

# Special Education Law Update: Lessons Learned

Mississippi Directors Conference

Mississippi Department of Education

June 2015

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# New IDEA Regulation

## Maintenance of Effort

- If Local Education Agency fails to meet MOE, level of expenditures required in subsequent years is the amount that would have been required in the absence of that failure and not the actual reduced level of expenditures by the LEA.
- If the LEA fails to meet MOE, the SEA is liable in a recovery action to return to U.S. DOE, using nonfederal funds, an amount equal to the amount by which the LEA failed to maintain its level of expenditures or the amount of the LEA's Part B subgrant in that fiscal year, whichever is lower.

34 CFR 300.203(c) and (d)

# Results Driven Accountability

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- The United States Department of Education's Office of Special Education Programs (OSEP) has revised its accountability system shifting the balance from a system focused primarily on compliance to one that puts more emphasis on results.
- States are required to include a new qualitative indicator, the State Systemic Improvement Plan (SSIP) in the state's State Performance Plan.

# Empowering Parents and Students Through Information Act of 2015

- The bill would ensure that parents give fully informed consent before their children with significant cognitive disabilities are placed on alternative education tracks.
- Parents would need to be informed how participation in alternate assessments might affect their student's ability to earn a high school diploma.
- The bill would also require that each state “develop, disseminate information about, make available and promote the use of reasonable accommodations”.

# IDEA Full Funding Act

- The bill would authorize federal appropriations to increase from Fiscal Year 2016 to Fiscal Year 2025 to reach the 1975 Congressional goal of providing 40% of the excess cost of special education services.

# Keeping All Students Safe Act (H.R. 927)

- Bill would require Federal Standards:
  - Prohibiting certain restraints/interventions that compromise health and safety
  - Prohibiting restraint/seclusion unless imminent danger of physical injury
  - Requiring staff to receive state approved training
  - Prohibiting restraint/seclusion from being written into a plan as a planned intervention
  - Establishing procedures to timely notify parents if seclusion/restraint is used on their child
  - Providing authority for the Protection and Advocacy systems to investigate, monitor and enforce protections

# Child Find

- The school district violated its child find obligation under the IDEA denying the student a FAPE
- The parents never requesting an evaluation or sharing an independent psychological evaluation was not relevant in the Court's conclusion
- Multiple events provided the school with sufficient information which should have resulted in an evaluation

Jana K. v. Annville Cleona School District

# Lesson Learned

- IDEA's child find requirements places an affirmative responsibility on the school district to initiate a special education referral which is not dependent on a parent request.
- Although it may be helpful, a parent is not legally required to share with the school district a diagnosis of a disability that may have been made by a private psychologist.



# Child Find

- A high school student with multiple sclerosis should have received an evaluation to determine sp ed eligibility
- Section 504 accommodations were not sufficient to address the adverse academic, emotional and physical impact of her disability

Simmons v. Pittsburgh Unified Sch. Dist.

# Lesson Learned

- The fact that a student has been placed on a Sec. 504 plan is not determinative of whether the student may also need a special education evaluation.
- No one person from the school should make a decision whether the student should be evaluated for special education services.

# FBA's

- The school district did not violate the IDEA when a functional behavioral assessment (FBA) was conducted without parent consent
- The school psychologist merely reviewed existing data to determine if additional assessments were necessary.
- FBAs which are administered for the limited purpose of adapting teaching strategies to a child's behavior are not evaluations

West-Linn Wilsonville School District v. Student

# Lesson Learned

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- When terms such as FBA, BIP, RTI are used clarification should be sought as to how those terms are being used.
- A review of existing information does not constitute an evaluation under the IDEA requiring parental notice/consent.

# Independent Ed Evaluations

- After determining the student was not eligible, the school promptly responded to the parent's request for obtaining an IEE.
- The parent did not provide the school the IEE report for two years.
- The school properly treated the IEE as a request for a new evaluation in light of the time period that elapsed.

Magnum v. Renton School District

# Lesson Learned

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- Respond to requests from the parent for an IEE at public expense in a timely fashion and document the school's response.
- Schools have discretion under the IDEA as to how to address an Independent Educational Evaluation which is not timely submitted by the parents.

# Independent Ed Evaluations

- The parent was entitled to be reimbursed for the IEE since the school district never requested a due process hearing to defend the appropriateness of its evaluation or to challenge the IEE even though the parent initiated a due process hearing challenging the provision of FAPE.
- Schools may not require a parent to provide an explanation of why they disagree with the school's evaluation.

Jefferson County Board of Education v. Lolita S.

# Lesson Learned

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- If a school is not going to pay for an IEE requested by the parent, the school must initiate a due process hearing to prove that its evaluation was appropriate and/or that the IEE was not appropriate.
- A school may ask but not require the parent to explain why they are in disagreement with the school's evaluation.



# Independent Ed. Evaluations

- IEE criteria must be the same as the criteria that applies to school district evaluations.
- The Court upheld the school's denial of funding the IEE since the IEE did not meet the evaluation criteria in state policy which the parents were informed of through an email link.
- After the school denied reimbursing the parent for the IEE, the school district was not required to initiate a due process hearing since the IEE did not meet school district criteria.

B. v. Orleans Parish School District

# Lesson Learned

- A school district may establish policy requiring that criteria for IEEs such as financial caps, state evaluation policies, etc. be followed
- Such school district policy must allow parents to request an exception to the policy for exceptional circumstances.
- Schools must inform parents of such criteria before the IEE is conducted.

# Eligibility

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- Meets One or More of the Disability Categories
- Adversely Affects Educational Performance
- In Need of Special Education
  - Specially Designed Instruction

# Eligibility

## Adverse Affect

- Although the student had a disability, he was found ineligible for special education based on the Team's conclusion that there was no adverse affect on the student's educational performance putting the student in need of special education.
- The Team properly considered the student's overall academic success and that none of the school's assessments found that the student's behaviors impeded his participation in the general curriculum.  
D.A. v. Meridian Joint School District No.2

# Lesson Learned

- Adverse affect on educational performance includes both academic and nonacademic factors.
- The determination of adverse affect should result from consideration of multiple sources of information.
- A student's overall success in the general curriculum will be an important factor to consider.
- Not all graded activities are deemed strictly academic.

# Eligibility

## Adverse Affect

- Student with emotional problems was eligible for sp ed in spite of the fact that she had a good academic performance
- Adverse effect is not limited to academics
- Students with good grades may still be eligible
- Her emotional problems impacted her ability to attend and participate in school

M.M. v. New York City

# Lesson Learned

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- Consideration of both academic and nonacademic factors should be considered in determining adverse affect.
- A student with good grades may still be eligible for special education services.

# Eligibility

## Severe Discrepancy

- A Team erred in finding a student ineligible as a student with SLD since the Team determined she did not meet the statistical discrepancy score under school district criteria.
- The IDEA prohibits a Team from relying on a single measure or assessment as the sole criterion
- The Team must consider multiple sources of information in making its decision

V.M. v. Sparta Township



# Lesson Learned

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- Teams may not rely on one factor, such as a severe discrepancy score, in determining whether a student is eligible for special education services.

# “Twice Exceptional” Students

- Students with a disability who also have high cognition may still be eligible for special education services if they require special education.
- School may not use a “cut off” score when determining a severe discrepancy between ability and achievement under the SLD category as the determining factor in eligibility decisions.

Memo to State Directors of Sp Ed 15-08

# Lesson Learned

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- Again, no one factor may be relied on as the determining factor in an eligibility decision
- Students who are academically gifted may still be eligible for special education as a “twice exceptional student”

# Eligibility RTI Data

- School District adopted the “severe discrepancy” standard for SLD determination.
- FAPE denied since the school did not document and disclose all RTI (General Ed Interventions for all students) data to the parents and Team in determining eligibility and developing the IEP.
- Parent participation was significantly impacted since all RTI data was not shared with the parents

M.M. v. Lafayette School District

# Lesson Learned

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- Make sure that parents have been informed of any data collected as part of the school's general education intervention process prior to a referral for special education.
  - Especially if the student is being referred based on a suspected learning disability

# Emotional Disturbance/ Social Maladjustment

- A student who was diagnosed as being socially maladjusted was also determined to be emotionally disturbed and eligible for special education.
- Her major depression lead to the Court concluding that she had “a general pervasive mood of unhappiness or depression” which lasted for a long time, to a marked degree and affected her school performance

H. M. v. Weakley County Bd of Ed

# Lesson Learned

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- Students who are diagnosed as having a social maladjustment are not eligible as a student with an emotional disturbance based on that diagnosis.
- Students who are socially maladjusted, however, may also have an emotional disturbance if they meet the criteria under the ED category.

# 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?



# Prior Written Notice Potential Staff Shortages

- The PWN stated that the student would be placed in the “public high school in his community”.
- The PWN provided to the parent was sufficient to put the parent on notice of which school was being proposed.
- Contract with private service providers was a sufficient backup in the event of staff shortages to ensure IEP implementation.

Marcus I. v. Hawaii Dept of Education

# Lesson Learned

- Make sure that the school sends the parent a prior written notice of any proposed/refused changes even if the parent attends and participates in the IEP meeting.
- If staff shortages are an ongoing challenge, one way to ensure that the IEP will be implemented is to have contracts with private providers as a back up.

# IEPs for Students In Private Schools

- The school violated the IDEA by not offering an eligible student a FAPE through the development of an IEP while the student was attending a private school.
- IEP development not conditioned on enrollment in the school district of residence.
- IEP implementation is conditioned on enrollment in the school district of residence.

District of Columbia v. Wolfire

# Lesson Learned

- For legal residents of the school district, the district is not only obligated to engage in child find activities but to develop an IEP for eligible children even if the child is not enrolled as a student in the public school.
- School districts are not obligated to implement the IEP for such children unless the child is enrolled in the public school.

# Potential IEP Amendments

- The potential of amending the IEP to continue 1:1 para services cannot be relied on in offering FAPE.
- The Court held it is “inappropriate to take into account the possibility of mid-year amendments in determining whether an IEP as originally formulated was substantively adequate”

Reyes v. New York City

# Lesson Learned

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- If a parent challenges the IEP for their student, the IEP as developed will be subject to the FAPE analysis without consideration of what potential IEP amendments could be made.

# Parent-School Relationships

- Since the parents did not formally revoke consent the school district was required to continue to provide a FAPE to a homebound student.
- The evidence showed that the parents' conduct prevented the school district from providing services to the student and amounted to an effective revocation of services.
- If the doctor approved of services in an alternative location, one or both parents may, but would not be required to be present in the alternative location.

Grasmick v. Mat-Su Borough School District

# Lesson Learned

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- Should a parent not provide the level of cooperation expected, document multiple attempts that the school staff have engaged in to provide the required IEP services.
- Support your staff in difficult situations and remind them to stay calm and not engage in confrontations or arguments with the parent.



# Parent-School Relationships

- The parent was told that the School District's Director of Special Education would be the sole point of contact for IEP purposes.
- The parent also received some ridiculing emails from the school district.
- The Court upheld an award of 4 hours of comp ed based on a limited denial of FAPE.

Stepp v. Midd-West School District

# Lesson Learned

- Do not arbitrarily impose limits on parent communication.
- Should a parent have a “high volume” of communication with teachers and other staff members, before imposing any restrictions on such communication confer with the parent and attempt to reach a mutually acceptable resolution.
- Be careful and sensitive about what you put in email communication with staff!!!!

# IEPs/Notices

## Use of Email

- Email may be used to send parents IEPs and related documents (progress reports, etc.) provided that the school and parent both agree.
- Electronic or digital signatures permissible for consent
- Appropriate safeguards must be taken to ensure the integrity/confidentiality of the process

Letter to Breton (OSEP)

# FAPE/IEP Goals

- The reading goals were unrealistic given the student's achievement level.
- The goals were not based on the student's individual needs but were the “state standard for 9<sup>th</sup> grade students”
- The IEP also failed to include individualized transition goals based on age appropriate assessments.

Jefferson County v. Lolita S.

# Lesson Learned

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- Although the IEP needs to address the student's access to and progress in the general curriculum don't forget the "I" in the IEP.
- Grade level standards may not always be appropriate to be included in every student's IEP goals.

# IEPs and Instructional Implications

- The IEP did not provide the student with a FAPE since it did not properly address the student's visual impairment.
  - Focus of the evaluation was solely on mobility not educational impact
- The student's teachers exhibited no understanding of the impact of the student's disability on the student's learning which led to an inappropriate IEP.

Caldwell Independent School District v. Joe P.

# Lesson Learned

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- Ensure that someone on the IEP Team is able to interpret the instructional implications of the evaluation results for the student.
- Ensure that staff responsible for implementing the student's IEP are informed of their “specific responsibilities”.

# FAPE and Methodology

- IEP which did not reflect the parents preferred methodology (ABA) for their student with autism was appropriate.
- The Court noted “We are required to give particular deference to state educational authorities on the issue of educational methodology”.

A.S. v. New York City



# Lesson Learned

- The Comment to the regulations state “There is nothing in IDEA that requires an IEP to include specific instructional methodologies”.
- If an IEP Team determines that specific instructional methods are necessary for the child to receive FAPE, the instructional methods may be addressed in the IEP.
- Although not required to be included in the IEP it may be prudent to discuss with the parent how the IEP is intended to be implemented.

# Related Services

## LRE

- The provision of speech services through an “embedded model” (direct speech therapy provided in the classroom with peers present) was appropriate.
  - Even if the student could make greater progress through a 1:1 pull out program
- The provision of services by a graduate clinician supervised by a SLP did not impact FAPE.

E.L. v. Chapel Hill-Carrboro

# Lesson Learned

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- The Least Restrictive Environment provisions also apply to related services.
- If a non-licensed person, such as a paraprofessional or intern, will be “assisting” in the provision of services ensure that the person is adequately trained and supervised by qualified staff.

# Assistive Technology

- The parents testified that they used an iPad (with the Proloquo2Go application) to communicate with the student successfully at home reducing her problematic behaviors although the school testified that they did not find that to be the case in school.
- The Court found FAPE was denied when the District failed to take affirmative measures to determine why [the student] did not exhibit those successes at school.”

North Hills School District v. M.B.

# Lesson Learned

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- When parents' input regarding their student's progress differs than the school district's experiences, it is incumbent on the IEP Team to attempt to discuss the differences and attempt to reconcile why there are different perceptions of the student's progress.

# Placement Decisions

- The IEP shall EXPLAIN the extent, if any, to which the student will not be educated with peers who are not disabled.
- Vague statement in IEP failed to include the reasons why the student could not be in regular ed classroom
- FAPE denied

Hannah L. V. Downington

# Lesson Learned

- When determining what the least restrictive environment is, the Team must start with the question of whether the student can appropriately receive their IEP services in the regular classroom with supplementary aids and services.
- If not, the IEP Team must include an explanation in the IEP of the reasons why the student cannot be appropriately placed in a regular class.
  - What are the student needs and what supplementary aids and services were considered.

# Classroom Selection

- The IEP calling for a special day class placement was inappropriate “as a matter of law” since it did not identify a specific classroom location.
- The failure to identify a specific classroom significantly restricted the parents participation in the IEP process since they had no opportunity to discuss a specific placement option with the IEP Team.

Bookout v. Bellflower



# Lesson Learned

- Although the IDEA has historically been interpreted as distinguishing between “placement” and “location”, the Courts are issuing decisions concluding that location is often determinative of whether the placement is appropriate.
- If not in the IEP, the Team should consider addressing with the parent where the IEP will be implemented.

# Classroom Selection

- The Court held that the failure to identify a specific special education classroom in the IEP did not deny the student a FAPE.
- Location and placement are distinct.
- While the exact location where services will be delivered is an important factor in evaluating whether the IEP delivered a FAPE, it is not dispositive.

Bobby v. School Board of the City of Norfolk

# Lesson Learned

- The Team should discuss with the parents the services to be provided and the qualifications of staff providing the services.
- Courts will consider the level of parental cooperation in determining whether the IEP Team met their obligations in determining placement/location.

# Placement v. Location

- A specific school site was included in the PWN as the school that would be implementing the IEP although the school district changed their proposal afterwards.
- Depending on the needs of the student, the characteristics of the specific school site could be an important factor in assessing the appropriateness of the IEP.
- The parents were denied info. to be able to meaningfully participate in decision making.

V.S. v. New York City

# 5<sup>th</sup> Circuit and Mississippi Case Law

- Courts in both Mississippi and the 5<sup>th</sup> Circuit historically have held that parents do not have a right under the IDEA to participate in school site selection.
- Question remains whether the Courts in this Circuit will modify their position on the placement v. location issue based on emerging case law from other jurisdictions.

White v. Ascension Parish School Board (U.S. Court of Appeals, 5<sup>th</sup> Circuit (2003)).

C.R.R. v. Water Valley School District(U.S. District Court, Northern District, Mississippi (2008)).

# Lesson Learned

- Again, the Courts are starting to consider the location of the placement in determining whether it is an appropriate placement.
- Should the school's initial proposal change due to either changing circumstances or parent objection, it is important to document that the parent has been informed of the change in the initial proposal.

# LRE and Services in a Classroom

- Parents are “guaranteed only the opportunity to participate in the decision about a child's ‘educational placement,’ ... which ‘refers to the general educational program -- such as the classes, individualized attention and additional services a child will receive -- rather than the 'bricks and mortar' of the specific school’ ”
- LRE “applies to the type of classroom setting, not the level of additional support a student receives within a placement”

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

# Lesson Learned

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- Although some Courts have held that parents are not entitled to participate in the determination of which school their student will receive their IEP services in, it is wise to discuss with and inform the parents of the school site selected.



# LRE

## Homebound Students

- The parents felt that in home instruction was necessary for their student to prevent the student from becoming ill or developing stress.
- The Court upheld the IEP which called for a modified plan of both in home and in school services since the LRE provisions favor reintegrating students into the school setting where they can socially interact with other students.

A.K. v. Gwinnett County School District

# Lesson Learned

- Parent preference must be considered but does not override the requirement that the student be placed in the LRE.
- In selecting the LRE, the Team may want to consider on a case by case basis a “reintegration plan” incrementally returning the student into a school environment.

# Unilateral Placements

## Factors for Reimbursement

- IEP did not provide FAPE, and
- Parental Placement is Appropriate
  - Need not be an approved special education facility
  - Personnel need not be credentialed
- Equitable Factors
  - Parental notice of disagreement and intent to make a unilateral placement requesting public payment
  - Providing school opportunity to evaluate student
  - Unreasonable actions by the parents

Burlington v. Department of Education and Florence  
County v. Carter

# Unilateral Placement

- When the school predetermined placement, FAPE was denied since the parents opportunity for meaningful participation was denied.
- The Court ordered reimbursement for the therapies paid for by Medicaid and for a private home based instructional program.

R.L. v. Miami Dade County School Board

# Lesson Learned

- Under the IDEA's unilateral placement provision, reimbursement is not limited to a private school placement but will also include private services.
- Whether a service is required for educational v. medical reasons is not determined by whether the service is covered by Medicaid.

# Ed v. Non-Ed Placements

- The parents were not entitled to reimbursement for either private placements they made for their student with emotional/social disabilities since the placements were for non-educational reasons.
- Under the IDEA the private placement must measure and judge the student's progress by educational achievement instead of disability treatment.

Fort Bend Independent School District v. Douglas A.

# Lesson Learned

- A school is not financially responsible for a unilateral placement that is primarily motivated by non-educational factors.
- A school is responsible for meeting the student's educational needs not "treating" the student's disability.

# Notice of Unilateral Placement

- The IDEA states that a parent must notify the school of their intent to pursue public reimbursement of a private placement either at the most recent IEP Team meeting leading up to or at least 10 business days prior to the removal of the student from the public school.
- Reimbursement was denied since the parent did not provide timely notice to the school district.

W.D. v. Watchung Hills Regional High School Board of Education



# Lesson Learned

- Even if it is determined that the IEP did not provide a FAPE and that the unilateral placement is appropriate, a hearing officer or Court may reduce or deny reimbursement if the parent did not provide proper notice to the school of:
  - Parental concerns regarding the proposed IEP and
  - Parents' intent to place their student privately and seek public reimbursement.

# Appropriateness of the Private School Placement

- The Court concluded that the parents of a student who was bi-polar and depressed did not present sufficient “objective evidence” of how the private program was specially designed or the specific services provided to “channel [the student’s] psychological improvement into academic improvement”.

Hardison v. Board of Education of the Oneonta City School District

# Lesson Learned

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- In a unilateral placement case, the parents have the burden of proof not only to show that the IEP offered their student was not appropriate but also that their private placement was appropriate.
- The private placement must be shown to have met the student's academic and nonacademic needs related to their disability.

# Behavior Plans

- The Court held that the alleged failure to conduct a functional behavioral assessment or develop a behavior intervention plan was “irrelevant” since the IDEA does not require such assessment or plan outside of certain disciplinary actions which were not present here.
- Although the school was having difficulty managing the student’s behavior it was in the process of reassessing his behavior interventions when the student was withdrawn from school.

Andrew F. v. Douglas County School District

# Lesson Learned

- Although the IDEA requires that a student's behavior be assessed and addressed if the student's behavior is interfering with their learning or the learning of others, an "FBA" and "BIP" are only required if the student is engaged in disciplinary change of placement.
- Note: Although the terms FBA and BIP are not defined in the IDEA, Mississippi policies define the terms in Section 300.530(d)(1).

# Discipline Weapons

- A temporary restraining order issued prohibiting the return of a student who brought a knife and alcohol to school pending the final litigation.
- IAES was “stay put” placement.
- The school has a “legitimate interest in, and obligation to provide, safe and productive learning environments”.

Ocean Township Board of Education v. E.R.

# Lesson Learned

- Although a school cannot unilaterally change a student's placement after the 45 school day IAES placement has expired, the school may seek immediate judicial proceedings to seek a TRO.
- In such case, the school must prove that the student poses an imminent danger to the school community if they return to their original placement.
- This is one of the few instances where a school can bypass the due process hearing system.

# IEP Behavior Components

- The behavior component was appropriate since the student showed progress in that she was learning to use self-control and would self-remove from the classroom to the cool-down area.
- The school district reviewed the BIP with the student's teachers, trained her teachers on the BIP, and implemented the BIP.

C.P. v. Krum Independent School District



# Lesson Learned

- Schools will prevail in a challenge to the behavior component of an IEP when:
  - The behavior component is based on assessment data
  - The IEP includes a behavioral goal
  - Staff are informed and trained on how to implement the behavior interventions in the IEP
  - The behavior interventions are fully implemented
  - Data is maintained to show that the student is progressing

# Temporary Restraining Order

- The school sought a TRO to prohibit the student from returning to the high school and place her in an IAES.
- The school district was unable to prove that the student's return would have likely resulted in injury to himself or others.
- The denial of the TRO was based on the lack of full implementation of the student's IEP behavioral component which called for a "safe person" to accompany the student.

Troy School District v. K.M.

# Lesson Learned

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- Schools seeking judicial relief have the burden of proof.
- The school must show that the student poses an imminent threat of injury if they return to school and must show that the behavioral component of the student's IEP was being fully implemented.

# Safety and Behavior

- The Court issued an order barring the student from school premises based on a showing that the student's continued attendance in his current placement posed an immediate threat to the safety of school staff and other students.
- The school was ordered to provide education through a virtual online program with staff support.

Wayne-Westland Community Schools v. V.S.

# Lesson Learned

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- Even when a school proves that a student with a disability poses an imminent threat to the safety of school staff and other students, the school must provide educational services to the student.

# Bullying

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- There is no Federal law or regulation directly addressing the issue of bullying although Mississippi statute defines bullying. (Miss. Code Annotate Section 37-11-67)
- United States Department of Education, Office of Special Education Programs (OSEP) has addressed bullying and the provision of FAPE under the IDEA.

# Role of the IEP Team

- Addresses whether bullying has impacted the student's ability to receive "meaningful educational benefit"
- Determine if additional assessments are necessary
- If bullying impacts FAPE, revise IEP with additional/different services as required
- Determine if a placement change is necessary
- Procedural safeguards afforded the parent

Dear Colleague Letter (OSEP)

# Bullying and OCR

- The bullying of a student on any basis (whether disability related or not) who is receiving services and/or accommodations under a 504 plan may result in a denial of FAPE that must be remedied.
- A school's compliance with state law and/or local school policy is not sufficient to meet the school's responsibility under Section 504.
- The Section 504 Team must determine whether as a result of bullying services/placement need to be changed.

Responding to Bullying of Students with Disabilities



# Lesson Learned

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- **Compliance with state law and/or school district's bullying policy does not fulfill the school district's obligation to ensure that the student with a disability who is a target of bullying is receiving a FAPE under their IEP or Sec.504 plan.**

# FAPE and Bullying

- “a disabled student is deprived of a FAPE when school personnel are deliberately indifferent to or fail to take reasonable steps to prevent bullying that substantially restricts” the educational opportunities of the student with disabilities.
- Where there is a “substantial probability that bullying will severely restrict a disabled student’s educational opportunities, as a matter of law an anti-bullying program is required to be included in the IEP” in an “intellectually accessible” way for parents

T.K. v. New York City

# Lesson Learned

- If a student on an IEP is being bullied, the IEP Team must be convened to address what, if any, changes to the IEP are warranted in order to provide FAPE and to address an “anti bullying program” for the student.
- The IEP must be written in language which is understandable by the parents.

# FAPE and Bullying

- Student was not denied a FAPE as the result of being bullied.
- School took adequate steps to address bullying/harassment.
  - IEP Team met to address the student's social/emotional needs
  - Investigated each report
  - Disciplined students when appropriate

N.M. v. Central Bucks School District

# Lesson Learned

- Schools will be insulated from legal liability when:
  - The school is not dismissive of parental concerns about bullying.
  - The IEP Team addresses the concerns from the parents about the bullying of their student.
  - School policy requiring investigation and follow up, as appropriate, is followed.

# Liability for Harassment

- The parents of a student with a disability sued the school district for damages under Section 504 and ADA based on harassment of their student by other students.
- The Court held that the school was not liable since the school investigated reports of harassment, disciplined other students as appropriate and provided training to students and staff.
- A school is not held to a standard of “purging” the school of harassment.

Nevills v. Mart Ind. School District

# Lesson Learned

- For a school to be held liable under Section 504 or the ADA for peer harassment, the parents must prove that the school was “deliberately indifferent” or “intentionally discriminated” against the student.
- Fully implementing a school’s harassment policy and documenting a school’s follow up to reports of harassment will mitigate a school’s exposure to legal liability.

# Liability

- The now adult student and parents alleged that the former student was not provided the accommodations stated in his IEP, school personnel ignored the parents phone calls and attempts to schedule meetings and ignored eight requests to view their student's educational records.
- The Court held that the parents had legal standing to sue based on a delegation of rts. and independent claims
- The Court also held the IDEA claims against school personnel in their personal capacity should not have been dismissed.

Stanek v St. Charles Community Unit School District



# Lesson Learned

- Only one reported case found that a school employee was personally liable under the IDEA which was based on the teacher's deliberate refusal to implement the IEP.
- Schools should maintain documentation of their efforts to implement the IEP and responses to parents when warranted.
- This decision should be closely followed to see if the Court actually finds school staff liable under the IDEA.

# Liability

- The sp ed teacher and aide were not protected by qualified immunity for allegedly grabbing and pinning the student with a disability in an overly aggressive manner.
- The administrators were dismissed from the lawsuit since there was no evidence that they participated in the actions or knew of the actions and failed to act to prevent them.

Rosentsein v. Clark County

# Lesson Learned

- Staff should receive training on the proper ways to restrain a student when the student poses an imminent threat to their safety or the safety of others.
- Staff should be required to report to their supervisor instances where physical restraint was used and a written report should be generated.
- Parents should be informed in those instances.

# Liability

- A lawsuit for damages was filed based on alleged conduct by the paraprofessional who engaged in inappropriate verbal commands and physical contact.
- There was no intentional discrimination supporting damages since the school district did not ignore or otherwise minimize the incidents.

Shadie v. Hazelton Area School District

# Liability

- The Director of Sp Ed initiated a referral to social services that she had reason to believe that the father of a student with an intellectual disability engaged in inappropriate physical behavior with the student.
  - The allegations were found to be unsubstantiated.
  - The Court held that the Director was not entitled to qualified immunity since the parents' allegations established that the Director was motivated at least in part by the father's advocacy on behalf of his student.
- Wenk v. O'Reilly

# Lesson Learned

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- Should a report to social services be necessary as a mandated reporter under state law, be specific in the report what information you relied on to substantiate your belief that a report was required.

# Stay Put

- The “stay put” provision of the IDEA continues to apply through the end of the appeals process.
- The school must fund the placement if appealed even though the District Court found that the IEP was appropriate.
- The U.S. Supreme Court denied the appeal.

M.R. v. Ridley School District

# Stay Put

- The Court issued an injunction changing the stay put placement based on a finding that the student posed a substantial risk of harm to other students and staff.
- The Court approved a placement in a self-contained class in the school district as the stay put placement.

Seashore Charter Schools. V. E.B.



# Stay Put

- The parents with joint legal custody disagreed on the student's placement.
- The hearing officer agreed that a change of placement was appropriate.
- Under stay put, only one parent's agreement would be necessary to approve a change of placement to invoke stay put.

Sheils v. Pennsbury School District

# Stay Put and Transfer Students

- The Court held that in an intra-state transfer the new school district must provide comparable services/program to the student.
- Comparable services/program does not trigger the “stay put” provision of the IDEA.

J.F. v. Byram Township Bd of Ed

# Attorney's Fees

- The Court awarded attorney's fees to the parents for their attorney's preparation and participation in mediation
- The Court distinguished mediation from a resolution session.

Evanston Skokie Community Consolidated School District 65 v. Risen

# Statute of Limitations

- A 25 yr. old former student may proceed with legal action asserting that his former school district failed to provide him with appropriate special education programs and services during his entire 16 years as a student.
- The time period did not start until until 2010 when he obtained an IEE that diagnosed him with a specific learning disability.

K.H. v. New York City

# Resolution Meetings

- The Court held that the school violated the IDEA when no one with authority to make final decisions was present at the resolution meeting.
- The school's offer was made subject to the approval of the school board.
- FAPE, however, was not denied as a result.

J.Y. v. Dothan City Board of Education

# Lesson Learned

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- Ensure that someone with final decision making authority is at the resolution meeting or at least be contacted during the resolution meeting.
- Note: The same is true regarding a person with decision making authority at an IEP Committee meeting and a mediation session.

# Hearing Guidelines

- A "guideline" was issued by a state's Office of Administrative Hearings, which stated that, "[i]n all but exceptional circumstances, evidentiary hearings should be concluded within three hearing days of six hours each."
- OSEP stated that the guideline appears, on its face, to be consistent with the IDEA because it permits a hearing officer to extend the time limitation for evidentiary hearings under "exceptional circumstances".

Letter to Kane

# State Administrative Complaints

- It is not consistent with the IDEA for the SEA to assign the burden of proof to either party when handling a state administrative complaint.
- It is solely the SEA's duty to investigate the complaint, gather evidence and make a determination as to whether a public agency violated the IDEA based on a "preponderance of evidence".

Letter to Reilly



# State Administrative Complaints

- A school district and a county office sued the state department of education alleging that the department violated IDEA requirements when handling state administrative complaints.
- The Court held that school districts “lack an implied right of action in the context of complaint resolution proceedings”. Therefore, the case was dismissed.

Fairfield-Suisun Unified School District v. CDE

# State Administrative Complaints

- The U.S. DOE raised concerns about the practice of a school district requesting a due process hearing after a parent has filed a state administrative complaint.
- A SEA must hold in abeyance the investigation of an issue in a state complaint that is being heard by a due process hearing officer.
- Schools are “strongly encouraged” to respect the parents’ choice of dispute resolution forums.

Dear Colleague Letter

# IEP Consent Revocation and Sec.504

- The parents withdrew consent for their student to receive IDEA services, but requested that the school provide him with accommodations under Section 504.
- Revocation of consent for services under IDEA is tantamount to revocation of consent for services under Section 504 and the ADA.

Lamkin v. Lone Jack C-6 School District  
(District Court, Missouri)

# IEP Consent Revocation and Sec. 504

- Revocation of consent under the IDEA does not impact the school's obligation under Section 504
- A school has a “continuing obligation under Section 504 and the ADA to protect [the student] from discrimination while she remains a qualifying student with a disability”
- A school is required to convene a Section 504 meeting and develop a 504 plan after the parents revoked consent for IDEA services.

Kimble v. Douglas County School Dist.(Dist.Ct., Colorado)  
D.F. v. Leon County School Board (Dist.Ct., Florida)

# Lesson Learned

- You may want to seek legal advice from school district counsel on steps to take under Sec. 504 for a student whose parents have revoked consent for continued IEP services.
- The safest legal position to take would be to acknowledge in the written response to the revocation that the school district is offering to work with the parent to develop a Sec.504 plan.

# Service Animals

- The Court held that the school's policy requirement that the parent maintain liability insurance for the service animal and procure vaccinations in excess of the requirements under state law is a surcharge prohibited by the ADA.
- The Court also held that the accommodation requested (taking the student and service dog outside when the dog needed to urinate) under the facts presented were reasonable accommodations under the ADA.

Alboniga v. School Board of Broward County

# Lesson Learned

- Service animals brought onto public sites is addressed in the ADA, Title II
- It would be prudent for a school district to consider policies or guidelines to respond to a request from a student/parent/employee/community member who would like to bring a service animal onto school premises.
- Preparation not reaction is key.

# Section 504

## Implementation of the Plan

- No violation of Sec.504 by not following the plan exactly as written.
- Violations must be “significant enough to effectively deny a disabled child the benefit of a public education”.
- School did not act unreasonably in refusing to alter the recommended doses of insulin based on parent request.

C.T.L. v. Ashland School District



# Lesson Learned

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- Similar to IEPs, school districts are legally obligated to provide accommodations or services in a Sec.504 plan.
- Courts will not find legally liability for minor variances from the Sec.504 plan.

# Charter Schools

- Federal civil rights laws, regulations, and guidance that apply to charter schools are the same as those that apply to other public schools.
- These laws extend to all operations of a charter school, including recruiting, admissions, academics, educational services and testing, school climate (including prevention of harassment), disciplinary measures, athletics and other nonacademic and extracurricular services and activities, and accessible buildings and technology.

Dear Colleague Letter (OCR)

# 504 Actions for IDEA Violations

- The parents of several students with disabilities filed a lawsuit under Section 504 and the ADA seeking compensatory and punitive monetary damages for a school district's alleged failure to implement their students' IEPs.
- The Court held that exhaustion of administrative remedies (pursuing due process hearings) was not required.

Stropkay v. Garden City Union Free School District

# Effective Communications

- Title II of the ADA requires that public schools ensure that communication with students with hearing, vision or speech disabilities is as effective as communication with students without disabilities.
- Title II requirements also apply to other individuals with disabilities such as parents or members of the public in activities such as parent-teacher conferences, ceremonies and performances.

Frequently Asked Questions on Effective Communication for Students With Hearing, Vision or Speech Disabilities in Public Elementary and Secondary Schools

# Lesson Learned

- OCR/U.S. Dept of Justice and the Courts are increasing their compliance focus on a school district's efforts in providing effective communication to individuals with a disability.
- Requirements under the effective communication ADA regulations go beyond a school district's obligation to provide students a FAPE.

# Retaliation Claims

- The parent was directed to only communicate with the school's attorney since staff felt "extremely anxious and threatened" by the parent.
- The Court refused to grant the school's Motion for Summary Judgment in response to a lawsuit alleging retaliation under Sec. 504 and the ADA seeking monetary damages.
- The alleged disputed facts presented triable issues.

Lee v. Natomas Unified School District

# Accessibility

- A high school football field, built in 1971, was not subject to the ADA accessibility stds. which apply to facilities built after Jan.1992.
- For existing facilities, a public entity need only provide program access, by “operat[ing] each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities.”

Daubert v. Lindsay Unified School District

# Lesson Learned

- School districts would be well advised to have an inspection of school district buildings and facilities to ensure that they meet applicable accessibility standards.
- The applicable accessibility standards are dependent on the date of the building construction or renovation.
- Accessibility requirements apply to more than school buildings including athletic facilities and playgrounds.



# Transportation Under Sec.504

- The Court held that the school district did not violate Sec. 504 when it denied the request of the parent of a student with a disability to transport the student to a daycare out of the school district's boundary.
- The request for special transportation was based on the parent's needs not the student's needs.

S.K. v. North Allegheny School District

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**Mahalo!!!**