

Legal Developments Affecting  
Private Special Education Schools

NAPSEC Annual Leadership Conference

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# Agenda

- The FAPE standard under *Endrew F.*
- Private schools and IDEA/504
- Psychiatrically Fragile Students
- Student Data Privacy and Security

# IDEA Requires:

- A “free appropriate public education” (FAPE)
- In the “least restrictive environment”

# Varying Interpretations

- United States Supreme Court
- Circuit Courts of Appeal
- District Courts



# Federal Circuit FAPE Standards

- 1st Circuit – “Meaningful” benefit ( D.B. v. Esposito, 58 IDELR 181 (1st Cir. 2012))
- 2nd Circuit – “Meaningful” benefit (M.W. v. New York City Dept. of Educ., 61 IDELR 151 (2nd Cir. 2013))

- 3rd Circuit – “Meaningful” benefit (Coleman v. Pottsdown Sch. Dist., 64 IDELR 33 (3rd Cir. 2014))
- 4th Circuit – “Meaningful” benefit (O.S. v. Fairfax County Sch. Bd., 66 IDELR 151 (4th Cir. 2015))

- 5th Circuit – “Meaningful” benefit (Cypress-Fairbanks Independent Sch. Dist., 26 IDELR 303 (5th Cir. 1997))
- 6th Circuit – “Meaningful” benefit (T.W. v. Northport Pub. Sch., 59 IDELR 64 (6th Cir. 2012))

- 7th Circuit – “Benefit” with “progress,” citing 5th Circuit test (M.B. v. Hamilton Southeastern Schs., 58 IDELR 92 (7th Cir. 2011))
- 8th Circuit – “Benefit,” but “progress is an important factor” (M.M. v. District 0001 Lancaster County Sch., 60 IDELR 92 (8th Cir. 2012))

- 9th Circuit – “Benefit” (some cases mention “meaningful”)(K.S. v. Fremont Unified Sch. Dist., 56 IDELR 190 (9th Cir. 2011))
- 10th Circuit – “Barely more than de minimis”

- 11th Circuit – “Adequate educational benefit based on surrounding and supporting facts” and “child’s individual needs” (Phyllene W. v. Huntsville City Bd. of Educ., 66 IDELR 179 (11th Cir. 2015))
- D.C. Circuit – “Educational benefit” (Reid v. District of Columbia, 43 IDELR 32 (D.C.Cir. 2005))

Andrew F. v.  
Douglas Co. S.D. RE-1 (2017)

- 5th grade Colorado autistic student with behavioral problems
- Virtually identical IEP goals for 2nd, 3rd, and 4th grade year
- Not performing at grade level

- 10th Circuit FAPE standard: “merely more than *de minimus*” progress
- Parents claimed FAPE requires “opportunities to achieve academic success, attain self-sufficiency, and contribute to society” equal to those available to non-disabled students

## Supreme Court Holds:

Districts must offer an IEP “reasonably calculated to enable a child to make progress appropriate in light of the child’s unique circumstances.”

IDEA does not require a potentially-maximizing education, but “barely more than *de minimis*” is too low.

Districts are *not* required to offer “educational opportunities equal to those afforded to nondisabled individuals.”

“[T]he essential function of an IEP is to set out a plan for pursuing academic and functional advancement”

“[P]rogram must be appropriately ambitious.”

IDEA does not “guarantee any particular level of education,” and “cannot and does not promise any particular educational outcome.”

IEP planning requires “a prospective judgment by school officials” based on the specific facts related to a student and informed by school officials' expertise and input from the parents or guardians.

“Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal.”

The “absence of a bright-line rule” is *not* “an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review”

# Take-Aways

- Amply documented baseline
- Individualized program with specific, measurable goals
- Mid-course corrections as necessary to reflect child's progress toward achieving goals

# IDEA & Section 504

- Do they apply to you as a private school?
- Can you be stuck in “stay put”?
- Can you be sued for damages?

# Legal Relationship with Students

- Private entity, not “state actor” for federal civil rights liability, *Hamlin v. City of Peekskill Bd. of Educ.*, 377 F.Supp.2d 379, 386 (S.D.N.Y. 2005)
- Relationship primarily contractual

# IDEA

- IDEA places obligation on *states* and *local school districts* to provide appropriate education
- 20 *U.S.C.* § 1412(a)(11), 34 *C.F.R.* § 300.33
- Nothing in IDEA itself imposes any legal duty on private schools

- The IDEA contemplates that a public agency may place a student in a private school. §1412(a)(10)
- Must be “the means of carrying out the requirements of [the IDEA] or any other applicable law requiring the provision of special education and related services to all children with disabilities.” §1412(a)(10)(B)(i)

“Each public agency in the State is responsible for ensuring that the rights and protections [of the IDEA] are given to children with disabilities ... [r]eferred to or placed in private schools and facilities by that public agency.” 34 *C.F.R.* §300.2(c); § 300.146.

- Most courts have found private schools *not liable* for violations of IDEA
- *St. Johnsbury Acad. v. D.H.*, 240 F.3d 163, 171 (2<sup>nd</sup> Cir. 2001) (“IDEA’s implementing rules reinforce the principle that IDEA applies only to the State and other public agencies, *not* to private schools in which public agencies may place children.”)

# Alternative Theories of Liability

- State regulations imposing IDEA responsibility
- Language in tuition contracts
- Contractual third party beneficiary exposure

# State Regulations

“The rules in [New Jersey’s special education administrative code] shall apply to all public and private education agencies providing publicly funded educational programs and services to students with disabilities.”

*N.J.A.C. 6A:14-1.1(c).*

# Tuition Contracts

**“The APPROVED PRIVATE SCHOOL as signatory to this contract agrees to operate in accordance with applicable federal and state laws, and rules and regulations . . . .”**

# Third Party Beneficiary

- General Rule: Only parties to a contract are entitled to seek enforcement of it.
- Exception: A non-party who is specifically intended as the beneficiary of a contract may have enforcement rights.

- Compensatory education awards for failure to provide services required by IEP
- Exposure to “prevailing party” counsel fee awards
- Maintenance of “stay put” during pendency of disputes over termination

# Section 504

- Different than IDEA
- Accommodates disabilities that don't necessarily relate to learning, but may

# Rehabilitation Act of 1973 (“Section 504”)

“No otherwise qualified individual with a disability in the United States... shall, solely by reason of her or his 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.”

# “Federal Financial Assistance”

“Any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which [USDOE] provides or otherwise makes available assistance in the form of: 1) Funds; 2) Services of Federal personnel; or 3) Real or personal property or any interest in the use of such property.”

# Direct Receipt of Funds

- Title I of ESEA
- Drug-Free Schools and Communities Act of 1986
- National School Lunch Program
- E-Rate Program

# Indirect Receipt of Funds

- Tuition from public school districts
- *P.N. v. Greco*, 282 F. Supp. 2d 221 (D.N.J. 2003), held receipt of tuition enough, but
- Other decisions apply “control” test, *J. v. School Dist. of Philadelphia*, 2007 WL 1221216 (E.D. Pa. 2007)

# Take-Aways

- Be mindful of state regulations binding you to IDEA/504
- Be aware of contractual language
- Review your insurance coverage

# Psychiatrically Fragile Students

- Boundary line between medical services and educational services
- Is student “available to learn”
- Is residential placement appropriate but for non-educational reasons

# Mary T. v. Sch. Dist. of Phila. (3d Cir. 2009)

- Supervised LifeStyles
- No educational accreditation/no on-site school or special education teachers
- Acute Care Ward/Post-Acute Care Ward

*Test:* Whether residential placement is necessary for educational purposes, or was a response to medical, social or emotional problems that are segregable from the learning process. (Only placements providing special education qualify.)

- “Token Economy Program”
- One-to-One Support
- Life Skills Training
- Psychoeducational skill groups

## Court Holds:

- Services designed to make patient aware of medical condition and how to respond to it, *not* for educational purposes
- Educational and medical needs severable in this case

- Not “related service” either because not intended to help student remain at school
- Also excludable because SLS more closely resembled hospital than a school

- **Compensatory education also rejected**
- **Student psychiatrically unstable and unable to receive education**
- **No obligation to provide FAPE while student is psychiatrically unstable**

# Family Educational Rights and Privacy Act

- Defines “Education Records”
- Balances privacy vs. accessibility
- State student privacy laws go further

# Privacy Battlegrounds

- Student records storage
- Web-based IEP programs
- Electronic communication with  
staff/families
- Classroom apps



**There is no cloud**  
it's just someone else's computer

## “Direct Control” 34 CFR 99.31

- School Official Exception — PII may be disclosed without consent to ...
- (1)(i)(A) ... other school officials ... whom the agency or institution has determined to have legitimate educational interests.
- (B) A contractor, consultant, volunteer, or other party to whom an agency or institution has outsourced institutional services or functions may be considered a school official under this paragraph provided that the outside party —
  - (1) Performs an institutional service or function for which the agency or institution would otherwise use employees;
  - (2) Is under the direct control of the agency or institution with respect to the use and maintenance of education records; and

## “Direct Control” 34 CFR 99.31

- (3) Is subject to the requirements of § 99.33(a) governing the use and redisclosure of personally identifiable information from education records.
- (ii) An educational agency or institution must use reasonable methods to ensure that school officials obtain access to only those education records in which they have legitimate educational interests. An educational agency or institution that does not use physical or technological access controls must ensure that its administrative policy for controlling access to education records is effective and that it remains in compliance with the legitimate educational interest requirement in paragraph (a)(1)(i)(A) of this section.

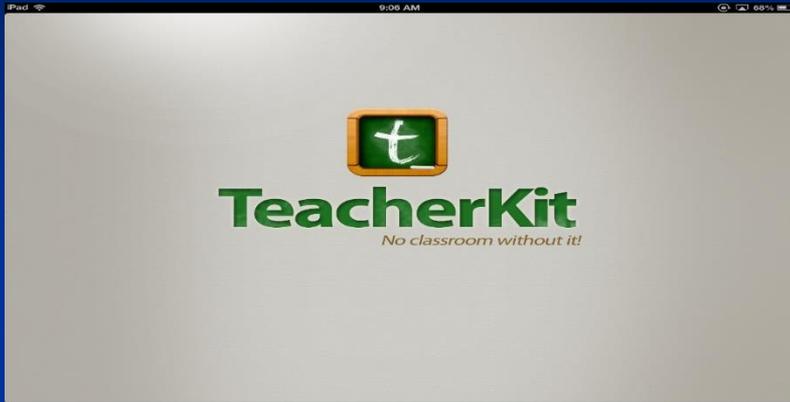
**Think in terms of data,  
not records**



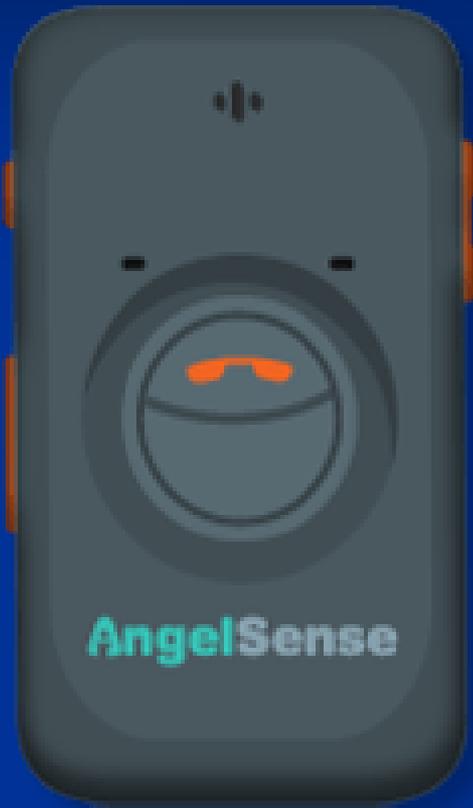


- Email
- District-based servers
- Cloud storage
- Classroom apps
- Online IEPs
- Text messages
- Metadata





- **Low-to-no-cost apps**
- **No supervisory oversight**
- **No centralized procurement**
- **New privacy legislation assumes staff awareness**
- **Effective staff training is essential**



# Thanks for Coming!

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