A Top 20 Hits of Legal Issues in Special Education 2016-2017 Year in Review

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Endrew F. & FAPE

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Endrew F. & FAPE

- Parents of an autistic 5th grader with escalating behavioral problems complained that the district included almost identical goals in his IEPs for 2nd, 3rd, and 4th grade years.
- The child was not participating in a general education setting and was not performing at grade level (unlike student in *Rowley*).
- So in this child's case, what does FAPE mean?

Endrew F. by Joseph F. v. Douglas County Sch. Dist. RE-1, 69 IDELR 174 (U.S. 2017)

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Endrew F. & FAPE

- In the 10th Circuit, the standard for FAPE had been "merely more than de minimus" progress.
- Endrew's parents argued that FAPE amounts to "opportunities to achieve academic success, attain self-sufficiency, and contribute to society" equal to those available to non-disabled students.

Endrew F. by Joseph F. v. Douglas County Sch. Dist. RE-1, 69 IDELR 174 (U.S. 2017)

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Endrew F. & FAPE

- The U.S. Supreme Court ruled in *Endrew F.* that a school must offer an IEP that is "reasonably calculated to enable a child to make progress appropriate in light of the child's unique circumstances."
- Court agrees with longstanding proposition that IDEA doe not require an optimal, ideal, or potentially-maximizing education, but "barely more than de minimis" is too low compared to grade-to-grade advancement required for mainstreamed sped students
- Court also rejected parents' proposed standard of "educational opportunities equal to those afforded to nondisabled individuals"

Endrew F. by Joseph F. v. Douglas County Sch. Dist. RE-1, 69 IDELR 174 (U.S. 2017)

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Endrew F. & FAPE

- The IEP must be geared toward **progress**
  - "After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement"
  - "program must be appropriately ambitious"
- "**in light of child's circumstances**"
  - Reflects the individualized nature of special education
  - *Circumstances?* -- Type of disability, severity, environmental issues, behavior, parent participation/cooperation, etc…

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Endrew F. & FAPE

- Other interesting language in opinion:
  - "The IEP provisions reflect *Rowley's* expectation that, for most children, FAPE will involve integration in the regular classroom…"
  - "The goals may differ, but every child should have a chance to meet challenging objectives."
  - "A reviewing court may fairly expect [school] authorities to be able to offer a cogent and responsive explanation for their decisions…"

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Endrew F. & FAPE

. . . But what does *Endrew F.* mean for how FAPE is defined in Texas?

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Endrew F. & FAPE

Facts:

- C.G. was a child with autism and pervasive developmental delays.
- 2011-2012 & 2012-2013, C.G. received instruction in a SPED classroom, speech therapy, and occupational therapy.
- 2013-2014, C.G.'s parents were dissatisfied with her progress, rejected the proposed 2013-2014 IEP, enrolled her in private school & private speech therapy.
- Parents asserted C.G. had been denied FAPE and wanted tuition reimbursement.
- District court decision was before *Endrew* and used *Michael F.* standards

C.G. by Keith and Linda G. v. Waller ISD, 70 IDELR 61 (5th Cir. 2017)

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Endrew F. & FAPE

Ruling:

- The 5th Circuit interpreted *Endrew F.* and ruled that its 4-factor test from *Cypress Fairbanks ISD v Michael F.* aligns with the *Endrew F.* standard of FAPE.
- An IEP is appropriate if it:
  - Is individualized on the basis of the student's assessment & performance;
  - Is administered in the LRE;
  - Is implemented in a coordinated and collaborative manner by the key stakeholders; and
  - Demonstrates positive academic and non-academic results.
- Court held that the *Michael F.* standard which focuses on "progress, not regression or trivial advancement" and "meaningful" benefit was "fully consistent" with *Endrew F.* and met the "appropriately ambitious" standard

C.G. by Keith and Linda G. v. Waller ISD, 70 IDELR 61 (5th Cir. 2017)

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Endrew F. & FAPE

Conclusion: application of Fifth Circuit's "meaningful benefit" standard complies with *Endrew. F.* – doesn't change what FAPE is in Texas.

- *See also C.M. v. Warren ISD*, 69 IDELR 282 (E.D. Tex. 2017)
- *See also E.R. v. Spring Branch ISD*, 70 IDELR 158 (S.D. Tex. 2017)

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Best Practice Tips from *Endrew F.*

- **IEP goals for students with severe disabilities must nevertheless be appropriately ambitious**
  - Present levels of performance should be advancing commensurate with potential for progress
  - Goals and objectives should likewise show progression in skills, even if modest due to severity of disability

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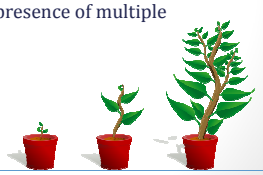
Best Practice Tips from *Endrew F.*

- **Evaluators may want to render opinions on students' "potential for growth"**
  - For students with lower potential for growth, evaluations may want to document realistic expectations for progress, as supported by data (cognitive assessment data, behavior data, developmental delay, presence of multiple disabilities, etc…)



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Best Practice Tips from *Endrew F.*

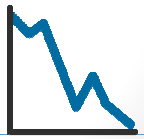
- **Procedurally, schools should focus on well-articulated prior written notices (PWNs) and documentation of the team's reasoning**
  - *Endrew F.* emphasizes that schools must have cogent and responsive explanations for their educational decisions
  - Schools should focus on developing quality PWNs and documenting logical reasoning of ARDC decisions

NOTICE

ADD YOUR OWN WORDING HERE

Best Practice Tips from *Endrew F.*

- **Schools should document any circumstances that may be limiting a student's progress**
  - The existence of any factor detrimental to student progress should be documented
  - To the degree it can, any such factor should be discussed and, if possible, addressed at ARDC meetings



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Best Practice Tips from *Endrew F.*

- **IEP teams should take action when fully mainstreamed students are not passing**
  - As *Endrew* emphasizes, FAPE for fully mainstreamed students means advancement from grade to grade. Thus, ARDC should meet promptly to address failure in regular classes.

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Fry, Exhaustion, and Service Animals

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Fry & Exhaustion

- Exhaustion Basics:
  - IDEA requires that a parent file a due process hearing BEFORE going to court.
  - The IDEA does not limit a parent's right to file a claim under another statute that protects the rights of children with disabilities (i.e. ADA, 504, etc.)
  - However, "...except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) **shall be exhausted** to the same extent as would be required had the action been brought under" the IDEA.

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Fry & Exhaustion

- **Why Exhaustion Matters…**
  - Federal courts are "generalists" that deal with all kinds of legal matters
  - State agencies and hearing officers are experts on disability law matters
  - The administrative process serves to develop a record, which is heard by a hearing officer, which in turn assists a federal court that may eventually have to rule on the case
  - IDEA litigation is time-consuming and costly, but cannot lead to money damages

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Fry & Exhaustion

Facts:

- Case arising from School's refusal to allow a 5 year old child's Goldendoodle service dog ("Wonder") to come to school.
- Pediatrician wrote prescription for a service animal
- Wonder helped student retrieve dropped items, balance when using a walker, open/close doors, turn on/off lights, transfer to and from toilet, etc., and "enables [E.F.] to develop independence and confidence and helps her bridge social barriers"
- School decides Wonder cannot come to school, since IEP meets all FAPE needs and parents agree that there is no denial of FAPE and instead allege violations of 504 & ADA.

Fry ex. rel. E.F. v. Napoleon Cnty. Schs., 69 IDELR 116 (U.S. 2017)

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Fry & Exhaustion

Ruling:

- Exhaustion hinges on whether a lawsuit seeks relief for a denial of FAPE (the "gravemen" of the suit):
  1) Could the student assert the same complaint against another non-school public entity (i.e. public library)?
  2) Could an adult assert the same claim against the district?
  3) What is the history? Have the parents previously invoked the IDEA remedies to address the dispute?

Fry ex. rel. E.F. v. Napoleon Cnty. Schs., 69 IDELR 116 (U.S. 2017)

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Fry & Service Animals

Facts:

- 4th grader with Type I diabetes attended school with a $15,000 Labradoodle trained as a diabetic alert dog named Jeff. Jeff was trained specifically to learn the child's scent and alert the child when his blood sugar was out of range.
- A classmate ran closely past the child and Jeff and attempted to jump over Jeff. Jeff lunged, snapped, and bit the classmate.
- District excluded Jeff from school as a result of the incident.
- Parents filed a Section 504 claim and ADA disability discrimination claim.

A.P. by J.P. and M.P. v. Pennsbury Sch. Dist., 68 IDELR 132 (E.D. Pa. 2016)

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Fry & Service Animals

Ruling:

- Under the ADA and Section 504, A district's obligation to reasonably modify policies, practices, and procedures to allow the use of a service animal did not extent to a service dog that has bitten someone on school grounds.
- Though Jeff had been taunted, Jeff's response was inappropriate regardless of circumstances.
- Also, evidence had been presented that Jeff had barked, growled, nipped, and chewed on classroom supplies on several other occasions.

A.P. by J.P. and M.P. v. Pennsbury Sch. Dist., 68 IDELR 132 (E.D. Pa. 2016)

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Fry & Service Animals

Facts:

- Non-verbal 8 year old girl with autism and epilepsy was able to give her service dog commands using a series of hand gestures or signals. In the 5 years the service dog accompanied the child, it had never been out of control either at school or on the school bus.
- District alleged that child required assistance with untethering and occasional prompting and therefore sought to require a third-party handler as a condition to the service dog's presence at school.
- District noted that the service dog's seizure detection skills were less than reliable, and that the district had provided the child with a 1-to-1 nurse after a physician advised she would need medication within 3 minutes of a seizure. Also, the district had an emergency plan for transportation in place.

United States of America v. Gates-Chili Cent. Sch. Dist., 68 IDELR 70 (W.D.N.Y. 2016)

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Fry & Service Animals

Ruling:

- The ADA requires that a service animal be under the control of its handler at all times.
- Court advised it needed to resolve the factual dispute of whether the child could control the service dog before a determination of whether the district had violated the ADA could be made.
- Specifically, if the child requires school district personnel to actually issue commands to the service dog, then she cannot be considered in control of her service dog.
- Alternatively, if the only assistance the child needs is to untether her from the service dog and to be occasionally reminded to issue commands to the service dog, then the child could be considered to be in control of her service dog.

United States of America v. Gates-Chili Cent. Sch. Dist., 68 IDELR 70 (W.D.N.Y. 2016)

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Best Practice Tips After *Fry*

- **More plaintiffs seeking money damages will try to go straight to federal court and file under 504 & ADA**
  - *Fry* will lead to more intensive litigation on the exhaustion of administrative remedies question
  - Attorneys will try various ways to "draft around" what may really be an IDEA claim

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Best Practice Tips After *Fry*

- **For the IDEA student, requests for use of a service animal should go to through the ARDC first**
  - For students with communication needs, ARDC should discuss ongoing effective communication needs in annual ARD meetings
  - ARDC should document if the requested item is needed for FAPE or for ADA/§504 access
  - If required for FAPE, add to the IEP
  - If would conflict with FAPE, document how
  - If not needed for FAPE, but required by ADA/504, and no conflict with FAPE, ensure school provides
  - FAPE is not everything; ADA & 504 might require more

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Child Find

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Child Find

Section 504 Child Find

Facts:

- Middle school child had been bullied for years on the basis of race and because of his weight.
- Child informed school personnel that he was hearing voices and taking medication for depression. Later that same day, he committed suicide.
- Parent sued district on a Section 504 failure to accommodate her child's depression.

Reed ex re. Estate of J.R. v. Kerens ISD, 70 IDELR 40 (N.D. Tex. 2017)

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Child Find

Ruling:

- A District does not violate its child find duty under Section 504 unless it knows or has reason to suspect that a child has a disability and requires an accommodation as a result.
- Though child told school personnel on the day of his suicide of his depression, this was not enough to find the school knew or should have known of his impairment any earlier.

Reed ex re. Estate of J.R. v. Kerens ISD, 70 IDELR 40 (N.D. Tex. 2017)

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Child Find

IDEA Child Find

Facts:

- November 2013, school psychologist completed cognitive, educational, visual-motor, and socio-emotional tests, spoke with parent, and observed 6 year old child in classroom.
- School psychologist concluded child's "transient emotional distress" did not appear to interfere with his ability to access general education.
- Two months after the district found a 6 year old child ineligible for IDEA services, the child attempted suicide on school grounds by jumping out of a window. After the incident, the child informed school personnel that he "wanted to die" and had violent altercations with classmates and teachers.

Horne ex re. R.P. v. Potomac Preparatory Charter Sch., 68 IDELR 38 (D.D.C. 2016)

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Child Find

Ruling:

- Fact that school had found child ineligible for IDEA services just 2 months earlier did not excuse a failure to re-evaluate after his suicide attempt.
- Suicide attempt in itself amounted to inappropriate behavior under normal circumstances—one of the IDEA's 4 criteria for an ED.
- Failure to reconsider child's need for services after multiple incidents of inappropriate and violent behavior amounted to a child find violation.

Horne ex re. R.P. v. Potomac Preparatory Charter Sch., 68 IDELR 38 (D.D.C. 2016)

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Child Find

IDEA Child Find

Facts:

- 2013-2014, school developed Section 504 plan to address disability-related needs of enrolling 9th grade student with ED, OHI, and SLD, who passed with minimal accommodation.
- 2014-2015, child's behavior and academic performance deteriorated in 10th grade. Child scored below 20th percentile on standardized tests, failed several classes, engaged in criminal behavior, and was hospitalized in September 2014 for disability-related behavior.
- Child was not referred for IDEA evaluation until April 2015.

Krawietz .v Galveston ISD, 69 IDELR 207 (S.D. Tex. 2017)

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Child Find

IDEA Child Find

Ruling:

- District failed its child find obligations after it did not refer child for IDEA evaluation until 6 months after becoming aware of academic and performance issues.
- The district's "child find duty arose anew in the fall of 2014 when it became aware of academic decline, hospitalization, and incidents of theft."

Krawietz .v Galveston ISD, 69 IDELR 207 (S.D. Tex. 2017)

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Child Find

- Facts: Documentation showed that a grade school boy with Tourette Syndrome was making meaningful educational progress under a Section 504 plan calling for modified homework assignments, testing accommodations, preferential seating, and time to visit nurse to release tics. The student was earning 80s and 90s in all subjects and met proficiency standards for standardized tests in English and Math. Parent also noted during a 504 meeting that the student had done "exceptionally well."
- Ruling: The documentation justified the school district's decision not to refer the child for a full IDEA eligibility evaluation until his parents requested an assessment, even when subsequent testing found student eligible for IDEA services.

R.E. v. Brewster Cent. Sch. Dist., 67 IDELR 214 (S.D.N.Y. 2016)

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Child Find

- A preschool program's failure to implement RTI and provide resulting data cannot delay or deny the receiving school district's obligation to "locate, identify, and evaluate" a child suspected of having a disability.

Memo to State Directors of Special Ed., 67 IDELR 272 (OSEP 2016)

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Eligibility

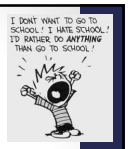
Eligibility

Facts:

- High school student with anxiety, depression, and ADHD received IDEA services in 9th and 10th grades due to suicidal ideation, declining grades, and difficulties with interpersonal relationships.
- At the start of 11th grade, ARDC exited child from IDEA services based on academic and social progress. He earned straight A's, was rarely tardy or absent, scored averagely on college entrance exams, and was excelling socially.
- Parents filed due process complaint related to district's finding that their child was ineligible for services after he began to be truant in 12th grade.

D.L. by J.L. and A.L. v. Clear Creek ISD, 70 IDELR 32 (5th Cir. 2017)

Eligibility



Ruling:

- None of the evidence available at the time of the eligibility determination suggested a continued need for IDEA services.
- In determining whether the student has an educational need, it must consider his current performance; ARDC can't find the student eligible based solely on concerns that he might require special education at some point in the future.

Note: Court did not address whether district had violated child find obligations at the beginning of 12th grade because parents did not raise this claim in their due process complaint.

D.L. by J.L. and A.L. v. Clear Creek ISD, 70 IDELR 32 (5th Cir. 2017)

Eligibility

Facts: School determined that an 8th grade student who received low scores on 2 SLD assessments that specifically measured reading fluency was ineligible for IDEA services in light of her straight A's, classroom performance, and above-average scores on statewide assessments.

Ruling: 1st Circuit ruled that the lower court erred in relying solely on the child's grades and overall performance in determining that she did not have an SLD. Eligibility and need are 2 different questions.

Note: 1st Circuit did not address whether the child needed special education services to receive an educational benefit because that issue was not before the Court.

Mr. and Mrs. Doe v. Cape Elizabeth Sch. Dist., 68 IDELR 61 (1st Cir. 2016)

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Eligibility

Facts: Though 1st grader with anxiety performed at a high level academically, her behavioral issues required frequent removals from her general education classroom. She was absent 20 days as a result, causing her to fall behind in classroom instruction.

Ruling: Lower court erred in finding her ineligible for IDEA services based on her academic performance.

A.A. v. District of Columbia, 70 IDELR 21 (D.D.C. 2017)

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Eligibility

- Facts: Student began having serious behavior problems in the 2nd grade, including bullying other students, anger, lack of self-control, suicidal ideations. The School provided a Behavior Support Plan and revised it multiple times without success. The School then provided counseling, a 1:1 behavioral aide and various accommodations. A FIE concluded that the child was not eligible. Two suicide attempts followed and a psychiatric hospitalization. Although student made satisfactory academic progress, behaviors continued and another FIE concluded he had ADHD, but School still found DNQ due to his academic performance.
- Ruling: School erred by discounting student's behavior issues and counseling and other services provided to him at school and finding him DNQ. Found that the specialized services constituted "special education" and were not merely general education interventions.

L.J. v. Pittsburg Unified Sch. Dist., 117 LRP 6572 (9th Cir. 2017)

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Eligibility

- Facts: District knew in 2002 that the student's physician had diagnosed her with autism. Within a reasonable time after learning of this diagnosis, district evaluated the student, but after multiple evaluations, the district did not classify the student as AU. Instead, district found student eligible at SI and ID. Parents complained that they wanted AU to enhance their ability to obtain optimal services from other agencies.
- Ruling: IDEA does not require districts to affix a student with a particular label. Rather, the question is whether the district provided an IEP that is sufficiently individualized to address the student's needs and provide meaningful educational benefit.

Lauren C. v. Lewisville ISD, 70 IDELR 63 (E.D. Tex. 2017)

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Eligibility

- Facts: Student's treating therapist diagnosed student with autism as well as anxiety. School anxiety was deemed the student's most significant difficulty and school found student eligible as ED and not AU. Parent alleged no harm resulting from this allegedly inappropriate classification.
- Ruling: A student's eligibility classification (AU v. ED) or label is unimportant so long as it does not interfere with the development of an appropriate IEP and the provision of services.

Joanna S. v. South Kingstown Pub. Sch., 69 IDELR 179 (D. RI 2017)

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Evaluations

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Evaluations

Facts: School chose to conduct evaluations of a 14 year old bilingual child with SLD and ED from a Spanish-speaking home in English instead of Spanish.

Ruling: District did not violate IDEA in conducting the evaluations in English instead of Spanish. While the student spoke Spanish at home, he was fluent in English and had informed the school's evaluators that he felt more comfortable taking assessments in English.

B.G. by J.A.G. v. City of Chicago Sch. Dist., 69 IDELR 177 (N.D. Ill. 2017)

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Evaluations

Facts: In December 2015, parent told the school that the student who had an existing 504 plan was having problems utilizing his online coursed because of his vision problems. Parent provided a physical therapist's letter describing the student's condition. The school did not evaluate because it was waiting for parent to provide a letter from a physician to verify the disability.

Ruling: School was not free to wait for a physician's letter verifying that a student had a visual tracking problem before evaluating his need for additional services. Once the district had information sufficient to trigger its suspicion, it was obligated to promptly evaluate with or without the student's doctor's verification.

Fairfax County (VA) Pub. Schs., 70 IDELR 106 (OCR 2017)

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Evaluations

Facts:

- Evaluator did not obtain parent input in an FBA conducted for kindergartner medically diagnosed with autism.
- FBA was developed by school counselor who determined function of child's behavior was to gain access to preferred activities. Parent, meanwhile, believed behaviors were related to transitions and sensory issues.
- FBA led to decision not to develop a BIP, and child's behavioral needs were not addressed.

Ruling:

- School conducted an inappropriate FBA and denied FAPE. To yield accurate results, an FBA must include input from people who are knowledgeable about when, where, and how the child's behavior occurred. It is essential to include parents as part of the process, since their input may shed light on what triggers the behavior.

El Paso County Sch. Dist. 11, 70 IDELR 189 (SEA CO 2017)

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Evaluations

Facts:

- School psychologist evaluated intellectually gifted 3rd grader with anxiety disorder and determined she did not need IDEA services.
- Parents alleged that the school psychologist failed to consider treatment notes from a private therapist that established their daughter's inability to attend school.

Ruling:

- Parents may have disagreed with school psychologist's interpretation of assessment data, but they presented no evidence that the evaluation report was legally deficient. As long as the evaluator offers reasonable support for her conclusions, a court or hearing officer will not disturb her findings. In this case, not only did the school psychologist show that she considered the private therapist's input, but she also explained why IDEA services were not necessary to address the therapist's concerns.

G.D. v. West Chester Area Sch. Dist., 70 IDELR 180 (E.D. Pa. 2017)

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Evaluations

- Facts: Student displayed signed of autistic behavior and was referred for an evaluation. When the district conducted its initial evaluation of the student, a psychologist observed the student for 30-40 minutes without using assessment tools. He concluded that he could not diagnose the student with autism "off the top of [his] head." The district concluded that the student had only an expressive language impairment.
- Ruling: Relying on an evaluator's observations to decide against evaluating a student for autism violated FAPE. When a disability is suspected, districts must formally assess students using reliable and standardized methods.

Timothy O. v. Paso Robles Unified Sch. Dist., 822 F. 3d 1105 (9th Cir. 2016)

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Independent Educational Evaluations (IEEs)

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IEEs

Facts: Parents requested IEE by private speech-language pathologist whose fees significantly exceeded the maximum fee schedule for IEEs, which was based on customary rates in the area

Ruling: Although parents are entitled to an IEE at public expense when they disagree with a district's evaluation, the district may limit the cost of the IEE as long as the cap does not prevent the parents from obtaining an independent assessment. The private SLP's fee significantly exceeded the district's "maximum fee schedule" for IEEs, which was based on customary rates in the area. Moreover, the parents failed to establish unique circumstances which would justify the excessive costs.

Shafi A. by Mohammed and Shamfin A. v. Lewisville ISD, 69 IDELR 66 (E.D. Tex. 2016)

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IEEs

- Once a parent requests an IEE based on a district failing to assess a student in a particular area, the district may not avoid either filing for due process or paying for an IEE by completing the additional assessments. *Letter to Carroll,* 68 IDELR 279 (OSEP 2016)
- A 49-day delay between the time a Texas district received an IEE request and the time the district filed for due process to show that its evaluation was appropriate was unreasonable, particularly when the district failed to provide a reasonable explanation for the delay. In addition, while the parents signed off on the IEP, which was based on the evaluation the parents later challenged, does not show that the parents agreed to the evaluation. *Clear Creek ISD*, 117 LRP 20561 (TEA 2017)

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IEEs

Facts: Parents of a 12 year old with ADHD criticized evaluators' failure to administer certain subtests or to interview the student as well as their reliance on a "pattern of strengths and weaknesses" model when assessing the student for SLD and requested an IEE.

Ruling: Despite their criticisms, parents were unable to prove evaluators' methods were inappropriate. Courts and IHOs will not disturb evaluators' choices unless they reflect a clear disregard for IDEA requirements or professional standards. Evaluators often need to use their professional judgment when deciding which assessments to administer and which types of information to collect. IEE not warranted.

E.P. by J.P. and A.P. v. Howard County Pub. Sch. Sys., 70 IDELR 176 (D. Md. 2017)

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IEEs

Facts: Parent of a child with an undisclosed disability agreed with validity of 2 assessments conducted by district but just wanted a "second opinion."

Ruling:

- School districts are not automatically required to provide an IEE at public expense whenever a parent requests one.
- Because there was no disagreement over whether the district's evaluations were appropriate, the district was not required to provide a publicly funded IEE.

Seminole County Sch. Bd., 70 IDELR 192 (SEA FL 2016)

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IEP Development & Implementation

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IEP Development & Implementation

- **Facts**: Preschool student with SI was recommended for speech therapy 2 x per week for 30 minutes. IEP team based recommendation on it's SLP's professional knowledge and coursework.
- **Ruling**: In one of the few cases to interpret IDEA's provision requiring IEP services to be "based on peer-reviewed research to the extent practicable," court held that the school district denied FAPE to student by failing to consider any peer-reviewed research in recommending speech therapy services. The court found that the school district was not legally bound to follow the ASHA's recommendation for 3x-5x per week, but that the IEP team was legally bound to cite peer-reviewed research as basis for its therapy recommendation.

L.M.H. v Arizona Dept of Educ., 68 IDELR 41 (D. Arizona 2016)

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IEP Development & Implementation

- Facts: After IEP meeting in which the parent participated, District unilaterally modified the IEP by increasing the amount of VI services provided to the student from 240 minutes per month to 240 minutes per week.
- Ruling: A district's unilateral modification of IEP services for a blind student constituted a substantive violation of the parent's right to meaningful participation of the development of her son's IEP. "When a parent is unaware of the services offered to the student -- and, therefore, can't monitor how those services are provided -- a FAPE has been denied, whether or not the parent had ample opportunity to participate in the formulation of the IEP." The panel noted that it was unclear whether the procedural violation had resulted in educational harm to the student, however, the parent had been forced to file a due process complaint and incur legal fees to learn which services the student was receiving.

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IEP Development & Implementation

- Gap in the annual goals for a 13-year old with autism were remedied by the details provided in the short-term objectives. *C.M. v. New York City Dept of Educ., 69 IDELR 117 (S.D.N.Y. 2017)*
- A school district did not violate the IDEA when an IEP team continued working on a transition plan after the parent and two advocates left the IEP meeting due to scheduling issues. The evidence showed that the parent and the advocates were active participants in the IEP development for 2 hours prior to their departure, and that the parent attended and participated in two follow-up IEP meetings. *Pangrel v. Peoria Unified Sch. Dist.*, 69 IDELR 133 (D. Arizona 2017).

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Predetermination

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Predetermination

Facts: District's placement specialist allegedly called the parent the morning of the IEP meeting and told her that the chair intended to place the student in a public school program and that the parent needed to be "ready for a fight." However, ARD documentation showed that team had a "robust discussion" about tow potential placements during the ARD.

Ruling:

- Predetermination was not proven by the parents.
- "While a [district] must not finalize its placement decision before an IEP meeting, it can and should have given some thought to that placement."
- "[P]redetermination is not synonymous with preparation."
- District employees must be careful when speaking with parents prior to an ARD. Even if simply giving the parent a heads up, comments may lead to parent thinking the decision was already made.

J.R. v. Smith,
70 IDELR 178 (D. Md. 2017)

61

Predetermination

- Facts: District circulated a draft IEP to parents prior to the meeting. Parents alleged that the district disregarded their input by giving them a draft IEP before a meeting and by recommending a 6:1:1 classroom several years in a row.
- Ruling: The circulation of a draft IEP prior to an IEP meeting does not constitute predetermination. The final IEP reflected parents' concerns and considered alternative placements.

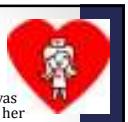
J.S. v. New York City Dept. of Educ.,
69 IDELR 153 (S.D.N.Y. 2017)

62

Placement

63

Placement



- Facts: 4th grade student with life-threatening seizure disorder was relocated from the public school she had attended for 3 years to her neighborhood elementary school.
- Ruling: Parents failed to show that their daughter's reassignment to that school amounted to an impermissible change in placement. Court held that a change in the location of a child's services may qualify as a change in placement if it results in a fundamental and detrimental change to the child's education. However, Court found that the school transfer in this case had no harmful impact on the student's progress. Although the parents argued that the district jeopardized the student's health by moving her to a school where staff members were unfamiliar with her needs, the evidence showed that all relevant staff members received training on how to respond to the student's seizures. Furthermore, the district arranged for qualified resource room teachers to cover the student's class on the days her teacher was absent.

E.R. v. Spring Branch ISD, 70 IDELR 158 (S.D. Tex. 2017)

64

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Placement

Facts:

- Child had Downs Syndrome and qualified for numerous special education services, including 1-on-1 support.
- IEP stated the child would attend a local public high school.

Ruling:

- As a general rule, the failure to name a school a child is to attend is not an IDEA violation.
- Because the services identified in the child's IEP were available statewide, there was no need to identify the specific high school she would attend to ensure that she received FAPE.

Rachel H. v. Dep't of Educ., State of Hawaii, 70 IDELR 169 (9th Cir. 2017)

65

Thompson & Horton LLP

Placement

Facts: Parent was concerned that public school would not provide a 12:1+1 placement, oxygen therapy, full-time nurse, or other services to disabled student with irreversible pulmonary hypertension. District's proposed placement was a public school career and living skills academy, which served a number of children with oxygen tanks and health service requirements. Parent rejected proposed placement & sought reimbursement for private school.

Ruling: Court upheld decision that the placement was appropriate. Placement turns on a school's ability to implement the child's IEP. A court will not reimburse parents for a unilateral private placement based on speculation that the school "would have" failed to deliver services it was fully capable of providing.

N.M. et al v. New York City Dep't. of Educ., 15-cv-1781, 2016 WL 796857 (S.D.N.Y. Feb. 24, 2016)

66

Thompson & Horton LLP

Placement

Facts: Pre-school autism student was evaluated by district prior to kindergarten and found eligible for special education services. Evaluator's recommendations were based on the autism diagnosis rather than on specific observations of the student, stating "[t]hese are general recommendations I make for most students with autism." Evaluator recommended placement in autism self-contained program.

Ruling: Denial of FAPE. District personnel should never assume that a student is unable to participate in the general education environment simply because he has a particular disability. While some children may require support outside of the general education setting, such determinations must be based on their unique needs. Not only did school officials in this case recommend enrollment in a different school based on the child's perceived need for an autism support program, but the district psychologist based his placement recommendation on the child's diagnosis. Those errors showed that the IEP team did not seriously consider the child's participation in a mainstream setting.

School Dist. of Philadelphia v. Post 70 IDELR 96 (E.D. Pa. 2017)

67

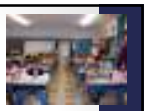
Placement

- Facts: The parents of an 11-year old student with autism, global apraxia, and an ID alleged that their child should be provided 1:1 academic instruction rather than opportunities for socialization with peers.
- Ruling: Citing *Endrew F.*, court held that district's mainstreaming efforts were appropriate. The court explained that the district's tracking the student's progress in socialization helped show that it was complying with *Endrew F.* standards and providing the student with a meaningful benefit. The district documented the student's progress through his IEPs. The court also noted that the student was afforded daily opportunities to interact with peers with and without disabilities during lunch, recess, built-in lesson breaks, group activities, art and music classes, and in the halls. It concluded that the IEP team designed and implemented a program that provided the student with a meaningful educational benefit consistent with the *Endrew F.* standard.

T.M. v. T.M. and C.M. v. Quakertown Cmty. Sch. Dist., 69 IDELR 276 (E.D. PA. 2017)

68

Placement



- Facts: 10-year old boy with Down Syndrome who was unable to keep pace with his nondisabled peers in the general education curriculum was placed by the district in a special education classroom instead of mainstream.
- Ruling: School violated IDEA. Although the court agreed that student was not capable of mastering the general education curriculum, the court held that the IDEA requires placement in general education "to the maximum extent possible," and the evidence shoes that he made academic, behavioral and social progress during his time in a regular education class.

L.H. v. Hamilton Co. Dept. of Educ., 68 IDELR 274 (E.D. Tenn. 2016)

69

Placement

- **Facts**: Student demonstrated a significantly high level of problem behaviors both at home and at school. After 3-year reevaluation, District proposed several residential and therapeutic placements for the student. Parents disagree and opted for private school.
- **Ruling**: Private school reimbursement granted. According to the IHO, the district's proposed placements did not meet LRE standards. First, the evidence showed the district had "very little information about any of the proposed placement" and only selected them because they were on a list from the state ED. The district never visited them. The IHO further found that some of the proposed placements were "of an essentially medical nature or served populations where Student did not fit the population criteria." The proposed placements were also not close to the child's home.

Georgetown Indep. Sch. Dist., 117 LRP 23396 (TEA 2017)

70

Procedural Violations/ Safeguards

71

theguardian

Procedural Violations/Safeguards

Facts:

- Texas has still not complied with IDEA provision requiring states to establish procedures for the appointment of parents to represent the interests of adult students with disabilities who have not been deemed incompetent but are unable to give informed consent on educational matters.
- Parent did not obtain a state court order declaring her adult child incompetent until 2 months after the district challenged her authority to file a due process claim on behalf of her 21 year old child.

Ruling:

- Questions of competency and guardianship of an adult student with disabilities did not allow parent to sue district for alleged IDEA violations occurring more than 1 year before the due process complaint was filed. A state's failure to adopt a procedure to appoint parent (as required by the IDEA) does not extend the applicable limitations period for FAPE claims.

Reyes ex rel. E.M. v. Manor ISD, 69 IDELR 147 (5th Cir. 2017)

72

Procedural Violations/Safeguards

Facts:

•Russian-speaking parents communicated in English orally and in writing, but had obvious difficulty doing so. District did not provide parent with translator during IEP meetings or notice of procedural safeguards in Russian.

Ruling:

•District violated IDEA by failing to provide notice of parent's procedural safeguards in Russian. Parent with some English language skills nevertheless has a right to an interpreter and translation of IEP documents.

•"The injury to the [parent] is not simply that she was deprived of her ability to assert her rights, but additionally that she was denied the ability to understand her rights or meaningfully participate in the IEP process."

Y.A. ex rel. S.G. v. New York City Dep't. of Educ., 69 IDELR 76 (S.D.N.Y. 2016)

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Procedural Violations/Safeguards

- A district may not condition holding an IEP meeting on a parent's attorney not participating or on the parent providing prior notice of his/her intent to invite the attorney.
- A parent has no duty to notify a district before bringing an attorney to an IEP meeting.
- Whether or not a district may reschedule a meeting when a parent unexpectedly brings his attorney so that it can include its own lawyer depends on whether or not: (1) the parent agreed to reschedule; and (2) rescheduling will interfere with the child's timely receipt of FAPE.

Letter to Andel, 67 IDELR 156 (OSEP 2016)

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Behavioral Issues

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Behavioral Issues

Facts:

- 9 year old who had exhibited significant behavioral and social skills problems since pre-kindergarten was not performing at grade level. Child's severe behavioral problems which included non-compliance, eloping, and physical aggression toward staff and other students, prevented him from receiving instruction in a general education classroom.
- After the child attended school in the district for 41 days, parent, who initially resisted evaluations and repeatedly asserted her child did not have behavioral issues, claimed that he had regressed. Parent filed a due process complaint alleging that her child was not making sufficient progress academically and sought private school tuition reimbursement.

C.M. ex. rel. CC v. Warren ISD, 69 IDELR 282 (E.D. Tex. 2017)

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Thompson & Horton LLP

Behavioral Issues

Ruling:

- The behavioral progress that a 3rd grade ED student made undercut the parent's claim that the student was not making sufficient progress, despite the fact that the student was not yet performing at grade level academically.
- Citing *Endrew F.*, the court did not focus on the student's academic abilities. Instead, it considered whether the student's IEP was reasonably calculated to enable him to make progress that was appropriate in light of his circumstances: "This progress is appropriate for a student of [the student's] circumstances where his own behavior so significantly impedes his access to general education."

C.M. ex. rel. CC v. Warren ISD, 69 IDELR 282 (E.D. Tex. 2017)

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Behavioral Issues

Facts:

- In September 2014, district prepared an FBA of 14 year old student, which noted her low frustration level and highly inappropriate verbal interactions with peers and indicated she acted out to get attention. The November 2014 BIP addressed those behaviors by identifying various methodologies. The BIP also included a goal relating to attendance and provided counseling to explore her lack of educational motivation.
- In October 2014, child was physically attacked by schoolmates who took her belongings, and afterward stopped attending school. The November 2014 BIP did not address this incident.

Garris v. District of Columbia, 68 IDELR 194 (D.D.C. 2016)

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Behavioral Issues

Ruling:

- When a district develops a BIP to address a student's truancy, it should consider the impact of any significant events that occurred after the completion of the FBA.
- Even thought the BIP failed to address the October 2014 assault, the document as a whole offered adequate interventions for the child's truancy.

Garris v. District of Columbia, 68 IDELR 194 (D.D.C. 2016)

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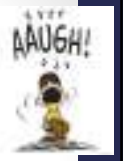
Behavioral Issues



Facts: When parent enrolled the student in the district, she provide a BIP that identified numerous problem behaviors. Conversations with previous providers further revealed that the student had behavioral outbursts, including physical aggression, when she became frustrated or overstimulated. The district developed a BIP that characterized all of the student's difficulties as "noncompliance."

Ruling: District violated IDEA when it developed a BIP for a 4th grade student that not only misclassified her serious behavioral problems, but also failed to consider the underlying cause.

Paris Sch. Dist. v. A.H., 69 IDELR 243 (W.D. Ark. 2017)

80

Behavioral Issues

FACTS: The student experienced anxiety when completing assignments, and had difficulties with paying attention, hyperactivity, organization, and regulating emotions. The parents alleged that his 2012 and 2013 IEPs lacked appropriate behavioral programming and that the district should have conducted an FBA and created a positive behavior support plan by 2012.

RULING: The District Court explained that in the case of a child whose behavior impedes learning, the IEP team must consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. However, outside of the disciplinary context, an FBA isn't necessarily required, the court stated, where an IEP provides other means to address behaviors. Here, evidence showed that the district regularly expanded on the supports it was providing. For example, the 2012 IEPs included supports targeting the student's attentional, hyperactivity, and organizational deficits. Moreover, subsequent IEPs retained those supports and added numerous others, such as modified tests, breaks, relaxation strategies, direct counseling and frequent check-ins by an adult. In addition, the district added a formal positive behavior support plan to the September and December 2013 IEPs. Although it didn't conduct an FBA until August 2013, the district acted appropriately when it sought to manage the behaviors through an array of positive behavioral interventions and other supports.

T.L. v. Lower Merion Sch. Dist., 68 IDELR 12 (E.D. Pa. 2016)

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Behavioral Issues

- **Facts**: A school district barred a 504 honors student with anxiety and depression from participating in a school play as punishment for plagiarism. His parent's argued that the plagiarism was actually a mistake in citation caused by their son's mental health conditions, and that participation in the play was therapeutic.
- **Ruling**: The court upheld the school district's actions, ruling that the actions were not based on the student's disability but on his behavior.

Harrington v. Jamesville Central Sch. Dist., 117 LRP 14109 (S.D.N.Y. 2017)

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Behavioral Issues

- **Facts**: School restrained a 9-year-old girl with disabilities on at least 6 occasions without following its established policies and procedures to contact the parent within one hour of restraining the student, give the parent a written report within one school day, or convene an IEP meeting within 5 days of each incident.
- **Ruling**: The District's noncompliance with its own policies and procedures impeded the parent's participating in the IEP decision-making process and was a denial of FAPE.

Beckwith v. District of Columbia, 68 IDELR 155 (D.D.C. 2016)

83

Private Schools

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Private Schools

Facts:

- High school student with schizophrenia and LDs moved from California to Texas, but immediately enrolled in private school.
- District finalized an IEP one week before the child's high school graduation.

Ruling:

- A court may not award reimbursement for private services a student with a disability received before the district had a duty to provide the student FAPE. The district evaluated the student and convened an ARD within the time frames set by the state's special education code.

Dallas ISD v. Woody, 70 IDELR 113 (5th Cir. 2017)

85

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Private Schools

Facts:

- Evidence reflected that a private day school providing highly structured and individualized support was the LRE for a high school student with intensive behavioral needs.
- District made numerous attempts to place the child at an appropriate private placement, but most private facilities in the area rejected the student's enrollment application, and parent refused to consent to a placement outside of her residential district or state.

Ruling:

- "The questions here are not based on the quality of the IEP or the identification of placements, but the inability of having the outside third parties and/or placements to find space for the student."
- Because the IEP addressed all of the child's needs, and the district made numerous attempts to place him at an appropriate facility, the district satisfied its FAPE obligations.

In re Student with Disability, 68 IDELR 58 (SEA VA 2016)

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Health Issues

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Health Issues

Facts: District cited its policy concerning medical storage safety issues in refusing to store a diabetic child's glucose testing kit in the classroom.

Ruling: The determination of what aids and services a student with a disability requires must be made by a group of knowledgeable people based on the student's specific needs. 504 teams must decide where a child's medication or medical testing equipment will be stored based on the child's unique circumstances.

North East ISD OCR Letter, 69 IDELR 256(OCR, Dallas (TX) 2016)

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Health Issues

- **Facts:** Student was a non-verbal 24 year old with autism and unusually unstable Type 1 diabetes. He was assigned a highly-qualified RN to provide the school-based diabetic care. Parent filed a due process complaint alleging the school's refusal to allow either the parent or her designee to administer diabetic care during the school day was denial of FAPE.
- **Ruling:** Court held that the district's failure to use the parent's preferred nurse or the parent herself did not amount to an IDEA violation. Nurse assigned by school had the experience, training, and credentialing required to provide the student's care.

Swanson v Yuba City Unified Sch. Dist., 68 IDELR 215(E.D.Ca. Oct. 13, 2016)

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Health Issues

- Facts: 1st grader's IEP called for a 1:1 nurse. Nurse missed 2 days of work. IEP did not provide for a substitute.
- Ruling: Court held that absence of nurse did not amount to a material failure to implement the student's IEP because it did not imped the child's progress. Court did NOT address whether the IEP's failure to address substitute nurse made is substantively inadequate.

Kent Sch. Dist. v. N.H. and D.N, 68 IDELR 276 (W.D. Wash 2016)

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Cameras in SPED Classrooms

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Cameras in SPED Classrooms

19 TAC §103.1301(a):

"Beginning with the 2016-2017 school year, in order to promote student safety, on request by a parent, trustee, or staff member, a school district or open-enrollment charter school must provide video equipment to campuses in accordance with Texas Education Code (TEC), § 29.022, and this section. . ."

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Cameras in SPED Classrooms

Requests:

- Must be made in writing
- May be made by:
  - A parent, guardian, or other person standing parental relation to the child for the classroom or setting to which their child is assigned,
  - A board of trustees or governing body for self-contained classrooms or SPED settings at multiple campuses (not individual Board members),
  - A principal or assistant principal of the campus for her own campus, or
  - A staff member (teacher, related service provider, paraprofessional, counselor, or educational aide) assigned to work with a child receiving SPED services in a self-contained classroom or other sped setting at that campus and only for the setting to which the staff member is assigned.
  - NOTE: SB 1398 specifies that resource is not a self-contained classroom

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Cameras in SPED Classrooms

Requests cont.:

- Must be submitted to the campus's principal or principal's designee.
- Campus principal or principal's designee must provide a copy of the request to the district's designated administrator coordinating compliance with Sec. 29.022.
- When a board of trustees or governing body requests the equipment, the designated administrator must provide a copy of the request to the campus principal or principal's designee.

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Cameras in SPED Classrooms

Operational Requirements:

- Must capture video ***and*** audio.
- Visual recording must cover all areas of the classroom or other SPED setting ***except*** the inside of a bathroom or other changing areas.
- Audio recording must cover all areas of the classroom or other SPED setting ***including*** the inside of a bathroom or other changing areas.
- Surveillance must continue for the remainder of the school year unless the requestor withdraws the request in writing.

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Cameras in SPED Classrooms

Compliance:

- District must respond within 7 school business days of the designated central office administrator's receipt of a written request to authorize or state reasons for denial of request.
- Cameras must be operational no later than the 45th school business day after the request is authorized, unless the TEA grants an extension.
- Parent of a child who will be placed by an ARDC in an eligible classroom setting the next school year may request video surveillance by the later of the last day of the current school year or the 10th school business day after the ARDC's decision.
- The camera must be operational by the later of the 10th school day of the fall semester or the 45th school business day after the request was made.

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Cameras in SPED Classrooms

Notice Requirements:

- Advance written notice that audio and video surveillance will be conducted must be given prior to implementation to 1) all school or campus staff, and 2) the parents of all children assigned to the classroom or other SPED setting.
- Campuses may be required to post a notice at the entrance of any self-contained classroom or other SPED setting stating that video and audio surveillance are being conducted.

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Cameras in SPED Classrooms

Notice Requirements cont.:

- If for any reason recording will be discontinued, the campus must notify the parents of each student in regular attendance in the classroom or setting at least 5 school days in advance, unless surveillance will stop per request by original requestor.
- No later than 10 school days before the end of the school year, the parents of each student must be notified that surveillance will not continue during the following school year unless there is a new request.

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Cameras in SPED Classrooms

NO Consent Requirements:

- There is no requirement that the district obtain parental consent before video and audio recording of their child for the purposes of complying with Tex. Educ. Code Sec. 29.022.
- No exceptions for classrooms where one or more parents object to the use of cameras.

99

Cameras in SPED Classrooms

Access: Video recordings of students are confidential and may not be released EXCEPT…

A school district ***shall release a recording for viewing*** by:

- A school district employee or a parent or guardian of a student who is involved in an incident documented by the recording for which a complaint has been reported to the district, on request of the employee, parent, or guardian;
- Appropriate Department of Family and Protective Services personnel as part of an investigation of alleged or suspected abuse or neglect of a child in a school;

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Cameras in SPED Classrooms

Access cont.: A school district ***shall release a recording for viewing*** by…

- A peace officer, a school nurse, a district administrator trained in de-escalation and restraint techniques, or a human resources staff member designated by the board of trustees of the school district in response to a complaint or an investigation of an incident (abuse or neglect by school personnel or physical or sexual abuse committed by a student); or
- Appropriate TEA or State Board of Educator Certification personnel or agents as part of an investigation.

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Cameras in SPED Classrooms

Access cont.: If school personnel, TEA, SBEC, and/or TX Dept Family & Protective Services believe the recording documents possible violations of district or campus policies:

- They ***may*** give access to recording to "appropriate legal and human resources personnel."
- It **may** be used in a disciplinary proceeding against school personnel.
- School personnel ***must*** give access to recording to parent in a legal proceeding upon request.
- School personnel ***must*** give access to recording to employee who is subject to the disciplinary action.

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Cameras in SPED Classrooms

Access cont.:

If school personnel, TEA, and/or SBEC have cause to believe the recording documents possible violations of abuse or neglect of a child:

- They ***must*** submit a report to Tex. Dept. Family & Protective Services or other authority in accordance with Tex. Family Code Sec. 61.1051.

Report Abuse

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Cameras in SPED Classrooms

Using Recordings:

- Cannot allow regular or continual monitoring of video feed.
- May not be used for any purpose other than the promotion of safety of students receiving SPED services in qualifying classrooms or settings.
- May not use recordings to evaluate teacher performance.
- Recording believed to document a possible violation of district or school policy may be used as part of a disciplinary action against district or school personnel and is viewable by the employee subject to the disciplinary action. However, policy violation at issue must be one that relates to neglect/abuse of a student.

104

Virtual Schools

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Virtual Schools

- A student with disabilities may attend a virtual school and never interact with her teacher outside of telecommunication technology, but that doesn't make his/her IDEA rights or those of the parent any less real.
- SEAs and LEAs must have policies and procedures in place to ensure that virtual school students who are in need of SPED and related services are identified, located, and evaluated.

Dear Colleague Letter, 69 IDERL 108 (OSERS OSEP 2016)

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Transgender Students

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Transgender Students

- Transgender individuals are not automatically individuals with disabilities under Section 504 or the IDEA.
- Still, the issue is of interest to school personnel who are working with students with gender identity issues, some of whom also suffer from depression and anxiety.
- *U.S. News and World Report*, citing a recent Columbia University study, reported transgender students are twice a likely to consider suicide as non-transgender students.

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Transgender Students

- OCR and DOJ rescinded Obama administration guidelines regarding the civil rights of transgender students "to further and more completely consider the legal issues involved," leaving schools without advice from the federal government on how to accommodate bathroom and locker room facility use by transgender students.
- SB 6, the proposed "Texas Bathroom Bill," was not passed during the 2017 Session. However, Gov. Abbott and Lt. Gov. Patrick both emphasized that this issue remains a legislative priority, so stay tuned.

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Bullying

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Bullying

Tex. Educ. Code Sec. 37.0832(a) defines "cyberbullying" as bullying through the use of any electronic device, including a telephone, computer, camera, email, instant messaging, text messaging, social media, internet website, or any other internet-based tool.

SB 179: David's Law

- School districts are now required to implement anti-cyberbullying reporting, prevention, and mediation programs.
- Victims younger than 18 can seek injunctions and restraining orders in court.
- Criminalizes online harassment if it can be proven that a bully intended for a victim to hurt himself.

111

Bullying

School district policies must:

- Establish a procedure to give notice of a bullying incident to:
  - A parent/guardian of the alleged victim on or before the 3rd business day after the incident is reported, and
  - A parent/guardian of the alleged bully within a reasonable time after the incident;
- Establish procedures for reporting, investigating, and determining whether a reported bullying incident occurred;
- Prohibit discipline of the victim if s/he was engaged in reasonable self-defense; and
- Require that discipline of a student with disabilities for bullying comply with federal law, including IDEA.

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Bullying

- Facts: 3rd grader with LD, according to the student's special ed teachers, was having difficulty concentrating and staying on task due to her classmates' constant teasing and exclusion. Student dreaded going to school, was frequently tardy, and began carrying dolls for emotional support. However, the district members of the student's IEP team denied the parent's request to discuss peer bullying in the IEP meeting.
- Ruling: Noting that parents had reasonable concerns about the effect of peer harassment on their daughter's ability to learn, Court held that district's refusal to discuss bullying during the student's IEP meeting was a denial of FAPE (impeded parent's participation in process) and awarded reimbursement of private school. Court did not decide whether failure to address bullying in the student's IEP amount to a substantive denial of FAPE.

T.K. and S.K. v. New York City Dept. of Educ, 67 IDELR 1 (2nd Cir. 2016)

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Bullying

- Facts: Parent of student who had suffered "horrifying and inexcusable" bullying during his enrollment in public school argued that proposed IEP was inadequate. IEP called for one-to-one aide at all times and a detailed crisis plan to address any negative interactions with peers, including a specific definition of "bullying," both real and perceived, and requiring staff to remove the student from the situation and bring him to support personnel for immediate assessment and assistance.
- Ruling: IEP included reasonable supports for both actual and perceived peer bullying and provided FAPE. Court explained that that the LEA could not promise the parent that the student would not experience further bullying. "Although, ideally, no student would ever be subjected to bullying at public school, that type of guarantee is not required to provide a FAPE," the judge wrote. Nonetheless, IEP team took adequate steps to address the possibility of peer bullying.

J.M. v. Dept. of Educ. State of Hawaii, 69 IDELR 31 (D. Hawaii 2016)

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Bullying

- Facts: 12-year old boy who photographed a schoolmate on the toilet was disciplined by school district by placing him in alternative school for 60 days.
- Ruling: Parent failed to show placement was based on student's disability or that misconduct was a manifestation of his ADHD. Rather, the evidence showed that the district did not change the student's placement until after it conducted the MDR and determined that the student's misconduct was unrelated to his disability. The parents' broad claim that the student's ADHD affected his ability to make good decisions did not alter the court's analysis. "If that conclusory statement were enough to plead discrimination, any plaintiff with ADHD could attribute any misconduct, no matter how severe, to the disability."

C.C. v. Hurst-Euless-Bedford ISD, 67 IDELR 111 (5th Cir. 2016)

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Medicaid

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Medicaid

- For 3 decades, Medicaid has helped pay for services and equipment schools provide to SPED students.
- Since 1988, schools have been able to register as Medicaid providers and seek reimbursement like doctors and hospitals.
- According to the School Superintendents Association, 2/3 of districts that bill Medicaid use the money to pay the salaries of employees who work directly with children, including nurses, social workers, physical, occupational, and speech therapists.
- Congress has failed to pass proposed legislation slashing Medicaid finding, but stay tuned.

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TEA's PBMAS 8.5% Target

TEA's PBMAS 8.5% Target

- September-December 2016, Houston Chronicle published an investigative series, *Denied: How Texas Keeps Thousands of Children Out of Special Education*.
- October 2016, OSERS ordered TEA to respond to allegations that 1 of its monitoring indicators, an 8.5% target for identifying students with disabilities, resulted in numerous students with disabilities to remain unidentified. See *Letter to Morath,* 68 IDELR 231 (OSERS 2016):
  - "If a state agency creates an identification benchmark as part of its system of evaluating districts, it will need to ensure the benchmark doesn't effectively become a ceiling on the number of students served."

TEA's PBMAS 8.5% Target

- SB 160 – Prohibiting Monitoring System Performance Indicators
  - Effective May 22, 2017.
  - The TEA and Commissioner are prohibited from adopting or implementing any performance indicator in any agency monitoring system, including PBMAS, that solely measures a school district's aggregated number or percentage of enrolled students receiving SPED services.

Other Recent Texas Bills

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Other Recent Texas Bills

- HB 657 – ARD Meeting After Failure to Perform Satisfactorily on STAAR
- HB 1556 – SPED Decision Making for Children in Foster Care
- HB 1886 – Transition Planning & Dyslexia
- HB 2130 – Impact of STAAR Tests on SPED Students

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Other Recent Texas Bills

- HB 3632 – Military Service Member Request for Due Process Hearing
- SB 589 – Regulation of Behavior Analysts
- SB 2142 – Non-Attorney Representatives in Due Process Hearings

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THANK YOU!

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