

## **SPECIAL EDUCATION AND STUDENT MATTERS UPDATE**

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This material addresses significant case law determinations, legislative updates and State and federal guidance from the last year that impact school district obligations to students, with an emphasis on matters involving students with disabilities. The challenge of balancing student rights involving bathroom and locker room use requests of transgender students are not included given their separate consideration in this conference.

### **Case Law Update**

#### **1. Supreme Court Review** (Source: [www.scotusblog.com](http://www.scotusblog.com), NSBA Supreme Ct. Update Oct. 11, 2016.)

A. *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, Docket No. 15 827, [798 F. 3d 1329 (10<sup>th</sup> Cir.)]. Issue(s): What is the level of educational benefit that school districts must confer on children with disabilities to provide them with the free appropriate public education guaranteed by the *Individuals with Disabilities Education Act*. Review granted 9/26/16.

B. *Fry v. Napoleon Cnty. Sch.*, Docket No. 15-497 [788 F. 3d 622, (6<sup>th</sup> Cir.)]. Issue(s): Whether the Handicapped Children's Protection Act of 1986 commands exhaustion in a suit, brought under the Americans with Disabilities Act and the Rehabilitation Act, that seeks damages – a remedy that is not available under the Individuals with Disabilities Education Act. Argued 10/31/16.

C. *Ivy v. Williams*, Docket No. 15-486 [781 F. 3d 250 (5<sup>th</sup> Cir.)] Did the U.S. Court of Appeals for the Fifth Circuit err in deciding that the relationship between public and private actors does not invoke dual obligations to accommodate in any context other than an express contractual relationship between a public entity and its private vendor. Argument scheduled 11/17/16.

#### **2. Circuit Courts of Appeals – Special Education & Section 504.**

A. **Seventh Circuit Court of Appeals.** No cases, but, appeal has been filed by the parents in *Jason O.*, summarized below.

##### **B. Other Circuits – Select Opinions.**

i. *Tina M. v. St. Tammany Parish Sch. Bd.*, 816 F.3d 57 (5th Cir. 2016), petition for certiorari denied. (Attorneys' Fees for Interim Relief of Stay Put)

Parents of a student with a disability under the IDEA requested a due process hearing and filed a stay-put order after their son's school attempted to change his placement in response to an incident that happened outside of school. The ALJ granted parents' request for a stay-put order and specifically noted that the order was not a final adjudication of the merits, rather it served as "injunctive relief during the

pendency of the due process action to maintain the status quo." Subsequently, parents and district reached an agreement through mediation and the ALJ terminated the matter without reaching the merits of the claims. Parents then filed suit on behalf of their minor son and, based on their successful request for a stay-put order, sought attorneys' fees under the I stay-put order was not a ruling on the merits, nor is the stay-put order a "similar form of judicially sanctioned relief" sufficient to confer prevailing party status. Rather, the IDEA's stay-put provision is an automatic procedural safeguard. Consequently, the parents were not the prevailing party and were not entitled to attorney's fees.

ii. Ivy v. Williams, 781 F. 3d 250 (5<sup>th</sup> Cir., 2015), petition for certiorari granted. (Duty to Accommodate, Public/Private Actors)

Putative class action was filed by a group of deaf individuals under the Americans with Disabilities Act and *Rehabilitation Act* alleging discrimination by the Texas Education Agency (TEA) in regard to its oversight of driver education facilities in Texas. In Texas, individuals under 25 must present a driver education certificate to the State in order to obtain a driver's license. The certificates are only available from private driver education schools licensed by the TEA. The schools all informed the named plaintiffs they would not accommodate their disability and the TEA took the position that it had no obligation to enforce the ADA absent the Department of Justice finding that the private driving schools had violated the law. Thus, the plaintiffs were unable to obtain a driver's license.

The Fifth Circuit Court dismissed the case reasoning that the driver education schools were not a service, program or activity provided by a public entity. The TEA neither taught nor contracted with the schools to teach driver education, and it did not issue driver education licenses. Its only role was to license and regulate the private schools, a task too attenuated to impose an obligation on the TEA as related to the actions of the schools themselves. To reach this conclusion the 10<sup>th</sup> Circuit Court reviewed the regulations of Title II of the ADA and Rehabilitation Act and concluded that they failed to identify what it meant to provide an aid, service or benefit. Interpretive guidance of the DOJ, however, takes a position that the public entity is not responsible for the discriminatory practices of a private entity on the basis of licensure alone unless the practice is the result of a requirement or policy established by the public entity. The 10<sup>th</sup> Circuit Court majority found no such connection here in the TEA's exercise of its licensing authority. The dissenting Justice argued that the TEA and private driving schools are inextricably intertwined to promote a State policy of safe driving and civic and community values and that the TEA more rigorously oversees its driver education providers than most "run of the mill" licensing operations. This case has been accepted for review by the United States Supreme Court.

iii. Fry v. Napoleon Cmty. Schs., 788 F.3d 622 (6<sup>th</sup> Cir. 2015), petition for certiorari granted. (Exhaustion)

Parents of a daughter born with spastic quadriplegic cerebral palsy were prescribed a service dog to assist their daughter in completing physical tasks, increasing her mobility, and helping her develop a sense of independence and social confidence in school. After a specially convened IEP meeting and a brief trial period during which time the girl brought the service dog to school, the school refused permission for the service dog to accompany the girl in the school because her current IEP included a one-on-one human aide to provide the type of support the service dog would provide. Subsequently,

the Parents began homeschooling their daughter and, two years later, the OCR found that the school's refusal to permit the service dog to accompany the girl in school violated the ADA, so the school changed its position. However, the Parents enrolled their daughter in a different district and filed suit under the Title II of the ADA, Section 504 of the Rehabilitation Act, and a state law.

The Court of Appeals for the Sixth Circuit affirmed the district court's decision to grant the school district's motion to dismiss on the pleadings because the Parents' claims required them to exhaust administrative remedies under the IDEA before filing suit. The court reviewed the IDEA's policy justifications and cited the holding in *Charlie F. v. Bd. of Educ.*, 98 F.3d 989, 993 (7th Cir. 1996) that when the injuries alleged can be remedied through the IDEA parties cannot evade the IDEA's procedures by bringing suit under other causes of action. Then, the court conducted a review of the Parents' claims and explained how each is "crucially linked to [their daughter's] education." "[B]ecause the specific injuries the [Parents] allege are essentially educational, they are exactly the sort of injuries the IDEA aims to prevent, and therefore the IDEA's exhaustion requirement applies."

Significantly, Judge Daughtrey wrote an eight-page dissent in which she asserted that the Parents' claims were not educational in nature and, thus, not subject to the IDEA's exhaustion provision. Rather, they were about equal access under the ADA, specifically access to a trained service animal. Because the Parents' request for a service dog required a modification of school policy, not the student's IEP, rectification could be accomplished by "a few keystrokes of a computer." Judge Daughtrey also cited the Ninth Circuit's en banc opinion in *Payne v. Peninsula School District*, which held claims that do not explicitly seek relief under the IDEA are not subject to the exhaustion requirement even if the injuries could conceivably be redressed by the IDEA. The appropriate inquiry then, according to the dissent, is whether the Parent's request for a service dog is "the functional equivalent of an IDEA remedy?"

iv. *Andrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 798 F. 3d 1329 (10<sup>th</sup> Cir.), petition for certiorari granted. Parents of fifth grade student with Autism appealed Hearing Officer and District Court denial of reimbursement for tuition costs associated with unilateral private school placement. Parents pursued private placement after student's behavioral challenges escalated in the District's program and prior to the District implementing a revised behavior plan developed with the assistance of outside consultants specializing in working with students with Autism. Procedurally, Parents alleged that poor progress reporting impeded their ability to meaningfully participate in their son's IEP development and lack of an FBA and behavior intervention plans over a two year period denied their son a FAPE. Substantively, the Parents' challenged whether the student's fifth grade IEP was reasonably calculated to provide an educational benefit due to similarities with prior IEP years and failure to consider the Student's escalating behavior issues.

The Tenth Circuit Court rejected the parent participation argument, finding the Parents were actively involved and aware of their son's progress in school, communicating with the teacher in some fashion daily and receiving draft IEPs from which they contributed to the IEP content. The court further determined that the IDEA did not mandate a behavior plan except for disciplinary reasons, which were not present in this case. Moreover, the school had "considered" and responded to the Student's behavioral needs as evidenced by the school's engagement of outside consultants to develop a behavior

plan but were impeded from implementing the plan given Parents' unilateral placement of the Student. Finally the court rejected the claim that the 5<sup>th</sup> grade IEP was not adequate. Despite the lack of data and meaningful comments in Student's progress reports, the record reflected that the goals over time typically increased in difficulty from year to year and reflected "some academic progress" had been made. It rejected Parent's contention that the 10<sup>th</sup> Circuit had adopted in a recent case the more stringent standard of "meaningful benefit" in use in the 6<sup>th</sup>, 5<sup>th</sup> and 3<sup>rd</sup> Circuits, and it is this decision which set up the appeal to the United States Supreme Court.

### 3. Illinois District Court Cases

A. *KJ v. Cook Cty. Sch. Dist. 104*, No. 15 C 8551, 2016 WL 212958 (ND Ill., Jan. 2016). (Pleading – Case Reassignment.) District's motion to reassign a case and join another with the same plaintiff alleging violations of student's rights under IDEA was denied on the basis of the District having failed to plead with specificity the issues of fact and law shared by the cases such that a judicial savings will be achieved and the commonality of issues to the outcome of both cases.

B. *B.G. v. Claypool et al*, No. 15 C 6372, 67 IDELR 6 (ND Ill., Feb. 2016). (Exhaustion of Administrative Remedies, Sufficiency of Pleading.) Parent sought an independent educational evaluation following assessment by the District. The District successfully defended its assessment, and Parent then filed a 50 page complaint with the District Court, the nature of the claims not set forth in the decision. The District and Claypool were dismissed from the case by agreement of the parties. ISBE sought to have the complaint dismissed on grounds of it failing to meet the pleading standards and failure to exhaust administrative remedies by way of the ISBE conducting its own evaluations. The District Court found sufficient factual allegations in the pleading to deny the motion to dismiss on procedural grounds. The District Court also identified the due process hearing on the issue of the appropriateness of the District's assessment to be sufficient for purposes of an exhaustion analysis.

C. *Raglin et al v. Board of Educ. of Bloom Twp. High Sch. Dist. #206 et al*, No. 15 C 4476, 2016 WL 772848 (ND Ill., Feb. 2016). (Exhaustion Of Administrative Remedies.) Parents failure to comply with Hearing Officer order to produce information, documents and witnesses in support of compensatory education claim led to the claim being stricken at the administrative due process hearing and subsequent dismissal of a Section 504 and equal protection claims for damages due to failure to have exhausted administrative remedies under IDEA.

D. *Jason O. et al v. Manhattan Sch. Dist. No. 114*, No. 14 C 7778, 173 F. Supp. 3d 744 (N.D. Ill., March, 2016) appeal filed, No. 16-1901 (7th Cir. April 5, 2016). (Child Find, Predetermination, Stay Put, Hearing Procedures, FAPE, LRE, Reimbursement.) Parents of kindergarten student diagnosed with Dysthymic Mood Dysregulation Disorder and Attention Deficit Hyperactivity Disorder challenged school district's IEP and placement on multiple procedural and substantive grounds plus sought reimbursement for third party evaluations and private preschool placement. District's placement of student in a self-contained classroom for students who need significant socio-emotional supports and "in the moment" instruction was upheld given District's exhaustion of options for maintaining student in a general education setting and evidence of student's academic regression and failure to make any progress on

behavioral goals. Services progression included trial period in Early Childhood preschool program, where student was successful; transition to regular kindergarten class with increasing amounts of social work support over time; consideration of outside evaluations and incorporation of some of their recommendations into student's program; reconsideration of eligibility label; use of a behavioral consultant; implementation of a FBA/BIP, student retention in kindergarten and delay of preferred placement at Parent request with modification of existing plan.

Parents prevailed only on issue of reimbursement for full cost of privately obtained evaluations that subsequently were relied upon by the District rather than post-insurance costs awarded by the Hearing Officer. In modifying the original award under its equitable powers, the District Court relied on the Restatement (Second) of Torts §920A and reasoned that the District should not be credited for payments made by third parties and thereby avoid having to compensate the Parents for the full harm caused when the District chose to rely on Parents' outside evaluations rather than conduct its own. Requests for reimbursement of private preschool tuition, private OT services and transportation from the student's preschool to the district for speech services during that time were denied.

E. *Martin v. E. St. Louis Sch. Dist. #189*, No. 14-CV-1393-MJR-SCW, 2016 WL 1718332, (S.D. Ill., April 29, 2016). (Duty to Protect – State Created Danger.) Court held that East St. Louis School District #189 did not violate the 14th Amendment rights of female high school student with an intellectual disability by failing to prevent her on-campus rape by a general education student. Complaint alleged violation of 14th Amendment, Title IX, Section 504 of the Rehabilitation Act, and Title II of the Americans with Disabilities Act. The School District's motion for summary judgment on the Parent's federal claims was granted. Court declined jurisdiction over state law claims. The District Court held that the District does not have a duty to protect from private parties under the 14<sup>th</sup> Amendment, and the allegations were insufficient to conclude that the District was indifferent to a substantial risk of rape. The District's inaction did not amount to a state-created danger for purposes of Section 1983 and fail for "want of notice." The District was not on the kind of notice required to be liable under Title IX; the District must have known of misconduct that would have created the risk.

F. *Allison W. v. Oak Park & River Forest High Sch. Dist. #200*, No. 16 C 2725, 2016 WL 3034067 (N.D. Ill., May 27, 2016). (Exhaustion.) Defendants Oak Park and River Forest High School District # 200 and Superintendent Steven Isoye moved to dismiss Count III of Plaintiff's Amended Complaint, which sought to bring a 42 U.S.C. § 1983 claim related to deprivation of the rights of minor Allison W. under the Individuals with Disabilities Education Act ("IDEA," 20 U.S.C. §§ 1400 et seq.). The Court noted that although federal courts of appeal are split on whether parties can bring claims under § 1983 for violations of IDEA, the Seventh Circuit has held that § 1983 can be an avenue for pursuing remedies under IDEA.

G. *Thurmon v. Mount Carmel High Sch.*, No. 15 C 4500, 2016 WL 3227307 (N.D. Ill., June 13, 2016). (Discrimination) Student, a senior in high school with learning disabilities under Individuals with Disabilities Act (IDEA), brought action against parochial high school, principal, and two teachers, who also were football coaches, alleging violations of §1981, the *Rehabilitation Act*, intentional interference with prospective economic advantage, breach of contract, and intentional infliction of emotional

distress, arising from his suspension. The District Court held that Student's conclusory and unsupported allegation that the circumstances he was subjected to at private school was based on his race did not support his §1981 claim, and that Student failed to allege intentional discrimination during his suspension, as required to support his *Rehabilitation Act* claim. Specifically, the Court noted that Student alleged that he was deprived of accommodations for ADHD while suspended from school, but failed to show that he needed certain accommodations and was not provided them during the suspension.

*H. Kuhner v. Highland Cmty. Unit Sch. Dist. No. 5, No. 15-CV-00107-JPG-DGW, 2016 WL 3254487 (S.D. Ill., June 14, 2016).* (Exhaustion.) The Court dismissed a Parent's amended complaint which was comprised of various 42 U.S.C. § 1983 failure to protect claims; violation of the Rehabilitation Act of 1973; violation of the Americans with Disabilities Act; and willful and wanton misconduct claims based on alleged bullying, emotional injury, bodily injury, and payment of medical bills. The facts alleged that Student J.K. had stopped attending school and attempted suicide due to bullying and harassment at school. The Court noted that although the bullying and harassment of Student J.K. was undoubtedly cruel, the Parents were required to pursue all avenues to ensure the safety and welfare of their child. The Court did not find that any of the exceptions to IDEA's exhaustion requirement were applicable to the facts at hand.

I. *Nardella v. Leyden High Sch. Dist. 212, No. 15-CV-4885, 2016 WL 4245528, at \*1 (N.D. Ill. Aug. 11, 2016).* (§1983 remedy for IDEA claims, Intentional Infliction of Emotional Distress.) Plaintiff, Cynthia Nardella, acting as the parent and guardian of C.D. (student with autism a/k/a Asperger's syndrome), filed a first amended complaint against Leyden High School District 212, Nick Polyak, the Superintendent of Leyden High School District 212, the Board of Education of Leyden Township, Melinda R. McGuffin, Kate Talsma, Katie LaCount, Kathy Klaus (collectively "the Leyden defendants"), and the Adventist Glen Oaks Hospital Therapeutic Day School (Glen Oaks). C.D. has deficiencies in the areas of social interaction, social understanding, and obsessive and compulsive thoughts and behaviors. Subsequent to a due process hearing, initiated by Parent, the hearing officer issued a Final Decision and Order ("FDO"), which concluded that the District had failed to address C.D.'s needs. The District was ordered to schedule an independent evaluation of C.D. and subsequently arrange for ten one-hour individual counseling sessions with a qualified mental health professional. Nardella filed suit appealing a hearing officer's FDO asserting federal claims under 42 U.S.C. § 1983, which the court did not specify, and raising a state law claim for intentional infliction of emotional distress.

The individual defendants were dismissed from Count I, which appealed the hearing officer's FDO as they were not parties to the underlying due process hearing and could not be joined on appeal. The Court followed the example of the Seventh Circuit and withheld resolution of the question of whether Section 1983 actions are available to remedy IDEA violations until after summary judgment. The court held that although the plaintiff's allegations identified specific instances in which District employees purportedly behaved unprofessionally and disrespectfully, turning a blind eye to C.D.'s personal and educational needs, those allegations did not evince the level of extreme and outrageous conduct required to establish an actionable intentional infliction of emotional distress claim. Nardella's allegations against the District and McGuffin that they turned a blind eye to Talsma, Klaus, and

LaCount's conduct, therefore, similarly fail to demonstrate extreme and outrageous conduct. The court held that there was no basis in the allegations for the Court to conclude that C.D.'s placement at Glen Oaks constituted extreme and outrageous conduct beyond all bounds of human decency. The Court noted that even if an instance of extreme and outrageous conduct had been identified, Nardella did not allege that any of the defendants intended to cause C.D. severe emotional distress or knew of a high probability that they might do so. Accordingly, Nardella did not state a claim for intentional infliction of emotional distress.

#### 4. Due Process Hearing Officer Cases

A. 116 LRP 27408, In re: Student with a Disability; Illinois State Educational Agency 2015-0388, February 16, 2016 (Milsk). MF is a 10 year old female fifth grader with a significant reading disability which impacts her ability to learn across all domains, and has combined type ADHD. MF also struggles with executive functioning. The issues presented in the matter are: (1) Whether the Parents should be reimbursed by the School District, in whole or in part, for the cost of MF's parental placement at a private therapeutic day school, from the 2014 summer session through the date of this decision (February 16, 2016); (2) Whether, going forward, MF requires a therapeutic day school to receive a free appropriate public education (FAPE); (3) Whether the School District denied FAPE to MF by (a) failing to give full consideration to private evaluations of MF obtained by Parents at their expense in developing the IEP of December 11, 2013, (b) failing to provide an appropriate evaluation of MF's assistive technology (AT) needs and (c) failing to appropriately address MF's educational needs in the areas of reading, writing, math and speech/language; (4) Whether MF's rights were violated by the School District from April 9, 2013, through the date of this decision, and, if so, should MF be awarded compensatory services? Parents sought determination that they should be fully reimbursed for the cost of educating MF in the therapeutic day, and that MF's educational placement should continue to be that private school, and also sought compensatory services for MF.

The Hearing Officer found that the School District failed to provide FAPE to MF prior to her removal from the School District, reasoning that this conclusion was based mainly on substantive grounds – noting that MF's most recent, was not reasonably calculated to enable MF to receive educational benefit. Hearing Officer also noted procedural shortcomings in that the IEP goals and benchmarks are not tied specifically to the Wilson program steps, and the present levels of educational performance lack the measurability necessary to write specific measureable goals and benchmarks. It was found that the mechanism for providing the Parents with regular progress reports and homework assignments, which they have repeatedly requested, was lacking.

Second, the Hearing Officer found parental placement at the private school was appropriate under the Burlington/Carter (decisions holding that parents can be awarded tuition reimbursement under certain conditions that were codified in the 1997 IDEA amendments and refined further in 2004). Hearing officer noted that a parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by a local school district.

Hearing Officer concluded that the Parents' decision to place MF in in the therapeutic day school was reasonable in light of her lack of progress at public school and the private school's focus on students with disabilities similar to MF's.

The Decision reflects the conclusion that the equities warrant a partial reimbursement of tuition for the private school placement.

With regard to compensatory services, H.O. noted that Deficiencies in the District's 2013 IEPs for MF included the lack of a Wilson Reading program, no direct speech therapy, no clearly described multisensory program or collaborative teaching process, no specific assistive technology programs, devices or services based on an individualized assessment, and no social work services, which the private school was providing, and compensatory services in the form of tuition payment to enable MF to remain in the private school through the end of the 2015-2016 academic year were appropriate to meet her needs and to enable her to accrue some of the educational gains she was denied.

B. 116 LRP 27410, In re Student with a Disability, Illinois State Educational Agency 2015-0495, December 23, 2015 (Maxwell-Wickett). Parents of a seven year old student being home schooled due to Parent's disagreement with the placement proposed by the School District challenged the District's placement on the basis of it not being the least restrictive environment. They also challenged the District's compliance with its Child Find obligations; challenged the qualifications of the student's general education teacher, school social worker, building principal and Superintendent and asked for the functional assessment of behavior committed to in the IEP be completed in the general education setting rather than the placement recommended by the District. Student was eligible for services under the category of ED and has a diagnosis of severe Oppositional Defiant Disorder. The District recommended placement was a self-contained public day program, with a goal to reintegrate the student in the regular school setting when appropriate.

The Hearing Officer upheld the District's placement based upon the student's persistent disruptive and unsafe behaviors despite multiple services provided in the general education setting to try and address the behaviors. Interventions included: teacher redirection, preferential seating, sensory breaks, visual and auditory modes of instruction, use of a behavior management plan, time out, additional staff support, and individual social work services. The District's efforts to intervene with the Student's behaviors over a two month period and analysis of data collected related to these efforts before seeking a special education evaluation coupled with the Parents' initial refusal to consent to an evaluation supported a finding in favor of the District on the question of Child Find. Finally, on the question of staff qualifications, the Parent's only evidence was that the staff could not intervene with her child's behavioral needs in a general education setting. This was not enough to overcome the District's evidence of qualification based upon licensure, evaluations and training, and the Hearing Officer noted the staff's lack of success was indicative of the severity of the student's needs not the staff's lack of ability.

C. 116 LRP 27412, In re: Student with a Disability. Illinois State Educational Agency 2016-0002, January 15, 2016 (Leisner). Parents of 18 year old student with multiple disabilities needing transition

services filed due process alleging failure to provide a FAPE, including ESY services; failure to provide an appropriate placement for transition services; failure to consider private evaluations and violations of the student's confidentiality rights by sharing the student's IEP with a therapeutic day program absent written consent. The student had earned sufficient credits to graduate but continued to need transition services related to social skill development and independent living skills. Parents placed student unilaterally in an out-of-state residential program and sought reimbursement of tuition and an order of prospective placement for the remainder of the school year. The residential program was not an educational program and was not an ISBE approved facility.

Parents' failure to sign student up for the District's summer program undermined their claim that ESY was not provided. The District's failure to follow through with an IEP meeting to identify the student's fall services in an IEP that ran January to January resulted in a finding against it. The Hearing Officer rejected the argument that Parent abandonment of District services via a unilateral placement excused its following through with the meeting given that Parent testified she would have met with the District and considered what was offered. That the existing IEP goals were written for a therapeutic day program to which the student could not return, having aged out midway through the IEP year, also supported a finding in favor of Parents.

Finally, the District's failure to identify a specific placement for student that it would provide contributed to the Hearing Officer awarding reimbursement to the Parents. Preliminary negotiations with the Parents' paralegal regarding potential placements was not enough to save the District as those discussions did not incorporate the procedural safeguards associated with developing an IEP. Rather, they appeared to have occurred during due process resolution efforts – a day late and a dollar short. Although the Hearing Officer found the student did not need residential placement due to his disability, the point was noted as being moot due to the failure of the District to offer any placement and the student making progress on his disability related needs while there.

D. 116 LRP 27414 In re: Student with a Disability; Illinois State Educational Agency 2016-0077, May 20, 2016 (Fuhrmann). This matter involved a due process proceeding initiated by non-custodial Mother. The issues presented are whether District provided non-custodial Mother with notice and procedural safeguards related to evaluation, assessment, and identification of disabilities, where the failure to provide such notice impeded Parent's participation in the decision making process, whether Parent was denied opportunity to inspect, review, and receive copies of student records denying Parent opportunity to participate in decision making process. There is no allegation of denial of FAPE. Student was in 8<sup>th</sup> grade with a 504 Plan. Pursuant to family court Order, Father was granted temporary custody of Student, and as such is the custodial parent. Hearing Officer concludes that Mother is not "the parent" under IDEA. However, Hearing Officer explains that non-custodial parent still retains procedural protections granted to parents under IDEA. Hearing Officer also noted that District is not required to secure attendance of both parents at meetings. District was ordered to provide Mother with IDEA Notices, not to restrict Mother's access to Student's education records, and to submit proof of compliance to the ISBE.

E. 116 LRP 27416 In re: Student with a Disability; Illinois State Educational Agency 2016-0135, May 14, 2016 (Maxwell-Wickett). Student was a 16 year old male junior in high school. Student was eligible for special education services under the categories of autism and speech or language impairment. Student was enrolled in general education classes with modifications and supplementary aids and services. He was also enrolled in a self-contained special education classroom for designated minutes per week. Parents due process complaint alleged denial of FAPE premised upon disagreement with various services (speech language, transition, social work, and academic instruction), as well as disagreement with IEP goals and accommodations, claims that she was denied opportunity for meaningful participation at several IEP meetings (District allegedly ignored her requests for additional meetings and required personnel were allegedly not present at meetings), failure to evaluate all suspected areas of disability, and allegations related to denial of FAPE based on Student's placement in an interim alternative educational setting based on a bomb threat that was found to be a manifestation of his disability.

The Hearing Officer found that the removal to the IAES was a change of location, and not a change of placement for which compensatory services were owed, because the school district provided "comparable/identical" services to the Student and Parent failed to demonstrate any harm from the change. Hearing Officer concluded that District did not violate procedural right with regard to required attendance at meetings. With regard to substantive claims, Student was not denied FAPE based on one missed 30 minute session of speech language services. Hearing Officer concluded that Student was provided transition services as required by IEP, academic instruction was appropriate, and Student was provided required accommodations according to his IEPs. Hearing officer addressed additional claims made by Parent related to health and safety plans, evaluations, and goals and concluded that Parent's allegations in several instances were without merit and the District provided Student with FAPE.

F. 116 LRP 27418, In Re Student with a Disability. Illinois State Educational Agency 2016-0063, February 13, 2016 (Maxwell-Wickett). Parents of 5<sup>th</sup> grade student eligible for services under SLD and SLP unilaterally placed student in a private therapeutic program where she received intensive instruction using Wilson methodology, speech, occupational therapy and social work support. Hearing issues involved appropriateness of the IEP goals, sufficiency of related services, and instructional methodology utilize in the areas of language arts, math, speech language therapy, occupational therapy and assistive technology; and whether the district appropriately considered student's progress or lack thereof and its own evaluations in revising the student's IEP; and least restrictive environment. The Hearing Officer found for the Parents and awarded reimbursement for the private placement and tutoring. The basis of the award included the District's failure to conduct OT and AT evaluations, failure to consider its own evaluation data as to student's present levels of performance and then address the identified needs in the student's IEP, failure to collect data or accurately report on the data it did collect when issuing progress reports, failure to provide services to the level listed in the IEP, failure to provide accommodations and failure to notify Parent of her procedural safeguards. Student's progress in the private placement and Parent efforts to work with the district prior to unilaterally placing student, moreover, supported the award of tuition reimbursement.

G. 116 LRP 27486, In re Student with a Disability, Illinois State Educational Agency 2016-0350, January 15, 2016 (Maxwell-Wickett). Parent of a 16 year old student eligible for special education under SLD and OHI challenged the adequacy of the student's reading goal and the District's implementation of the goal as well as the adequacy of transition goals geared toward independence and self-advocacy around completing work. Parent sought an award of tutoring at the student's school and a year of tutoring and homework assistance from Sylvan Learning Center. The Hearing Officer ruled in favor of the District based on the student's adequate progress in all of his general education, co-taught classes and IEP goals. Student's own testimony as to the basis for his homework performance, or lack thereof, was relevant to the Hearing Officer's determination that the homework difficulties were choice driven behaviors not disability related behaviors.

## **Legislation**

**1. Academic Programming Considerations.** Laws impacting academic programming which have been passed or updated include:

A. Driver Education – Traffic Stops (new). Requires public school districts and private entities include to in the curriculum for driver education information regarding how to respond in traffic stops, including demonstrations. PA 99-0720, eff. 1/1/17.

B. Gifted Students – Eligibility Testing. Modifies the requirements associated with eligibility testing for gifted programs funded through a State grant. PA 99-00706, eff. 7/29/16.

C. Juvenile Justice Act – After Care Planning (new). Addresses efforts to better support juveniles preparing to and re-entering the community following release from commitment to the Department of Juvenile Justice through the provision of after care services. Relevant to school districts is language that mandates a prohibition on access to and use of the Internet to communicate with minors, absent court order to the contrary, for students convicted of certain sexual offenses against minors. PA 99-0628, eff. 1/1/17.

D. Minors Participation in Elections (new). Allows minors who are 17 years old to participate in a caucus, general primary election, or consolidated primary election nominating candidates when they will be eligible to vote (i.e. 18 years of age) in the immediately following general election or consolidated election. PA 99-0722, eff. 8/5/16.

E. Student Journalists (new). Expands the free speech rights of "Student Journalists", simultaneously narrowing the authority of school districts to engage in "prior censorship" of Student Publications while preserving the districts authority to teach principals of journalism. The law creates, in essence, three classifications of student speech in schools: a) speech prohibited by all students, b) speech that may be prohibited for all students other than student journalists, and c) student journalists' speech. Student journalists are defined as "public high school student[s] who gather[], compile[], write[], edit[], photograph[], record[], or prepare[] information for dissemination in school-sponsored media." Student Journalists' publications are those publications, whether written or broadcast, made

under the direction of a teacher or media advisor and published to the student body, outside of the classroom in which the speech is produced. PA 99-0678, eff. 1/29/16.

**2. Attendance.** Two new laws address attendance requirements:

A. Excused Absence, TAPS – Students must be granted an excused absence for purposes of sounding TAPS at military honors. PA 99-804, eff. 1/1/17.

B. Truancy & Charter Schools. Subjects charter schools to the same truancy rules governing public schools. PA 99-0596, effective 7/22/16.

**3. Concussion Reporting.** Requires IHSA to impose monthly reporting obligations on member school districts "that have certified athletic trainers" in regard to student athletes of whom they are aware who have sustained concussions. The IHSA then is to report aggregated data to the General Assembly. PA 99-0831. Effective 8/19/16.

**4. DCFS Liaison.** Encourages school districts to identify at least one individual to serve as liaison to DCFS to facilitate student enrollment and records transfers. Requires preference be given to staff who meet select experience and training requirements. PA 99-0781, eff. 8/12/16.

**5. Dyslexia – Statutory Definition.** Incorporates into the School Code the international definition of dyslexia which last year was adopted by the ISBE in special education regulations. The change makes it clear that the definition is applicable to students impacted by the condition whether or not they have an IEP. PA 99-0602, eff. 7/22/16.

**6. Early Childhood Block Grants.** Increases Early Childhood Block Grant funding dedicated to 0-3 programs by 25% of new funding over prior fiscal years until a floor of 20% of overall funding dedicated to this age group is achieved. PA 99-0589, eff. 7/21/16.

**7. Environmental Barriers – Disability Access.** Identifies the Illinois Accessibility Code (71 Ill. Admin. Code 400) as the governing standards for improving access to public facilities and multi-unit housing. Updates definitions, including what constitutes a public area and who is "the public", and path of travel standards; strengthens enforcement provisions, including prohibiting waivers of the Code. PA 99-0582, eff. 1/1/17.

**8. Medication Administration.** Several bills were passed impacting the availability and administration of medication in schools related to public health initiatives associated with the asthma management, the heroin crisis and access to epinephrine auto-injectors.

A. Asthma. Imposes an affirmative duty on school districts to request annually an "asthma action plan" for students known to have asthma and requires school districts to adopt emergency response protocols that align with model protocols developed by the ISBE. PA 99-6333, eff. 8/19/17.

B. Epinephrine auto-injectors – Availability and Costs. Specifically authorizes use of undesignated epinephrine auto-injectors on school busses and mandates that the entity ordering the

undesigned epinephrine auto-injector "shall be" responsible for the cost of the medication. PA 99-0711, eff. 1/1/17.

**9. Post-Secondary & Workforce Readiness Act.** This law has three primary goals aligned to improving student readiness for post- secondary education or employment. A. Establishes workforce to develop model post- secondary and career expectations and identify activities for school districts, Parents and community organizations to develop students' knowledge in the areas of career exploration, post-secondary exploration and financial aid/financial literacy. B. Allows for a pilot, competency based high school graduation program, supported in part with State grant funds to the extent available, for implementation in FY 2019-2022, with next steps dependent on success of the pilot program(s). C. Creates partnerships with community colleges for "transitional mathematics instruction" and Statewide implementation of the same by FY 2019, contingent on public and private funding, with an opt out option for school boards who find it too costly to implement. PA 99-0674, eff. 7-29-16.

**10. Residency Hearings.** Updates Section 10-20.12a of the School Code, articulating specific notice, evidentiary standards and procedural safeguards governing residency hearings. PA 99-0670, eff. 1/1/17.

**11. School Breakfast Programs.** School districts with student populations wherein 70% or more of the students are eligible for free and reduced lunch, are low income or can be claimed for free or reduced lunch must provide "breakfast after the bell" unless they can show they already effectively serve 70% of the population or are excluded out for specific cost reasons after a public hearing. Program to be put into effect FY 2018. PA 99-0850, eff. 1/1/17.

**12. Staff Training, Americans with Disabilities Act.** Requires staff training every two years regarding the rights of individuals with disabilities under the Act and the obligations of school districts and personnel. PA 99-0616, eff. 1/22/16.

**13. Transition to Post-secondary Employment or Education (students with and without disabilities).** A handful of laws went into effect impacting students' opportunities beyond their high school years:

A. Biliteracy State Seal, Foreign Language Credit. Requires State colleges and universities to accept the Biliteracy State Seal on a student's transcript for foreign language credit. Grants students up to three years to request recognition of such credit. PA 99-0600, eff. 1/1/17.

B. GED – Waiver of Fee, Homeless Students. Requires waiver of GED testing fees for students who are homeless. PA 99-0742, eff. 1/1/17.

C. International Baccalaureate Diploma. Requires colleges and universities to accept a score of 4 or more for courses which the college or university must identify. PA 99-0624, eff. 7/22/16.

D. Post-Secondary & Workforce Readiness Act. Creates among other things a committee of stakeholders to develop and publish model postsecondary and career expectations for public school students in grades 8-12 and an optional College and Career Pathway Endorsement for high school diplomas. PA 99-0674, eff. 1/1/17.

E. PUNS Wait List – Parent Notification. The ISBE notice to parents regarding access to adult services is to be updated to include the consideration of the amount of time an individual has been on the Prioritization of Urgency of Need wait list when selecting individuals for services. PA 99-0716, eff. 1/1/16.

**14. Student Retention Committee – CPS.** Allows CPS to create a committee to review and make final determinations regarding student retention. PA 99-0592, eff. 7/22/16.

**15. Task Forces.** Several task forces are authorized to study the current state of affairs in Illinois and make recommendations for action which likely will impact students in the near future through academic programming options or obligations or assistance in access to the District's services and programs.

A. At Risk Students Advisory Council. Creates an ISBE advisory council tasked to study school districts serving a majority of minority students in regard to performance of and barriers to success for at risk students (students receiving one or more of multiple services via DHFS), programs and curriculum that is successful with at risk populations and teaching of cultural history. PA 99-721, eff. 8/5/16.

B. Bilingual Advisory Task Force. Directs the existing task force to study the feasibility of requiring specific qualifications for interpreters in schools and, if needed recommend procedures for when and how schools should access such services. HJR 0127.

C. Computer Science Education - Creates a bi-partisan task force to analyze current computer science education and laws, highlighting best practices, with recommendations to the General Assembly. PA 99-647, eff. 7/28/16

D. Reading Advisory Group – Reestablishes the reading advisory task force, which sunset in December 2015, to develop teacher and administrator training modules regarding multi-sensory, systematic, and sequential instruction in reading. PA 99-0603, eff. 7/22/16.

E. Youth Unemployment Task Force – Establishes a five member task force comprised of DHS, DCC and community organization representatives to study the youth unemployment crisis, particularly as related to "youth of color" and report to the General Assembly by December 2017. Sunsets January 1, 2018. PA 99-0645, eff. 7/28/16.

**16. Transportation, Students with IEPs.** Allows school districts to utilize multi-functional school activity buses to transport students with an IEP to specifically identified private schools (Acacia Academy, Alexander Leigh Center for Autism, Marklund Day School, Helping Hands Center, Connections, New Horizon). PA 99-0888, effective 1/1/17.

## **Significant State and Federal Guidance**

### **1. Federal Guidance**

A. Non-Regulatory Guidance: Ensuring Educational Stability for Children in Foster Care (US DOE and DHHS, June 23, 2016). Builds on the Fostering Connections Act and ESSA Title I requirements to coordinate child welfare and educational agency collaboration on behalf of foster children to "promote greater stability for children in foster care so that they can continue their education without disruption, maintain important relationships with peers and adults, and have the opportunity to achieve college- and career-readiness."

B. Students with ADHD and Section 504: A Resource Guide, (OCR, July 26, 2016). This Resource Guide reviews obligations to students diagnosed with attention deficit hyperactivity disorders under IDEA, Section 504 and the ADA. Of note, the Guide articulates the OCR's position of starting with the presumption that a student diagnosed with ADHD is a student with a disability, leaving open the possibility for rebutting the presumption.

C. Non-Regulatory Guidance: English Learners and Title III of the Elementary and Secondary Education Act (ESEA), as amended by the Every Student Succeeds Act (ESSA)(US DOE, September 23, 2016). Addresses use of Title III funds to provide supplemental services that improve the English language proficiency and academic achievement of English Learners.

D. Non-Regulatory Guidance Early Learning in the Every Student Succeeds Act Expanding Opportunities to Support our Youngest Learners (US DOE, October 2016). Reviews the importance of investing in early learning, highlights opportunities available under the law to strengthen early education, and provides examples of how States and local communities may support young children's success in school.

E. Non-Regulatory Guidance Student Support and Academic Enrichment Grants (US DOE October 2016). Addresses requirements of ESSA Title IV grant opportunities.

F. Education for Homeless Children and Youths Program Non-Regulatory Guidance (US DOE, July 27, 2016). Updates the federal guidance based on ESSA changes that take effect October 1, 2016, including extension of rights to preschool age students.

G. Understanding The Confidentiality Requirements Applicable To Idea Early Childhood Programs, Frequently Asked Questions (FAQS) (OSEP, October, 2016). Discusses obligations under both Part B and Part C, comparing and contrasting them to one another and FERPA.

H. OSEP Dear Colleague Letter on Ensuring Equity and Providing Behavioral Supports to Students with Disabilities (August 1, 2016). Reviews IDEA requirements to address student's behavioral needs and notes that multiple short term suspensions can be an indicator that existing interventions are not sufficient.

I. OSEP Memo 16-07. Response to Intervention Process Cannot Be Used to Delay-Deny an Evaluation for Preschool Special Education Services under the Individuals with Disabilities Education Act. The subject matter line says it all.

J. OSEP Dear Colleague Letter on Children with Disabilities Residing in Nursing Homes (April 26, 2016). Reminder that children with disabilities residing in nursing homes have full IDEA rights and highlights some of the unique considerations related to these cases.

K. OSEP Letters Illinois Connection:

i. Letter to Perry Zirkel (OSEP August 22, 2016). Parents and District may not waive the 20 day hearing time line for an expedited hearing. Related, unidentified ISBE policy question to be addressed directly with the State. IDEA does not identify "core characteristics" of an RTI process or address fidelity of implementation. The one year time line for implementation of corrective action in a State complaint may be extended for good cause but the State must continue to follow up on compliance efforts.

ii. Letter to David Andel, ISBE (OSEP February 2016). When parents bring an attorney to an IEP meeting without prior notice to the district, the district may request the meeting be rescheduled so long as doing so would not delay or deny the student a FAPE. The District cannot require the parent to proceed with the meeting without the attorney present given the parent's right to invite individuals with special knowledge to meetings. OSEP also reiterated its strong recommendation that attorneys not attend IEP meetings due to the adversarial atmosphere that can result.

G. Proposed Rule - Equity in IDEA. 81 Fed. Reg. 41. Proposed rule "requires states to implement a standard approach to compare racial and ethnic groups, with reasonable thresholds for determining when disparities have become significant." OCR Press release, February 23, 2016 <http://www.ed.gov/news/press-releases/us-department-education-takes-action-deliver-equity-students-disabilities>. Public comment period closed.

## 2. State Guidance

A. Appropriate Standard Practices For Illinois Special Education Due Process Proceedings With Accompanying Forms And Certification Procedures, (ISBE, 2016). This guideline was developed by the ISBE, Division of Special Education and Support Services with significant input from the hearing officers over several years. It outlines procedures commonly used in special education due process hearings and provides model forms. Use of these procedures and forms are not mandatory. The guideline currently is available at: <http://www.isbe.net/spec-ed/pdfs/due-process-standard-practices.pdf>.

B. Emergency Response Protocol – Asthma. Consistent with PA 99-0843, this protocol has been developed and is available on the ISBE website at: [http://www.isbe.net/spec-ed/pdfs/asthma %20response\\_protocol.pdf](http://www.isbe.net/spec-ed/pdfs/asthma%20response_protocol.pdf). A sample asthma action plan also is available: [http://www.isbe.net/spec-ed/pdfs/sample\\_asthma\\_plan.pdf](http://www.isbe.net/spec-ed/pdfs/sample_asthma_plan.pdf) The documents reflect a collaboration between the ISBE and the American Lung Association, Respiratory Health Association, Illinois Asthma Partnership, Chicago Asthma Consortium and Illinois Association of School Administrators. (October 2016).

C. Medical Form, Home /Hospital Services. ISBE has published an optional form for parents to request such services. The form incorporates some of the statutory requirements to support home/hospital requests. <http://www.isbe.net/spec-ed/pdfs/34-58-home-hospital-inst.pdf>

D. Model Suicide Prevention Policy. The ISBE has adopted the IASB PRESS policy for its model suicide prevention policy. Copies can be requested from lbremer@iasb.com with the subject line: Suicide Awareness & Prevention Policy Request.

E. FAQ, Sex Education (ISBE, April 2016). Reviews requirements of districts regarding the provision of sex education, including information on abstinence and contraception and parental opt out rights. <http://www.isbe.net/spec-ed/pdfs/guidance-16-1-sex-education.pdf>

## **Miscellaneous**

**1. Special Education Regulations.** Updates occurred, effective January 13, 2016. In addition to language clean up and term of art changes (PEL for certificates, intellectual disability for cognitive impairment, career and technical for vocational), the updates:

- A. Clarify that the State complaint process can be used to challenge evaluation request denials, §226.110(k);
- B. Incorporated the definition of Dyslexia, also set forth in the School Code, §226.125;
- C. Clarifies the treatment of evaluations and IEPs when there is less than the standard implementation time left in the school year, §§226.110(d), 226.220(a);
- D. Imposes an obligation on the resident school district to ensure a surrogate parent is appointed for a ward of the court if the residential facility has not already obtained one. §226.550(a);
- E. Adds the reference to stay put obligations in mediation, §226.560(b), and clarifies the time by which the ISBE is to conduct its investigations of complaints and district's respond to such complaints, §226.570(c);
- F. Removes the burden of filing with the ISBE any special education policy updates and instead requires they be on file available upon request, §226.710(a);
- G. Clarifies that the 70/30 class size applies to general education classrooms with qualified teachers employed for the purpose of teaching general education, §226.730(a);
- H. Reframes special education work load plans as "work load limits" and emphasizes the intent that the plan be implemented and maintained versus just "adopted"; requires bargaining unit meetings on the subject to occur soon enough to allow implementation by the start of the school year, §226.735(a);
- I. Simplifies Section 7.03 reimbursement cost calculations, removing supplemental considerations not set forth in the *School Code*;
- J. Adjusts for retirement of the sue of "administrative" endorsement – directors of special education and assistant directors of special education having to hold a special education director endorsement, §226.800(g), and chiefs of special schools being able to hold a principal or special education director endorsement, § 22600(h);

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K. Requires schools to keep on file and produce upon request evidence of the credentials of "other personnel", §226.800(j)(3);

L. Reinforces that aides without a PEL may not perform "nursing activities" without a nursing license, §226.800(k)(2);

M. Sunsets as of Aug. 15, 2015 (sic) rules for issuance of special education teaching approvals for transition endorsements to the LBS-I and II standards following the *Corey H* special education licensure restructuring, §226.810;

N. Adds qualifications necessary for reimbursement for LBS-1 while removing reference to cross categorical; updates requirements for music therapist, utilizing a National Music Therapy Registry listing or four year college degree, §226.850; and

O. Removes speech/language paraprofessionals as noncertified personnel for whom reimbursement may be obtained, §226.860.