


Key Issues in Special Education Law: Present and Future


Perry A. Zirkel
[www.perryzirkel.com]
© 2017



I. ESSA (former NCLB)

- present:
 - elimination of (a) HQT requirement (same for IDEA) and (b) additional 2% AA-AAS allowance (but IEP team determination)
 - expanded definition of graduation cohort
- future:
 - extending direction of recent voiding, per Congressional Review Act (CRA), of Nov. ESSA regulations?

Copyright © 2017 Perry A. Zirkel



2. Response to Intervention (RTI)

- present:
 - specific to SLD identification under IDEA
 - largely limited to state special ed laws, not court decisions
 - * exc. *M.M. v. Lafayette Sch. Dist.* (9th Cir. 2014)
 - * exc. *Greenwich Bd. of Educ. v. G.M.* (D. Conn. 2016)
- future:
 - extended generically, as MTSS, beyond SLD (under IDEA, not just ESSA)?
 - ripening of predicted litigation?

Copyright © 2017 Perry A. Zirkel

3. IDEA Eligibility Issues

- present:
 - identification of ED
 - overall emphasis on prong 2*
 - confusing overlap with “child find”
- future:
 - evolution of “child find”
 - definition of “special education”

* ex. Compare *Mr. I v. Sch. Admin. Unit 55* (1st Cir. 2007) with *C.B. v. Dep’t of Educ.* (2d Cir. 2009)
* ex. *L.J. v. Pittsburg Unified Sch. Dist.* (9th Cir. 2017)

Copyright © 2017 Perry A. Zirkel

4. § 504 Eligibility Issues

- present:
 - ADAAA of 2008 (effective 1/1/09)
 - ADA Title II regs (effective 8/11/16)
- future:
 - “252” v. § 504 plan v. IDEA IEP?
 - * ex. ADHD
 - * ex. concussions
 - * IHPs
 - courts v. OCR
 - * ex. *B.C. v. Mount Vernon Sch. Dist.* (2d Cir. 2014)
 - * ex. Trump administration pronouncements re OCR

Copyright © 2017 Perry A. Zirkel

5. Parental Consent/Choice

- present:
 - absolute (i.e., unilateral), including revocation, for initial services
- future:
 - confusing fall-back to § 504
 - continuing increase in state voucher-type sp. ed. laws
(AR - 4/5/15; MS - 4/16/15; and TN - 5/20/15)
(*Oliver v. Hofmeister* (Okla. 2016))
 - and possible federal legislation

Copyright © 2017 Perry A. Zirkel

6. FAPE Litigation: Autism

- present:
 - approximately half of FAPE court decisions – “disproportionality”
 - breaking the methodology barrier
- future:
 - maturational mitigation?

Copyright © 2017 Perry A. Zirkel

7. FAPE Litigation: Parental Participation

- present:
 - IDEA 2004 procedural-violations exception to two-part test?
 - frequent claims with limited results (e.g., pre-determination*)
- future:
 - increasing judicial acceptance?

* ex. *T.K. v. N.Y.C. Dep't of Educ.* (2d Cir. 2015)

Copyright © 2017 Perry A. Zirkel

8. FAPE Litigation: Substantive Standard

- present:
 - relaxed approach to peer-reviewed research (PRR) provision
 - *Andrew F. v. Douglas Cty. Sch. Dist. Re-1 (2017)* – progress in the child’s individual circumstances
- future:
 - more fact-based analysis under higher but still moderated and flexible standard
 - Second Circuit methodology decision in *A.M. v. N.Y.C. Dep't of Educ.*

Copyright © 2017 Perry A. Zirkel

9. FAPE Litigation: The Implementation Issue

- present:
 - predominant adjudicative standard of substantial or significant w. or w/o benefit, not 100%
- future:
 - N.Y. variation: capable of implementing
 - continuing alternative standard for SEA CRP enforcement?

Copyright © 2017 Perry A. Zirkel

10. FAPE Litigation: Bullying

- present:
 - recent refined recognition without differentiation (Dear Colleague Letter (OCR 2014) (§504); *T.K. v. NYC Dep't of Educ.* – 2d Cir. 2015 (IDEA). *But see J.M. v. Dep't of Educ.* (D. Haw. 2016)
- future:
 - increasing claims with limited success and § 504 alternative (not state anti-bullying laws)

Copyright © 2017 Perry A. Zirkel

11. Increased Use of § 504/ADA

- present:
 - mostly on behalf of “double-covered” students
 - dangers of “consolation prize”
 - separate from and for private schools*
 - district-friendly liability standard
- future:
 - limited differential
 - * ex., *Tustin* (2013)/DOJ Dear Colleague Letter (2014) re vision aides
 - * ex. *Alboniga* (2015)/*Riley* (2016)/*Gates-Chili* (2016)/ *A.P.* (2016) re service dogs
 - acceptance of disparate impact theory
 - * ex. *F.C. v. N.Y.C. Dep't of Educ.* (S.D.N.Y. 2016)

Copyright © 2017 Perry A. Zirkel

12. Restraint and Seclusion

- present:
 - ESSA “explanatory statement” - continued trend in **state laws**
 - largely unsuccessful litigation
- future:
 - part of reauthorized IDEA – not likely under current fed. gov’t.

Copyright © 2017 Perry A. Zirkel

13. Other Legislative Changes?

- present:
 - *Schaffer v. Weast (2005)* – B/P
 - *Arlington Central (2006)* – expert fees
- future:
 - likely limited to state laws re B/P in the short run

Copyright © 2017 Perry A. Zirkel

13. Other Legislative Changes (cont.):

- state laws
 - restraints/seclusion
 - **vouchers**
 - autism
 - **dyslexia**

Copyright © 2017 Perry A. Zirkel

14. Litigation Remedies

- present:
 - tuition reimbursement – e.g., residential-placement test
- future:
 - compensatory education (e.g., interaction, calculation, limitations period, and implementation issues)
 - standard for money damages under § 504 – same for FAPE denial?

Copyright © 2017 Perry A. Zirkel

15. Supreme Court Activity

- Trend toward adjudicative issues (e.g., burden of proof)
- Consistent declining of review since 2009, until:
 - *Fry v. Napoleon Cmty. Sch.* (IDEA's "exhaustion" provision) – if FAPE is the "gravamen" of the case
 - *Andrew F. v. Douglas Cty. Sch. Dist.* – ad hoc progress standard

Copyright © 2017 Perry A. Zirkel

16. Effect of *Andrew F.*

- During first few weeks: 6 of 8 cases being no outcome change, with the other two being remands for reconsideration, especially *M.C. v. Antelope Valley Union High Sch. Dist. (2017)* ("commensurate opportunity" translation)
- Longer range effect: "it depends" multi-factor variation, including child's potential for substantive FAPE and uncertain for 2nd step of procedural FAPE

Copyright © 2017 Perry A. Zirkel

17. Other Litigation Issues?

- not present, but possibly future:
 - “twice exceptional” students
 - **ELL students**
 - assistive technology
 - transition services
 - disciplinary changes in placement
 - reverse attorneys’ fees

Copyright © 2017 Perry A. Zirkel

18. Dispute Resolution

- present:
 - frequency: “**two worlds**”
 - outcomes: perception of bias
 - process: legalization
 - emphasis: “alternatives” (filings v. adjudications)
- future:
 - increased use of complaint resolution systems (SEA but perhaps not OCR)

Copyright © 2017 Perry A. Zirkel

19. Concluding Caveat

- **law:**
 - minimum requirements
 - risk management
- **lore:**
 - misconceptions of law
 - distinctive role of “best practice” norms (e.g., FBAs/BIPs)

Copyright © 2017 Perry A. Zirkel
