

# Special Education Legal Symposium

Mississippi Department of Education

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# Federal Regulatory/Guidance Review

- Presidential Executive Order established a Federal policy “to alleviate unnecessary regulatory burdens” to determine which ones are “outdated, unnecessary or ineffective”.
- 72 Guidance documents rescinded
  - 63 issued by the Office of Special Education addressing IDEA issues
  - 9 issued under the Rehabilitation Act

# IDEA Special Education Teacher Qualifications

- Highly Qualified Requirements eliminated
- Sp Ed Teachers must meet full State certification requirements (including alternative routes)
- No certification waivers on an emergency, temporary or provisional basis
- Must hold at least a bachelor's degree

# Alternate Assessments

- Limited to Students with the Most Significant Cognitive Disabilities (SWCD)
  - No definition in the ESSA statute
  - The regulations require that each state establish a State definition
- State must establish and monitor “clear and appropriate guidelines” for IEP Teams
- Team must determine on a case by case basis:
  - Whether the student meets the state definition of a Student With a Significant Cognitive Disability (SWCD)
  - Whether such student will be assessed based on alternate academic achievement standards

# Alternate Assessment

- Must provide IEP Teams with “clear explanation” of the difference between:
  - Assessments based on grade level academic achievement standards; and
  - Assessments based on alternate academic standards
- How such participation may affect the student from completing a regular diploma but cannot preclude the student from attempting to do so

# Alternate Assessments/Parent Notice

- Must ensure that parents are informed in an understandable format:
  - That their child's achievement will be measured based on alternate academic achievement stds.
  - and
  - How such participation may delay or otherwise affect their child from completing the requirements of a regular high school diploma

# Cap on the Use of Alternate Assessments

- The total number of students assessed in each subject using the alternate assessment cannot exceed 1 % of the total number of all students in the State who are assessed.
- ESSA prohibits a State from establishing a local cap on the percentage of students administered an alternate assessment.

# Intellectual Disability

- Final Regulations were issued under the IDEA and Section 504 changing the term “mental retardation” to “intellectual disability”.
- The change was the result of a federal statutory change of the terms in 2010 in what is known as “Rosa’s Law”



# IDEA Regs.

## Significant Disproportionality

- States must use a standard approach using risk ratios in determining whether significant disproportionality based on race or ethnicity is occurring in the state and in its districts.
- Requires that States address significant disproportionality in:
  - Identification of children with disabilities
  - Placement in educational settings
  - Incidence, duration, and type of disciplinary actions, including suspensions and expulsions
- Requires the review and revision of policies, practices, and procedures when significant disproportionality is found.

# Effective Date??

- The December 2016 regulations have an effective date of July 1, 2018
- The U.S. Dept of Ed has proposed a draft rule postponing the effective date until July 1, 2020
- The proposed rule would also postpone the effective date for including children, ages 3-5, from July 2020 to July 2022
- Public comment period closed May 14, 2018

# Child Find

- No violation of child find since the school never overlooked “clear signs of a disability” or lacked rational justification for its actions:
  - The school utilized general education interventions under an “RTI” plan
  - Section 504 plan with all requested accommodations
- Procedural violation when it did not send written notice of refusal to evaluate when the parent requested sp ed services
  - No loss of educational opportunity

M.G. v. Williamson County School

# Child Find

- A child find violation occurs when the school overlooks clear signs of a disability and is “negligent” in failing to evaluate the student without a rational justification.
- The school acted reasonably in that it provided the student immediate support and accommodations when he first experienced problems.
- Initial decision of ineligibility upheld since his behaviors were not experienced “over a long period of time” as the IDEA definition of an emotional disturbance requires.

Mr. P. v. Hartford Board of Education

# Child Find

- The parent requested a sp ed evaluation of their student who had been placed on a Sec.504 plan by their previous district.
- The parent did not return the consent for evaluation form for 3 months
- No violation of child find since being on a Sec.504 plan does not equate with a suspected disability under the IDEA
- School has rt. to assess the student based on its own staff observations and interventions

Panama-Buena Vista v. A.V.

# Parental Observation of Assessments

- The parent's condition for consent was that she be allowed to see and hear the assessment was unreasonable and amounted to the imposition of improper conditions and restrictions on the assessments.
- The failure to complete the required three year reevaluation did not deny FAPE since it was caused by the parent's interference and denial of consent.

R.A. v. West Contra Costa Unified School District

# Independent Educational Evaluation

- Cost Limit for IEEs upheld
  - Cost Cap must be reasonable
  - Parents must be informed before they obtain an IEE
  - Parents must be afforded the opportunity to request an exception based on unique circumstances
- The reasons submitted that the student was autistic, was virtually non-verbal and uses an augmentative communication device did not show unique circumstances.

A.A. v. Goleta Union School District

# Eligibility

## Need for Special Education

- Student with autism, ADHD, depression, OCD and anxiety was no longer eligible in 10<sup>th</sup> grade since there was no longer a need for sp ed
  - Consideration was given to both academic and non-academic factors
- Teacher observations are “especially instructive”
- Fear that the student may experience problems in the future as a result of his disability is not by itself a valid reason for IDEA eligibility

D.L. v. Clear Creek Sch. District



# Eligibility

- A student diagnosed with ADHD who was on a Sec.504 plan was not eligible for IEP services when his academic performance significantly declined.
- The Court found that his poor work and grades were not due to his inability to concentrate but rather from the student neglecting his studies.
- The evidence based on multiple sources of information did not support his need for special education.

Durbrow v. Cobb County School District

# Visual Impairment/Blindness Criteria

- State-established eligibility standards must not narrow the definitions in the IDEA.
- The definition of "visual impairment including blindness," in the IDEA regulations does not contain a modifier.
- Therefore, any impairment in vision, regardless of significance or severity, must be included in a State's definition, provided that such impairment, even with correction, adversely affects a child's educational performance.

# FAPE Standard

- The Supreme Court in the Rowley case established two criteria in determining FAPE:
  - Have the procedures been adequately complied with?  
and
  - Is the IEP reasonably calculated to enable the child to receive educational benefits?

Hendrick Hudson School District v. Rowley (1982)

# Parent Participation

- Parent challenged the school's "policy" of not providing ABA services violating her rights to be a meaningful participant at the IEP Team meeting.
- Each of her student's IEPs included a PECS which the Court found to be an "ABA based intervention".
- The inclusion of an ABA-based service in the IEPs refuted the allegation that she was denied meaningful participation by a "policy" refusing to provide ABA.

L.M.P. v. Broward County

# IEP Services and Supports

- Although the school staff told the parents that the student would also receive supports during lunch and recess, the IEP did not reflect these supports
- FAPE denied as a result
- One of the chief purposes of an IEP is to ensure that the services provided are formalized in a written document that can be assessed by the parents and challenged if necessary.

N.W. v. District of Columbia

# IEP Implementation

- The school did not provide Braille materials “for all classroom assignments and instruction” as the student’s IEP required.
  - The Court held that although the school did not provide the student with Braille materials 100% of the time, there was no violation of FAPE.
  - The student “received significant educational benefit” from his classroom instruction and “met and often exceeded the ability to communicate with the proficiency of his peers”
  - The IDEA does not require perfection.
- I.Z.M. v. Rosemont-Apple Valley-Eagan Public Schools

# Obligation to Develop an IEP

- The school had no obligation to create a new IEP after the parent withdrew the student from school and had no contact with the school until the following school year.
- However, the school violated the IDEA the following school year when it conditioned its offer to develop an IEP to a student residing in the district only when the parents enrolled the student in public school.
- FAPE was denied.

Hack v. Deer Valley Unified School District

# IEP Procedural Issues

## (Decision Withdrawn—Rehearing)

- “Transition services” addressing the student’s move from private to public school were required to be included in the IEP.
- The LRE provision stating that the student would be in a “gen ed setting” as appropriate was too vague and improperly delegated the placement decision to teachers outside the IEP process.
- Methodology must be included in the IEP when “a particular methodology plays a critical role” in the student’s education.

R.E.B. v State of Hawaii



# Transition Assessments and Services

- The school itself did not conduct assessments of the postsecondary transition needs of the student.
- The Team, in developing goals/services relied on:
  - Parent's private evaluation
  - Vocational interview with the parents
  - Student's private school teachers' input
- No denial of FAPE since the IEPs were reasonably calculated to provide the student with the postsecondary goals and transition services required by the IDEA.

R.B. v. New York City Department of Education

# FAPE and Educational Benefit

## Endrew F. v. Douglas County

- The decision lays out a “general standard, not a formula” rejecting a “merely...more than de minimis” standard
- “A school must offer an IEP **“reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances”** .
- An IEP is a collaborative effort between families and schools to develop a plan for “academic and functional advancement”
- The IEP Team must have a prospective judgment of the child’s circumstances based on a “fact intensive exercise”

# Andrew F. v. Douglas County

- “...for most children, a FAPE will involve integration in the regular classroom and individualized special education calculated to achieve **advancement from grade to grade**”
- For those children not “fully integrated” in a regular classroom the IEP need not necessarily “aim for grade-level advancement” although the IEP must be “**appropriately ambitious** in light of his circumstances”.
- When a dispute arises a Court “may fairly expect that those [school] authorities be able to offer a cogent and responsive explanation for their decision” (emphasis added) to show that the IEP offered the child a FAPE.

# What the Supreme Ct Did Not Do

- Rowley was not overturned but refined.
- The Court rejected the FAPE standard as requiring opportunities that are “substantially equal to the opportunities afforded children without disabilities”
- There is no “bright line rule” for determining appropriate progress which turns on the unique circumstances of the child.
- The Court remanded the case back to the lower Court to determine if the student received a FAPE in line with the Supreme Court’s decision.

# Remanded Endrew Decision

- The District Court reversed its earlier decision and held that a FAPE was denied.
- Progress under both the academic and functional goals was minimal.
- The Supreme Court was very clear that every child should have the chance to meet challenging objectives.
  - The IEP consisted of only updates and minor changes in the objectives with the same goals year after year

Endrew F. v. Douglas County School District RE-1 (District Court)

# Post-Andrew Case

- The Court agreed that the FAPE standard established by the Fifth Circuit in Cypress-Fairbanks Ind. School District v. Michael F. in 1997 was consistent with the Andrew F. standard.
  - (1) the program is individualized on the basis of student's assessment and performance;
  - (2) the program is administered in the least restrictive environment;
  - (3) the services are provided in a coordinated and collaborative manner by the key 'stakeholders'; and
  - (4) positive academic and non-academic benefits are demonstrated.

C.G. v. Waller Independent School District

# Post Andrew Cases

- The Court of Appeals remanded the M.C. decision in light of Andrew F. and stated:

“In other words, the school must implement an IEP that is reasonably calculated to remediate and, if appropriate, accommodate the child's disabilities so that the child can ‘make progress in the general education curriculum,’ .... **taking into account the progress of his non-disabled peers, and the child's potential.**” (emphasis added)

M.C. v. Antelope Valley

# Post Andrew Cases

- The parents wanted the IEP to incorporate “goals and objectives designed to teach [the student] about the laws and customs of Orthodox Judaism.”
- An IEP “reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.” is that the student is disabled, not that he is of the Orthodox Jewish faith
- The IDEA does not require an education that furthers a student's practice of his religion of choice.

M.L. v. Smith



# Related Services Standard

- Child must have a disability and be in need of special education
- Service must be necessary to aid the child to benefit from special education
- Service must be able to be performed by a non-physician

Irving Ind. School Dist. v. Tatro (Supreme Ct. 1984)

# Assistive technology

- The Court held the school did not deny the student a FAPE by failing to conduct an AT assessment or provide an AT device before the parent notified it of a private assessment and use of an Ipad.
- The evidence showed the student needed some foundational skills before being able to use an AT device successfully and was making “some progress” using nonelectronic devices.

E.F. v. Newport Mesa Unified School District

# Nursing Services

- The top of the student's IEP stated : "SPECIAL ALERT: IF R.G. FALLS TAKE HIM TO THE NURSE IMMEDIATELY AND NOTIFY PARENT".
- No violation of the IDEA by not having a nurse in the school during ESY services.
- Nursing services were never listed as a related service nor requested by the parent.
- The seizure plan never called for the services of a nurse but precautionary measures.

# Least Restrictive Environment

- The LRE for a student with autism was in a private school for students with autism as reflected in the IEP.
- The parents' proposed placement with 1:1 instruction in a separate classroom in the public school.
- The parents' placement would be significantly more restrictive since there would be no involvement with peers.
- There was no evidence of predetermination since several placement options were discussed.

R.A. v. West Contra Costa Unified School District

# “Location” Of Sp Ed Services

- The Court upheld the IEP even though it did not specify the school where the IEP would be implemented.
- Although the IDEA requires that the IEP include the “location” of sp ed services, "location" means the general setting in which the sp ed services will be provided and not a particular school or facility.
- However, not identifying a particular school in the IEP may at times result in denial of FAPE “especially when a child's disability demands delivery of special education services at a particular facility.”

Rachel H. v. Hawaii Dept. of Ed

# Least Restrictive Environment

- The LRE for a 2nd grader with a specific learning disability was a general ed setting except for language arts and math to be provided in a special education classroom
- The student was unlikely to receive any educational benefit from full time placement in a general education class.
- The student was far behind his peers in reading and math and had already received accommodations in the general education classroom that did help him.

B.E.L. v. State of Hawaii Department of Education

# Behavior Interventions

- IEP Teams must **consider** and, if necessary to provide FAPE, **include** appropriate behavioral goals and objectives and other appropriate services and supports in the IEPs of children whose behavior impedes their own learning or the learning of their peers.

Questions and Answers on Endrew F. v. Douglas County School District Re-1, Question 16

# Interim Alternative Education Setting

- A student with an emotional disturbance was placed in a 45 day IAES for assaulting another student
- The student sought to return to the Charter School after the expiration of the 45 days but was denied
- Parent filed for a DPH and a TRO and Injunction from Ct.
- The Court held that the student would remain in the IAES until the hearing decision was rendered since the evidence showed the student's return would lead to potential injury and was in the public interest.

Olu-Cole v. E.L. Haynes Public Charter School



# Basis of Knowledge

- The parent of a student on a Sec.504 plan asked for a sp ed evaluation as a result of several behavioral incidents at the beginning of the school year.
  - Consent was provided 4 mos. later
- The parent brought an DPH alleging the school failed to conduct a manifestation mtg.before suspending the student for more than 10 days since they had knowledge of a disability
- The Court held the “basis of knowledge” provision does not apply if the parent has not provided consent for the evaluation

A.V. v. Panama-Buena Vista Union School District

# Parent v. Adult Student Rts

- The parent initiated a due process hearing challenging the Team's decision that their student was not eligible
- While the hearing was pending the student turned 18 and expressed his desire to decline any sp ed services
- The Court upheld the dismissal of the parent's request by the ALJ since all IDEA rts transfer to the adult student.

Harris v. Cleveland City Board of Education

# Service Animals

## ADA or IDEA Issue??

- A school administrator denied the student's request to bring her service dog to school since the student's paraprofessional could provide the services.
- The Court overturned the dismissal of the lawsuit against the school and staff for failing to exhaust the IDEA due process hearing procedures.
- Exhaustion of the IDEA due process hearing process is limited to issues where the "gravamen" of the complaint is an alleged denial of FAPE.

Fry v. Napoleon (U.S. Supreme Court )

# Exhaustion of IDEA Procedures

- A student with autism had a “meltdown” and was placed by his teacher in a “Chill Zone” ( a 4 ft by 4 ft enclosure).
- A lawsuit was brought against the school district and the teacher in her individual capacity.
  - Alleged violations of Section 504, the Americans With Disabilities Act, false imprisonment, unreasonable seizure, excessive force and state law.
- The Section 504/ADA claims overlap with the IDEA and were dismissed for failure to exhaust administrative remedies
- The Court refused to dismiss the claim against the teacher in finding she could be held liable for punitive damages.

Rhodes v. Lamar County School District

# Attorney's Fees

- The Court held that the parents were justified in rejecting the settlement offer from the school since it did not address the payment of attorney's fees.
- “We do not read the IDEA to force parents to decide between the resolution of a placement dispute and paying for the attorney who assisted in achieving an appropriate placement for the student.”

Rena C. v. Colonial School District

# Liability

- In reversing itself, the Court held that individual staff members cannot be sued in their individual capacities under the IDEA
- Given the language and intent of the IDEA and the lack of remedies against individual employees, alleged violations of the IDEA may be pursued against the school district and not employees in their individual capacities.

Crofts v. Issaquah School District

# Liability

- The parents of a student with Asperger's Syndrome complained of more than 30 incidents of bullying/harassment
  - School investigated each incident
  - When warranted, a corrective action plan was implemented
  - Referral made for criminal conduct
- The Court stated although the school “cannot be particularly proud of its response to the problem” the school was not liable since it was not deliberately indifferent as required for ADA/504 liability.

Bowe v. Eau Claire Area School District

# Liability

- The parent sued the school district claiming that her student with ADHD was “harassed, teased, bullied and assaulted” based on his disability in violation of Sec.504 & the ADA.
  - It was alleged that the student had to take a test in the principal’s office after the school learned about the bullying incident in the bathroom.
- The case was dismissed since intentional discrimination must be shown to support a Section 504 liability claim.
  - Here the parent disagreed with the educational accommodation provided.

Blackledge v. Vicksburg-Warren School District



# Liability

- The parents of a student with a disability who committed suicide sued the Supt under Sec. 504 for damages
- The Court held that although the student was teased it did not amount to harassment under Sec. 504
  - Liability only if the behavior is “so severe, persistent and objectively offensive that it denied its victim the equal access to education.
- The Court also concluded that there was no evidence that the school knew or should have known about the harassment

Estate of Chandler J. Barnwell v. Watson

# Section 504

- A kindergarten student with a speech impairment was subjected to another student's aggressive and sexual conduct
- The student victim was diagnosed with PTSD
- The parents sued the school/staff under the ADA/504 alleging the school did not prevent or respond properly to the bullying
- The Court held no link was alleged between the bullying and the student's disability and therefore no discrimination under 504/ADA
- The Court did allow the allegation that the school failed to properly accommodate the bullied student under Sec.504 to proceed

Wormuth v. Lammersville Union School District

# Section 504

- The school refused the parents' request that their nonverbal 19 year old student who is autistic and has an intellectual disability be allowed to carry an audio recording device at school to record everything said
- An IDEA hearing officer held that the device was not necessary for the student to receive educational benefit.
- The Court held that the finding in the IDEA hearing that the device would provide "no demonstrable benefit" precluded the student from establishing that it was a required accommodation under the ADA/504.  
Pollack v. Regional School District Unit

# Retaliation Claims

- The Court found that the school had legitimate non-retaliatory reasons for its actions taken against a parent.
- The school refused to provide a copy of the particular test since it had copyright protections under federal copyright law.
- The school refused to have the IEP meeting held via email since it would limit collaboration by IEP Team members.
  - The school offered other dates and times for the meeting, the opportunity to participate via teleconference as well as to tape record the meeting.

McNight v. Lyon County School District

# Retaliation Claim

- The principal sent a letter to a parent of a student with a disability stating that, due to his “aggressive and disruptive” conduct with staff, he had to contact the principal and obtain permission before coming to school
- No evidence that the parent was ever denied permission
- The Court held no violation of the ADA since there was no evidence that the procedure excluded him from participating in the school’s programs and activities.
- The procedure was reasonable in light of his “intimidating, aggressive, disruptive and angry behavior”.  
Lagervall v. Missoula County Public Schools

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**Mahalo!!!!**