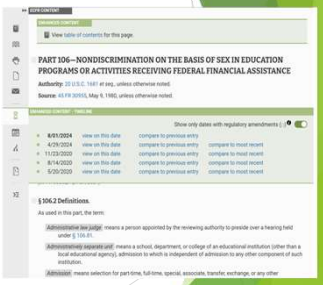
Agenda

- Timeline and current status of the Title IX regulations
- Basics of Title IX procedure
- Areas of general overlap or conflict with IDEA
  - Vulnerability and misinterpretation of behavior
  - Disciplinary action, investigation timelines, and placement considerations
    - Equitable supportive measures
  - Unidentified but suspected students with disabilities
  - Sexual harassment and FAPE



What does this mean?

- DOE announced it will enforce the 2020 rules
- Where do you find the 2020 rules in full?
  - Not all sources have reverted their publicly available information to the 2020 rules and still show the 2024 (inactive) rules
  - Best source I have found that can be counted on to view any version of the rules:
    - Go to the official National Archives webpage that contains the Code of Federal Regulations:
      - https://www.ecfr.gov/current/title-34/subtitle-B/chapter-I/part-106
    - Look for the hourglass icon on the left-hand side of the webpage
    - Select the August 14, 2020 version of the rules
      - Note: The April 29, 2024 version of the rules is the version that was vacated in full by a federal district court judge
      - If you are very interested, you can compare with previous versions or even compare to the most recent version of the rules



Basics of Title IX Procedure

Note: What this presentation is not

This is not a complete Title IX training for Title IX coordinators, investigators, or decision-makers

This presentation contains basic background information needed if you are working through an active Title IX issue involving a student with disabilities under the IDEA or Section 504

Important Definitions: (34 CFR 106.30)

- Title IX is a federal law that protects against sex discrimination and sexual harassment
  - This presentation focuses on the sexual harassment complaint and investigation process and its intersection with the IDEA and Section 504
- Complainant: an individual who is alleged to be the victim of conduct that could constitute sexual harassment
- Respondent: an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment

Sexual Harassment Definition: (34 CFR 106.30)

Conduct on the basis of sex that satisfies one or more of the following:

- (1) Quid Pro Quo Sexual Harassment: conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
- (2) Unwelcome conduct determined by a reasonable person to be **so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity**; or
- (3) Sexual assault, dating violence, domestic violence, or stalking, as defined in federal laws

Note: Always check your state's laws and your district's policies on sexual harassment

- Many states have their own sexual harassment law that imposes additional obligations on public schools and/or the federal courts have different interpretations of Title IX than the current administration
  - Ex: Oregon has a sexual harassment law that includes harassment on the basis of sexual orientation and gender identity although these were removed from the Title IX regulations by the return to the 2020 Rules
  - Ex: The Ninth Circuit Court of Appeals has interpreted Title IX to include gender identity and sexual orientation discrimination
- Check with your local legal counsel and district policy to know if there are obligations under your own state's sexual harassment or sexual conduct laws in addition to Title IX rules and regulations

Actual Notice: (34 CFR 106.30)

- Actual Notice
  - Notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to **any employee of an elementary and secondary school**
  - Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge
  - This standard is not met when the only official of the recipient with actual knowledge is the respondent

What is a complaint under Title IX? (34 CFR 106.30)

- A document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment
- At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed
- A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information required to be listed for the Title IX Coordinator under § 106.8(a), and by any additional method designated by the recipient.

Supportive measures: (34 CFR 106.30)

Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed

Such measures are designed to **restore or preserve equal access** to the recipient's education program or activity **without unreasonably burdening the other party**, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment

Supportive measures **may include** counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures

The recipient must maintain as **confidential** any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures.

What response is required? (34 CFR 106.44)

- A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, **must respond**
  - **Promptly**
  - In a manner that is not **deliberately indifferent**
- A recipient is deliberately indifferent only if its response to sexual harassment is **clearly unreasonable** in light of the known circumstances
- A recipient's response must treat complainants and respondents **equitably** by
  - Offering supportive measures to a complainant, and
  - Following a grievance process that complies with the Title IX rules **before the imposition of any disciplinary sanctions** or other actions that are not supportive measures against a respondent.

What response is required? (cont.)

- When a formal complaint is filed, the district **must** investigate and follow specific grievance procedures
- Basic requirements:
  - Written notice to the parties
  - Conduct an equitable and objective investigation
    - District must search out relevant evidence
    - Must be sufficient evidence to meet the burden of proof
    - Meet mandatory minimum timelines (more on this later)
  - Issue an investigative report that fairly summarizes the evidence
  - Issue a written determination of responsibility by someone other than the investigator
    - Includes findings of fact and conclusion for each allegation
    - Also explains and sets forth disciplinary sanctions

Informal Resolution Option

- The Title IX regulations allow for an informal resolution option
- Per 34 CFR 106.45(9), "at any time prior to reaching a determination regarding responsibility the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication," provided certain conditions are met, including the mutual consent of the parties.

Vulnerability of Students with Disabilities and Misinterpretation of Behavior

- Palo Alto Unified* Example:
- Two students on the robotics team who dated for about three months
- Female student claimed male student (with ASD and pragmatic language deficits) sexually assaulted and harassed her
  - Harassing text messages
  - Claimed male student forced female student to perform oral sex (off campus), which male student denied
- Female student ended the relationship and filed a Title IX complaint
- Outside investigator conducted the investigation
- Investigator used a preponderance of the evidence standard (that it was more likely than not that the allegations occurred) and concluded that the male student sent the female student text messages and made comments about her to other students that constituted sexual harassment

*No case citation available. Facts pulled from ongoing news coverage on Palo Alto Online and The Stanford Daily

Vulnerability of Students with Disabilities and Misinterpretation of Behavior

- Palo Alto (cont.)
- The district issued a permanent safety directive with specific no-contact provisions
- The directive put in place an alternating schedule to allow both students to attend after-school robotics activities
- When the student-managed team's competitive "build" season kicked off (December) and through the end of the school year, the boy would be not be allowed to participate.
- Boy's parent files a special education complaint – alleging boy's rights under the IDEA were violated
- The district and the boy's mother ultimately reached a mediated agreement in mid-January, giving him access to robotics team activities so long as an additional staff member, such as an escort, is present
- In late January, the district requested to meet with the girl's parents and informed them that the directive had been revised, and the boy would be allowed to participate in all robotics team activities, effective immediately

*No case citation available. Facts pulled from ongoing news coverage on Palo Alto Online and The Stanford Daily

Vulnerability of Students with Disabilities and Misinterpretation of Behavior

- Palo Alto (cont.)
- Girl's parents filed a motion in late January, which resulted in a temporary no-contact order that prohibited the male student from attending robotics
- Boy's lawyer filed to intervene in the case. He argued that the school district failed to comply with manifestation determination requirements for the boy as a special education student, claiming district had to determine if behavior was a manifestation of his pragmatic language difficulties as a student with ASD
- Lawyer claimed, the boy "suffers and will suffer irreparable harm if the January directive (between his family and the district) is not reinstated. He is being deprived of his educational opportunity in violation of the IDEA and the mediation agreement."

*No case citation available. Facts pulled from ongoing news coverage on Palo Alto Online and The Stanford Daily

Vulnerability of Students with Disabilities and Misinterpretation of Behavior

- Palo Alto (cont.)
- Ultimately, the cases were settled
- We will come back to the MDR question later….
- But what do you do when there is a serious question that a misunderstanding of the student's disability-related behavior is the possible basis for a Title IX dispute?
  - Do you stop the investigation?
  - Do you move forward with supportive measures?
  - Do you work through an informal resolution process?
- Remember, when a formal complaint is received, the district **must respond promptly and in a manner that is not deliberately indifferent**

Vulnerability of Students with Disabilities and Misinterpretation of Behavior

- Typical mistakes at early stages:
  - Assuming the conduct is "no big deal" because the student "doesn't understand"
    - *San Diego Unified School District*, 124 LRP 30097 (2024) (OCR compliance review)
    - In one example under this compliance review, OCR found that a student with behavioral issues that was receiving special education had slapped or grabbed other students' behinds on multiple occasions.
    - The Title IX coordinator stated in their notes that no one thought it was a "big deal" because the student was in special ed and no steps were taken to prevent further harassment
  - Assuming that students with disabilities cannot be the subject of a Title IX dispute because of their disabilities or because of their protections under the IDEA
    - From the same OCR compliance review in San Diego Unified, a teacher witnessed a special ed student put their hand in another special ed student's pants and did not report it because they "did not know how to process [the situation]."
    - While police investigated the incident, the district offered no interim measures, and no remedies were offered after the police confirmed that harassment had occurred.
  - Both incidents were used as evidence that the district had failed to evaluate allegations of sexual harassment consistent with the requirement of Title IX.

So what *should* you do?

- At the outset, the question is whether having knowledge of a student's disability would stop or pause the Title IX process if a formal complaint is made
  - Note: Again, discussion of how this mixes with requirements for placement and MDRs is coming…
- Always go back to the jurisdictional requirements and definition of sexual harassment under the law:
  - In the Palo Alto case, should they have stopped the investigation because the student just didn't understand the social cues in conversation with his then-girlfriend?
    - **Absolutely not**.
  - Even if conduct is obviously related to a disability, we still must go through the Title IX process
  - There is no exception that allows us to skip the Title IX process for that reason
  - Discipline is only one option available as a remedy under Title IX
  - Sexual harassment is defined as "unwelcome conduct determined by a reasonable person to be so **severe, pervasive, and objectively offensive** that it effectively denies a person equal access to the recipient's education program or activity"
  - Here: the text messages, comments to peers, and allegations of forced oral sex were enough to suggest to a reasonable person that the conduct was severe, pervasive, and objective offensive

Vulnerability of Students with Disabilities and Misinterpretation of Behavior

- Scenario:
  - Student with Tourette Syndrome experiences a tic that causes them to yell vulgar and sometimes suggestive language at staff and students. The tic is more prevalent in the hallway or the lunchroom because it tends to be triggered by overstimulating and loud environments.
  - Student has a behavior plan that describes proactive and preventative steps to take to avoid those environments for the student.
  - On a random Tuesday, the school conducts a fire drill. Because of the drill's protocols, the student must traverse the hallways with the rest of the student body to get outside
  - During this loud, overstimulating time, the student yells vulgarities randomly at staff and students in the hallway, making one especially suggestive comment to a female peer
  - The female peer files a Title IX complaint against the special education student with the District
- Should this complaint move forward through the Title IX process?
  - Is it unwelcome conduct determined by a reasonable person to be so **severe, pervasive, and objectively offensive** that it effectively denies a person equal access to the recipient's education program or activity?
  - Underlying question: Is one incident enough to establish something severe, pervasive, and objectively offensive such that it denied the student access to her education program or activity

Vulnerability of Students with Disabilities and Misinterpretation of Behavior

- Change the facts:
  - Student with Tourette Syndrome experiences a tic that causes them to yell vulgar and sometimes suggestive language at staff and students. The tic is more prevalent in the hallway or the lunchroom because it tends to be triggered by overstimulating and loud environments.
  - Student has a behavior plan that describes proactive and preventative steps to take to avoid those environments for the student.
  - Student has a 1:1 aide for a variety of reasons, but one of those reasons is to help direct them away from certain environments that they tend to gravitate to that also happen to increase their tics resulting in offensive comments
  - Unfortunately, the aide has not been following the behavior plan and the student has been allowed on multiple occasions to target a peer with suggestive and vulgar language in the hallways
  - The other student files a formal Title IX complaint against the special education student
- What should the district do?

Vulnerability of Students with Disabilities and Misinterpretation of Behavior

- Should this complaint move forward through the Title IX process?
  - Is it unwelcome conduct determined by a reasonable person to be so **severe, pervasive, and objectively offensive** that it effectively denies a person equal access to the recipient's education program or activity?
  - Should we conduct an MDR?
    - Possibly….
    - But when should we conduct one? (We will answer this question shortly)
- Other implications
  - Did the school fail to implement the behavior plan?
  - What could be the result of that failure?
  - Is there potential harm to the offending student as well?

Disciplinary action, investigation timelines, and placement considerations

Analysis of manifestation determination review (MDR) requirements

Overview of required investigation timelines

Emergency removals under both Title IX and IDEA

Implications of placement requirements under the IDEA

When must an MDR be held?

- 34 CFR 300.530(e):

Manifestation determination. (1) Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the LEA, the parent, and relevant members of the child's IEP Team (as determined by the parent and the LEA) must review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine—

(i) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or

(ii) If the conduct in question was the direct result of the LEA's failure to implement the IEP.

(2) The conduct must be determined to be a manifestation of the child's disability if the LEA, the parent, and relevant members of the child's IEP Team determine that a condition in either paragraph (e)(1)(i) or (1)(ii) of this section was met.

(3) If the LEA, the parent, and relevant members of the child's IEP Team determine the condition described in paragraph (e)(1)(ii) of this section was met, the LEA must take immediate steps to remedy those deficiencies

What is a change of placement because of disciplinary removals?

- 34 CFR 300.536:

(a) For purposes of removals of a child with a disability from the child's current educational placement under §§ 300.530 through 300.535, a change of placement occurs if—

(1) The removal is for more than 10 consecutive school days; or

(2) The child has been subjected to a series of removals that constitute a pattern—

(i) Because the series of removals total more than 10 school days in a school year;

(ii) Because the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals; and

(iii) Because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another.

(b)

(1) The public agency determines on a case-by-case basis whether a pattern of removals constitutes a change of placement

(2) This determination is subject to review through due process and judicial proceedings.

When must an MDR be held?

- 34 CFR 300.530(e):

Manifestation determination. (1) Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the LEA, the parent, and relevant members of the child's IEP Team (as determined by the parent and the LEA) must review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine—

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(3) If the LEA, the parent, and relevant members of the child's IEP Team determine the condition described in paragraph (e)(1)(ii) of this section was met, the LEA must take immediate steps to remedy those deficiencies

Counting Days

- 34 CFR 300.11: What is a school day?
  - "School day means any day, including a partial day that children are in attendance at school for instructional purposes"
- When is a removal a change of placement?
  - More than 10 **consecutive** school days;

    OR
  - A student has been subjected to a series of removals that constitute a **pattern** for **more than 10 cumulative** school days

What to review at the MDR

- 34 CFR 300.530(e):

  Manifestation determination. (1) Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the LEA, the parent, and relevant members of the child's IEP Team (as determined by the parent and the LEA) must review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine—

  (i) If the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or

  (ii) If the conduct in question was the direct result of the LEA's failure to implement the IEP.

  (2) The conduct must be determined to be a manifestation of the child's disability if the LEA, the parent, and relevant members of the child's IEP Team determine that a condition in either paragraph (e)(1)(i) or (1)(ii) of this section was met.

  (3) If the LEA, the parent, and relevant members of the child's IEP Team determine the condition described in paragraph (e)(1)(ii) of this section was met, the LEA must take immediate steps to remedy those deficiencies

How to conduct an MDR

- 34 CFR 300.530(e):

  Manifestation determination. (1) Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the LEA, the parent, and relevant members of the child's IEP Team (as determined by the parent and the LEA) must review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine—

  (i) If the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or

  (ii) If the conduct in question was the direct result of the LEA's failure to implement the IEP.

  (2) The conduct must be determined to be a manifestation of the child's disability if the LEA, the parent, and relevant members of the child's IEP Team determine that a condition in either paragraph (e)(1)(i) or (1)(ii) of this section was met.

  (3) If the LEA, the parent, and relevant members of the child's IEP Team determine the condition described in paragraph (e)(1)(ii) of this section was met, the LEA must take immediate steps to remedy those deficiencies

What happens after the MDR?

- 34 CFR 300.530(e):

Manifestation determination. (1) Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the LEA, the parent, and relevant members of the child's IEP Team (as determined by the parent and the LEA) must review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine—

(i) If the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or

(ii) If the conduct in question was the direct result of the LEA's failure to implement the IEP.

(2) The conduct must be determined to be a manifestation of the child's disability if the LEA, the parent, and relevant members of the child's IEP Team determine that a condition in either paragraph (e)(1)(i) or (1)(ii) of this section was met.

(3) If the LEA, the parent, and relevant members of the child's IEP Team determine the condition described in paragraph (e)(1)(ii) of this section was met, the LEA must take immediate steps to remedy those deficiencies

If conduct is **not** a manifestation of disability:

- 34 CFR 300.530(c) and (d)
- School personnel may apply the relevant disciplinary procedures to children with disabilities in the same manner and for the same duration as the procedures would be applied to children without disabilities
- Except
  - Must continue to receive educational services, as provided in § 300.101(a), so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP; and
  - Receive, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur.

If conduct **is** a manifestation of disability

- If the LEA, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child's disability, the IEP Team must—
  - Either
    - Conduct a functional behavioral assessment, unless the LEA had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the child; or
    - If a behavioral intervention plan already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior; and
  - Except in special circumstances of weapon violations, drug violations, or serious bodily injury (each defined by regulation), return the child to the placement from which the child was removed, unless the parent and the LEA agree to a change of placement as part of the modification of the behavioral intervention plan

What if the MDR goes wrong?

Parents' rights:

- File district public complaint
- File OCR complaint
- Request mediation (from ODE)
- File state complaint
- File due process complaint

Possible outcomes if MDR process and/or decision was not done in line with the IDEA:

- Vacating MDR decision
  - In an extreme case, vacating an expulsion decision
- Compensatory education – can be sizable if result was vacating an expulsion

The big clash of Title IX and IDEA/Section 504

- 34 CFR 106.45(b)(5)
- Title IX investigations can take much more time than is allowed for removal or a change in placement under the IDEA
- District must gather relevant evidence
- Minimum of 10 days for parties to inspect and review relevant evidence prior to completion of investigator's report
- After investigator completes the report, then an additional minimum of 10 days for parties to any determination of responsibility
- Must allow parties time to submit relevant questions to other party or witnesses prior to making a determination of responsibility
- Altogether, the guideline (not rule) that is often followed is a 30-day minimum from start to finish of a Title IX grievance process

The main issues:

Supportive Measures

Emergency removals

Discipline as a consequence

How can supportive measures run afoul of the IDEA?

- Remember, supportive measures **may include** counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures
- Many of these could affect a student's special education placement:
  - Change exposure to gen ed peers
  - Change exposure to gen ed curriculum

How can supportive measures during a Title IX process cooperate with the IDEA?

- If either a complainant or respondent student is an eligible student with a disability and is in need of supportive measures during a Title IX grievance process, best practice would be to pull together the 504 or IEP team to discuss:
  - How to implement certain supportive measures
  - Discuss whether they require changes to the IEP or 504 plan
  - Document with a Safety Plan or other documentation that shows when, how, and for how long the supportive measures will be in place

Supportive Measures and the IDEA

- Scenario:
  - Jason is a high school freshman
  - Before band class, some of the freshman boys are rough housing. Aaron and Blake, also freshman who have been in school with Jason for the last two years, approach Jason, and call him a derogatory slur based on Jason's sexual orientation
  - Jason attempts to ignore Aaron and Blake but they follow him. Eventually, Aaron grabs Jason in the groin area while Blake continues to taunt Jason
  - Jason files a Title IX complaint against Aaron and Blake
    - In his complaint, Jason also alleges that this is not the first incident of inappropriate sexual conduct by Aaron and Blake towards Jason, i.e., that Aaron and Blake have bullied him for the past two years through middle school
    - Jason has an IEP
    - Aaron has a 504 Plan
    - Blake is not identified as a student with a disability

Supportive Measures and the IDEA (Scenario cont.)

- The District appropriately begins an investigation into the conduct and meets with Jason and his parents
- Jason and his parents request a Safety Plan for supportive measures. As part of the Safety Plan, they request the following:
  - No contact with Aaron and Blake
  - Jason asks to be placed in an alternate math class because he has math with Aaron
  - Jason asks for extensions of time on his assignments as he deals with the anxiety from the incident
- Can the school district agree to these requests?
- How should they go about responding to these requests?

Supportive Measures and the IDEA (Scenario cont.)

- Can the school district agree to these requests?
  - Yes and no – it's best to review the process for responding to these before evaluating the individual requests
- How should they go about responding to these requests?
  - Jason has an IEP, so the Title IX Coordinator should discuss with the student's case manager about how these requests will affect the IEP*
  - A No Contact Order on its own probably does not have direct implication on the IEP (unless students are in the same classes)
  - But a class change could affect the student's services and placement – so the IEP team should meet to consider this request as part of a broader Safety Plan
    - Should the IEP team agree to this?
    - What if both students wanted a class change? Which student do we move?
    - The Title IX rules require that supportive measures be "equitable" for both parties, nondisciplinary, nonpunitive and **restore or preserve equal access** to the recipient's education program or activity **without unreasonably burdening the other party**
    - That's why the IEP and/or 504 plan process can be not only helpful but necessary here. It can sort out what the actual burden would be to each student and figure out what will work to provide each student a FAPE based on a holistic picture not just a singular request
  - Extensions on assignments due to increased anxiety is definitely an accommodation for the IEP team to consider

*Note: This was a requirement in the new 2024 rules that were overturned, but it's still a best practice and will avoid compliance issues for student's with disabilities if Title IX coordinators regularly check in with case managers for students with IEPs or 504 plans

Supportive Measures and the IDEA (Scenario cont.)

- Other implications
  - Aaron has a 504 plan – do these changes for Jason impact Aaron's rights as a student with disabilities as well?
  - Possibly – again, Title IX coordinator should meet with Aaron's 504 plan case manager and discuss the implication on that plan

Emergency Removals 34 CFR 106.44(c)

- Nothing in this part precludes a recipient from removing a respondent from the recipient's education program or activity on an emergency basis, provided that the recipient undertakes an **individualized safety and risk analysis**, determines that an **immediate threat to the physical health or safety of any student or other individual** arising from the allegations of sexual harassment justifies removal, and provides the respondent with **notice and an opportunity to challenge the decision immediately following the removal**.
- This provision may not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act.

Emergency Removals 34 CFR 106.44(c)

- From the Federal Register (comments to the final rules) – 85 FR 30026
- "Section 106.44(c) states that this provision does not modify any rights under the IDEA, Section 504, or the ADA."
- "[N]othing in § 106.44(c) prevents a recipient from involving a student's IEP team before making an emergency removal decision, and § 106.44(c) does not require a recipient to remove a respondent where the recipient has determined that the threat posed by the respondent, arising from the sexual harassment allegations, is a manifestation of a disability such that the recipient's discretion to remove the respondent is constrained by IDEA requirements."

Emergency removal under the IDEA 34 CFR 300.530(g)

- School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, if the child—
  - (1) Carries a weapon to or possesses a weapon at school, on school premises, or to or at a school function under the jurisdiction of an SEA or an LEA;
    - 34 CFR 300.530(i)(4): Weapon has the meaning given the term "dangerous weapon" under 18 USC 930(g)(2)
    - 18 USC 930(g): a weapon, device, instrument, material, or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury, except that such term does not include a pocket knife with a blade of less than 2 1/2 inches in length
  - (2) Knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of an SEA or an LEA; or
    - 34 CFR 300.530(i)(2): ***Illegal drug*** means a controlled substance; but does not include a controlled substance that is legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed or used under any other authority under that Act or under any other provision of Federal law.
  - (3) Has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of an SEA or an LEA
    - 34 CFR 300.530(i)(3): Serious bodily injury has the meaning given the term "serious bodily injury" under 18 USC 1365(h)(3):
      - (A) a substantial risk of death;
      - (B) extreme physical pain;
      - (C) protracted and obvious disfigurement; or
      - (D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty

Scenario: Removal of Student

-A student-student sexual assault occurred on school bus.

-The District suspended the respondent student pending expulsion.

-Law enforcement is involved and the Student is now on **Day 15** of the suspension.

-The Student has an IEP.

TIX Standard: If imminent and serious threat, may remove with immediate ability to appeal.

Special Ed Standard: Immediate removal if "Serious bodily injury." (i.e. bodily injury, which involves substantial risk of death; extreme physical pain; protracted and obvious disfigurement; or protracted loss or impairment of the function of a bodily member, organ or mental faculty

Did the School District have the ability to immediately remove the student?

- Did the District have the ability to immediately remove the respondent student?
  - Special Education IAES:
    - Probably not
    - No weapon or drug violation
    - No serious bodily injury
      - Note: Some jurisdictions are showing an interest in considering psychological injuries in this category, but it has not grown much of a following yet without a corresponding physical injury
  - TIX Emergency Removal:
    - Probably yes
  - So what do we do now that the student is already on Day 15 of suspension and the Title IX process is still ongoing?

Emergency Removals

What to do when Title IX, safety, emergency removals, and the IDEA conflict

- Are the federal rules any help?
- 85 FR 30026 (commentary on the federal rules)
  - The Department reiterates that recipients, including elementary and secondary schools and postsecondary institutions, must meet obligations under the final regulations while also meeting all obligations under applicable disability laws including the IDEA, Section 504, and ADA.
  - Recipients' obligation to comply both with these final regulations and with disability laws applies to all aspects of responding to a Title IX sexual harassment incident including investigation, discipline, and segregating elementary and secondary school students with disabilities from classroom settings.
  - Nothing in these final regulations precludes or impedes a recipient from determining what services may be necessary to ensure a safe, welcoming environment for all students.
- Short answer: No.

What to do when Title IX, safety, emergency removals, and the IDEA conflict

- OCR Guidance: "Q&A on the Title IX Regulations on Sexual Harassment," 121 LRP 25013 (July 20, 2021)
  - Suggest conducting an MDR ***after*** the Title IX investigation is concluded
- Specifically, sample policy included with Q&A suggests:
  - (1) For any student with an Individualized Education Program (IEP), or that a school has knowledge may be a child with a disability, the decision-maker will make a referral to the school to conduct a manifestation determination review (MDR). The MDR team meeting shall convene as soon as reasonably possible and make available to the decision-maker the MDR decision and written rationale in no later than ten school days;
  - (2) For any student with a disability covered by Section 504, the decision-maker will make a referral to have a knowledgeable committee convene a Section 504 Causality Review. The causality review meeting shall convene as soon as reasonably possible and make available to the decision-maker the causality review decision and written rationale in no later than ten school days;
  - (3) Before a student with a disability is suspended, reassigned, or recommended for expulsion, the principal of the school will consult with the student's case manager, review the student's IEP, and take into account any special circumstances regarding the student. The IEP team will consider the parents' views and any preference for the reassignment location along with any location proposed by school staff at the meeting. It is the duty of the IEP team at its meeting to discuss, propose, and decide upon the educational placement, consistent with the disciplinary decision. Accordingly, the IEP team will consider the views of all members, including the parents, at the meeting

What I recommend:

- Use the IEP teams or 504 teams of the complainant or respondent (as applicable) to come up with compromises or plans that do not require emergency removals under either the IDEA or Title IX
  - Meet as soon as possible after a Title IX grievance process has been initiated
  - Will the team agree to change placement?
  - Are there other arrangements the appropriate team can recommend or put in place
    - Safety Plans
    - Counseling and support?
    - No contact orders?
- If the student's behavior is likely a manifestation of the student's disability anyway, discipline is not what we would impose
  - And we would not be allowed to under the IDEA, even if Title IX process contemplates there might be discipline at the end
- Remember, discipline is not the only option available as part of the Title IX process
  - An allegation of sexual harassment can be substantiated under Title IX and other remedies can be the solution if we are unable to change the placement of a student with disabilities
- **In most situations, it will be recommended to wait to hold the MDR until the Title IX decision-maker finds the student responsible for the misconduct and recommends imposing discipline that would result in a change of placement (if all supportive measures and meetings described above have taken place)**

Case Example: *Tillamook Sch. Dist.*, 125 LRP 22501 (SEA OR, Jul. 9, 2025)

- This exact situation arose in an Oregon case this past year
- Spells out an ideal way to manage the varying timelines and concerns between Title IX (appropriately applying the 2020 regulations) and the IDEA
- Facts:
  - 8th grade student eligible for special education under SLD engaged in sexual harassment on March 31, 2025, at track practice
  - School district immediately notified parties and reported to law enforcement
  - Law enforcement picked up the investigation and the district paused its Title IX investigation while law enforcement's investigation was active
  - Parent held student out of school for the first week after the incident occurred
    - Importantly: No request from the district to keep the student out of school
    - Decision to keep student home was parent's alone

Case Example: *Tillamook Sch. Dist.*, 125 LRP 22501 (SEA OR, Jul. 9, 2025)

- District convened a meeting on April 7, 2025, to discuss alleged behavior and status of law enforcement investigation
- At the meeting, the District proposed alternative placements that could help ensure the safety of both students and prevent any further interactions
- The options included: a possible transfer to a different campus within the District, enhanced learning supports, and curricular options to increase accessibility.
- The District believed the options would not alter the Student's current placement or services
- The family chose to pick up packets from the School and complete the work at home while the District conducted its investigation

Case Example: *Tillamook Sch. Dist.*, 125 LRP 22501 (SEA OR, Jul. 9, 2025)

- Law enforcement concluded its investigation on or around April 11, 2025
- District then began its own investigation
- Student and family refused to participate in either law enforcement's or the district's investigation
- An IEP meeting was held on April 23, 2025
- The IEP team reviewed interim education options for the Student
- The team extended a full offer of FAPE, including the following options:
  - Attendance at another school with adult support
  - Enrollment in the Virtual Academy with adult support for a full day (available either in person or with virtual support)
- At the time of the meeting, the Parent declined the options and decided to continue accessing packet-based instruction from the School

Case Example: *Tillamook Sch. Dist.*, 125 LRP 22501 (SEA OR, Jul. 9, 2025)

- District concluded its Title IX investigation through a third-party investigator on May 12, 2025
- Contacted the family the same day and scheduled a manifestation determination for May 20, 2025
- At MDR, team determined not a manifestation of disability
- Parent filed complaint that student was improperly removed from placement without an MDR for six weeks (from initiation of Title IX process to conclusion)

Case Example: *Tillamook Sch. Dist.*, 125 LRP 22501 (SEA OR, Jul. 9, 2025)

- Result: No violation of FAPE
- Addressed supportive measures in the light of the student's IEP
- If a school district receives a formal complaint of sexual harassment, it must follow an appropriate grievance process under the 2020 Title IX regulations to investigate the alleged harassment.
- Additionally, with or without the filing of a formal complaint, the school district must offer supportive measures to the student who was the alleged victim, as well as to the student who allegedly perpetrated the sexual harassment.
  - This was demonstrated by the District's offers of FAPE to the Student during the investigations, which the Parent declined.
  - The Student also had access to their schoolwork during this time period.
- The District stated the Student was not removed for disciplinary reasons and the Parents decided not to have the Student participate in any options provided by the District.
- The District also explained they were investigating the incident and determining actions to keep both students safe.

Case Example: *Tillamook Sch. Dist.*, 125 LRP 22501 (SEA OR, Jul. 9, 2025)

- How about the timing of the MDR?
- In the case of a student with a disability, an emergency removal under the 2020 Title IX regulations may trigger the requirement for a manifestation determination and review.
- If a school district receives a sexual harassment complaint, it must initiate the grievance process to determine whether the alleged harassment occurred and implement any necessary remedies.
- During this process, 2020 Title IX regulations require a school district to presume the respondent is not responsible for the alleged misconduct.
- However, under the IDEA and Section 504, a school district holding a manifestation determination and review must generally presume the student engaged in the alleged misconduct to determine whether it was related to the student's disability or the result of an implementation failure

Case Example: *Tillamook Sch. Dist.*, 125 LRP 22501 (SEA OR, Jul. 9, 2025)

- Acknowledging all this, the Department referred to the July 2021 Q&A from OCR that suggests an MDR should not be conducted until after the Title IX decision-maker has determined the student was responsible for the alleged sexual harassment
- In this case, the District's Title IX incident form indicated a response to the Student would be determined once the investigation was complete
- A Manifestation Determination was not required due to the IDEA's disciplinary protections as the Student was not removed for disciplinary purposes.
- However, the District conducted a Manifestation Determination consistent with policies for students with disabilities related to Title IX

Going back to our scenario…

- You get the call that the student is on day 15 of suspension and Title IX grievance process is still ongoing….
- First: Put the student back in their placement immediately (or as immediately as possible)
  - Also can offer alternative options like in the Tillamook case that provide FAPE without a change of placement
- Next: Convene an IEP meeting to discuss supportive measures and safety supports while Title IX process is ongoing
  - Include a discussion of comp ed to account for at least the time past 10 school days that the student was illegally removed from their place

Finishing the scenario

- Question: Do you conduct an MDR at this point?
  - Conducting an MDR prior to Title IX process conclusion inherently has its own risks
    - Possible disparate findings (with final Title IX determination of responsibility or with a future MDR at conclusion of Title IX investigation)
    - Basing MDR determination on allegations, rather than substantiated evidence
  - Here: The damage is done. In most situations, it would be advisable to wait until Title IX process is done to see if further discipline (and removal) is required.
    - If conduct ends up being a manifestation, then you will owe comp ed for the days that the student has already been removed
      - But you will have mitigated this with the time you were able to put the student back in their regular placement (or an alternative placement that offer FAPE with no change of placement)
      - Whether you need to conduct another MDR at this point when further removal is not contemplated is debatable
    - If conduct is not a manifestation of disability, that will also mitigate any comp ed that might have been owed

- Always check with your legal counsel if the posture of the situation is past 10 days of removal by the time you find out this has occurred
- The "correct" answer for you will consider many factors:
  - Safety of the students involved
  - Risks of complaints from either the Title IX complainant or respondent
  - Severity of the conduct alleged and appropriateness of reaction
  - Any collaboration or requirements with law enforcement
  - Applicable state laws that require a specific response
  - And more….
    - But most of the time, you will not go "wrong" if you put the student back in their placement with additional supports and services as determined by the IEP or 504 team

Final Thoughts on Scenario

Unidentified Students

- What happens when we learn of a suspected disability during the Title IX process?
- Scenario:
  - Trey and Rory are high school students who have been dating for the past two months
  - Trey files a Title IX complaint against Rory, claiming Rory sexually assaulted Trey in the locker room after a basketball game
  - Neither student has a 504 plan or an IEP or any previous history of known or suspected disability
  - Rory's parents notify the school district of a new ASD dx that they had not yet shared with the school and claim that Rory's misunderstanding of social cues contributed to the situation
  - Trent's parents notify the school district of new anxiety and PTSD dx stemming from the alleged sexual assault
- What is the district's obligation to both students?

Unidentified Students

- What is the district's obligation to both students?
- Child find is now triggered for both students
- But how does that affect the Title IX process?
  - 34 CFR 300.534(a) General. A child who has not been determined to be eligible for special education and related services under this part and who has engaged in behavior that violated a code of student conduct, may assert any of the protections provided for in this part **if the public agency had knowledge** that the child was a child with a disability **before the behavior that precipitated the disciplinary action occurred.**
  - 34 CFR 300.534(b): Basis of knowledge. A public agency must be deemed to have knowledge that a child is a child with a disability if **before the behavior that precipitated the disciplinary action occurred**—
    - (1) The parent of the child **expressed concern in writing** to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services;
    - (2) The parent of the child **requested an evaluation** of the child; or
    - (3) The teacher of the child, or other personnel of the LEA, **expressed specific concerns about a pattern of behavior** demonstrated by the child directly to the director of special education of the agency or to other supervisory personnel of the agency.
- But how does that affect the Title IX process?
  - In this scenario, no knowledge of the ASD dx prior to the behavior occurring
  - Anxiety and PTSD dx were caused by the alleged behavior – so definitely not something from before

Can we engage in Child Find while a Title IX process is ongoing?

- Absolutely
- And in this scenario, the district **must** initiate child find proceedings
- The evaluation process should not delay the Title IX process and vice versa
- Change the facts:
  - What if the ASD dx had been shared prior to the conduct and an evaluation was in process for Rory at the time Rory became a respondent in the Title IX grievance?
  - Can the Title IX investigation move forward since we know that Rory has a dx that affects understanding social cues and communication?
    - Absolutely – in fact, it **must** move forward under the Title IX regulations
  - Can you delay the Title IX process until the evaluation is complete?
    - No
  - Can you delay an MDR if Rory is ultimately found responsible for sexual harassment until evaluation is complete?
    - No
    - *Letter to Nathan*, 119 LRP 4245 (OSEP, Jan 19, 2019): Must conduct an MDR anytime disciplinary removal will be more than 10 days, even if student is not eligible yet. Recognizing there is no IEP to assist with MDR determination, OSEP stated the team must review and consider all information regarding the student
    - "The group would likely consider the information that served as the LEA's basis of knowledge that the child may be a child with a disability under IDEA, such as concerns expressed by a parent, a teacher or other LEA personnel about a pattern of behavior demonstrated by the child."

Sexual Harassment and FAPE

Special Focus on Harassment/Bullying Based on Disability
OCR Dear Colleague Letter: August 20, 2013

- Students with disabilities are disproportionately affected by bullying/harassment
  - Sexual harassment is a form of harassment and/or bullying
- **"Any bullying of a student with a disability that results in the student not receiving meaningful educational benefit constitutes a denial of FAPE under the IDEA that must be remedies"**
- As part of the school's appropriate response to bullying of a student with a disability, the school should:
  - Convene the IEP Team (or 504 Team) to determine whether, as a result of the effects of bullying, the student's needs have changed such that the IEP no longer provides a FAPE
  - If IEP no longer provides a FAPE, the IEP Team must determine to what extent additional or different special education or related services are needed to address the student's needs
  - Revise the IEP appropriately
- **Note:** Much of this is what we have already discussed with supportive measures, so if you have gone through a process to put in place supportive measures with the IEP team, you will be meeting both your FAPE and Title IX obligations under the deliberate indifference standard

In re Student with a Disability, 81 IDELR 87 (DE SEA, April 29, 2022)

- Facts:
  - Student with ASD in separate special education classroom
  - Multiple incidents of bullying and harassment from another student in the program
  - Parent confronted district on many occasions but no action was taken
  - After more incidents of bullying, Parent requested student learn remotely
  - Without an IEP meeting, district agreed and began uploading assignments for student
  - Student struggled to access assignments and was frequently absent
  - Parent eventually disenrolled the student

In re Student with a Disability, 81 IDELR 87 (DE SEA, April 29, 2022)

- Holding
  - Student with a disability can be denied a FAPE when bullying results in the student not receiving meaningful educational benefit
  - District ignored parent's bullying concerns and moved student to an inappropriate placement
  - District did not adequately respond to Parent's concerns
  - District also failed to hold an IEP meeting even though it was aware the student would not be able to meaningfully access the online learning platform
- Takeaways
  - Acquiescing to parent's requests is not always the right course of action
  - IEP team should discuss what changes can be made to the student's IEP
  - Changing placement of the victim/targeted student should be avoided unless necessary to provide a FAPE

In re Student with a Disability 81 IDELR 146 (DE SEA, May 10, 2022)

- Facts
  - Student with learning disability in gen ed classroom
  - Student and Parent reported multiple bullying incidents to the district
  - Student sustained a concussion during gym class altercation
  - District fully investigated and disciplined the bullying student
  - Local police apprehended the bullying student
  - IEP meeting convened to address Student's post-concussive needs
  - Another meeting held to address bullying incident and discuss whether Student felt safe at school
  - Student opted not to participate in restorative circle with other student
  - Seating and schedule changes made to prevent the two students from being near each other

In re Student with a Disability 81 IDELR 146 (DE SEA, May 10, 2022)

- Holding
  - District offered victim student a FAPE
  - Student continued to make academic progress and received good grades
  - District implemented all the steps of its bullying and prevention program, including counseling for the student after each incident
  - District investigated the student's injury and reported to local police
  - Offending student was disciplined
- Takeaways
  - We can't prevent every instance of bullying from occurring
  - But promptly responding and meeting to discuss ways to address the bullying can avoid a denial of FAPE
  - Having an antibullying program/policy/plan and implementing it with fidelity can also demonstrate provision of FAPE and not deliberate indifference

01	02	03
Support involved students	Document some level of investigation	Communicate out findings

Title IX and IDEA Takeaway:
Focus on 3 Things

Questions?

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Workshop 12

The Ins and Outs of Independent Evaluations (IEEs) Under IDEA: From District Criteria to Helpful Tips for Schools and Parents

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Pacific Northwest Institute on Special Education and the Law
October 27-29, 2025
Bellevue, Washington

The Ins and Outs of Independent Evaluations (IEEs) Under IDEA: From District Criteria to Helpful Tips for Schools and Parents

Presented by
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2025 Pacific Northwest Special Education Law Conference
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The Basic Idea

Districts have a duty to conduct evaluations to determine eligibility and educational need of IDEA students.

As evaluations are the foundation data for IEP team decision-making, they are crucial.

So, regulation provides parents with an opportunity to seek an independent evaluation when they disagree with the district's evaluation, or obtain one on their own at their cost.

These independent educational evaluations (IEEs) must be considered by the IEP team.

The IEE Regulation

34 C.F.R. §300.502—The Basic Rules for IEEs

Parents have a right to independent educational evaluations (IEEs) subject to this regulation. [(a)(1)].

Upon request for an IEE, schools must provide parents **information** on where they can obtain one and what district criteria apply. [(a)(2)].

An independent evaluation is one **not conducted by an employee** of the district. [(a)(3)].

The IEE Regulation

34 C.F.R. §300.502

Parents have a right to request an IEE at public expense **if they disagree with an evaluation obtained by the district**. [(b)(1)].

When parents request an IEE at public expense, the district must, without unnecessary delay, either:

1. File a **request for due process** (DP) to show that its evaluation is appropriate, or
2. **Grant the IEE**, unless it proves at a hearing that the IEE does not meet agency criteria. [(b)(2)].

The IEE Regulation

34 C.F.R. §300.502

If the district successfully proves its evaluation is appropriate, the parent has a right to an IEE, but not at public expense. [(b)(3)].

Districts can ask parents why they seek an IEE, but an explanation cannot be required. [(b)(4)].

Parents can obtain only one IEE at public expense per district evaluation with which they disagree. [(b)(5)].

The IEE Regulation

34 C.F.R. §300.502

Whether provided at public or parent expense, **IEEs shared with the district must be considered**, if they meet district criteria in any decision involving FAPE. [(c)(1)].

IEEs may be presented by any party as **evidence** in IDEA due process hearings. [(c)(2)].

If an IDEA hearing officer orders an IEE as part of a DP hearing, it must be at district expense. [(d)].

The IEE Regulation

34 C.F.R. §300.502

For IEEs at district expense, **district IEE criteria** on location of IEE and qualifications of evaluator must be the same as the criteria the district imposes on its own evaluations, as long as the criteria are consistent with parents' right to obtain an IEE. [(e)(1)].

Except for the criteria above, districts may not impose additional conditions or timelines related to an IEE at district expense. [(e)(2)].

The IEE Regulation

Right to IEE actually not contained in IDEA, but rather the federal regulation

Although the statute does not contain an IEE provision, courts have held that schools' obligation to pay for IEEs is firmly grounded in Congress's intent in passing the law. ***Phillip C. v. Jefferson County Bd. of Educ.*, 60 IDELR 30 (11th Cir. 2021), *cert. denied*, 113 LRP 40516, 134 S.Ct. 64 (2013).**

Prerequisite for IEE Requests

To request an IEE at district expense, the parent must disagree with an existing district evaluation.

Otherwise, a parent can always pay for an IEE themselves and submit it for IEP team consideration at any time.

There is no requirement for the parent to provide written notice to the district prior to obtaining their own IEE. ***Letter to Gramm*, 17 IDELR 216 (OSERS 1990); *Letter to Thorne*, 16 IDELR 606 (OSEP 1990).**

What constitutes disagreement with a district evaluation? Normally, IEP team reviews a district evaluation, and the parent expresses disagreement with its results, but there can be another type of disagreement…

Prerequisite for IEE Requests

***Letter to Baus*, 65 IDELR 81 (OSEP 2015)**

OSEP stated that if a parent disagrees with a district's evaluation because a child was not assessed in a particular area, the parent has a right to request an independent educational evaluation (IEE) to include assessment in the area sought by the parent.

Question—Could not the district deny the IEE request and prove at a hearing that the assessment area wanted by the parent is not really required or not really a valid area of suspected disability? One would think so.

Prerequisite for IEE Requests

***Letter to Baus*, 65 IDELR 81 (OSEP 2015)**

Note—Consistent with the logic of *Letter to Baus*, although not citing to it, a court later held that a district's failure to assess assistive technology needs as part of an initial evaluation entitled the parent to a full IEE covering all areas. ***Jones-Herrion v. District of Columbia*, 75 IDELR 92 (D.D.C. 2019)**.

Prerequisite for IEE Requests

As a follow-up, In ***Letter to Carroll*, 68 IDELR 279 (OSEP 2016)**, USDE clarified *Baus* by adding that a district could not avoid its obligation to pay for an IEE by responding that it was now willing to conduct assessments in the additional areas of disability sought by the parent.

Note—So, this is sort of an exception to the disagreement prerequisite, since the district does not get to assess the allegedly missing area, or another form of disagreement with a district evaluation.

It can be important to reach prior mutual agreement on areas of suspected disability and scope of evaluation to avoid this type of problem.

Prerequisite for IEE Requests

A twist on this issue is the case of ***J.A. v. Monroe Township Bd. of Educ.*, 123 LRP 25723 (D.N.J. 2023)**, where the court denied a parent's claim for an IEE because the parents never disagreed with any of the evaluations conducted by the District.

Rather, it appeared that the parents' contention was the scope of the District's evaluation, in that they alleged there was a failure to assess a suspected auditory processing disorder.

> **Question:** Does not *Letter to Baus* support the parent's claim here—IEE available because District failed to assess a suspected area of disability?

Prerequisite for IEE Requests

***J.A. v. Monroe Township Bd. of Educ.*, 123 LRP 25723 (D.N.J. 2023)**

Letter to Baus states that if a parent disagrees with the scope of a district's evaluation and validly claims an area of suspected disability was not assessed, then the parent is entitled to a full IEE.

But, the decision does not consider *Letter to Baus*. Did no one cite it?

Judge questioned why the ALJ below focused on whether the auditory processing assessment was needed, but in fact, the issue is crucial.

If the parent's claim of a suspected area of disability is not valid, then one would think that an IEE under *Letter to Baus* would not be available.

Prerequisite for IEE Requests

But parents cannot disagree with an evaluation that they prevent…

In ***M.S. v. Hillsborough Township Pub. Sch. Dist.*, 75 IDELR 212 (3rd Cir. 2019)**, parents who withdrew consent for a district evaluation could not recover the costs of their subsequent IEE, as parents cannot disagree with an evaluation they don't allow to be conducted.

The Court cited the USDOE commentary to the regulations, which stated that a "parent would not have the right to obtain an IEE at public expense before the public agency completes its evaluation." 71 Fed. Reg. 46,689 (August 14, 2006).

Prerequisite for IEE Requests

What is an "evaluation" that can support a request for an IEE?

Certainly, evaluations to determine eligibility or continued eligibility can support an IEE request, if the parent disagrees with them.

What other type of "evaluation" might support an IEE request?

What about functional behavioral assessments (FBAs)? Reviews of existing evaluation data (REEDs)?...

Prerequisite for IEE Requests

***Herron v. District of Columbia*, 83 IDELR 17 (D.D.C. 2023)**

As an IDEA student transferred into the District from another state, IEP team relied on a review of existing evaluation data (REED) to change the eligibility category and IEP services without additional evaluations.

Subsequently, the parents' attorney requested comprehensive reevaluation, but the record does not show the District's response.

Court held that the REED qualified as an "evaluation" subject to a parent request for IEE because the team determined the student's educational needs based on that review.

Prerequisite for IEE Requests

***Herron v. District of Columbia*, 83 IDELR 17 (D.D.C. 2023)**

It also held that the District violated IDEA in not conducting a real reevaluation when the parent's attorney requested it.

School cannot both refuse reevaluation and an IEE, as parents would be deprived of necessary data.

Note—Real problem is that in the REED process, if an IEP team decides additional evaluation may not be required, parent has option of requesting evaluation be conducted. 34 C.F.R. §300.305(d)(1)(ii), (d)(2). Here, the school did not comply with this provision.

Prerequisite for IEE Requests

***Herron v. District of Columbia*, 83 IDELR 17 (D.D.C. 2023)**

Note—Is court finding that REED was an evaluation subject to IEE really necessary? Could it not have found that the school improperly refused to conduct reevaluation upon parent request and thus an ALJ or court can order the IEE at that point?

But, yet another court has held it is not clear if a REED qualifies as an "evaluation" subject to an IEE. ***Paniacci v. West ADA Sch. Dist. #2*, 123 LRP 25493 (D.Id. 2023)**("regulations do not prescribe exactly what type of evaluation is sufficient to trigger the right to request IEE).

Prerequisite for IEE Requests

***Herron v. District of Columbia*, 83 IDELR 17 (D.D.C. 2023)**

Note—But see ***F.C. v. Montgomery County Pub. Schs.*, 68 IDELR 5 (D.Md. 2016).** Disagreeing that a REED qualifies as an evaluation, as it does not involve "a variety of assessment tools and strategies" to gather relevant information.

Question? Would not an IEE based on disagreement with a district REED be also limited to a review of existing data and not involve additional evaluations?

Prerequisite for IEE Requests

***Herron v. District of Columbia*, 83 IDELR 17 (D.D.C. 2023)**

Practical Point—Thus, it appears that whether REEDs are "evaluations" subject to an IEE is simply not clear.

In REEDs, if IEP team decision is that no additional evaluation is needed, teams must make sure to document that they have made clear to the parents that they can request additional evaluations if they wish, and the district will conduct them.

Prerequisite for IEE Requests

***D.S. v. Trumbull Bd. of Educ.*, 77 IDELR 122 (2nd Cir. 2020)**

Panel held that an FBA is a "targeted examination" of behavior rather than a comprehensive assessment of a child's disability, and thus, could not support an IEE request, rejecting USDOE's interpretation.

OSERS had taken the position that parent's could request independent FBAs if they disagreed with them, as FBAs are used to help develop IEPs. See *Questions and Answers on Discipline Procedures*, 52 IDELR 231 (OSERS 2009).

Prerequisite for IEE Requests

***D.S. v. Trumbull Bd. of Educ.*, 77 IDELR 122 (2nd Cir. 2020)**

Court stated that "by its nature, [an FBA] is limited to understanding and improving one aspect of the child's overall learning experience…. [i]t is not a comprehensive, multi-focused assessment of all areas of the child's disability."

Note—Is this logic sound? So, since an OT, PT, counseling, or psychological evaluation are not comprehensive assessments of *all* areas of disability, they are not susceptible to IEE requests?...

Prerequisite for IEE Requests

***D.S. v. Trumbull Bd. of Educ.*, 77 IDELR 122 (2nd Cir. 2020)**

Note—USDOE responded to this case by stating that "OSERS intends to review its previously stated positions on this matter including whether and when an LEA must seek parental consent before conducting an FBA for an eligible child with a disability." *Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA's Discipline Provisions*, 81 IDELR 138 at fn. 5 (OSERS 2022). Will it also address the IEE question?

Prerequisite for IEE Requests

***D.S. v. Trumbull Bd. of Educ.*, 77 IDELR 122 (2nd Cir. 2020)**

Practical Implications—Districts outside the 2nd Circuit may want to follow existing USDOE guidance indicating FBAs both (1) require prior parent consent, and (2) are subject to requests for IEEs.

Prerequisite for IEE Requests

Must parents discuss their IEE request at an IEP meeting before obtaining the IEE?

No. USDOE has stated that parents cannot be required to discuss their IEE request at an IEP meeting prior to obtaining an IEE. ***Letter to Anonymous*, 55 IDELR 106 (OSEP 2010).**

Help for Parents in Obtaining IEE

Generally, the help takes the form of a list of evaluators that meet district criteria. ***Letter to Parker*, 41 IDELR 155 (OSEP 2004).**

But, the Letter makes clear parent is not required to choose from the list, as there may be other evaluators that meet district criteria.

Timeline for Parents' IEE Request

Federal IDEA regulations do not impose a timeline within which parents must request an IEE based on a disagreement with a District evaluation.

Ostensibly, states could impose an IEE limitations period, as long as consistent with parents' right to obtain IEEs.

The Second Circuit has ruled that the limitations period for parents to file DP hearing requests is not applicable to IEE requests. ***D.S. v. Trumbull Bd. of Educ.*, 77 IDELR 122 (2nd Cir. 2020).** The Panel reasoned that parents do not have to request DP in order to request an IEE, and thus, the DP limitations period should not apply to IEE requests.

Timeline for Parents' IEE Request

The *Trumbull* Panel thus stated that "where, as here, a child is evaluated according to the default evaluation timeline, the parent must disagree with an evaluation within that three-year timeframe."

Otherwise, "a parent will be able to abuse the process to obtain a publicly funded IEE based on their disagreement with an old evaluation."

Thus, the Panel opines that parents must express their disagreement with an evaluation while it remains current (3 or less years old) in order to be able to request an IEE. See also, ***Atlanta Pub. Schs.*, 51 IDELR 29 (SEA GA 2008).**

Timeline for Parents' IEE Request

The 3rd Circuit has held that a parent that expressly agrees with a district's evaluation might not be able to obtain reimbursement for a later IEE. ***Lauren W. v. DeFlaminis*, 47 IDELR 183 (3rd Cir. 2007).**

In so holding the Panel wrote that "[w]e, however, never have held that parents who expressly agree with a district's evaluation but obtain an independent evaluation are entitled to reimbursement for the evaluation and we cannot imagine how we could do so."

But, the IEE option would be open to parents who either expressed no opinion or expressly disagreed with the District's evaluation.

Timeline for Parents' IEE Request

In situations where the school believes the parents' IEE request is too late, must it file a DP hearing request to prove so?

At least one court thinks so. In ***Hopewell Township Bd. of Educ. v. C.B.*, 77 IDELR 20 (D.N.J. 2020)**, the Court noted that New Jersey imposed a 20-day timeline for districts to request DP to deny an IEE request and that the District failed to do so.

Having so failed, the Court held that it could not now argue the parents' 2-year delay in seeking an IEE rendered the request untimely.

Timeline for Parents' IEE Request

Schools should keep in mind that parents can request an IEE to challenge an evaluation that finds the student ineligible under IDEA, and the IEP team will have to reconvene to review and consider the IEE when completed, even though the student is not IDEA-eligible.

> Similarly, a student's graduation does not mean a school no longer has to consider a pending IEE. ***Dallas Ind. Sch. Dist. v. Woody*, 67 IDELR 168 (N.D.Tex. 2016), *aff'd in part, rev'd in part*, 70 IDELR 113 (5th Cir. 2017).**

But, if a district evaluation finds that a student can be dismissed from IDEA, a parent request for an IEE does not trigger the IDEA's stay-put provision. ***Letter to Anonymous*, 72 IDELR 163 (OSERS 2018).**

District IEE Criteria

Should reflect the criteria that the district uses with respect to the location and qualifications of the evaluator for its own evaluations. 34 C.F.R. §300.502(e)(1).

For example, criteria could limit the geographic area within which an evaluation is conducted to that applied to its own evaluations (e.g., within X miles of the city).

Same with qualifications/credentials of evaluators—IEE evaluators must match or exceed qualifications required of district evaluations. And, parents do not set qualifications requirements. See, e.g., ***Tustin USD*, 49 IDELR 145 (SEA CA 2007).**

District IEE Criteria

What about cost? USDOE has stated that "public agencies should not be required to bear the cost of unreasonably expensive IEEs." 71 Fed. Reg. 46,689 (August 14, 2006).

Thus, districts may establish maximum allowable charges for specific tests. ***Letter to Anonymous*, 103 LRP 22731 (OSEP 2002).**

For example, district criteria may indicate that the cost of an IEE cannot exceed more than X% more that the cost of the same district evaluation.

See, e.g., **F.P. v. Clifton Bd. of Educ., 77 IDELR 46 (D.N.J. 2020)**(District that normally paid $900 for psychological evaluations not required to pay $5,200 for two independent psychological evaluations; no extraordinary circumstances).

District IEE Criteria

What about cost?

If a parent's selected evaluator does not meet its cost limitations, schools must be prepared to discuss those cost limits with parents.

For example, in ***L.C. v. Alta Loma Sch. Dist*., 74 IDELR 261 (C.D.Cal. 2019)**, a Court held that the school improperly failed to provide the parent information on its cost cap when she requested it after the school told her the selected evaluator was too expensive.

The Court found that the school's failure to provide the cost information unnecessarily delayed the IEE.

Note—The school could have simply notified the parent its selected evaluator was 3X more expensive than its cost cap, disclosed the cap to the parent, and requested another choice of evaluator.

District IEE Criteria

But schools cannot impose other types of restrictions, such as prohibiting IEE evaluators from associating with private schools or advocacy groups. See ***Letter to Petska*, 35 IDELR 191 (OSEP 2001).**

District IEE Criteria

What about educational focus? USDOE has stated that IEEs should gather data relevant to educational decision-making:

> an evaluation conducted by a public agency must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining whether the child is a child with a disability under Sec. 300.8, and the content of the child's IEP, including information related to enabling the child to be involved in and progress in the general education curriculum (or for a preschool child to participate in appropriate activities). These requirements also apply to an IEE conducted by an independent evaluator, since these requirements will be a part of the agency's criteria. 71 Fed. Reg. 46,690.

District IEE Criteria

Exceptions to District IEE Criteria

Over the years, OSEP has stated that parents must be provided an opportunity to demonstrate that unique circumstances justify selection of an independent evaluator who does not meet district IEE criteria. ***Letter to Young*, 39 IDELR 98 (OSEP 2003)**; *see also* 71 Fed. Reg. 46,689-690.

See ***Los Lunas Pub. Schs. Bd. of Educ.*, 123 LRP 29853 (D.N.M. 2023)**(rarity of student's condition (Angelman Syndrome) justified ALJ decision to order IEE by evaluator with expertise in that disability).

District IEE Criteria

What if the IEE fails to meet district criteria?

If the parent seeks an IEE at public expense that does not meet district criteria, the school can deny it and request a DP hearing without unnecessary delay to show the requested IEE fails to meet criteria.

Cases have held that the school bears the burden of proof to show that the parents' requested IEE fails to meet district criteria. See, e.g., ***Collette v. District of Columbia*, 74 IDELR 251 (D.D.C. 2019)**(District improperly required parents to show that their requested neuropsychological evaluation met District criteria with respect to IEE cost).

District IEE Criteria

What if the IEE fails to meet district criteria?

Other courses of action?—An option that avoids litigation for the school in this situation would be to agree to pay for the IEE after informing the parent that it fails to meet District criteria, but also inform the parent that the IEE's failure to meet criteria may mean that the District is not required to consider it.

This option is most apt in situations where the problem is not unreasonable cost, but rather the location of the IEE or the qualifications of the independent evaluator.

District IEE Criteria

What if the IEE fails to meet district criteria?

If the parent submits an IEE obtained at their own expense and are not seeking reimbursement from the district, then in reviewing the IEE, the IEP team could make findings that the IEE fails to meet district criteria, and thus, it could decide it would not consider it.

Practical Note—Another option is to consider the IEE but note that, for example, it fails to meet the District's qualifications requirements for evaluators and thus discount its validity with respect to IEP decision-making.

District IEE Criteria

To what degree must a parents' IEE meet district criteria?

In ***Seth B. v. Orleans Parish Sch. Bd.*, 67 IDELR 2, at fn. 82 (5th Cir. 2016)**, the Fifth Circuit held that parents need only show "substantial compliance" with state or local evaluation criteria to be entitled to reimbursement for an IEE, particularly where the criteria are complicated to understand, given the strong interest in protecting parents' right to IEEs.

This is likely the position that other circuit courts would take on this point.

District IEE Criteria

Must districts pay for IEEs or can they reimburse parents?

USDOE has stated that the regulations are silent on whether districts must provide advance funding for IEEs. Thus, requiring parents to pay for IEE first and then get reimbursed is allowed, as long as this method does not effectively deny the right to a publicly**35 IDELR 191 (OSEP 2001);** funded IEE. See, e.g., ***Letter to Petska,* 35 IDELR 191 (OSEP 2001); *Letter to Heldman*, 20 IDELR 621 (OSEP 1993)**

See also, ***Seth B. v. Orleans Parish Sch. Bd.*, 67 IDELR 2, at fn. 82 (5th Cir. 2016)**(finding IDEA would not necessarily prohibit schools from requiring parents to pay upfront for IEEs).

District IEE Criteria

Must districts pay for IEEs or can they reimburse parents?

Practical Note—Districts should understand that if they wish to have parents pay upfront for IEEs, parents may raise issues of inability to pay. Will schools really want to get into the thicket of requiring parents to prove insufficiency of finances as part of an IEE?...

District IEE Criteria

See materials for a sample local district IEE criteria, which attendees hereby have permission to use for non-commercial purposes only.

District Consideration of IEEs

What does "consider" mean?

OSEP has written that to consider an IEE means that it is reviewed by the IEP team, discussed, and, to the extent that it is not adopted, the team explains the basis for disagreement. ***Letter to Anonymous*, 23 IDELR 563 (OSEP 1995)**. See also, ***T.S. v. Bd. of Educ. of the Town of Ridgefield*, 20 IDELR 889 (2nd Cir. 1993)**("consider" means only to reflect on or think about with some degree of care).

"Consider," however, does not mean that the IEE trumps or supersedes district evaluations…

District Consideration of IEEs

***C.M. v. Summit City Bd. of Educ.*, 77 IDELR 224 (D.N.J. 2020), *aff'd*, 81 IDELR 91 (3rd Cir. 2022).**

District declined to find a grade schooler with autism eligible under IDEA.

Court found that District properly considered IEE that stated that student posed "challenging diagnostic challenge" but had behaviors "suggestive" of ADHD and autism, together with its evaluations and RtI data.

At the time, District had reasonable bases to determine the student did not need sp ed, noting his improvement in academics and communication with regular interventions.

District Consideration of IEEs

***C.M. v. Summit City Bd. of Educ.*, 77 IDELR 224 (D.N.J. 2020), *aff'd*, 81 IDELR 91 (3rd Cir. 2022).**

Also, while District used RtI analysis to determines student was not SLD, parent argued that it was required to use a severe discrepancy formula.

But, Court quickly noted that IDEA states that schools are not required to take into consideration whether a child has a severe discrepancy between achievement and intellectual ability. 20 U.S.C. §1414(b)(6)(A); *see also* 34 C.F.R. §300.307(a)(1). And, states cannot require use of discrepancy either.

District Consideration of IEEs

***Knox v. St. Louis City Sch. Dist.*, 76 IDELR 286 (E.D.Mo. 2020).**

After the grandparent of an elementary age student with a history of academic and behavior problems provided the school with an IEE noting depression, aggression, and hyperactivity, it neither initiated its own evaluation nor reviewed the IEE.

The Court found that the District violated child-find in not conducting its own evaluation, and also failed to review the IEE, thus impeding the grandparent's opportunity to participate.

District Consideration of IEEs

***Knox v. St. Louis City Sch. Dist.*, 76 IDELR 286 (E.D.Mo. 2020).**

Note—The receipt of an IEE noting disability concerns normally raises child-find flags, but add to the mix significant existing academic and behavior problems, the child-find trigger is surely pulled.

School could have offered its own evaluation, completed it, then reviewed it together with the IEE in an initial IEP meeting.

District Consideration of IEEs

***Knox v. St. Louis City Sch. Dist.*, 76 IDELR 286 (E.D.Mo. 2020).**

More Note—At times a finding that a student does not qualify under IDEA after an initial evaluation leads to an IEE request. Although the student is not IDEA-eligible, another IEP team meeting will have to be held to review and consider the IEE when it is completed.

Considering and Deciphering IEEs

Key Factors and Questions in Considering an IEE

- Is the IEE premised on a non-IDEA standard, such as maximization benefit, maximum potential, optimal performance, fastest progress, etc?
- Lack of data from school staff, school records, prior evaluations?
- Are sources of data sparse? Few assessments? Only parent input?
- No actual assessment data? Conclusory opinions with no data support?
- Do findings and conclusions make sense in light of assessment data?
- Were assessments administered but scores not reported? Were subtests administered but scores not reported?

Considering and Deciphering IEEs

Key Factors and Questions in Considering an IEE

- Is the parent willing to have the evaluator answer some key follow-up questions? Is the evaluator willing?
- In making program or placement recommendations, does the evaluator have knowledge of district programs and placement options?
- Is the evaluation purely diagnostic, with no educationally-relevant data or findings?
- Are discordant test scores not reconciled in some rational fashion?
- Is there single-minded focus on test scores that show deficit, as opposed to others that do not?

Considering and Deciphering IEEs

Example of Assessment Skewing

Independent evaluator reports only certain achievement subtests, all of which are in the below average range.

After follow-up, evaluator indicates all subtests were scored, and basic (aggregate) scores were calculated, but only some subtests were reported.

Actually, all unreported basic aggregate scores in math, reading, and writing were in average range—only the subaverage subtests were shown in the report, to give an impression of achievement deficits.

Considering and Deciphering IEEs

What if nobody can make sense of the IEE?

Follow-up with evaluator to clarify report may be needed.

If parent will not consent or evaluator will not comply, then the IEE's value to decision-making is significantly undermined.

If it is an IEE at parent expense, at least one court has held that the school has no obligation to assist the parent in understanding the IEE, only to review and consider it. See ***Greenhill v. Loudoun County Sch. Bd.*, 76 IDELR 44 (E.D.Va. 2020**)(parents could have asked their chosen evaluator to clarify his report, which they did not understand, but IEP team properly considered it).

District Consideration of IEEs

Some Factors and Questions in Considering an IEE

Schools will want to make sure their own evaluators carefully review the IEE prior to the IEP team considering it, so they can scrutinize any potential shortcomings or questionable areas.

District Consideration of IEEs

Some Factors and Questions in Considering an IEE

Generally, the higher the quality of the IEE, the more the IEP team should consider its findings and recommendations

Consideration of IEE is not a reject-or-accept proposition—IEP teams can decide to follow some, but not all IEE recommendations.

For example, if a particular recommendation is sound, the IEP team may want to incorporate it into the IEP, as opposed to another recommendation that is less well-reasoned.

District Consideration of IEEs

What if the parents submit only a Dr's notepad with scribbled diagnoses?

This is technically IEE data, and as such, must be considered.

But, parents should be informed that the more "bare bones" the information is, the less value to the IEP team decision-making process.

The IEP team may decide that the note is of little value beyond raising the issue of whether the team should conduct further evaluations to address the notepad diagnoses.

District Consideration of IEEs

What if the parents submit only a Dr's notepad with scribbled diagnoses?

If the IEP team has already evaluated the notepad diagnoses areas, but the district evaluation does not support the diagnoses, then consideration of both pieces of data would lead to the IEP team relying on its own, multiply-sourced evaluation, as opposed to a bare diagnosis.

Parents also should be informed that medical diagnoses do not necessarily translate to IDEA eligibility.

IEE Steps for Schools

1. Receive IEE request
2. Work with parent to resolve the issue informally, but without delay
3. Decide to grant or deny IEE
4. If denial, file request for DP without unnecessary delay
5. If grant, provide parents with evaluator list and District criteria
6. Obtain parents' selection of evaluator
7. Contract with evaluator
8. Receive IEE report and review internally
9. Schedule IEP team meeting to consider IEE without delay

Ideas and Tips for Parents

- Having the independent evaluator review the district's evaluation is always helpful, as they can critique or reconcile the district's finding with their own.
- Try to select evaluators who will be willing to obtain school-based data (e.g., teacher checklists, review of records, observation at school, etc).
- If the IEP team is not willing to adopt all of the IEE's findings, you may want to request that they incorporate some of the IEE recommendations.
- Remember that the IEE does not "replace" the district's evaluation, but rather is additional evaluation data that must be considered.

Ideas and Tips for Parents

- If the IEP team is not going to adopt the findings and recommendations of the IEE, you should ask it to indicate why it is not doing so.
- Ask the independent evaluator how long it will take to issue the final evaluation report (some IEEs can take many months…).

Independent Evaluator School Observation

Must schools allow the parents' selected independent evaluator to observe the student in the school setting?

Issue not addressed in the IEE regulation at 34 C.F.R. §300.502.

But it has been the subject of litigation…

In ***L.M. v. Capistrano Unified Sch. Dist.*, 48 IDELR 189 (C.D.Calif. 2007),** a court held that an arbitrary limit of 20 minutes on an independent evaluator's observation of the child at school was inappropriate and contrary to IDEA.

Independent Evaluator School Observation

Must schools allow the parents' selected independent evaluator to observe the student in the school setting?

In ***E.C. v. Fullerton Sch. Dist*., 79 IDELR 17 (C.D.Calif. 2021),** a school would not allow a private pediatric neurologist to observe a child at school, as it had not yet developed the 2nd grade IEP.

The Court noted that State law required schools to allow such observations if it allows its own evaluators to observe, which was the case here.

The school's reasons for wanting to delay the observation were insufficient, as it was planning the student's placement, so the Court held its refusal impeded the parent's participation in the IEP process.

Independent Evaluator School Observation

Must schools allow the parents' selected independent evaluator to observe the student in the school setting?

***E.C. v. Fullerton Sch. Dist*., 79 IDELR 17 (C.D.Calif. 2021)**

Crucially, the finding of a procedural violation impeding the parent's participation also meant a finding of denial of FAPE, so the Court ordered the school to reimburse the parent's unilateral private placement.

Note—Once there is a finding of denial of FAPE, all possible IDEA remedies, including private school reimbursement, are on the table.

Independent Evaluator School Observation

Must schools allow the parents' selected independent evaluator to observe the student in the school setting?

See also ***School Bd. of Manatee Co., Fla.* v. L.H., 53 IDELR 149 (M.D.Fla. 2009)**(holding school must allow independent evaluator to observe child at school).

But, of course, the observations must not become disruptive of the learning process, as in ***In re: Student with a Disability*, 43 IDELR 214 (SEA Nevada 2005)**.

Independent Evaluator School Observation

Must schools allow the parents' selected independent evaluator to observe the student in the school setting?

Some states have stepped in with rules on this issue, as in the case of California, which requires schools to allow independent evaluators to observe a student if its own evaluators conduct classroom observations. See ***E.C. v. Fullerton Sch. Dist.*, 79 IDELR 17 (C.D.Calif. 2021**)(court found school's refusal to allow observation impeded parents' participation in IEP process and denied FAPE, leading to reimbursement for private placement).

Independent Evaluator School Observation

See also, ***In the Matter of New Jersey DOE*, 82 IDELR 184 (N.J. Sup.Ct. 2023)**(citing New Jersey law requiring schools to allow independent evaluators to observe student in classroom).

Independent Evaluator School Observation

In sum, it appears that a growing consensus of courts, hearing officers, and some states view classroom observations as a valid part of parents' right to IEEs where the independent evaluator wishes to conduct observation as part of the IEE.

Thus, schools may want to address this issue in its local IEE criteria. (See sample IEE Criteria in materials).

School's Evaluation Proved Appropriate

***R.Z.C. v. North Shore Sch. Dist.*, 73 IDELR 139 (9th Cir. 2018)**

- Parents argued District violated IDEA in discontinuing IDEA eligibility despite an IEE's conclusion the student had an SLD.
- District evaluation showed the student did not meet eligibility criteria for SLD due to dysgraphia, despite some weaknesses in writing.
- District data indicated student could express stories and convey information through his writing, and he received average grades.
- Thus, District's reevaluation and eligibility determination were appropriate.

School's Evaluation Proved Appropriate

***R.Z.C. v. North Shore Sch. Dist.*, 73 IDELR 139 (9th Cir. 2018)**

- *Note*—See also, ***A.S. v. Shoreline Sch. Dist.*, 125 LRP 18988 (W.D.Wash. 2025)**, where a Court found a District's evaluation of a student with Autism appropriate and denied an IEE.
- The reevaluation found that the student was no longer IDEA-eligible and recommended §504 eligibility.
- The District evaluation assessed the student in all relevant domains of need and properly reviewed private evaluations, even if it did not specifically include a sensory processing measure, which the Court found unnecessary.

School's Evaluation Proved Appropriate

***L.C. v. Issaquah Sch. Dist.*, 74 IDELR 132 (W.D.Wash. 2019)**

- Parents argued District evaluation was inappropriate because it failed to specifically assess for dyslexia (although it found SLD eligibility).
- District evaluation included appropriate testing to determine the presence of an SLD, which would include dyslexia (parent wanted the eligibility category to read "dyslexia," not SLD).
- Court found the District conducted "a detailed and comprehensive evaluation report… sufficient in scope to develop an IEP."
- Thus, District's conclusion that the student was SLD was appropriate and denied a publicly-funded IEE.

School's Evaluation Proved Appropriate

***L.C. v. Issaquah Sch. Dist.*, 74 IDELR 132 (W.D.Wash. 2019)**

Note—The underlying issue may have been that the parent wanted the school to use the specific Orton-Gillingham reading program, but the Court ruled the District was entitled to its choice of methodology.

The 9th Circuit affirmed this decision at 80 IDELR 61.

School's Evaluation Proved Appropriate

***Avila v. Spokane Sch. Dist*. 81, 69 IDELR 204 (9th Cir. 2017)**

Parents argued District evaluation of a student with Autism for dyslexia and dysgraphia was inappropriate, but District declined to grant IEE and filed a DP request.

The fact that the District's evaluation did not use the terms "dyslexia" or "dysgraphia" did not mean it was inappropriate.

District's evaluation broadly assessed student's reading fluency and reading with a battery of tests similar to those conducted in IEE.

Thus, the District was not required to pay for the IEE.

School's Evaluation Proved Appropriate

***E.P. v. Howard County Pub. Sch. Sys.*, 72 IDELR 114 (4th Cir. 2018)**

Parents argued a failure to administer additional subtests and use of a "pattern of strengths and weaknesses" analysis in evaluating SLD made a school's evaluation inappropriate and entitled them to an IEE.

But, the school evaluators had rational reasons for not administering additional WJ III subtests given the student's performance on subtests already administered.

And, the "pattern of strengths and weaknesses" analysis was actually approved by the Maryland SEA for SLD evaluations.

School's Evaluation Proved Appropriate

***E.P. v. Howard County Pub. Sch. Sys.*, 72 IDELR 114 (4th Cir. 2018)**

Note—Indeed, the parents' argument on the SLD analysis could not have succeeded, as the *federal* SLD regulation allows for the use of an assessment-based "pattern of strengths and weaknesses" analysis. 34 C.F.R. §300.309(a)(2)(ii).

In fact, this is the preeminent SLD analysis when assessments are used instead of, or together with, an RtI-based method.

School's Evaluation Proved Appropriate

***A.H. v. Colonial Sch. Dist.*, 74 IDELR 219 (3rd Cir. 2019)**

Parents claimed District evaluation was inappropriate because it lacked neurological, OT, psychiatric assessments and an FBA.

Court was not persuaded that the assessments desired by the parent were in fact necessary to understand the disabilities and needs of this student with ED.

District evaluation used a variety of assessment tools and strategies, sound instruments, and proper consideration of multiple data sources in determining student's eligibility and educational needs.

School's Evaluation Proved Appropriate

***A.H. v. Colonial Sch. Dist.*, 74 IDELR 219 (3rd Cir. 2019)**

Although parents' expert psychologist opined that the District's evaluation was "incomplete," the Court held that "the focus was not, nor should have been, on whether the [evaluation] explored all facets of 'the student's] disabilities."

Note—Parent's expert, moreover, had neither met nor observed the student, was not aware of the student's IEP or program offerings, and was not familiar with recently-collected evaluation data. This discounted the weight of her testimony.

School's Evaluation Proved Appropriate

***W.A. v. Panama-Buena Vista Union Sch. Dist.*, 124 LRP 22428 (E.D.Cal. 2024)**

The fact that an independent evaluator disagrees with the results of a District evaluation does not mean the evaluation will be found inappropriate—reasonable qualified evaluators may differ.

Here, although an independent evaluator disagreed with the District's FBA, the FBA was conducted by a qualified evaluator (BCBA), collected various sources of data, conducted observations on 5 different days, and identified behavior antecedents and the function of the student's behavior.

The Court easily found the District's FBA to be appropriate.

School's Evaluation Proved Appropriate

School have the right to deny a request for an IEE and then prove the appropriateness of its own evaluation in a due process hearing.

Relevant Questions—What kinds of challenges to an evaluation "work"?

What standards do courts refer to in determining the appropriateness of a school evaluation or reevaluation?

Practical Implications for schools—Sp ed litigation is increasingly costly. Is denying an IEE worth the resources? What if the IEE denial generates parent counterclaims? What about the potential of a parent appeal?

School's Evaluation Proved Appropriate

***Heather H. v. Northwest Ind. Sch. Dist.*, 81 IDELR 32 (5th Cir. 2022)**

In an IEE dispute, does the school have to prove its own evaluation is appropriate *and* that the parents' IEE is inappropriate?

Fifth Circuit rules that school must do one, but not both ("the statute plainly indicates the District needed to show one or the other.").

Since it proved that its evaluation did not have to address ED, as there was no school-based evidence of anxiety at school or any problem in educational performance as a potential result, it denied the parents reimbursement for their IEE.

School's Evaluation Proved Appropriate

***Heather H. v. Northwest Ind. Sch. Dist.*, 81 IDELR 32 (5th Cir. 2022)**

In ruling, Court found student's transition to Kindergarten was fairly normal, and that District's evaluation was not inappropriate because it used one test (CARS-2) over another (ADOS-II) preferred by the parents.

Lastly, the District's evaluation in fact addressed emotional and behavioral domains in evaluating the student for potential autism.

Note—Glancing potshots or differences of opinion about a school's evaluation will rarely suffice; something must be fundamentally wrong about the evaluation that violates IDEA evaluation regulations in order to prove it inappropriate.

School's Evaluation Proved Appropriate

***A.H. v. School Dist. of Philadelphia*, 123 LRP 27555 (E.D.Pa. 2023)**

After a District waited until 17 days before a 3-yr reevaluation was due to seek consent and was late in completing the report, the parents sought an IEE, which the District refused.

Initially, the Court held that the reevaluation delay alone would not entitle the parents to an IEE; rather, they had to prove the school evaluation was inappropriate (procedural violation did not deny FAPE or impede parents' participation).

School's Evaluation Proved Appropriate

***A.H. v. School Dist. of Philadelphia*, 123 LRP 27555 (E.D.Pa. 2023)**

School's evaluation was appropriate—all suspected disability areas assessed, multiple data and assessment sources…

In sum, parents not entitled to IEE at public expense.

Note—The 5-week delay, moreover, straddled the 2021-22 Christmas break, and parent-suggested changes to the IEP were accepted by IEP team (more sp ed service time, OT, speech), thus showing parents meaningfully participated.

School's Evaluation Proved Appropriate

See also ***Smith v. Tacoma Sch. Dist.*, 77 IDELR 48 (W.D.Wa. 2020)**, where the Court was not persuaded that the school's reevaluation's failure to reassess cognitive functioning or defer to physician's reports rendered it inappropriate. IEE therefore denied.

Note—Parent's expert, moreover, had neither met nor observed the student, was not aware of the student's IEP or program offerings, and was not familiar with recently-collected evaluation data. This discounted the weight of her testimony.

School's Evaluation Inappropriate

In ***San Jose Unified Sch. Dist. v. H.T.*, 82 IDELR 37 (N.D.Cal. 2022)**, state law required schools to obtain parent input as part of FBAs, but the school did not persist in obtaining the father's input after a single voicemail exchange.

The Court held that "nothing in the Parent's communications suggested a categorical unwillingness to participate in the FBA," and thus, the failure to persist to obtain the input rendered the FBA inappropriate.

Thus, the Court ordered an independent FBA.

Note—In such a situation, the school could have persisted in communicating with the parent, indicating the need to obtain his input, and documenting the various attempts to do so.

Timeline for School to Request Hearing

Again, schools have the right to deny a request for an IEE and then prove the appropriateness of its own evaluation in a due process hearing, but schools must act promptly.

Is there a set timeline? Does your state set one?

If there is no set timeline, what factors do courts examine to assess timeliness?

Practical Implications for schools—Schools cannot deny a parent request for an IEE and sit on the request, as failure to act promptly can have bad consequences in litigation…

Timeline for School to Request Hearing

***MP v. Parkland Sch. Dist.*, 79 IDELR 126 (E.D.Pa. 2021)**

To this court, the District's failure to respond to a parent's request for an IEE precluded it from showing that its evaluation was appropriate.

Here, the parents requested an IEE for their child with Rett Syndrome, but the District neither granted the IEE nor requested a DP hearing, so the parents filed their own DP hearing request.

Although the Court agreed there was no denial of FAPE, it held the District's failure to respond violated IDEA and rendered the appropriateness of its evaluation irrelevant.

Timeline for School to Request Hearing

***MP v. Parkland Sch. Dist.*, 79 IDELR 126 (E.D.Pa. 2021)**

Thus, the Court held the guardian was entitled to an IEE at District expense, as well as attorneys' fees (close to $48,000—see 79 IDELR 272).

Note—Instead of responding to the IEE request, the District apparently tried to get the guardian to withdraw her request, asserting its evaluation was appropriate, and asked why she wanted an IEE (to which she responded through her attorney, even though she did not have a duty to specify why).

Timeline for School to Request Hearing

***MP v. Parkland Sch. Dist.*, 79 IDELR 126 (E.D.Pa. 2021)**

Note—See also ***D.D. v. Garvey Sch. Dist.*, 79 IDELR 15 (C.D.Cal. 2021)**, where a California Court likewise ruled that the District's utter failure to respond to an IEE request in any way meant it "waived its right to contest the request."

Timeline for School to Request Hearing

***L.C. v. Alta Loma Sch. Dist.*, 78 IDELR 271 (9th Cir. 2021)**

At times, however, *some* degree of delay might not be inappropriate.

Here, a California District communicated with the parent for over 3 months in an attempt to work out their dispute over the cost of a visual processing IEE, and thus the delay did not violate IDEA.

Holding that "unnecessary delay" is a fact-specific inquiry, the Panel noted that the parties were trying to work out the evaluation dispute until an impasse was reached, at which point the District quickly filed for DP.

Timeline for School to Request Hearing

***L.C. v. Alta Loma Sch. Dist.*, 78 IDELR 271 (9th Cir. 2021)**

Practical Implications—If a school is trying to work out an IEE dispute with a parent, it should involve its attorneys, document its efforts closely, not let the negotiations drag out, and if a mutual resolution is not forthcoming, opt to file for DP (at which time, negotiations can still continue).

For another similar case, see ***L.S. v. Abington Sch. Dist.*, 48 IDELR 244 (E.D.Pa. 2007)**(schools' 10-week delay justified)

Timeline for School to Request Hearing

***L.C. v. Alta Loma Sch. Dist.*, 78 IDELR 271 (9th Cir. 2021)**

Parent caused delay—In ***I.M. v. Renton Sch. Dist. #403*, 63 IDELR 277 (9th Cir. 2014)**, the Court held the parent caused the delay in securing an IEE. The District provided the parent with all necessary information to obtain an IEE, but the parents did not select an evaluator for 15 months, and then the evaluator delayed 2 months in providing the report after its completion.

An unexplained delay case—For a case where the school had no explanation for its 11-week delay in requesting a hearing, thus violating IDEA, see ***Pajaro Valley Unified Sch. Dist.*, 47 IDELR 12 (N.D.Cal. 2006)**.

Timeline for School to Request Hearing

State-Law May Set Timeline for District Response

Be aware that your state may choose to impose its own timeline for a response to an IEE request, as in ***K.K. v. Parsippany-Troy Hills Township*, 79 IDELR 257 (D.N.J. 2021)**, where the Court noted that New Jersey law gives districts only 20 calendar days to request a DP hearing to prove the appropriateness of its evaluation and deny an IEE.

Some Miscellaneous IEE Points

That an IEE is currently pending is not reason for an IEP team to forego needed or scheduled revisions to the IEP. ***AAA v. Clark County Sch. Dist.*, 80 IDELR 133 (D.Nev. 2022)**.

Note—The Court also found that the District should have offered to revise the IEP even though a DP request was also pending. Parents not required to agree to offered revisions, however, due to the stay-put provision of IDEA.

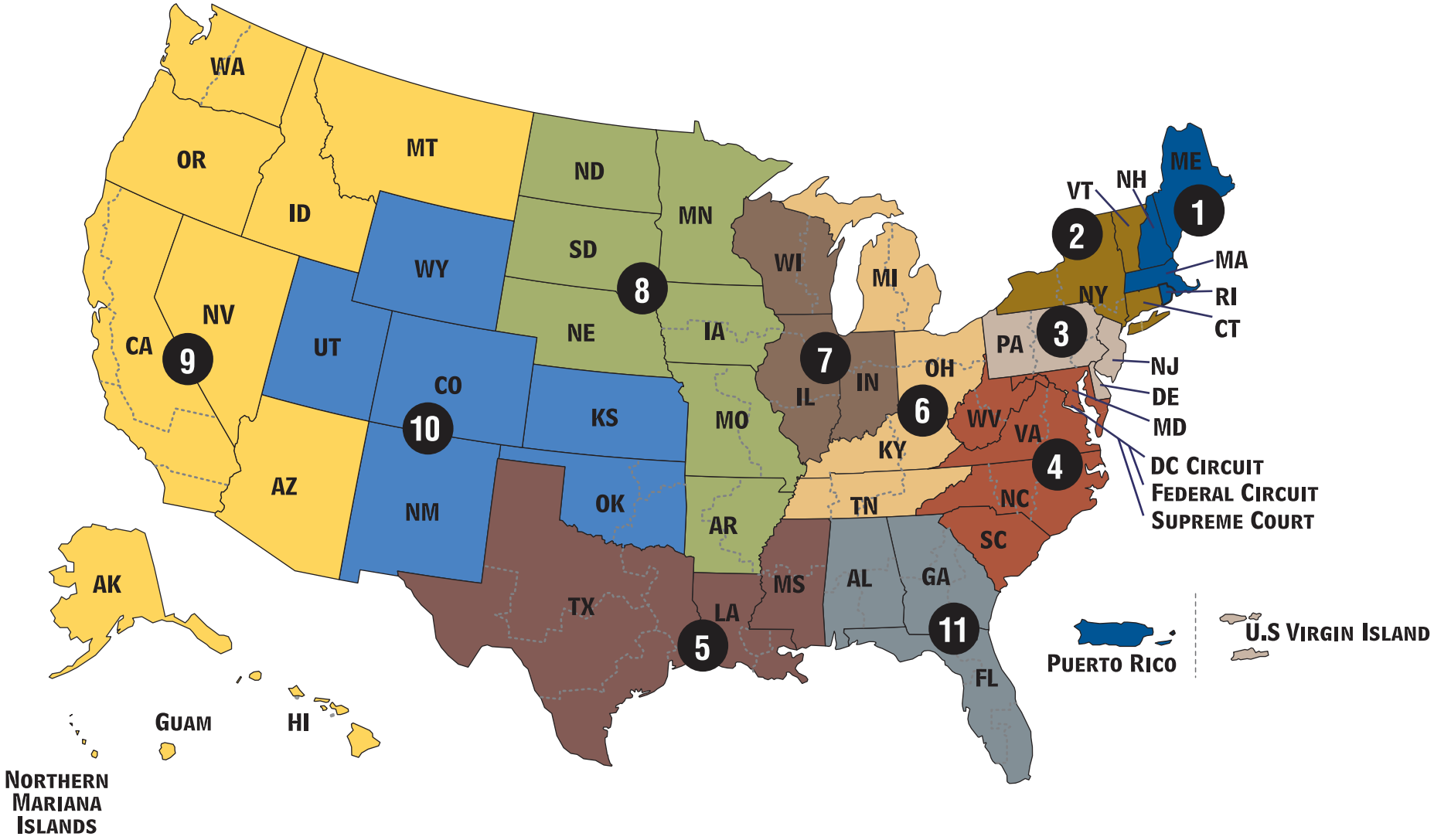
IEP teams cannot be responsible for revising IEPs while IEEs are pending, if the parents refuse to meet. Also, IEEs do not overcome the presumption that District's choice of educational methodology is proper. ***P.P. v. Northwest Ind. Sch. Dist.*, 78 IDELR 7 (5th Cir. 2020).**

Some Miscellaneous IEE Points

Generally, courts have held that schools are required to pay for IEEs ordered by hearing officers even if they are presently appealing the decisions. See, e.g., ***Jackson Township Bd. of Educ. v. Y.B.*, 123 IDELR 31683 (D.N.J. 2023); *Independent Sch. Dist. No. 720 v. C.L.*, 72 IDELR 64 (D.Minn. 2018).**

Geographic Boundaries

of United States Courts of Appeals and United States District Courts



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