

**Special Education Law  
Update:  
Lessons Learned**

Arizona Directors Institute

Arizona Department of Education

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Presenter: Art Cernosia

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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)

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**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. District (District Ct. CA)

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### 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.

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### 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 (9<sup>th</sup> Circuit)

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### Lesson Learned

- 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.

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### Independent Ed. Evaluations

- The school district should have conducted a new evaluation when the student was discharged from the Juvenile Detention Center and reentered his home high school.
- Reliance on a previous school district's evaluation in the Detention Center was not appropriate.
- Parents were entitled to an IEE at public expense.

D.A. v. Meridian Joint School District No. 2 (9<sup>th</sup> Circuit)

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### Lesson Learned

- Schools should invite input from the Team, including the parents, to determine the need of an updated evaluation.
- When a student changes educational settings (in this case for non-educational reasons) the Team should review existing information and determine the need for updated evaluation information.

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### Eligibility

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

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### 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 (9<sup>th</sup> Circuit).

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### 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.

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### 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 (District Ct. TN)

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### Lesson Learned

- 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.

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### 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 benefit?

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### 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 (2<sup>nd</sup> Circuit)

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### Lesson Learned

- 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.

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### Parent Participation

- FAPE denied when the school held the IEP Team meeting in spite of the fact that the parents informed the district four days ahead of time that they would be unable to attend.
- A school district can make an IEP Team decision without the parents only if it is unable to obtain their participation which was not the case here.

D.B. v. Santa Monica-Malibu Unified School District  
(9<sup>th</sup> Circuit)

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### Lesson Learned

- Schedule that annual IEP review sufficiently before the due date to allow for the need to reschedule the meeting due to parental or staff needs.
- Document all attempts the school has engaged in to find a mutually agreeable time and date for the IEP Team meeting.
- Caution!!! Hold the meeting without parent participation only if the school is unable to get the parents to attend the IEP Team meeting.

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### 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 (District Ct. PA)

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### 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!!!!

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### 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. (11<sup>th</sup> Circuit)

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### Lesson Learned

- 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.

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### 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 deny the student a FAPE.
- E.L. v. Chapel Hill-Carrboro (4<sup>th</sup> Circuit)

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### Lesson Learned

- 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.

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### Speech/Language Services Students With Autism

- OSEP issued a letter to the field raising concerns that a growing number of children with autism may not be receiving needed speech and language services.
- “Some IDEA programs may be including applied behavior analysis (ABA) therapists exclusively without including, or considering input from, speech language pathologists and other professionals who provide different types of specific therapies that may be appropriate for children with ASD”

Dear Colleague Letter (U.S. Office of Sp Ed Programs)

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### Lesson Learned

- Special education and related service determinations must be based on the student’s assessment data and unique needs, not based on the disability category.
- ABA therapy is just one methodology used to address the needs of children with autism.

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### Placement/LRE

- The IEP for a student with autism calling for small group instruction provided a FAPE in the least restrictive environment.
- The placement was intended to be an interim placement since the student had not been in the school district for the last three years.
- The staff had only one opportunity to observe the student before the IEP Team meeting. Therefore, their knowledge of the student was somewhat limited.

C.B. v. Garden Grove Unified School District (9<sup>th</sup> Circuit)

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### Lesson Learned

- For new or transfer students contact the previous educational placement for updated information on the student's ed needs.
- Invite the parents to share information on the student's previous ed program and ed needs.
- The IEP must EXPLAIN the extent, if any, why the student cannot participate in the regular classroom environment and other activities with students who are not disabled.

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### Least Restrictive Environment

- The LRE for a student with autism was in a classroom with six students, one teacher, one classroom paraprofessional and a full time "transitional paraprofessional" to support the student's move from a private to a public school.
  - The Court rejected the parents' contention that the para would be a "crutch that vitiates their son's right to be educated in the least restrictive environment"
  - 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 Dept. of Ed (2<sup>nd</sup> Circuit)*

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### Lesson Learned

- When making a placement decision, the Team must determine what supplementary aids and services are required for the student.
- If the Team determines that the student needs a full time paraprofessional, the Team should explain the role(s) the para is expected to fulfill with a goal of increasing the student's independence.

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### Least Restrictive Environment

- The IEP’s proposed placement for a student with autism in a private day school was not appropriate.
- The placement was not appropriate due to:
  - The excessive transitions between classes;
  - The inclusion of significantly older students in classes since students are grouped according to ability not age; and
  - The exposure to a student population with more severe behavioral issues than exhibited by the student. Pointe Educational Services v. A.T. (9<sup>th</sup> Circuit)

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### Lesson Learned

- In determining the LRE for a student, the Team must consider interaction with age appropriate peers.
- Both academic and non-academic factors (such as the schedule, behaviors, etc.) must be considered by the Team.

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### 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.
- Endrew F. v. Douglas County School District. (District Ct., Colorado)

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### 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.

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### Behavior/Alternative Placement Temporary Restraining Order

- The school sought a TRO to prohibit the student from returning to the high school and place her in an alternative placement.
- 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. (District Ct., Michigan)

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### Lesson Learned

- 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.

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### Behavior/Alternative Placement Temporary Restraining Order

- 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. (District Ct., Michigan)

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### Lesson Learned

- 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.

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### Bullying

- There is no Federal law or regulation directly addressing the issue of bullying although Arizona does have a bullying law. (ARS 15-341(A) (37))
- United States Department of Education, Office of Special Education Programs (OSEP) has addressed bullying and the provision of FAPE under the IDEA.

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### 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)

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### Bullying and Sec. 504

- 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 (OCR)

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### Lesson Learned

- **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.**

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### 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 (District Ct., NY)

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### 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.

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### Liability

- The Director of Sp Ed initiated a referral to social services since 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 and the father filed a lawsuit against the Director.
- 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(6<sup>th</sup> Circuit Appeal pending)

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### Lesson Learned

- 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.
- Maintain documentation of the information and how you obtained it in a separate file from the student's education records.

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### Liability

- The parent of a student with autism sued the special education teacher and the school district alleging violations of the student's Constitutional rights for the improper use of a "safe room" which was in the IEP's behavior component.
- The teacher was entitled to qualified immunity since "at the time she acted, it would not have been clear to a reasonable official that placing [the student] in the safe room, as part of his aversive and behavioral intervention plan, was an unconstitutional seizure...or violated the [student's] substantive due process rights.

Payne v. Peninsula School District (9th Circuit)

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### Lesson Learned

- Ensure that all staff working with a student with behavior interventions in their IEP are informed of them and trained on how to properly implement them.
- Make certain staff are aware of and follow Arizona's law on the use of restraint and seclusion. (ARS 15-105).
- "Seclusion" means the involuntary confinement of a pupil alone in a room from which egress is prevented. Seclusion does not include the use of a voluntary behavior management technique, including a timeout location, as part of a pupil's education plan, individual safety plan, behavioral plan or individualized education program that involves the pupil's separation from a larger group for purposes of calming.

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### 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

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### Lesson Learned

- 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.

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### 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 (District Ct., Florida)

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### 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!!

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### 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)

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### 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 (U.S. Depts of Ed and Justice)

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### 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.

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Mahalo!!!

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