Special Education Legal Updates

Region IV and VI Regional Conference

June, 2017

Ron Hager, NDRN

1

United States Court System

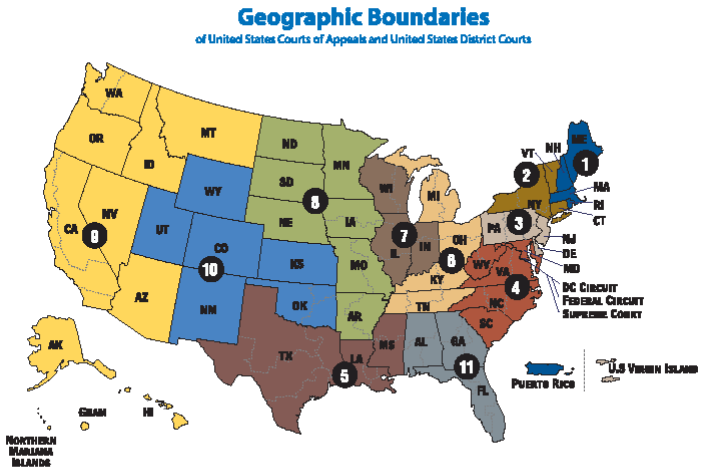
- **District Courts:** The nation's 94 district or trial courts are called U.S. District Courts. District courts resolve disputes by determining the facts and applying legal principles to decide who is right.
- Trial courts include the district judge who tries the case and a jury that decides the case. Magistrate judges assist district judges in preparing cases for trial.
- There is at least one district court in each state, and the District of Columbia. Each district includes a U.S. bankruptcy court as a unit of the district court. Four territories of the United States have U.S. district courts that hear federal cases, including bankruptcy cases: Puerto Rico, the Virgin Islands, Guam, and the Northern Mariana Islands.

United States Court System

- **Courts of Appeals:** There are 13 appellate courts that sit below the U.S. Supreme Court, and they are called the U.S. Courts of Appeals.
- The 94 federal judicial districts are organized into 12 regional circuits, each of which has a court of appeals.
- The appellate court's task is to determine whether or not the law was applied correctly in the trial court.
- Appeals courts consist of three judges and do not use a jury.
- There is possibility of review by all judges on the court—*en banc* review

United States Court System

- **The Supreme Court** is the highest court in the United States.
- Article III of the U.S. Constitution created the Supreme Court and authorized Congress to pass laws establishing a system of lower courts.
- In the federal court system's present form, 94 district level trial courts and 13 courts of appeals sit below the Supreme Court.



Judicial Decisions

FAPE

Substantive

7

Unanimous United States Supreme Court Rejects "Barely More Than *De Minimis*" Educational Progress Standard Under IDEA

- *Endrew F. v. Douglas County School District RE-1*, 37 S.Ct. 988 (March 22, 2017)
- IDEA requires districts to provide "an educational program reasonably calculated to enable a child to make progress in light of the child's circumstances."
- Any review of the IEP will address "the question of whether the IEP is *reasonable*, not whether the court regards it as ideal."
- Nevertheless, the "IEP must aim to enable the child to make progress," which "reflects the broad purpose of the IDEA, an 'ambitious' piece of legislation."

8

Endrew F. Continued

- For most children, a FAPE will involve integration in the regular education program and individualized special education calculated to achieve advancement from grade to grade.
- Court did not hold every student with a disability advancing from grade to grade is automatically receiving FAPE.
- For students for whom regular education is not a "reasonable prospect," their "IEP need not aim for grade-level advancement."
- But his educational program must be appropriately *ambitious* in light of his circumstances, just as advancement from grade to grade is appropriately *ambitious* for most children in the regular classroom.
- The goals may differ, but every child should have the chance to meet *challenging* objectives.

9

Endrew F. Continued

- But whatever else can be said about it, this standard is markedly more demanding than the "merely more than *de minimis*" test applied by the Tenth Circuit.
- It cannot be the case that the Act typically aims for grade-level advancement for children with disabilities who can be educated in the regular classroom, but is satisfied with barely more than *de minimis* progress for those who cannot.
- The absence of a bright-line rule" should not be taken as an invitation for reviewing courts "to substitute their own notion of educational policy for those of the school authorities which they review."

10

Ninth Circuit Clarifies FAPE and Discrimination Standards under IDEA, ADA, and Section 504

- *A.G. v. Paradise Valley Unif. Sch. Dist. No. 69*, 815 F.3d 1195, 2016 WL 828095 (9th Cir. Mar. 3, 2016)
- Student sued after being transferred to more restrictive setting and for being restrained for behavior
- Parents settled IDEA claims and court reviewed standards for FAPE and for damages under ADA and Section 504
- Denial of FAPE under IDEA does not necessarily establish denial of FAPE under Section 504
- Elements of ADA Title II claim don't differ in any material sense from Section 504 claim

11

A.G. Continued

- Although parents consented to transfer to more restrictive setting, that did not bar claim, as parents cannot be expected to have specialized expertise about needs of child
- Parents did not have duty, nor legal expertise, to determine what accommodations might allow A.G. to remain in regular education, and there was triable issue of fact as to whether services district allegedly failed to provide were actually reasonable, necessary, and available
- On deliberate indifference, medical expert testified that some of the services were not legally necessary, but expert not qualified to render legal opinion

12

Sixth Circuit Affirms Holding on FAPE Failure in Transition Case and Remands on Fee Award

- *Gibson v. Forest Hills Local School District,* 655 Fed.Appx. 423, 2016 WL 3771843 (6th Cir. 2016) (unpublished)
- Sixth Circuit agreed with district court that school failed to invite Chloe to transition meetings; to take other meaningful steps to insure her interests were considered, and failed to provide her with measurable post-secondary goals (based on age appropriate assessments)
- Chloe unlikely to attend IEP meetings, under contentious circumstances, so that violation could not be considered in the FAPE analysis. The other two resulted in substantive violation of FAPE.
- District court did not clarify which factors it considered and left somewhat unclear why it chose a 62.5% reduction in fee instead of some other amount. Therefore Sixth Circuit vacated and remanded

13

FAPE

Procedural

14

Second Circuit Holds School District's Failure to Conduct FBA or Develop BIP Did Not Deny FAPE

- *J.C. v. New York City Dept. of Educ.*, 643 Fed.Appx. 31, 2016 WL 1040160 (2d Cir. March 16, 2016) (Mem)
- Failure to conduct adequate FBA is serious procedural violation because it may prevent IEP Team from obtaining necessary information about student's behaviors, leading to their being addressed in IEP inadequately or not at all
- Such failure also seriously impairs substantive review of IEP because courts cannot determine exactly what information an FBA would have yielded and whether that information would be consistent with student's IEP
- Nevertheless, failure to conduct FBA will not always result in denial of FAPE so long as IEP adequately identifies student's behavioral impediments and implements strategies to address that behavior
- Court deferred to SRO that failure did not deny FAPE

15

Second Circuit Holds Failure to Discuss Bullying at IEP Meeting Violates IDEA

- *T.K. v. New York City Dept. of Educ.*, 810 F.3d 869 (2d Cir. 2016)
- L.K. subjected to severe bullying by students. District refused to discuss at meetings with school staff or at IEP meetings, so parents placed L.K. in a private school
- District's refusal to discuss at IEP meetings violated right to FAPE because it significantly impeded her parents' procedural right to participate in developing IEP and record supported finding that bullying impeded educational progress
- Private school was appropriate even though it didn't provide adequate therapies since she made progress and parents need not show private school provided every needed service to be appropriate
- Equities favored reimbursement since parents were generally cooperative and if there was an adversarial relationship school shared responsibility

16

Eligibility

17

Ninth Circuit Holds School District's Refusal to Find Student Eligible Violates IDEA

- *L.J. v. Pittsburg Unif. Sch. Dist.,* 835 F.3d 1168, (9th Cir. 2016)
- District court determined student not entitled to special education eligibility due to satisfactory performance in general education classes. The court discounted suicide attempts as not bearing on the need for educational services because they took place outside of school. Ninth Circuit reversed
- Ninth Circuit determined student was receiving special education services such as one-one instruction, specially designed mental health services and extensive clinical interventions which are not provided under general education
- Student's disability also interfered with education and fact that suicide attempts occurred outside school was immaterial. His emotional disturbance affected attendance and his absences did hurt academic performance
- Court also found it how to imagine that repeated suicide attempts would not interfere with school performance

18

First Circuit Vacates Summary Judgment and Remands to Determine Whether Student has Reading Fluency Deficit and "Needs" Special Education

- *Doe v. Cape Elizabeth Sch. Dist.*, 832 F.3d 69 (2016)
- First Circuit concluded that while Jane's overall academic performance could be relevant, district court erred in relying on this fact without regard to how it reflects her reading fluency skills specifically
- District court also failed to make independent judgment as to additional evidence submitted by family, affording too much deference to hearing officer's findings
- Court clarified that even if district court found student had a reading fluency deficit, she would not necessarily be eligible for special education unless she also "needed" special education
- Grades and standardized test scores could be used to help make that determination

19

Least Restrictive Environment

20

Ninth Circuit Holds School District Offered FAPE in LRE to Preschool Student

- *A.R. ex rel. Reese v. Santa Monica Malibu Sch. Dist.*, 636 Fed.Appx. 385, 2016 WL 145768 (9th Cir. 2016) (unpublished)
- The court weighs four factors when considering whether placement is LRE:
- (1) educational benefits to student; (2) nonacademic benefits to student; (3) effect on the teacher and classmates; and (4) costs
- Court upheld findings that student could not benefit from general education placement "due to the severe symptoms of his autism."
- Additionally, school had offered a number of potential placements designed to meet his needs, "including programs with non-disabled peers."

21

Eleventh Circuit Holds Student's Need for Direct Instruction Supports Separate Setting for Part of Day

- *S.M. v. Gwinnett County Sch. Dist.*, 636 Fed.Appx. 763, 2016 WL 1138336 (11th Cir. March 24, 2016) (unpublished)
- S.M. to be educated in regular classroom except for reading, writing and math
- District provided supplemental aids and services in regular classroom, including co-teaching in science and social studies
- In reading, writing and math, she could not be educated in regular classroom even with supplemental aids and services
- Required direct, explicit, small group instruction with drill and repetition, significantly different from a general second grade classroom
- Therefore, modification of regular classroom curriculum would not be feasible and would modify regular curriculum beyond recognition

22

Unilateral Placements

23

Fifth Circuit Denies Tuition Reimbursement Due to Parents' Failure to Cooperate with School District

- *Rockwall Indep. Sch. Dist. v. M.C.*, 816 F.3d 329 (5th Cir. 2016)
- Student had been placed in private school by parents
- Parties met to develop IEP to return student to public school and agreed to reconvene to finish IEP, but parents would not, stating no point to meeting if district refused to consider their request to keep student at private school for one more semester
- Although ALJ held district did not offer FAPE, Fifth Circuit determined reimbursement should be denied because of parents' acted unreasonably by adopting an all or nothing approach
- However well-intentioned parents' actions may have been, those actions "constituted an unreasonable approach to the IEP-development process, rather than the collaborative or interactive approach envisioned by the IDEA" and they are not entitled to tuition reimbursement

24

Independent Educational Evaluations

25

Fifth Circuit Creates New Substantial Compliance Standard for IEEs

- *Seth B. ex rel. Donald B. v. Orleans Sch. Parish Bd.*, 810 F.3d 961, 2016 WL 157998 (5th Cir. Jan. 13, 2016)
- Parents asked permission for IEE, and Board assented, offering up to $3,000
- Parents sent IEE to school and Board responded with concerns it did not meet criteria of Bulletin 1508, State guide for district evaluations
- Court held IEE must be in substantial compliance with Bulletin 1508
- Insignificant or trivial deviations from letter of agency criteria may be acceptable as long as substantive compliance with all material provisions and IEE provides detailed, rigorously produced and accessibly presented data
- Schools may find ambiguities or inconsequential nonconformities in IEE, treating parents' right as privilege, since school has power to determine reimbursement
- Court limited reimbursement to $3,000, as parents knew of cap and didn't seek exception

26

"Zero Reject"

27

State Court Judge Orders Connecticut to Revise Its Special Education Funding Scheme

- *CCJEI v. Rell, et al.*, No. X07HHDCV145037565S, 2016 WL 4922730 (Conn. Super. Ct. Sept. 7, 2016) (unpublished)
- Plaintiffs challenged the State's school funding formula, alleging it violated the state's Constitution
- Court partially agreed and ordered state to develop a series of revised policies
- Court also found stat's special education funding warranted "constitutional concern" and was irrational
- First, court took issue with First Circuit's decision in Timothy W.

28

Rell continued

- The *Timothy W.* case has contributed to this and other states telling school districts to transport, care for and provide extensive services for multiply-disabled children regardless whether the state can do anything that *would look to most people like education*. It is a phenomenon that costs immense sums, but conventional education thinking seems resigned to it.
- Districts are spending "immense sums" on students who "are too severely disabled to get any benefit from elementary or secondary education."
- Court framed issue to be "about whether schools can decide in an education plan for a covered child that the child has a minimal or no chance for education, and therefore the school should not make expensive, extensive, and ultimately pro-forma efforts."
- Court also found identification of students is mostly arbitrary and the state standards allow for both under and over-inclusion

29

Charter Schools

30

Ninth Circuit Holds Charter School's Refusal to Admit Student with Disability Not Discriminatory

- *J.C. ex. rel. W.P. v. Cambrian Sch. Dist.*, 648 Fed.Appx. 652, 653 (9th Cir. 2016) (unpublished)
- Ninth Circuit affirmed district court's summary judgment dismissing claim that charter school wrongfully denied student admission based on his disability
- Under ADA, must show denied admission by reason of disability and under Section 504, denied admission solely by reason of disability
- Charter school had preference for existing students, but students who moved out of the district were not excluded from definition
- School's classroom was at capacity for budget reasons, so decision not to accept students on waiting list, including J.C., was not discriminatory
- Record of negative interactions between school and mother were not dispositive
- Dissent agreed with dismissal under Section 504's "strict causal standard" but found general issue of material fact on ADA claim

31

Procedural

Exhaustion

32

Supreme Court Holds Exhaustion Not Required Where Gravamen of Plaintiff's Case is Not Provision of FAPE

- *Fry v. Napoleon Community Schools*, 137 S.Ct. 743, 2017 WL 685533 (Feb. 22, 2017)
- Frys filed suit for damages in federal district court under the ADA and Section 504 based on school's refusal to allow service dog in school
- District court dismissed the suit for failure to exhaust under IDEA
- Sixth Circuit affirmed, holding that §1415(*l*) required exhaustion "whenever 'the genesis and the manifestations' of the complained-of harms were 'educational' in nature."
- Supreme Court reversed in a unanimous decision

33

Fry continued

- We first hold that to meet statutory standard, a suit must seek relief for denial of FAPE, because that is only "relief" IDEA makes "available."
- We next conclude that in determining whether suit indeed "seeks" relief for such denial, court should look to substance, or gravamen, of plaintiff's complaint.
- In sum, complainant seeking relief for "other harms, independent of any FAPE denial, not subject to exhaustion rule because, once again, only 'relief' IDEA makes 'available' is relief for denial of FAPE."
- Decisive question was plaintiff's own claims, although issue was not "magic words" approach.
- Analysis does not rest on whether plaintiff explicitly refers to FAPE or IEP in complaint.
- Instead, statute "requires exhaustion when gravamen of complaint seeks redress for a school's failure to provide FAPE, even if not phrased or framed in precisely that way."

34

Fry continued

- In determining gravamen of plaintiff's compliant, reviewing courts should consider different purposes of IDEA, the ADA and Section 504.
- Primary purpose of the ADA and Section 504 is to prohibit disability-based discrimination, both inside and outside of schools for people of all ages
- IDEA's "goal is to provide each child with *meaningful* access to education by offering individualized … services appropriate to her 'unique needs'
- Complaint brought under Title II and § 504 might instead seek relief for simple discrimination, irrespective of IDEA's FAPE obligation

35

Fry continued

- First clue: courts could ask pair of hypothetical questions: could plaintiff have brought essentially same claim at a facility that was not a school, and could an adult at school have brought same grievance. If answer is yes, and complaint does not expressly raise FAPE claim, then complaint is "unlikely to be about that subject."
- Second clue: to consider history of proceedings in case—did plaintiff previously invoke the IDEA's formal dispute resolution procedures
- Court remanded on this issue
- Court did not address whether claim for damages, a remedy not available under IDEA, would also suffice

36

Fry continued

- Another example where exhaustion may be futile, raised by district:
  - Suppose that teacher, acting out of animus or frustration, strikes a student with disability, who then sues school under statute other than IDEA
  - Here too, suit could be said to relate, in both genesis and effect, to child's education. But school districts opine, we think correctly, that substance of plaintiff's claim is unlikely to involve adequacy of special education- and thus is unlikely to require exhaustion
  - Telling indicator of that conclusion is a child could file same kind of suit against an official at another public facility for inflicting such physical abuse – as could an adult subject to similar treatment by a school official

37

Procedural

P&A Access

38

P&A Access to School Affirmed in Case Brought by Disability Rights New York

- *Disability Rights New York v. North Colonie Bd. of Ed.*, No. 14-CV-0744, 2016 WL 1122055 (N.D.N.Y, Mar. 22, 2016)
- Court rejected claim that a school is not a "facility" or "service provider" under the DD, PAIMI and PAIR Acts
- Court rejected argument that P&A acts only apply to an entire school which serves individuals with disabilities, not to self-contained class rooms
- Services provided in [self-contained] classroom constitute 'care and treatment' as defined in PAIMI Act and 'services' as defined in DD Act and PAIR Act
- Court found "strained," reading of P&A acts that abuse and neglect requires actual injury or death, and determined that information from former employee and five parents/guardians about possible elopement, failure to properly respond to suicide threat, and potential excessive use of force when using physical restraint constituted abuse sufficient to trigger right to access

39

DRNY continued

- Court enjoined the school from disputing in future that students served under IDEA are also covered under the P&A acts, but court stated not clear if students had mental disability under PAIMI
- Though DRNY did not rely on P&A monitoring authority when seeking access, court found that it could monitor the school provided DRNY otherwise complies with requirement of P&A acts, such as PAIMI regulatory provision that P&As make an effort to inform parents and guardians of potential monitoring

40

Procedural

Deliberate Indifference

41

Fourth Circuit Holds School District's Response to Student-on-Student Bullying Not Deliberately Indifferent

- *S.B. ex rel. A.L. v. Bd. of Educ. of Harford County*, 819 F.3d 69 (4th Cir. 2016)
- Section 504 requires showing that student has a disability, was harassed by fellow students based on that disability, that harassment was sufficiently "severe, pervasive, and objectively offensive that it effectively deprived" student of educational benefit at school, that school knew about harassment, and it was deliberately indifferent
- Here, not clear whether bullying was based on disability
- Moreover, was no showing district was deliberately indifferent. The school investigated every incident of alleged harassment, disciplined offenders in nearly every case, and finally assigned a paraprofessional
- No reasonable juror could find school was less than fully engaged with S.B.'s problems, using escalating disciplinary sanctions to punish and deter student-on-student harassment and taking other protective measures on S.B.'s behalf

42

Procedural

Shocks the Conscience

43

Sixth Circuit Holds Teacher's Abusive Practices Do Not "Shock the Conscience"

- *Domingo v. Kowalski*, 810 F.3d 403 (6th Cir. 2016)
- Parents alleged that teacher, among other things, gagged student with bandana to keep him from spitting, strapped another to toilet to keep her from falling off, and forced another to sit with her pants down on training toilet in full view of classmates to assist her with toilet training
- District court and Sixth Circuit found it did not "shock the conscience"
- Whether actions served pedagogical purpose: "complained-of conduct involved attempts, albeit misguided ones, to address her special-education students undisputed educational or disciplinary needs."
- Whether conduct was excessive: no evidence that "educational methods were 'severe in force,' or otherwise constituted a 'brutal and inhumane' abuse of power."

44

Domingo continued

- In determining intent, question is whether teacher "acted in a good-faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm."
- Here, "purpose, in most instances, was to assist her students in meeting their educational goals, and in the others, to curb disruptive behavior."
- Whether any students "suffered a serious injury: Appellants have presented no evidence of any serious injury, physical or otherwise.
- Therefore, teacher's actions "may have been inappropriate, insensitive, and even tortious. This does not, however, render them unconstitutional."

45

Procedural

Attorney's Fees

46

Third Circuit Affirms Full Attorneys' Fees Award Following Successful Administrative Decision

- *E.C. v. Philadelphia Sch. Dist.*, 644 Fed.Appx. 154, 2016 WL 1085498 (3d Cir. Mar. 21, 2016) (unreported)
- Third Circuit fully affirmed $81,849 award and $900 in costs following successful IHO decision under IDEA
- Third Circuit disagreed with district's argument that attorney's fees should be capped at a 2:1 ratio of preparation time to hearing time
- Position was disingenuous because district's attorneys spent nearly as many hours preparing for hearing even though parents bore the burden on each claim
- Court rejected argument that fee should be reduced based on "limited success" at the hearing

47

E.C. continued

- Hearing officer found district did not provide FAPE in four of six areas raised by parents and granted all requested relief, including reimbursement for unilateral placement
- Based on *Hensley v. Eckert*, courts have held plaintiff's failure to prevail on all legal theories do not justify reductions in' fees where plaintiffs obtained excellent results, as here
- Court rejected proposition that' fees should be reduced because of financial troubles facing district
- Financial ability to pay is not a "special circumstance" that would justify the reduction in a fee award

48

Administrative Decisions

Office of Special Education Programs (OSEP)

49

OSEP Issues Policy Letter on Rights of Students with Disabilities Enrolled in Private Schools by Their Parents

- *Letter to Chambers*, 117 LRP 2508 (Dec. 27, 2016, OSEP)
- Rules apply any time parent enrolls student in private school, including when using vouchers or voucher like schemes
- They lose number of IDEA rights, including FAPE, an IEP, and due process hearing
- Districts must meet with representatives of schools to determine which services will be provided. Parents must be consulted but district makes final decision
- Services may be provided off-site, but transportation must be provided
- Services may be provided on site, even private religious school, "to the extent consistent with law." Providing services on site may be preferred to not to unduly interrupt child's education, unless compelling reason for services to be provided off-site

50

OSERS Issues Dear Colleague Letter Regarding Education of Children with Disabilities Attending Public Virtual Schools

- http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/dcl--virtual-schools--08-05-2016.pdf
- Students attending public virtual schools must receive all of their IDEA rights
- IDEA applies to all public virtual schools, regardless of structure
- SEA ultimately responsible for ensuring compliance with IDEA, as well as participation in State and district-wide assessments under ESSA and establishing and maintaining qualifications for personnel, including training and content knowledge.
- Virtual schools are responsible for identifying students under child find
- Virtual schools are responsible for providing FAPE
- LRE also applies

51

OSERS Issues Important "Dear Colleague" Letter re: The Role of Behavior Supports in FAPE and LRE: Provides Three Factor Test for Informal Removals

- *Dear Colleague Letter,* 116 LRP 33108 (OSERS/OSEP 08/01/16)
- Behavior supports not optional when child's behavior impedes their learning or that of others, and are not dependent upon a child being eligible in any particular IDEA eligibility category
- Behavior supports may be required even when student doing well academically, if students' behavior otherwise meets threshold above
- Failure to consider can result in denial of FAPE
- LRE applies: required throughout continuum of placements; child may not be placed in segregated program simply to receive behavior support
- Obligation extends to charter schools and JJ educational programs

52

OSERS behavior support memo continued

- OSERS uses term “exclusionary disciplinary measures” (EDM) to refer to both formal and informal removals/exclusions from classroom
- EDM includes shortened school days, and a pattern of office referrals that results in an extended removal from instruction, among others
- Three factor test to determine when informal removal may rise to suspension. Does student:
- 1) continue to be involved in and make progress in general curriculum, 2) receive instruction and services on IEP and, 3) participate with nondisabled children to extent they would in current placement

53

Administrative Decisions

Office for Civil Rights (OCR)

54

OCR Issues Guidance on Students with ADHD

- *Dear Colleague Letter*; *Students with ADHD and Section 504: A Resource Guide (Resource Guide)*, 68 IDELR 52 (OCR July 2016); http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201607-504-adhd.pdf
- Services must be based on specific needs, not cost, and not based on stereotypes or generalized misunderstandings of a disability
- ADAAA requires definition of disability be considered broadly and eligibility determinations should not require extensive analysis
- OCR will presume that any child with ADHD has an impairment that substantially limits a major life activity
- Students may be performing well academically, but still be eligible

55

ADHD guidance continued

- Students with inattentive-type of ADHD may not engage in impulsive or disruptive behavior but may nevertheless have significant limitations to learning
- Intervention strategies are supported by Department, but cannot be used to delay an evaluation
- If district determines medical assessment is necessary to determine eligibility, it must arrange it at no cost to parents
- Students are entitled to services that meet needs regardless of cost or administrative burden
- It is not responsibility of student with a disability to request FAPE

56

OCR Concludes School District Discriminated against Student through Repeated Use of Inappropriate Prone Restraints

- *Letter of Finding, Oakland (CA) Unified School District*, No. 09-14-1465 (OCR June 24, 2016) at http://www.disabilityrightsca.org/Documents/OCRFindingsReportReOUSDANOVAComplaint.pdf
- FAPE violation:
- District failed to ensure student's IEP was implemented in non-public school.
- School disregarded student's behavioral plan and used its own plan for the student
- While student was in restraint and during periods when student was in recovery student did not receive instructional services, speech and language services, and occupational therapy required under student's IEP

57

OCR R&S decision continued

- Failure to evaluate:
- School used prone restraint so frequently and for such long durations it should have prompted District to evaluate Student's behavior under its own policy
- ED's Resource Document provides that repeated restraint for an individual child, multiple uses within same classroom, or multiple uses by same individual should trigger review and, if appropriate, revision of behavioral strategies currently in place
- Time in which student was placed in restraint and in time "recovering" outside of his classroom exceeded ten instructional days and, thus constituted a change in placement, thereby requiring an evaluation
- District recognized need for an evaluation but almost a year passed before it was completed and student continued to be restrained

58

OCR R&S decision continued

- Discrimination claims
- Because district provided substantial assistance to non-public school district was responsible for non-public school's discrimination against student when it failed to take appropriate steps to obtain compliance from program or terminate its relationship with program
- Student denied equal opportunity to benefit from educational program when he was being restrained and then made to stay away from the classroom while he was "recovering"
- Student spent most of his time at non-public school outside of his instructional setting, made no academic progress and his academic and functional performance declined

59

OCR R&S decision continued

- Hostile environment:
- (1) harassing conduct is sufficiently serious to deny or limit student's ability to participate in or benefit from educational program; (2) district knew or reasonably should have known about harassment; and (3) district fails to take appropriate responsive action within its authority
- OCR evaluates whether or not conduct was sufficiently serious to deny or limit student's ability to participate in or benefit from district's program
- Inappropriate use of restraint may constitute disability-based harassment
- ED's Resource Document unambiguously states reason prone restraints should never be used is because they can cause student to either suffer serious injury or death
- School's inappropriate use of prone restraints against Student constituted disability-based harassment since it restrained student in response to disability-related behaviors

60

OCR R&S decision continued

- Use was severe and potentially lethal act that: caused Student to scream and cry with physical pain, suffer physical injury, fear and anxiety about going to school, and become depressed to the point of being suicidal
- Student struggled against restraint use; it was not welcome; he did not consent to its use.
- Student was subjected to this dangerous type of restraint when he was nine years old, small for his age and experiencing weak muscle tone by adults who were more than twice his size.
- He was denied food and water and denied right to use the restroom during periods of restraint.
- The restraint subjected Student to public humiliation as its use was preceded by physical escort to resource room visible to peers who saw him with his arms being held behind him by adult escort(s) as they took him away

61

OCR R&S decision continued

- R&S was also persistent and pervasive - placed in prone restraint over 90 times in 11 months, an average of twice a week … for an average of 29 minutes each time
- He also heard cries of other students being restrained on nearly daily basis
- The district had both constructive and actual knowledge of situation yet failed to promptly stop the harassment, eliminate the hostile environment, and remedy the effects of the harassment and therefore violated the ADA and Section 504

62

OCR R&S decision continued

- Discrimination based on different treatment:
- District implemented school-wide system of positive supports to address non dangerous behavior and prone restraint is not a positive intervention
- At his non-public school he was routinely placed in prone restraint in response to behavior that was defiant or disruptive, not dangerous. This would not have been the case at a school within the district
- Only students District allows to be prone restrained for non-dangerous defiant and disruptive behavior are students with disabilities
- OCR determined that District allowed Student to be treated differently for non-dangerous, defiant and disruptive behavior on the basis of disability and therefore violated ADA and Section 504

63

OCR Issues Guidance on Restraint and Seclusion in School

- On December 28, 2016, the U.S. Department of Education's Office for Civil Rights (OCR) issued a Dear Colleague Letter (DCL), and a Q&A/Fact Sheet, on restraint and seclusion in schools. The purpose of this guidance was to inform "school districts how the use of restraint and seclusion may result in discrimination against students with disabilities, thereby violating Section 504 of the Rehabilitation Act of 1973 (Section 504) and Title II of the Americans with Disabilities Act of 1990 (Title II) (both as amended)." Dear Colleague Letter at 1-2.

64

OCR Issues a Resource Guide for Parents and Educators on Section 504

- *Parent and Educator Resource Guide to Section 504 in Public Elementary and Secondary Schools* which generally addresses the rights of students under Section 504. The stated purpose of this guide:
- The attached resource guide reminds all educational institutions receiving Federal financial assistance from the Department that they must vigilantly work to ensure compliance with Section 504 and other Federal laws that protect students with disabilities. We intend this resource guide to also help parents of students with disabilities understand the obligations imposed under Section 504. In particular, the resource guide summarizes key requirements of Section 504, and aims to increase understanding of these requirements for both parents and members of the school community alike.
- The guide is a 52 page comprehensive overview of Section 504 obligations for students with disabilities and has 10 hypothetical fact patterns to help explain these obligations

65

Regulations

66

Department of Education Issues Final ESSA Regulations on Assessments

- On December 8, 2016, the U.S. Department of Education (ED) published final regulations regarding the assessment requirements of the Every Student Succeeds Act (ESSA). 81 Fed. Reg. 88886.
- https://www.gpo.gov/fdsys/pkg/FR-2016-12-08/pdf/2016-29128.pdf
- The effective date of the regulations is January 9, 2017.
- Note ESSA Accountability Regulations invalidated by Congress but States must still comply with statute
  - Stakeholder involvement
  - Sub-group accountability
  - N-size issue

67

ESSA Assessment Regulations Continued

- State Responsibilities for Assessment
  - assessments should be developed to greatest extent possible using principles of universal design for learning
  - general assessments must be aligned with challenging state academic standards that are aligned with entrance requirements for credit bearing coursework in systems of public higher education in State and relevant career and technical education standards
  - alternate assessments based on alternate academic achievement standards(AA-AAAS) be developed in a way that reflects professional judgement to highest possible standards achievable by student with most significant cognitive disabilities to ensure student is on track to pursue postsecondary education or competitive integrated employment

68

ESSA Assessment Regulations Continued

- Inclusion of Students with Disabilities
  - all students, except those with the most significant cognitive disabilities, must be assessed using the general academic assessment
  - students with the most significant cognitive disabilities may be assessed using either the general assessment or the alternate assessment for the grade in which the student is enrolled

69

ESSA Assessment Regulations Continued

- Appropriate Accommodations
  - states must provide accommodations for each student disability who needs them
  - interoperability with, and ability to use AT
  - use of AT consistent with nationally recognized accessibility standards
  - determination accommodations made by IEP team, placement team, or other team LEA designates
  - states must ensure that all appropriate staff receive training and know how to make use of accommodations
  - states must ensure students using accommodations have same opportunity to participate in and not denied benefits of assessment as compared with student who does not have disability, including such benefits as valid college reporting scores

70

ESSA Assessment Regulations Continued

- Alternate Assessments
  - incorporates statutory requirement regarding alternate assessments aligned with alternate academic achievement standards (AA-AAAS) for students with most significant cognitive disabilities, including 1% cap
  - LEAS which exceed 1 percent in a subject in a school must submit justification to state
  - States must submit waiver request to Secretary to exceed state level 1 percent cap
  - states must report on number and percentages of children with disabilities who take general assessments, general assessments with accommodations and AA-AAAS

71

ESSA Assessment Regulations Continued

- State Guidelines
  - states must adopt guidelines for IEP teams to use when determining which students take AA-AAS
    - guidelines include state definition of students most significant cognitive disabilities
    - definition would addresses factors related to both cognitive functioning and adaptive behavior
  - definition must consider those requiring extensive, direct individualized instruction and substantial supports to achieve measurable gains on challenging State academic content standards for grade in which student enrolled

72

ESSA Assessment Regulations Continued

- State Guidelines continued
  - must provide IEP teams clear explanation of implications of taking AA-AAS including effect on student's opportunity to complete requirements for regular HS diploma
  - state may not establish guidelines in such manner that preclude student taking AA-AAAS from obtaining regular HS diploma
  - must emphasize that students with significant cognitive disabilities who do not meet criteria for state's definition of students with most significant cognitive disability must receive instruction for grade in which enrolled and be assessed against same academic standards as all students

73

Department of Education Final Regulations Regarding Disproportionality

- On December 19, 2016,ED published final regulations establishing standard methodology states must use to determine whether significant disproportionality based on race and ethnicity is occurring. 81 Fed. Reg. 92376
- https://www.gpo.gov/fdsys/pkg/FR-2016-12-19/pdf/2016-30190.pdf.
- Purpose is to ensure states meaningfully identify LEAs with significant disproportionality and states assist LEAs in that students properly served.
- Regulations effective January 18, 2017 and compliance date is July 1, 2018, with an exception for children ages 3-5.

74

Disproportionality Regulations Continued

- States must address significant disproportionality in incidence, duration, and type of disciplinary actions, including suspensions and expulsions, using same statutory remedies required to address significant disproportionality in identification and placement of children with disabilities.
- Describe procedures that must be used when significant disproportionality is found.
- Require that LEAs identify and address factors contributing to significant disproportionality as part of comprehensive coordinated early intervening services (comprehensive CEIS) and allow these services for children from age 3 through grade 12, with and without disabilities.

75

Disproportionality Regulations Continued

- States must report all risk ratio thresholds, minimum cell sizes, minimum n-sizes, standards for measuring reasonable progress, and rationales for each, to Department
- States must consult with stakeholders and State Advisory Panels to develop
- Rebuttable presumption that minimum cell size of no greater than 10 and minimum n-size of no greater than 30 are reasonable.
- Clarifies remedies are triggered if state makes determination of significant disproportionality with respect to disciplinary removals from placement, clarifying prior area of confusion.
- States may choose to identify an LEA as having significant disproportionality after it exceeds risk ratio threshold for up to three prior consecutive years.
- State has flexibility not to identify an LEA with significant disproportionality if LEA is making “reasonable progress” in lowering risk ratios, even if they exceed State’s risk ratio thresholds.

76