1. 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?

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)
   - future:
     - extended generically, as MTSS, beyond SLD (under IDEA, not just ESSA)?
     - ripening of predicted litigation?
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 McI 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)

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

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 (Okl. 2016))
and possible federal legislation

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

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)

8. FAPE Litigation: Substantive Standard
• present:
  - relaxed approach to peer-reviewed research (PRR) provision
• 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.
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?

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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)

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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
  - acceptance of disparate impact theory
  * ex., K.C. v. NYC. Dep’t of Educ. (S.D.N.Y. 2016)

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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.

13. Other Legislative Changes?

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

13. Other Legislative Changes (cont.):

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

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

16. Effect of Endrew 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
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

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)

19. **Concluding Caveat**

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