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Top Legal Issues in Special Education of 2018

Indiana Council of Administrators of Special Education

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Overview

- Recent Court Cases
- LRE Considerations
- Student Behavior and Discipline
- Safety/Security Tips

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Recent Court Cases

Nicholas H. v. Norristown Area Sch. Dist., 69 IDELR 118 (E.D. Pa. 2017).

- Teenage Boy's IEP did not describe his services in a way that the parents could understand.
- Court prohibited testimony from staff explaining the meanings.
- Takeaway: Know your audience – the parents and students, in addition to staff.

K.M v. Tehachapi Unified Sch. Dist., 69 IDELR 241 (E.D. Cal. 2017).

- Student needed to comply with directions;
- None of the goals in the IEP specifically addressed the need to stay on task;
- BUT Court found, taken as a whole that the goals and aids adequately addressed this deficit.

Parrish v. Bentonville Sch. Dist., 69 IDELR 219 (W.D. Ark. 2017).

- An Arkansas school district that moved a third-grade student with autism and violent behaviors from a general education classroom to an autism class for one school day pending an IEP meeting did not violate the IDEA.
- The student had a history of physical aggression at school and on the day of his removal had charged another student.

Parrish v. Bentonville Sch. Dist., 69 IDELR 219 (W.D. Ark. 2017).

- The student was physically restrained, and the parent was notified that day that her son would attend the autism classroom pending an IEP meeting the following day.
- The court held that the temporary change in placement did not violate the IDEA because the student's educational services remained the same and the temporary removal did not exceed 10 school days.

McKnight v. Lyon Co. Sch. Dist., 70 IDELR 181 (D. Nev. 2017).

- The parent of a child with a disability asked to participate in IEP meetings via email rather than in person after she had filed a request for a due process hearing against the district.
- The court found that the district had not engaged in retaliation against the parent by refusing to allow her to participate via email, since the district gave a non-discriminatory reason for refusing the request.

McKnight v. Lyon Co. Sch. Dist., 70 IDELR 181 (D. Nev. 2017).

- The district asserted that its reason for refusing to conduct IEP meetings via email is that email-only participation would limit collaboration by IEP team members.

Y.D. v. New York City Dep't of Educ., 69 IDELR 178 (S.D.N.Y. 2017).

- The failure to include a specific sensory diet in a 9-year-old boy's IEP did not constitute a denial of FAPE.

Y.D. v. New York City Dep't of Educ., 69 IDELR 178 (S.D.N.Y. 2017).

- The federal judge ruled that IEP 's do not have to contain a detailed sensory diet as long as the IEP contains information about the student's sensory needs and suggests appropriate ways of managing these needs (e.g., proprioceptive movement-based activities, singing familiar songs)

Pangrel v. Peoria Unified Sch. Dist, 69 IDELR 133 (D. Ariz. 2017).

- A school district did not violate the IDEA when an IEP team continued working on a transition plan after the parent and two advocates left the IEP meeting due to scheduling issues.
- The evidence showed that the parent and advocates were active participants in the IEP development for two hours prior to their departure and that the parent attended and participated in two follow-up IEP meetings.

When Parents Refuse Certain CCC Attendees

CP-092-2014

- School and Parents exchanged emails to schedule the CCC and agreed upon a date + time
- Once School sent the Notice, Parents said they would not attend with the PAR

"I request that [the PAR] NOT be there in person or via telephone. If her presence is made, I will terminate the meeting and reschedule it another date and will continue to do so until [the PAR] DOES NOT make her presence at the case conference. I understand she has a job to do and she can do her job from the sidelines or behind the scene, however I/we DO NOT have to deal with her nor will I/we."

- School offered for Parents to participate by phone but left PAR on Notice
- IDOE: "Because the School attempted to convene CCC meetings at mutually convenient dates and times, no violation is found."

Endrew F. v. Douglas County School District (March 22, 2017)

The Issue: What is the Standard for FAPE?

How does one measure whether an educational program for a given child is reasonably calculated to enable the child to receive educational benefits where the child is not receiving instruction in the regular classroom?

Lower Court (10th Circuit)

FAPE “some educational benefit”

Unanimous Decision

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

"Some benefit" of *Rowley* is not measured in absolute terms ("some, as opposed to none"), but in relative terms ("appropriate in light of the child's circumstances").

Overall *Endrew F.* Takeaways

- No large legal shift. No "bright line" rule.
  - *Endrew F.* supplements, not replaces, *Rowley. Rowley* is still good law.
  - Don't necessarily have to do more than you were doing before
- Be responsive to individual needs of students.
- CCC should make reasonable attempt at designing the IEP based on what information is available at the time of the conference.

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Indiana Due Process Case

Issue One

Did the School timely and appropriately evaluate the student's needs as a child eligible for special education pursuant to 511 IAC 7-40-4 and 5?

- Yes
- Both 511 IAC 70-40-4 and 511 IAC 7-40-5 apply to initial educational evaluations. There is no requirement in the IDEA "that a reevaluation must mimic the depth and breadth of an initial evaluation."

  Robert B ex rel. Bruce B v. W. Chester Area Sc. Dist., 2005 WL 2396968, at *6 (E.D. Pa. 2005)

Issue One

Did the School timely and appropriately evaluate the student's needs as a child eligible for special education pursuant to 511 IAC 7-40-4 and 5?

- Further, "the IDEA clearly distinguishes between an initial evaluation and a reevaluation." *Id.*
- Based upon the preponderance of the evidence the other educational evaluations performed on the Student by the School were appropriately and timely done.
- The Petitioner has not met her burden of proof to show that the School did not meet the requirements of Article 7 in its evaluations.

Issue Two

Did the School appropriately identify the student needs as a child eligible for special education pursuant to 511 IAC 7-42-6 and 40-6?

- Yes
- IEPs need not directly address every possible need of the student.

  See J.D. v. Crown Point School Corp., 2012 WL 639922 at *21 (N.D. Ind. 2012).

- Further, the IEP need not align with Article 7 standards. Instead, the question is whether the IEPs address the Student's individual needs. *Id.* The School did this and the Petitioner did not meet her burden of proof.

Issue Three

Did the School provide the Student the appropriate level of related services pursuant to 511 IAC 7-40-6 and 42-6?

- Moreover, no evidence was presented as to which types of related services enumerated in 511 IAC 7-32-79 and 511 IAC 7-43-1 are necessary for the Student's IEPs to meet the requirements of the IDEA. 511 IAC 7-42-6 requires that the IEP team 1) determine the special education and related services that will 2) meet the unique needs of the student, regardless of the student's identified disability.

Issue Three

Did the School provide the Student the appropriate level of related services pursuant to 511 IAC 7-40-6 and 42-6?

- This is clear from case law interpreting the IDEA.

  Bd. Of Educ. Of the Hendrick Hudson Cent. Sch. Dist. V. Rowley, 458 U.S. 176, 182 (1982).

- The preponderance of the evidence established that the School did provide the appropriate level of related services in the student's IEPs.

Issue Four

Did the School provide the Student with specialized instruction needed for her to make progress pursuant to 511 IAC 7-32-88 and 42-6?

- In fact, the IEPs explained and the witnesses described how the Student's instruction was adapted to address her unique needs due to her disability which ensured access to the general curriculum to meet district standards.
- The Student has shown considerable overall progress from the beginning of fifth grade to the end of sixth grade. This progress has not been uniform and, as with any student, the Student has performed better under certain measures than others.

Issue Four

Did the School provide the Student with specialized instruction needed for her to make progress pursuant to 511 IAC 7-32-88 and 42-6?

- For example, at the beginning of fifth grade, the Student was reading at third-grade level, but by the end of sixth grade, the student was reading at grade level.
- Student's poor grades in fifth grade and the poor performance on this evaluation as evidence that the School was failing the Student, when in fact, those things are evidence of how much the Student improved under the School's program from the middle of fifth grade to the end of sixth grade. Testing or evaluation results cannot be isolated with this Student, particularly when she came to the School with academic skills far below her grade level.

Issue Five

Did the School develop an IEP reasonably calculated to provide the Student with meaningful educational benefit pursuant to 511 IAC 7-42-6?

- Yes
- To determine whether the IEPs are appropriate, it is critical to remember that an IEP is a snapshot in time.
- *Roy A. v. Valparaiso Community Sch.,* 951 F. Suppl. 1370, 1377 (N.D. Ind. 1997)(citing *Roland M. v. Concord School Comm.,* 910 F.2d 983, 988 & n.2, 992 (1st Cir. 1990) for the proposition that an IEP "must be assessed in terms of what was 'objectively reasonable when the snapshot was taken, that is, at the time the IEP was promulgated.'"); *See also, Carlisle Area Sch. V. Scott P.,* 62 F.3d 520, 534 (3d Cir. 1995)

Issue Five

Did the School develop an IEP reasonably calculated to provide the Student with meaningful educational benefit pursuant to 511 IAC 7-42-6?

- ([T]he measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date …. Neither the statute nor reason countenance 'Monday Morning Quarterbacking' in evaluating the appropriateness of a child's placement.")
- The adequacy of IEPs must be judged considering the available information upon which it was based.

Issue Five

Did the School develop an IEP reasonably calculated to provide the Student with meaningful educational benefit pursuant to 511 IAC 7-42-6?

- *M.B. v. Hamilton Southeastern Sch.,* 2010 U.S. Dist. LEXIS 80719, 20 (S.D. Ind. Aug 10, 2010) (stating "…the Court should not engage in a reexamination with hindsight that is enlightened by additional evidence or information not provided or available to the CCC at the time of either case conference.")

Issue Five

Did the School develop an IEP reasonably calculated to provide the Student with meaningful educational benefit pursuant to 511 IAC 7-42-6?

- Such an IEP, however, is not necessarily the best possible program or one that maximizes the potential of each child with disabilities or one that is in some sense equal to the education provided to children without disabilities.

  See *D.F. vs. Western School District,* 921 F. Supp. 559, 565 (S.D. Ind., 1996), *Board of Educ. Of Hendrick Hudson Cent. Sch. Dist. vs. Rowley,* 458 U.S. 176 (1982).

Issue Five

Did the School develop an IEP reasonably calculated to provide the Student with meaningful educational benefit pursuant to 511 IAC 7-42-6?

- *While the Petitioner may isolate items in the IEPs she now disagrees with or contends were not ideal, the law does not require IEPs to be perfect, nor does it require the School to educate the Student to her highest potential.*

Issue Six

Did the School develop appropriate goals for the student pursuant to 511 IAC 7-42-6(f)(2)?

- Yes.
- Many of the prior goals, or very similar ones, have been part of the Student's IEPs for a number of years, to which the Mother agreed, and the equitable doctrine of waiver should be applicable.

Issue Seven

Did the School develop an appropriate behavioral intervention plan for the Student pursuant to 511 IAC 7-44-5 and 32-10?

- Yes.
- The Student demonstrated poor behavior at times throughout the fifth and sixth grade years. However, the evidence shows that her behavior improved, even if there was some regression toward the end of sixth grade; that her poor behaviors were not inconsistent with those typically demonstrated by fifth and sixth graders; and that whatever poor behaviors she demonstrated were not independently interfering with her academic growth. The Independent Education Evaluator could not conclude that a behavioral intervention plan was necessary for the Student.

Issue Nine

Did the School appropriately provide the Student with Extended School Year (ESY) services pursuant to 511 IAC 7-36-4, 42-6 and 32-39 (not 40 as stated originally)?

- Yes
- There was no evidence submitted establishing the Student's need for ESY services, such as regression over the summer, lost opportunity to address a developing skill, or for any other reason.
- The Petitioner has not met the burden of proof to show that ESY services were necessary for the Student to receive a free appropriate public education. At no time did the Petitioner request ESY, nor did the case conference committee determine the ESY was necessary. While that alone is not determinative, it indicates he consensus that existed before Petitioner filed for due process that ESY was unnecessary.

Issue Ten

Did the School provide appropriately trained and enough individuals to work with the Student on her IEP and her needs pursuant to 511 IAC 7-42-1(b) and 36-2?

- IDEA does not require best possible education or specific methodology requested by parent

  Tucker vs. Calloway County Bd. Of Educ., 136 F3.d 495, 505 (6th Cir. 1998)

- Once a court determines that Act's requirements have been met, questions of educational methodology are for resolution by the States

  Lachman vs. Illinois State Bd. Of Educ. 852 F.2d 290, 297 (7th Circ. 1988)

Order Highlights

- *The mother's requests for reimbursement of tutoring services and the neuro-psychological evaluation are denied.*
- *The mother's requests for compensatory education for the Student for two years and application costs are also denied.*

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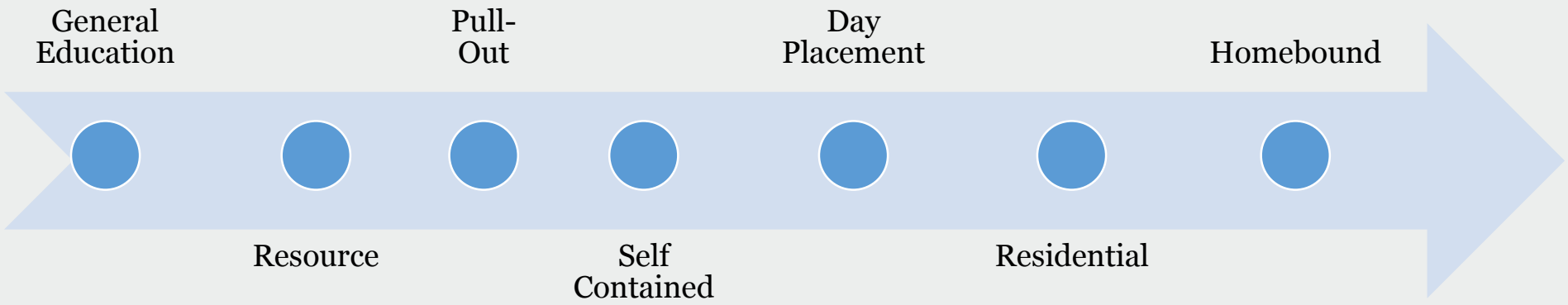
LRE Considerations


General Education
Resource
Pull-Out
Self Contained
Day Placement
Residential
Homebound

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Removals & Changes of Placement

Removals

- Removal = any situation in which a student is removed from his/her placement for any part of the day.
- "Removal" always includes expulsion, detention, out of school suspension
- "Removal" sometimes includes in-school suspension, bus suspension, sitting in principal's office, etc.
- Why does this matter? 11th Day.

In School Suspension (ISS)

Student can progress in Curriculum + District provides IEP services + Student interacts with nondisabled to the same extent =

ISS is NOT a removal

"Short Term Removal"

- What qualifies as a "short term removal"?
  - **Sending student home for ANY part of the day**
  - **Calling parent and asking/expecting the parent to pick up the student for ANY part of the day**
  - **Sending student to office for a portion of the day**
- Key factor: opportunity to interact with peers
- CAUTION against using "short term removal" as discipline … instead, use separation as an intervention strategy

Short Term Removal as Part of BIP

1. **Time out room**
2. **Breaks/walks**
3. **Other activities for re-direction**

- Include expected duration (short means short!) and frequency
- If frequency of removals increases, you need a new BIP
- Do not circumvent discipline rules

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Expulsions

Form 16

- ISBA-created form to waive rights to an expulsion meeting in exchange for returning to school with conditions
  - Not a waiver of special education protections to MDR
- Form 16 expedites not having the expulsion hearing

Expelling Special Education Students

- After CCC determines there was no manifestation…
  - the CCC's written findings must be given to the parents and the superintendent.
  - expulsion examiner must consider the student's special education and disciplinary records.
  - Student must continue to receive services during expulsion, as determined by the principal in consultation with TOR

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Safety/Security

IC 31-37-4-3

- Requires law enforcement agencies to notify the school when a child is taken into custody for suspicion of any of the listed crimes (mostly felonies) OR a situation to which IC 12-26-4-1 applies. Notification must include that the child was taken into custody and the reason why the child was taken into custody.
- Added bonus, IC 31-37-4-3(c) requires the notification be made within 48 hours.
- IC 12-26-4-1 gives law enforcement officers authority to apprehend and transport an individual believed to have a mental illness, is either dangerous or gravely disabled, and is in immediate need of hospitalization and treatment.

IC 31-39-4-8

- The head of a law enforcement agency or that person's designee may grant any person having a legitimate interest in the work of the agency or in a particular case access to the agency's confidential records.
- In exercising discretion, the head of a law enforcement agency shall consider that the best interests of the safety and welfare of the community are generally served by the public's ability to obtain information about:

IC 31-39-4-8

the identity of anyone charged with the alleged commission of any act that would be murder or a felony if committed by an adult

AND

(2) the identity of anyone charged with the alleged commission of an act that would be part of a pattern of less serious offenses.

A person having access to records under this section is not bound by the confidentiality provisions of IC 31-39-3 and may disclose the contents of the records.

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Legislative

SEA 217 - Dyslexia

- Requires schools to employ a reading specialist trained in dyslexia by July 2019
- Requires that information about dyslexia be:
  - included in a student's educational evaluation;
  - discussed by the student's case conference committee; and
  - included in a student's IEP if the case conference committee determines that the information should be included.
- Requires that a school's reading plan shall include indicators to screen for risk factors of dyslexia
- Requires additional dyslexia screening and intervention

SEA 217 - Dyslexia

School action:

- 2018-19 school year - review and revise policy/written guidance to ensure compliance with a variety of mandates as well as provide professional development to appropriate staff.
- 2019-20 school year - ensure compliance with the staffing requirements for the reading specialist trained in dyslexia.

HEA 1420 – Various Education Matters

Allows for the use of Cambridge International courses under certain circumstances

Requires a party to provide a school with notice prior to filing any legal or administrative action against the school

- A party's notice must include the alleged violation and a proposed remedy
- A school will have 15 days to grant relief prior to an action being filed by the other party

HEA 1420 – Various Education Matters

School action: Take advantage of the required notice for any type of complaint you receive after June 2018. The notice must go to the school and the board. It must have a specific request for relief. You will then have 15 days to grant the relief, make a written counter offer or do nothing. If the notice is not provided, then action must be dismissed without prejudice. Work with CCHA to best implement and hopefully deter frivolous litigation or complaints that should be resolved prior to litigation. You should also look into the Cambridge International courses given the perks created by this law.

HEA 1420 – Notice Provision

IC 34-13-3.5 - Claims Against Public Schools

Sec. 1.(a) This chapter applies only to an action brought against a public school under the laws of:

the United States; or

Indiana.

(b) This chapter does not apply to a civil action or administrative proceeding under IC 20-28 or IC 20-29.

Sec. 2.This chapter may not be construed to restrict or limit the rights, procedures, or remedies available to an individual or entity under:

the federal or state Constitution; or

another federal law.

Sec. 3. As used in this chapter, "public school" refers to a:

school corporation (as defined in IC 20-18-2-16(a)); or

charter school (as defined in IC 20-24-1-4).

HEA 1420 – Notice Provision

- Sec. 4. An individual or entity may not initiate a civil action or an administrative proceeding against a public school, unless the individual or entity submits a written notice to the public school and the governing body or the equivalent authority for a charter school that notifies the public school and the governing body or the equivalent authority for a charter school of the alleged violation of law and indicates a proposed remedy.
- Sec. 5. A proposed remedy that is offered under section 4 of this chapter must meet the following conditions:
  - Provide the public school with a specific request for relief.
  - Allow the public school to offer the individual or entity the relief requested in the written notice submitted under section 4 of this chapter before the individual or entity initiates a civil action or administrative proceeding against the public school.

HEA 1420 – Notice Provision

- Sec. 6. Not later than fifteen (15) days after the individual or entity submits the notice described in section 4 of this chapter to the public school, the public school may do the following:
  - Remedy the alleged violation or violations.
  - Make a written offer to the individual or entity to resolve the dispute.
- Sec. 7. If an individual or entity does not submit the notice described in section 4 of this chapter to a public school before initiating a civil action or an administrative proceeding, a court, administrative law judge, or hearing officer shall dismiss the action without prejudice.

SEA 230 – Suicide Prevention

- Requires all teachers that provide instruction in grades 5-12 to receive at least 2 hours of suicide awareness and prevention training every three school years
- Allows schools to require any other employee that provides instruction in grades 5-12 to receive at least 2 hours of suicide awareness and prevention training every three school years

School action: Plan for meeting the professional development mandate for the 2018-19 school year for teachers. Consider whether you will require other employees who provide instruction in grades 5-12 to attend the 2 hour training.

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Tips and Reminders for Administrators

Non-Public Consultation Issues

Transition Checklist: Moving from ABA Programs to School Programs

- Providing guidance on how to help successfully transition from an ABA program to a public school
- “In many cases, a service plan has been established with the school district when the child is placed in an ABA program.”

Non-Public Consultation Issues

Hypothetical

Tom Brady Sr. is placing son Tom Brady Jr. at the local ABA Center for a full-time placement but then wants related services provided in the evening from the public school.

Non-Public Consultation Issues

What questions do you ask?

1) Has the student been offered FAPE through an IEP?
2) Is the student homeschooled?
3) Is there a plan for transition back to the public school?

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Thank you.