

Legal Developments in the Education of Students with EBD: What You Need to Know and Why

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Overview of Session

- Every Student Succeed Act of 2015
- Recent DCL Documents
- Mental Health Decisions
- Update on Aversives Decisions
- Bullying Issues
- Other Issues
- General Discussion

The Every Student Succeeds Act of 2015

December 10, 2015
Reauthorizes ESEA and replaces NCLB

Important Dates

- 2016 - 2017 Transition year
- Grant programs begin in 2016
- State accountability plans go into effect in the 2017 - 2018 school year

The Intent of ESSA

ESSEA is an attempt to preserve the standards-based reform intent of NCLB (high standards, accountability, closing the achievement gap) while doing away with many of the unworkable and stringent requirements of NCLB and moving authority to the states and away from the federal government

Changes From NCLB: Gone

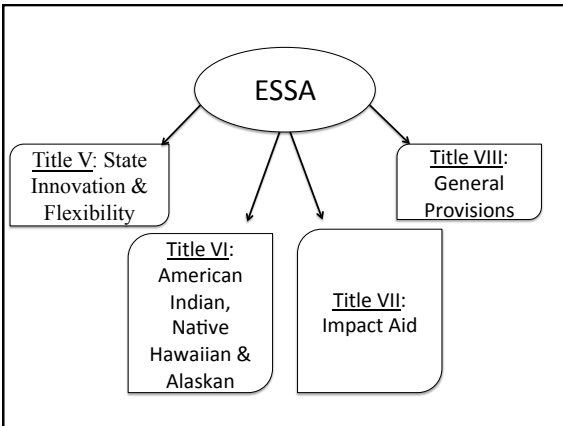
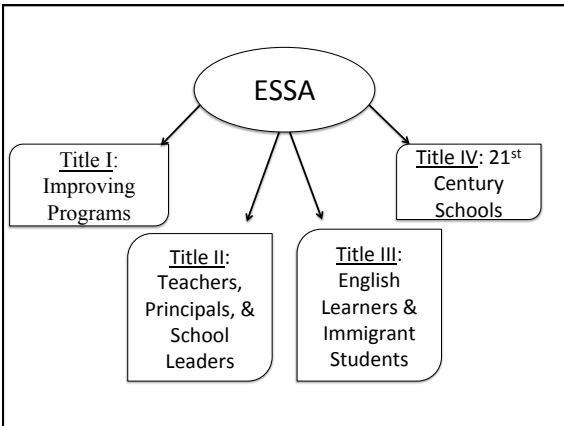
- Adequate Yearly Progress (AYP) & 100% proficiency
 - Highly Qualified Teachers (HQT)-Retains requirement of full state certification, Bachelors degree, & no waivers
- Teacher evaluation through student outcomes
- Sanctions on schools and districts failing to meet AYP

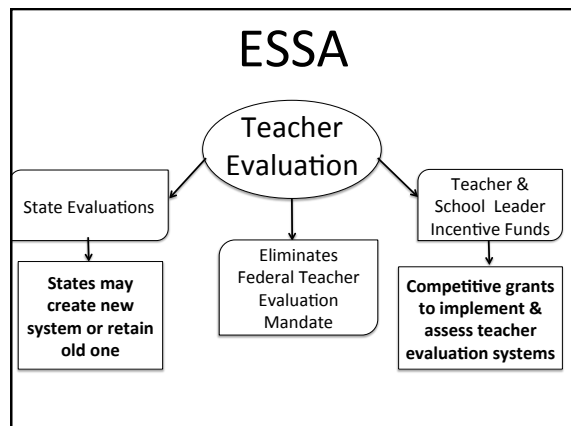
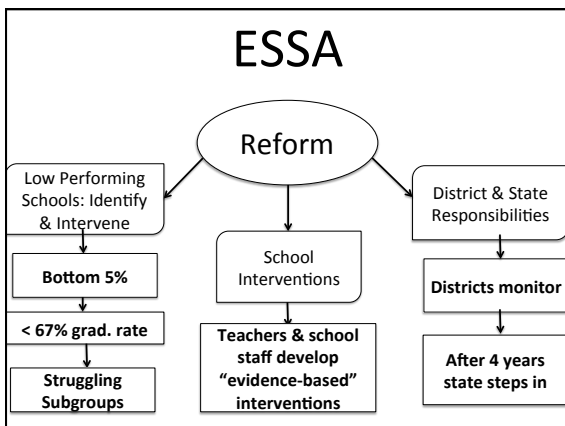
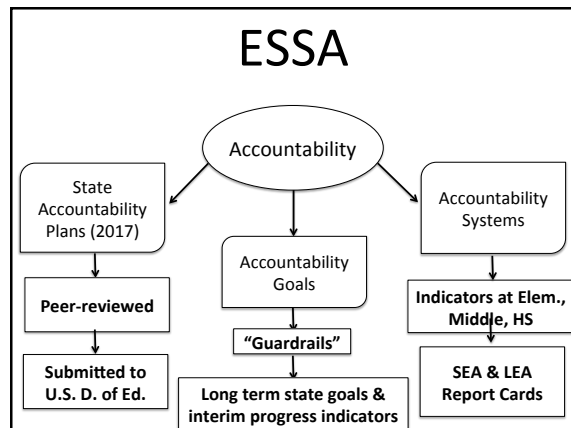
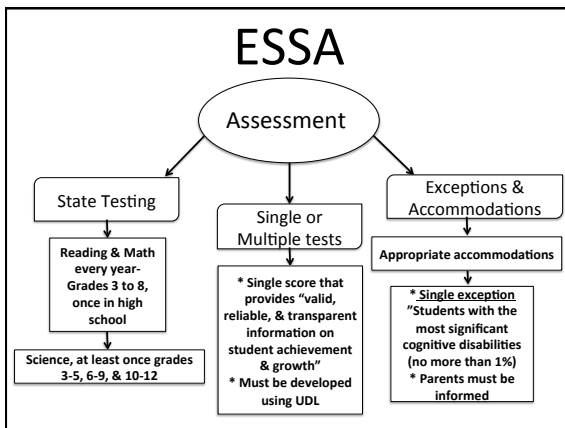
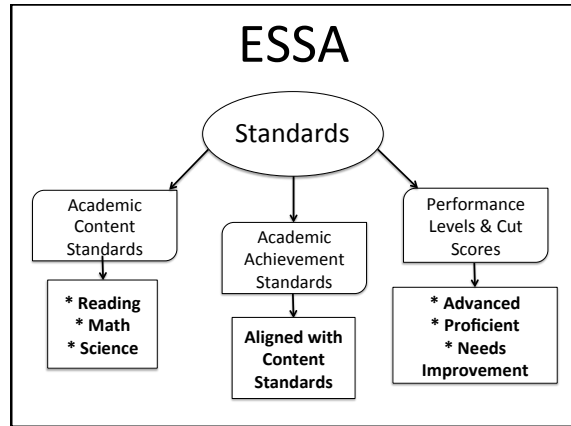
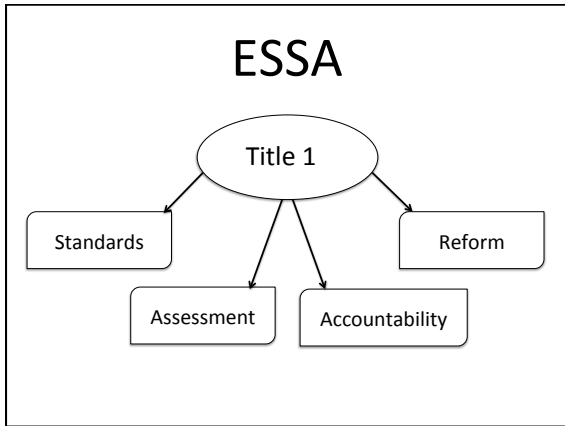
- ### Changes From NCLB: Remaining, but different
- Challenging content standards
 - State accountability and testing requirements remain although states have great leeway
 - U.S. Department of Education’s role continues but limited
 - Intervening and reforming low performing schools is entirely left to the states
 - States can create testing opt out laws
 - Weighing of indicators is left to the states

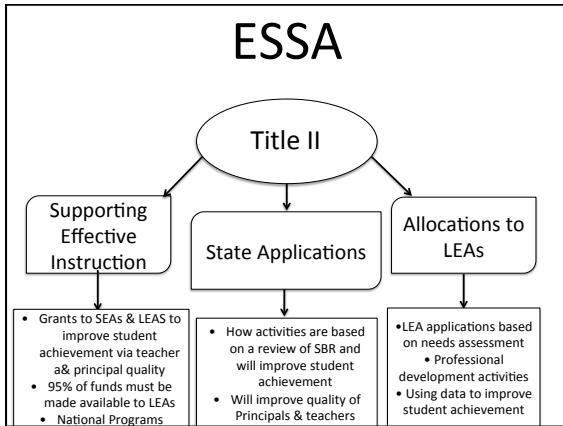
- ### Disaggregation of Subgroups
- Racial and ethnic group
 - Economically disadvantages students
 - Students with disabilities
 - English language learners

- ### Changes From NCLB: New
- Multi-tier system of supports
 - Positive Behavioral Interventions and Supports and mental health services
 - Universal Design For Learning
 - Emphasis on improving school climate and reducing bullying & use of aversives
 - Preschool Development Grant Program
 - Evidence-based Research & Innovation Program

- ### Miscellaneous
- Rejects portability provisions
 - Reject vouchers
 - Adds Pay for Success
 - Authorizes Jacob Javits Gifted and Talented Students Education Act







ESSA & IDEA: Testing

- Students with disabilities will still be a subgroup of students under ESSA who will need to be assessed, disaggregated, and reported separately on state assessments
- IEP teams may still require that state approved accommodations are used in assessments to ensure full participation
- No more than 1% of students may take an alternate academic achievement test

ESSA & IDEA: HQT

- ESSA amends the IDEA provision (20 U.S.C. 1412(a) (14)(C)) to require that special education teachers
 - Have obtained full state certification as a special education teacher
 - Hold at least a bachelor’s degree
 - Have not had a certification or license waived on an emergency, temporary, or provisional basis

ESSA & IDEA: Parents of Students taking the Alternate test

- IEP teams must clearly inform parents of the following:
 - That their child’s academic achievement will be based on alternate achievement standards
 - Participation in such assessments may delay or affect their child’s from completed the requirements for a regular high school diploma
 - Participation in alternative assessments, promotes the involvement and progress in the general education curriculum
 - The state plan describes the steps to incorporate universal design of learning in alternate assessments

The Bottom Line

- Schools will still be accountable for student performance but states will determine what that accountability will look like.
- Federal regulations and state decisions will be important in determining the effect of the ESSA
- Special education needs to be at the table when state decisions regarding ESSA are made

Dear Colleague Letter

Dear Colleague Letters

- Guidance by issued by federal departments to assist public entities in meeting their obligations under federal law.
- In special education, DCLs are primarily issued by the Office of Special Educations Programs (OSEP) and the Office of Civil Rights (OCR) in the U.S. Department of Education.
- As guidance documents, DCLs do not add to law.

Providing Behavioral Supports in IEPs

- Issued by OSERS on August 1, 2016
- Motivated by data on the discipline of students with disabilities that strongly suggests that many students with disabilities may not be receiving appropriate behavioral interventions and supports in their IEPs as required by the law
- Purpose of DCL is to clarify that schools* must provide appropriate behavioral supports in the IEPs of students who require such interventions in order to receive a FAPE

Definition of FAPE

- “The IDEA entitles each student with a disability to a FAPE that emphasizes special education and related services designed to meet the student’s unique needs.” (IDEA 20 U.S.C. § 1412[a][1])
- “The primary vehicle for providing FAPE is through an appropriately developed IEP that is based on the individual needs of the student.” (IDEA Regulations, 34 C.F.R. § 300.170300.24)

“In the case of a student whose behaviors impedes the student’s learning or that of other, the IEP team must consider, and, when necessary to provide FAPE, include in the IEP, the use of positive behavioral interventions and supports an other strategies to address that behavior” (IDEA Regulations, 34 C.F.R. 300.324[a][2][i] and [b][2]).

1-Evaluation, Eligibility, IEPs, & Behavioral Supports

- Team must use a variety assessment tools to gather relevant functional (e.g., behavioral), developmental, & academic information and assess the student in all areas
- “Incidents of misbehavior, classroom disruptions, and violations of the code of conduct may indicate the a student’s IEP needs to include appropriate behavioral supports.”
- “It is appropriate for a parent to request an IEP team meeting following disciplinary removals or changes in a student’s behavior because the IEP may not be properly addressing the students behavioral needs”

2-IEP Content & Behavioral Supports

- “Research shows that school-wide, small group, and individual behavioral supports that use proactive and preventive approaches, address the underlying cause of behavior, and reinforce positive behaviors are associated with increases in academic engagement, academic achievement, and fewer suspensions and dropouts.”

“As a matter of best practice, we strongly encourage schools to consider how the implementation of behavioral supports within the IEP could be facilitated through a school-wide, multi-tiered behavioral framework.”

2-IEP Content & Behavioral Supports

- “When a student with a disability experiences behavioral challenges, appropriate behavioral supports may be necessary to ensure that the student receives a FAPE.”
- “As part of the development, review, and, as appropriate, revision of the IEP, IEP teams should determine whether behavioral support should be provided in (1) special education and related services, (2) supplementary aids and services, and (3) program modifications
- Moreover these behavioral supports should be supported by evidence (i.e., peer-reviewed research requirement).

3-Potential Denials of FAPE or Placement in the LRE

- “A failure to provide needed behavioral supports to a student with disabilities could result in the student not receiving meaningful educational benefit, and thereby constitute a denial of FAPE or denial of placement in the LRE.”

3-Potential Denials of FAPE or Placement in the LRE

- The IEP team does not consider including positive behavioral interventions & supports in response to behavior that impedes the students learning or that of others.
- School officials fail to schedule an IEP meeting to review the IEP to address behavioral concerns after a reasonable parental request.
- The IEP team fails to discuss the parent’s concerns about their child’s behavior at his/her IEP meeting.
- There are no behavioral supports in a student’s IEP even though the IEP team determines they are necessary.

3-Potential Denials of FAPE or Placement in the LRE

- The behavioral supports in a student’s IEP are inappropriate for the student’s needs The frequency, scope, or duration are insufficient to prevent the behaviors.
- The supports have not accomplished positive changes in a student’s behavior.
- The behavioral supports in a student’s IEP are appropriate, but are not being implemented or not being properly implemented.
- School personnel have implemented inappropriate behavioral supports not included in the IEP.

3-Potential Denials of FAPE or Placement in the LRE

- The student is displaying behaviors that impede but is not receiving behavioral supports.
- The student experiences a series of disciplinary removals, which are not a change of placement for separate incidences of misbehavior that impede, but the need for behavioral supports is not considered or addressed by the IEP team.
- The student experiences a lack of expected progress towards annual goals related to behavior but the IEP is neither reviewed nor revised.

4-Implications for Exclusionary Disciplinary Measures

- Research demonstrates that short-term disciplinary removals and other exclusionary disciplinary procedures:
 - Impede the implementation of a student's IEP
 - Do not reduce or eliminate misbehavior
 - Produce unintended and undesirable results
- "The Department cautions that the use of short-term disciplinary removals from the current placement may indicate that the student's IEP or implementation of the IEP, does not appropriately address his or her behavioral needs...which could constitute a denial of FAPE."

Use of Exclusionary Discipline

- Exclusionary disciplinary measures include:
 - A pattern of office referrals
 - Extended time excluded from instruction (e.g., time out)
 - Restrictions in privileges
 - Sending students home on "administrative leave, or "day off."
 - Sending students home with conditions to return to school
 - Requiring students to leave school early
 - Short-term suspensions

Use of Exclusionary Discipline

Schools should take care when implementing exclusionary disciplinary measures that significantly interfere with a student's instruction and participation in school activities."

Conclusion

- The positive behavioral supports in a student's IEP may be facilitated through a school multi-tiered behavioral framework
- In the case of a student whose behaviors impedes the student's learning or that of other, the IEP team must consider, and, when necessary to provide FAPE, include in the IEP, the use of positive behavioral interventions and supports and other strategies to address that behavior

Conclusion

- A behavioral IEP is developed just as is an academic IEP
 - Assessment must address behavior in such a way as to lead to programming
 - Present levels of academic achievement and functional performance
 - Measurable annual goals
 - Special education services, related services, supplementary services, and program modifications
 - Student progress must be monitored and reported
 - If student is not progressing, his or her IEP should be revised

Conclusion

- Failing to address problem behavior in a student's IEP may be result in the denial of FAPE
- The overuse of exclusionary disciplinary procedures may indicate a denial of FAPE

A Second Dear Colleague Letter

Office of Civil Rights
July 26, 2016

Dear Colleague Letter (Office of Civil Rights, 7-26-16)

- One in nine complaints (2,000) received involve allegations of discrimination against a student with ADHD.
- Asserts that many teachers and administrators are not familiar with disorder which can impact equal access to a school district's program.

Noted Problems in Identification and Evaluating Students with ADHD

- Students never being referred for or identified as possibly having a disability and requiring special education.
- Students not being evaluated in a timely manner once identified as needing an evaluation.
- School districts conducting inadequate evaluations of students.

School Districts Fail to Meet 504 Obligations When They . . .

- Make inappropriate decisions about regular or special education, related aids and services, or supplementary aids and services the student needs.
- Fail to distribute relevant documentation to appropriate staff.
- Consider inappropriate administrative and financial burdens in selecting and providing appropriate related aids and services.

Attached

Students with ADHD and Section 504:
A Resource Guide

Selected Quotes

- “. . .it is critical to reject the assumption that an individual who has performed well academically cannot be substantially limited in activities such as learning, reading, writing, thinking, or speaking.”
- “In OCR's experience, school districts have not generally adopted a uniform definition of what constitutes an intervention strategy , protocol, or process . . .”

Other Notes

- Importance of appropriately training teachers and staff to identify academic and behavioral challenges that may be due to a disability.
- Medication administration is viewed as part of FAPE

Providing Mental Health Services for Students with Disabilities: Policy, Programming and Legal Considerations

Mental Health Services in Schools

- Schools represented the primary service delivery system for 2.9 million children and youth or 12.5% of the school population (SAMSHA, 2010)
- Schools are a critical service delivery system for children and youth with mental health service needs

Advantages of Providing MH Services in Schools

- a. Increases the likelihood of reaching children and youth who otherwise may not get the needed mental health services,
- b. Expands the possibility of treating vulnerable and disadvantaged students,
- c. Provides greater opportunities to engage parents and teachers in fostering the mental health of children and youth, and
- d. Enhances the probability of mental health prevention, promotion, and intervention

IDEA & MH Services

- Researchers have found that students with disabilities, especially those students who are classified as having emotional and behavioral disorders, have mental health-related disorders that are severe and may last a lifetime
- If students with disabilities are **eligible** under the Individuals with Disabilities Education Act (IDEA) or Section 504 of the Rehabilitation Act they have the right to receive a **free appropriate public education** (FAPE), consisting of special education & **related services**

Controversy

- Providing mental health services in a school district's special education program has been a controversial issue that had led to litigation
- A student's parents have disputed a school district's special education program did not confer FAPE because the program did not provide mental health services, which their child needed to receive educational benefit

Components of IDEA & Mental Health Services

- Child find
- Eligibility determination
- Free Appropriate Public Education (special education & related services)

Child Find

- School district's (LEAs) have an affirmative duty to locate all students with disabilities in the district's jurisdiction
- The purpose of a LEA's child find obligations is to who are suspected of having disabilities, and need special education services
- An LEA must publicize their child find activities. These activities usually include general screenings and a referral system

Evaluation

- Students who are suspected of having disabilities should be referred for special education evaluation
- Upon receiving written consent from a student's parents a multidisciplinary team of knowledgeable people, including the student's parents must conduct a full and individualized evaluation to determine if (a) student has an idea eligible disability and (b) because of that disability the student needs special education
- When conducting an evaluation, the team must assess all suspected areas of need irrespective of a student's possible disability

Kruelle v. New Castle School District, 1981

A student's social, emotional, and educational problems were so intertwined that it was "not possible for the court to perform the Solomon-like task of separating them.

Evaluation & Mental Health Needs

- Weatherly (2013) suggested that school personnel not limit their definition of educational performance to academic performance.
- When a student being evaluated for IDEA eligibility has mental-health related problems, a multidisciplinary team must determine how the problems negatively affects the student's performance in academic areas and nonacademic areas (e.g., socialization, behavior, communication)
- A team member should have expertise in MH issues

Free Appropriate Public Education (FAPE)

Special education and related services that

- Are provided at public expense, under public supervision and direction, and without charge,
- Meet standards of the state educational agency,
- Include an appropriate preschool, elementary, or secondary school education in the state involved,
- Are provided in conformity with the student's IEP

FAPE & Mental Health Needs

- A student’s IEP must address all a student’s individual needs by crafting an IEP that is reasonably calculated to confer meaningful educational benefit.
- The IEP team should have a member with expertise in evidence-based mental health services
- When an IEP includes mental health services, the services must be implemented as written.

Meet Amy Rowley



The Rowley Standard

Has the school district complied with the procedures set forth in the IDEA?
 Was the resulting IEP reasonably calculated to enable the student to receive educational benefit?

Free Appropriate Public Education (FAPE)

Students who are determined to be eligible under the IDEA are entitled to receive special education and related services that are specially designed to meet students’ unique educational needs

If the evaluation reveals that a student has mental health related problems that need to be addressed, the student’s IEP team must determine how best to meet those needs and include these services in his or her IEPs.

Free Appropriate Public Education (FAPE)

A common strategy to deliver mental health services is through the provision of related services

Related services are any services needed to enable to student to benefit from his or her special education. Except for medical services, or cochlear implants there are no restrictions on related services that may be included in an IEP.

The IEP team, in addition to determining the type of related service, must also determine the amount or frequency of service provision.

Students’ IEP teams often mental health related services via counseling, psychological services, or social work services

Summary of FAPE and Mental Health

A student’s IEP must address all of his or her individual needs by crafting an IEP, consisting of special education and related services, that is reasonably calculated to confer meaningful educational benefit.

When IDEA eligible services have mental health related needs, and meeting those needs is needed to provide a FAPE, the services must be written into the students IEP and delivered as written.

Litigation

Regional School District No. 9 Board of Education v. Mr. and Mrs. M. (2009)

- School district personnel overlooked clear signs of the student's
- District officials provided no rationale for their decision not to evaluate
- When they did evaluate they did not do so in a reasonable time period

Jana K. v. Annville Cleona School District (2014)

- School district personnel failed to evaluate
- Because school district did not evaluate the student's mental health needs, they denied FAPE
- School districts may not ignore student's needs nor can they wait for a student's parents to alter the district of potential problems
- When evaluating a student, the evaluation should address issues beyond academic skills and examine social and emotional issues

Moore v. Hamilton Southeastern School District (2013)

- School personnel had ample evidence of the student's behavioral and emotional problems but did not classify him as having an emotional disability because he had satisfactory grades

M.M. & I.F. v. New York City Dept. of Ed., 2014

- School district determined a student was not IDEA eligible because of satisfactory grades
- The court concluded that grades are but one criteria of a student's learning and in this situation the more fundamental issue was that the student could not attend school because of her emotional problems
- Because the school district erred in finding the student eligible for services, the parents were able to recover costs of residential placement

Mental Health and FAPE

An Update

Recent Judicial Decisions

- From 1/14 through 5/16
- LRP Database
- Excluding Decisions That Were Primarily Procedural
- Total of 18 Judicial Decisions
 - Seven at Circuit Level
 - 11 at District Level

Keeping A Score!!

- Circuit Court Level
 - Three – Favor of Parents
 - Four – Favor of District/SEA
- District Court Level
 - Seven – Favor of Parents
 - Four – Favor of District

Overall “Take Away” Messages

- Attend to issues of meaningful benefit/behavioral regression (B.D. v. D.C., D.C. Circuit, Hardison, Second Circuit)
- Importance of expertise of person delivering program (S.B.v. Murfreesboro City, Dist. – TN)
- Impact on educational performance of clinical conditions (Sneitzer v. Iowa D.E., Eighth Cir., M. P. v. Aransas Pass, Dist. – TX)
- Limitations of parental preference in determining residential setting (Dobbins, v. D.C., Dist. – DC)

“Take Aways” (Continued)

- Disability designation does not offset possible need for specialized program (Millburn Township v. M.P., Dist. – N.J.)
- Weight of LRE and issues of appropriate interventions in “special setting” (S.S. v. City of Springfield, Dist. – Mass.)
- Asserting that substance abuse, peer influences, attendance offsets need for mental health services (Oakland Unified v. N.S. , Dist. – CA)

An “Emerging” Area to Watch

Trauma Informed Interventions
(P.P. et al. v. Compton Unified, U.S
Dist. Ct – CA, 2015)

Issues in Case

- Accommodations for students with trauma-informed disabilities
- Question of providing trauma-awareness training for staff members
- Section 504 and Title II (ADA) issue
- Case Meaning – “While trauma itself does not qualify as a disability under either statute, the physical and mental effects of that trauma may entitle a student to services or accommodations if they substantially limit a major life activity.”

Message

Stay Tuned!

Looking At SEA Decisions

2015-16

The Scorecard

- Total Decisions (26)
- District Prevailing (6)
- Parents Prevailing (20)

Recommendations for School Leaders

Recommendations for Administrations

- Refer students when there is a suspicion that a student has a mental health-related disability that may require special education services
- When evaluating students for possible eligibility if there is a concern regarding mental health issues they must be addressed in the special education evaluation
- When making eligibility decisions, do not limit discussion of problems that affect a student's education performance to academic issues only

Recommendations for Administrators

- When a student with disabilities has mental health related needs, these needs should be included in the student's IEP as a special education service, related service and/or program modifications if needed by a student to receive a FAPE
- Have a team member with expertise in assessment and delivering evidence-based mental health services
- Implement the mental health services as indicated in the IEP

References

B.D. v. D.C., 116 LRP 10809 (DC Cir. 2016)
 Dobbins, v. D.C., 67 IDELR 34 (D. D.C. 2016)
 E.K. v. Warwick, 62 IDELR 289 (E.D. Pa. 2014)
 Forest Grove v. Student, 63 IDELR 163 (D. Oregon 2014)
 Fort Bend v. Douglas A., 65 IDELR 1 (Fifth Cir. 2015)
 Hardison v. Oneonta, 64 IDELR 161 (Second Cir. 2014)
 Jana K. v. Annville Cleona School District, 63 IDELR 278 (M.D. PA 2014).
 K.K. v. Pittsburgh, 64 IDELR 62 (Third Cir. 2014)
 Krulle v. New Castle County School District, 552 IDELR 350 (3rd Cir. 1981).
 Millburn v. M.P., 67 IDELR 19 (D. N.J., 2016)
 M.M. & I.F. v. New York City Department of Education, 63 IDELR 156 (S.D. NY 2014).
 Moore v. Hamilton Southeastern School District, 61 IDELR 283, S.D. IN 2013).
 M.P. v. Aransas Pass, 67 IDELR 58 (S.D TX 2016)

References

Mr. I. v. Maine School Administrative District #55, 47 IDELR 121 (1st Cir.)
 Oakland Unified v. N.S., 66 IDELR 221 (N.D. CA. 2015)
 P.P. v. Compton Unified, 66 IDELR 161 (C.D. CA 2015)
 P.P. v. Compton Unified, 66 IDELR 121 (C.D. CA 2015)
 Regional School District No. 9 Board of Education v. Mr. & Mrs. M., 53 IDELR 8 (D. CT)
 Sam K. v. Department of Education, State of Hawaii, 60 IDELR 190, (D. Hawaii, 2013).
 S.B. v. Murfreesboro City Schools, 67 IDELR 117, (D. Tennessee, 2016)
 Snetizer v. Iowa DE, 66 IDELR 1 (Eighth Cir. 2015)
 S.S. v. City of Springfield, 66 IDELR 253 (D. Mass. 2015)
 T.R. v. Humboldt, 65 IDELR 293 (N.D. CA 2015)
 Weatherly, J.J. (2015, March). 60 tips in 60 minutes. Paper presented to the 4th annual Inclusion Conference. Indianapolis, IN.
 Zirkel, P.A. (2014, November). Child find: The lore v. the law. Paper presented to the Tri-state Regional Special Education Law Conference. Omaha, NE.

The Use of Aversives

Within the ESSA

- "- how the State educational agency will support local educational agencies receiving assistance under this part to improve school conditions for student learning, including through reducing:
- - incidences of bullying and harassment;
- - the overuse of discipline practices that remove students from the classroom; and
- - the use of aversive behavioral interventions that compromise student health and safety

Southern Poverty Law Center

- May 24, 2012
- "A federal judge has approved a settlement agreement between the Southern Poverty Law Center and the public school system in Jackson, Miss., to reform discipline policies across the district and to end the brutal practice of handcuffing students to railings and poles for hours at a time as punishment for minor rule violations."

Atlantic (1-24-16)

- "While all educators struggle with how to cope with defiant or disruptive kids, there is no federal legislation and only a patchwork of state laws regulating how two of the most fraught responses—restraint and seclusion—are used with them. As a result, restraint and seclusion are misapplied on what could amount to millions of American schoolchildren each year, sometimes with deadly consequence." (M. Nicosia)

The Atlantic (1-24-16)

- “Nationwide, far more often than not, the subjects of restraint and seclusion are children of color and children with disabilities. That’s evident in Mississippi, according to 2009 data from the Office of Civil Rights. Of the total 715 incidents of restraint and seclusion reported by schools that year, 72 percent involved black or Hispanic students while 28 percent involved white students.” (M. Nicosia)

Physical Restraint

- “Physical restraint, also know as “manual restraint,” entails one or more persons using their bodies to restrict the movement of another person.” (Reece Peterson)

Seclusion

- Seclusion occurs when someone is placed in a room or location where they are alone and prevented from leaving the location. Seclusion should be distinguished from variations of “time out” which continue to be acceptable as long as the student is not isolated and not prevented from leaving. (Reece Peterson)

What are . . .

Acceptable Practices?

Policies Should Include (Peterson, 2009)

- An emphasis on how students will be treated with dignity and respect and how appropriate student behavior will be promoted and taught, thus minimizing the need for these or other emergency procedures.
- A statement that schools will use prevention, positive behavior supports and conflict de-escalation to preclude the need for use of these procedures.
- Definitions of restraint and seclusion.
- Acknowledgment that these are “last resort” safety procedures employed only after other procedures have been implemented without success, and that they are to be used only in situations where there is risk of injury to someone.

And . . .

- Indication that restraint or seclusion should be very short in duration (a matter of minutes) or only until the danger of injury has passed.
- Indication of how incidents will be documented, debriefed, data recorded, and responsibilities assigned for evaluation and oversight.
- Appropriate notification of parents/guardians when incidents occur.
- Staff training requirements including recurrent training and certification.

Additional Recommendations (Duncan, 2012)

- Never using mechanical restraints restricting a child's freedom of movement, and schools should never *use a drug or medication to control behavior or restrict freedom of movement (except as authorized by a licensed physician or other qualified health professional)* (emphasis added)
- These policies should apply to all children, not just those with disabilities.
- Restrain or seclusion should never be used as punishment or discipline.

And . . .

- Restraint or seclusion should never be used in a manner that restricts the child's breathing or harms the child.
- Reviews should be triggered if restraint or seclusion is used often with one child or in one classroom.
- Behavioral Strategies should address underlying cause or purpose of behavior.

An Important Thread

Seclusion and Restraint
"The Conscience Shocking Theme"

Conscience Shocking (Legal Dictionary)

- Based on the Fourteenth Amendment's prohibition against states depriving any person of "life, liberty, or property without due process of law," the test prohibits conduct by state agents that falls outside the standards of civilized decency. Little used since the 1960s, the test has been criticized for permitting judges to assert their subjective views on what constitutes "shocking."

What are the policy trends over past two years?

From Judicial, SEA and OCR
Perspectives

Judicial Decisions (2014-2016)

- Using descriptors of Aversives, Conscience Shocking
- Three Circuit Court Decisions (Third, Sixth & Ninth)
- Ten District Court Decisions
 - Washington, Minnesota, Michigan, Alabama, Ohio, Pennsylvania, Colorado, Oklahoma)

Circuit Court Results

- All decisions were in favor of teacher and/or district
- Negligence does not necessarily rise to level of constitutional violation!

Domingo v. Kowalski (Sixth Circuit, 2016)

- Teacher behaviors included belting a girl with cerebral palsy to the toilet, gagging a boy with autism to prevent spitting, and toilet training a child with autism in view of her classmates.
- As stated in the decision, "Kowalski's educational and disciplinary methods, as reported by Brant, may have been inappropriate, insensitive, and even tortious. This does not, however, render them unconstitutional."

On the Bright Side . . .

There was a dissenting opinion!

At the District Court Level (My Scorecard!)

- Parents – Prevailed in Five
- District – Prevailed in Five

Parents Prevailing

(Terry v. Russell, Dist. Ct. – Middle Alabama, 2015)

- “. . . teacher forced him into the hall, slammed him against a wall, pinned him to the floor, and choked him while yelling "I'm going to beat you within an inch of your life!" -- all because he used profanity. “

And . . .

- “The magistrate judge explained that the student's allegations, if true, strongly suggested that the teacher violated the student's clearly established constitutional right to be free from excessive force.”

H.M. v. Kings Local School Dist. (Dist. Ct. – Ohio – 2015)

- “In this case, the teacher's alleged misconduct included isolating the students, provoking behavioral outbursts, physically moving the students against their will, and depriving them of food and bathroom privileges. Accepting the parents' claim that those actions had no pedagogical purpose, the court held that the teacher should have known such conduct was unconstitutional.”

State Level Hearings (2014-16)

- Parents Prevailing (15)
- Districts Prevailing (10)

Prevalent Themes in SEA Hearings

- FAPE Issues (Individualized Programs, Educational/Academic/Behavioral Progress)
- Following IEP/BIP
- Following State Procedures (Safety Risk)
- Voluntary vs. Involuntary Seclusion
- Training of Staff
- Documentation
- Timely Notice to Parents

SEA Examples

- “The fact that a Minnesota district use “resolution rooms” to help a student with an undisclosed disability deal with challenging behaviors did not mean the district improperly secluded the student.” (***Watertown-Mayer Public School District, 2015***)

SEA Examples

- The district here avoided a finding of wrongdoing by doing everything by the book. When staff restrained the student on three occasions, the district ensured that they were properly trained, the student presented the requisite risk, each incident was properly documented, and the parent received timely notice. (***In re: Student with a Disability , Wisconsin SEA, 2014***)

OCR Complaints (2014-16)

- Founded - 8
- Unfounded - 2

Prevalent Themes in OCR Findings

- Non-Discriminatory Application (Disability Harassment)
- “One-size-fits-all” Behavior Management versus BIPs
- Professional Development
- Escalating Behaviors Following Positive Interventions

The Use of Aversives: The Future

State Accountability
IDEA Reauthorization

Bullying

- Bullying is characterized by aggression used within a relationship where the aggressor(s) has more real or perceived power than the target, and the aggression is repeated or has the potential to be repeated over time. Bullying can involve overt physical behavior or verbal, emotional, and social behaviors and can range from blatant aggression to far more subtle and covert behaviors
- OCR, OSEP Dear Colleague Letter, 2013

“Bullying fosters a climate of fear and disrespect that can harm the physical and psychological health of victims and create conditions that negatively affect Learning”

-Office for Civil Rights, *Dear Colleague Letter*, 2010-

What is Harassment (Bullying)?

- Harassment (bullying) may take many forms, including: verbal acts and name-calling; graphic and written statements, which may include use of cell phones or the Internet; or other conduct that may be physically threatening, harmful, or humiliating. **Bullying and harassment do not have to involve repeated incidents.**
- General disruptive or bad behavior, mutual bad behavior may not constitute harassment

What Special Educators Need to Know

- Students with disabilities are much more likely to be bullied than their nondisabled peers
- Bullying affects a student’s ability to learn
- Bullying based on a student’s disability may be a violation of Section 504 and the IDEA
- Students with disabilities have resources that may be used to address bullying (IEP & Section 504 plan)

Title VI of the Civil Rights Act of 1964

- No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.
 - P.L. 88-352 78 U.S.C. § 2000d

Title IX of the Education Amendments of 1972

- No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.
 - 20 U.S.C. §§ 1681-1688

Section 504

- No otherwise qualified individual with a disability in the United States...shall solely by reason of his or her disability, be *excluded from participation in, be denied the benefits of, or be subjected to discrimination* under any program or activity receiving *Federal financial assistance*...
 - 29 U.S.C. § 794(a)

Federal Civil Rights Statutes

- Title VI prohibits discrimination on the **basis of race, color, or national origin**
- Title IX prohibits discrimination on the **basis of sex**
- Section 504 & the Americans with Disabilities Act (ADA)-prohibits discrimination on the **basis of disability**

Violations of Civil Rights Laws

- Violations may occur when peer harassment based on race, color, national origin, sex, or disability is sufficiently serious that it creates a **hostile environment** and such harassment is **encouraged, tolerated, not adequately addressed, or ignored by school employees**

Section 504 and Bullying

S.B. v. Board of Education of Harford County (2016)

- On April 8, 2016 the U.S. Court of Appeals for the Fourth Circuit issued its ruling in *S.B. v. Board of Education of Harford County*
- Facts of the case
- Parents filed an action alleging that the school district had violated Section 504 and Title II of the ADA because officials failed to act to prevent bullying, thus discriminating against S.B.

S.B. v. Board of Education of Harford County (2016)

- Court applied the U.S. Supreme Court's Davis test
 1. The student was a member of a **protected** class
 2. He/she was harassed/bullied **because** of her status
 3. The harassment was sufficiently **severe or pervasive**, or objectively offensive
 4. School district personnel **knew** about the harassment
 5. School district personnel were **deliberately indifferent** to the harassment

S.B. v. Board of Education of Harford County (2016)

- The Davis standard requires a finding that the bullying was
 - Based on S.B.'s disability
 - Severe, pervasive, & objectively offensive as to deprive S.B. of educational benefits and opportunities
 - School officials knew about the bullying but didn't take sufficient action to investigate or respond
- Ruling for the school district

What The District Did Right

- School officials investigated each incident
- School officials disciplined the perpetrators
- A paraeducator was hired to shadow S.B. and monitor his safety

IDEA and Bullying

Free Appropriate Public Education (FAPE)

- Special education and related services
 - Provided at public expense
 - Meet state educational agency standards
 - Provided in conformity with the Individualized Education Program (IEP)

Bullying as a Denial of FAPE

- Two Elements
 1. Did then school personnel know, or should have know, that the effects of the bullying may have affected the student's FAPE (academic or behavior) under IDEA or Section 504?
 2. Did the school personnel meet their ongoing obligation to ensure FAPE by determining whether the student's educational needs were still being met by making changes to the student's IEP or Section 504 plan
- If yes, a FAPE violation has occurred

Bullying as a Denial of FAPE

- School officials have an obligation have an obligation to ensure that bullied students with disabilities continue to receive FAPE in accordance with his/her IEP
- The student's IEP/Section 504 team should be convened to determine the effects of the bullying and if the IEP should be modified (caution, avoid unilateral actions!)

T.K. v. New York City Department of Education, 2016

- On 01/20/2016 the U.S. Court of Appeals for the Second Circuit issues a ruling in T.K.
- Facts of the case
- Parents filed an action alleging that the school district had violated the IDEA because officials failed to act to prevent bullying and to discuss it at an IEP meeting, thus violating the student's right to receive FAPE
- Parents unilaterally placed their child in a private school and requested reimbursement

T.K. v. New York City Department of Education, 2016

- Ruling: Court upheld district court's decision against the school district
- The school district conceded that their failure to consider bullying when developing L.K.'s IEP was a FAPE violation
- The appellate court held that the failure to consider bullying denied L.K.'s parents the right to participate, thereby denying FAPE
- L.K.'s private placement was appropriate the appellate court affirmed award of reimbursement

T.K. Test

1. Was the student a victim of bullying?
2. Did school personnel have notice of substantial incidence of bullying?
3. Did school personnel fail to take reasonable steps to prevent the bullying?
4. Did the bullying substantially restrict the student's educational opportunities?

Court Decision

- The court in T.K. explained that a school district denies FAPE when it is deliberately indifferent to or fails to take reasonable steps to prevent bullying that substantially restricts the educational opportunities of a student with a disability
- The court awarded L.K.'s parents private school tuition

Implications

- School districts are **not liable** for all acts of bullying or harassment
- School districts are liable only for acts of bullying or harassment when school personnel were **aware** of the harassment and did **nothing to stop and prevent** it

Preventing Bullying

- Create a school environment that is sensitive to disability harassment and educates students, staff, and parents about what bullying is
- Widely publicize anti bullying policies
- Provide consistent and up to date training of staff about bullying, what it is, and how to prevent and stop it
- Be aware of signs of bullying and investigate, interview, & document when you have reason to believe bullying is occurring

Addressing Bullying

- Discipline the perpetrator
 - Consequences must be put in place to address the students who engage in bullying
 - Take steps to educate the bullier
- Proactively address the needs of victims
- If needed, revise a student's IEP or Section 504 plan
- Implement monitoring programs to follow up on bullying and to ensure a bullying free environment
- Systematically assess and modify bullying policies and programs

Lessons for Educators

- Know & fulfill your responsibilities
- Use common sense!
- When you see a something wrong occurring, report it
- Take reports of bullying seriously

Resources

- National School Board Association's website on state anti-bullying statutes:
 - www.nsba.org/SchoolLaw/Issues/Safety/Resources/Table.pdf
- U.S. Department of Education, Office of Civil Rights (2000). Dear Colleague Letter on bullying and harassment. Available at www2.ed.gov/about/offices/list/ocr/docs/disabharassltr.html.
- U.S. Department of Education, Office of Civil Rights (2010). Dear Colleague Letter on bullying and harassment. Available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>
- U.S. Department of Education, Office of Civil Rights (2014). Dear Colleague Letter on bullying. Available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-bullying-201410.pdf>.
- U.S. Department of Education, Office of Special Education and Rehabilitative Services (2013). Dear Colleague Letter on bullying. Available at <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/bullyingdcl-8-20-13.pdf>

Discussion

...and Thank You