President’s Message

Our 2016 annual meeting, November 2 – 5, in Orlando, is quickly approaching and promises to be the largest and best meeting in the history of ELA. The Buena Visa Palace is located in Disney Springs (formerly called Downtown Disney), and offers excellent amenities for our meeting. This venue allows for a most enjoyable professional meeting, as well as a chance to interact with one’s colleagues from around the nation. Additionally, it is an opportunity to bring the family and enjoy the Disney experience in a popular vacation location.

Weather at this time of year should also be very pleasant!

Your Board of Directors has done an outstanding job this year; many new exciting initiatives are under way, which will be announced at our annual meeting. Our goals for this year have included expanding and increasing services to the ELA membership. Due to the hard work of your Board of Directors and the program committee, the sessions and the general sessions speakers will be excellent.

Among the many activities that your Board has accomplished include a complete revision of the bylaws to reflect actual practice and better management. The Board has moved from a July 1 through June 30 fiscal year to a calendar year, in order to gain a better understanding of our revenues and expenditures. The Board developed a consistent and manageable Awards Policy. Additionally, a new development campaign is being launched with the officers and Board members leading the way for substantial gifts to enhance ELA’s services and value. The Board has substantially changed the endowment policies and strategies to reflect more conservative equities, with a balanced and diversified approach for the long-term future of the organization.

As previously announced, the Board—under the leadership of member Wayne Haglund, President-elect Lynn Rossi Scott, and Vice President Susanne Ecke—has been able to extend our working relationship and lease with Cleveland-Marshall so as to bring continued stability to the organization. This accomplishment is a major step toward the stability of ELA and its professional staff.

The Board has executed its commitment toward greater transparency and practice via issuing request for proposals (RFPs) in all of our standing text series. The forthcoming Principal’s Legal Handbook reflects the RFP approach in opening the process to the entire membership thus producing high quality publications for the members and the education law community in general.

Three new board members will be elected in Orlando, plus an incoming Vice President. The new election protocol will be fully operationalized for the next nominating cycle. At that point I will be the past president, and as dictated in the bylaws, will chair the nominating committee. This revised process will make the nominating and selection procedure more open to the members and more reflective to the various constituency groups of the organization. This protocol will determine the future leadership of ELA.

The ELA Annual Conference returns to San Diego for 2017 and, after much examination, the Board has decided that the 2018 and 2019 annual meetings will be in Cleveland and in Norfolk, Virginia. These locations offer us the most in terms of member experiences, value, and quality of the sites.

The Board of Directors is convinced that the 2016 annual meeting in Orlando will be a terrific professional and personal experience for our members and their guests.

In the same manner as I have closed all of my columns, let me again state if I may be of any service, or we can benefit from a discussion, please feel free to contact me; we will discuss any issue that would benefit ELA.

R. Craig Wood
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Steve Permutt, Ed.D.

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Regina Umpstead, J.D., Ph.D.

From the Executive Director

Much of our focus at this time of year is on the conference, because it is such a large part of membership in ELA. It’s not just the knowledge and potential credit hours you gain from attending, but also how you benefit from the perspectives of and collaboration with your professional peers that is so valuable in your work.

Although we encourage members to participate in the annual conference, we recognize it is not possible for everyone to attend every year. If you cannot go to the annual conference at least once during your time of membership, I hope you are taking advantage of all your other member benefits. During the meeting of your ELA Board of Directors in early summer, it came to my attention that not even the directors realized there were so many different types of benefits offered by ELA. These include:

- The School Law Reporter provides recent K-12/higher education/Supreme Court case summaries eleven times per year, with most issues carrying in-depth Case Commentaries, plus an annual SLR Index of Cases. Issues are posted on the ELA website under “Member Materials” and available in print to members who request it, plus library subscribers.
- Quarterly issues of ELA Notes, offering peer-reviewed scholarly articles, member and publication news, and special offers, also are offered in print and online.
- Access to the SLR Express, a key-word searchable online database comprised of many years of ELA case summaries from the School Law Reporter.
- Members receive 30-day advance access to the Education Law Consortium’s Education Law & Policy Review before it is available to the public.
- Members receive a 35% discount on most of our high-quality, reasonably priced books and monographs
- Special member registration prices for the ELA annual conference and other live seminars
- Free registration to webinars for all ELA members (non-members pay $99 each)
- Networking, presenting, and publishing opportunities through ELA and the contacts you make with members. Submit your news so that we may help share it with your colleagues.
- If you want to be available to the press as a research source for writers, be placed on our ‘experts list’ so that your information may be provided to writers and producers for print and television news stories.
- Access to a Teaching School Law folder where professor members can share teaching materials. Log in to the website to find this listed on the left menu.

Benefits Coming Soon:

- Spring Webinar Series: These are chosen from the most highly rated conference presentations, as well as created from suggestions provided by conference attendees. Four to six webinars are held annually.
- Spring Seminar Series: Several seminars are scheduled each spring to provide practical information to those in K-12 schools. This is a great way to teach others how the law can be applied at the building level. If you are interested in working with us on one of these seminars, please get in touch with me.
- Our improved website, with more information and resources, will continue to evolve. Its design and navigation were just updated. Soon to come are the long-awaited membership directory—a project for which fundraising is under way—and also more storage and software that will allow you to play our webinars if you miss the live presentation.

Cate K. Smith, J.D., M.P.A.

Executive Director

Law Journal Now Accepting Manuscripts

The Journal of Law and Education, edited at the University of South Carolina Law Center and the Louis D. Brandeis School of Law at the University of Louisville, is accepting unpublished manuscripts on all aspects of law related to education.

For submission information, see the October Member Materials on ELA’s website, www.educationlaw.org.

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Any opinions expressed or implied are those of the guest authors and may not represent official positions of the Education Law Association.
the scholarship cited in the Aug. 23 decision by the National Labor Relations Board on graduate student collective bargaining, in reference to the dissenters in a prior NLRB opinion.

Free Speech Book Review Published

Former ELA president William E. Thro, general counsel and adjunct professor at the University of Kentucky in Lexington, had a book review published Sept. 9 in the Journal of College & University Law. His article was titled, “Betraying Freedom: A Review of Lukianoff’s Unlearning Liberty and Powers’ The Silencing.” Bill is the 2016 ELA Annual Conference co-chair, along with Luke Cornelius, of the University of North Florida in Jacksonville.

ELA Members Interviewed on ‘Bloomberg Law’

Mark Paige, a professor at the University of Massachusetts-Dartmouth, and Preston Green, a professor at the University of Connecticut Neag School of Education, discussed school funding plans across the country in Bloomberg Law.

ELA Member Profile: Maria Lewis, J.D., Ph.D.

Maria Lewis, J.D., Ph.D. is an assistant professor in Education Policy Studies at Pennsylvania State University. She is also a faculty affiliate at Penn State Law. Maria’s research and teaching interests are situated at the intersection of education law and policy, particularly as it relates to issues of equity and diversity. Prior to joining the faculty at Pennsylvania State University, Maria served as a school administration consultant on the Special Education Team at the Wisconsin Department of Public Instruction. In this capacity, she was responsible for special education complaint investigations and compliance reviews.

Maria first attended the Education Law Association’s Annual Conference as a graduate student and presenter in 2012. She has continued to be an active member as a presenter and attendee since 2012. In 2015, Maria received ELA’s Joseph C. Beckham Dissertation of the Year Award. She is also currently serving as one of the editors for The Principal’s Legal Handbook.

In November, Maria and her colleagues will present preliminary findings of a study that examines the policy implications of special education research published since IDEA’s 2004 Reauthorization.

“Given my interdisciplinary research interests, I am happy have a place to call home in ELA. The Annual Conference is the conference I look forward to most. Being surrounded by so many bright scholars, attorneys and administrators who share a passion for education law has played a significant role in my professional development and will continue to serve this role for many years to come.”
Craig Wood, who is completing his term as this year’s ELA President after being elected at the 2015 conference, first joined ELA as a student member in 1975 and started his full membership in 1977, making him the association’s fourth-longest continuous member.

He is also a very active annual conference participant, having attended 33 of the last 35 of them. The first of his many ELA conference presentations over the years was in Williamsburg, Virginia, in 1981.

Wood is one of the leading scholars in the field of education law and the financing of public education in America. He is currently Professor of Educational Administration and Policy at the University of Florida, where he has been for 27 years, and teaches public education law, higher education law, and public education finance. Previously, he was a professor of educational administration at Purdue University.

Before he went into higher education, his career spanned public school classroom teacher, school district business manager, and assistant superintendent for finance for school districts across the nation.

His publications record includes more than 250 book chapters, monographs, law reviews, and scholarly journal articles.


In addition to writing, he has presented at numerous national and international academic conferences, including those in England and South Africa. He has conducted education finance litigation workshops for the National Conference on State Legislatures and the National Association of Attorneys General. Wood has served as the lead expert involving state constitutional challenges to financing public education in over a dozen states, and also as the lead expert witness for charter schools regarding funding. He has consulted with over two dozen state legislatures and many school districts regarding the financing of public education.

R. Craig Wood, then a professor of education at Purdue, receives the 1985 Golden Membership Award from Dale Gaddy for recruiting 33 new members in NOLPE (ELA’s former name).

2016 Annual Conference Runs Nov. 3-5 in Orlando, with Nov. 2 Preconference/Florida Seminar Day

Looking forward to beautiful fall weather are the ELA leadership team and an estimated 250 presenters and attendees, who will descend upon Orlando, Florida for Education Law Association’s 62nd Annual Conference.

Because the Buena Vista Palace host hotel is directly across from Disney Springs, the venue offers quick access to a wide array of dining and entertainment options for conferencegoers. This means that sessions previously offered at lunchtime or in the evening have been moved to breakfast slots—including the Roundtables on Thursday morning, the Role-Alike sessions on Friday morning, and the Poster Sessions on Saturday morning—thus freeing up time for offsite fun.

The theme of this year’s conference is “Equality and Freedom in Education,” with a significant emphasis on First Amendment, discrimination, and Title IX themes provided by the session presenters and featured speakers. As always, attendees will benefit from the practical, experience-based approach that characterizes ELA conference presentations.

Back by popular demand is the Legal Ethics preconference session on Wednesday morning. First-time conference attendees who are registered as professional members may attend one of three afternoon preconference sessions at no extra charge, prior to their orientation session at 4:30.

Registrants will receive an electronic syllabus before the conference, with useful information and advice in advance of signing in at the registration desk.

The officers and staff of ELA are excited about welcoming you to the conference. Safe travels!

Member News

(continued from page 3)

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Dryden and Arthur Quoted in Houston Chronicle about Student Athlete Protests

Houston Chronicle writer Shelby Webb extensively quoted ELA board members Andrea Arthur, an educational consultant and former educator, and Joe Dryden, an education law professor at Texas Wesleyan and Texas A&M, in a September article, After NFL player’s action, school athletes, officials tackle topic of protesting.

Although the Chronicle article is behind the paywall, it has been posted with the September Member Materials on our website.

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(continued from page 3)

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Attorney Fee Awards to Defendant Districts in IDEA Cases: The Road in the Reverse Direction*

Perry A. Zirkel, Ph.D., J.D., L.L.M.**

EDUCATION LAW INTO PRACTICE
A Special Section of West’s EDUCATION LAW REPORTER Sponsored by the Education Law Association

Enacted in its original version in 1975, the Individuals with Disabilities Act (IDEA) started as a funding act. The 1986 amendments of the Individuals with Disabilities Act (IDEA) authorized attorney fees for prevailing parents, thus making it more like a civil rights act. This shift in the burden under the general American rule undoubtedly contributed to the upward trend of litigation under the IDEA, which starts with an impartial hearing.

As a narrower step in the reverse direction (i.e., against the plaintiffs), the 2004 amendments of the IDEA authorized attorney fees for the defendant local and state education agencies in more limited circumstances. More specifically, if, as a threshold matter, the defendant agency, which usually is a school district, qualifies as prevailing, these most recent amendments authorize a court to award attorney fees:

1. against the attorney of a parent who files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation; or . . . who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation; or . . .

2. against the attorney of a parent, or against the parent, if the parent’s complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.

For the sake of brevity, this article refers to these respective frivolousness and improper-purpose provisions as “prong 1” and “prong 2.” The prerequisite step of the analysis is whether the defendant qualified as prevailing. At the other end, if the defendant prevailed and preponderantly proved prong 1 and/or prong 2, what is the amount, if any, in the court’s discretion, that meets stipulated boundaries of reasonableness.

The primary alternate and pre-existing avenue for what this article similarly refers to as “reverse” attorney fees is the broad sanctions authorization of Federal Rule of Civil Procedure 11. The other, narrower—and thus, less frequent—alternatives are Section 1927, Federal Rule of Appellate Procedure 38, and the courts’ inherent sanctioning authority.

There is ample literature with regard to attorney fees generally under the prevailing-parents’ federal highway under the originally amended IDEA. However, thus far it has not addressed this specific, reverse direction under the most recent amendments of the Act.

The purpose of this initial exploratory analysis is to systematically and synoptically canvass the case law to show the frequency and outcomes of judicial rulings specific to reverse attorney fees under this two-pronged provision of the IDEA and the other, pre-existing avenues, such as Rule 11. The specific research questions are as follows:

1. What is the total number of these decisions and their distribution between the IDEA and alternate avenues, such as Rule 11?
2. What is the overall longitudinal trend in these decisions?
3. Which jurisdictions account for the majority of these decisions?
4. What is the outcome distribution of the rulings under a) the IDEA, and b) Rule 11?
5. For the IDEA rulings, which part of the analysis—prevailing status, prong 1, or prong 2—tends to be the decisive step in the courts’ decision making?

Method

The pool for potentially pertinent decisions included: (1) the court case citations listed for the topical index subheading “Attorney Sanctions” under the heading “Attorneys Fees/IDEA” in the Specialedconnection, which is the electronic database for LRPs’ Individuals with Disabilities Education Law Reports (IDELR); (2) the results of a Boolean search on Westlaw using combinations of the terms “Individuals with Disabilities Education Act,” “attorneys’ fees,” “frivolous,” “improper use,” and “Rule 11”; and (3) the court decisions cited within the pertinent decisions. The selection criteria for pertinent decisions were that the underlying claims were based on the IDEA and the ruling was specific to the merits of attorney fees for the local or state education agency. Conversely, the exclusions were cases in which the court based the reverse attorney fees ruling on either an underlying claim that was not the IDEA or threshold adjudicative grounds, such as untimeliness or lack of jurisdiction.

As the foundation for the data analysis, the Appendix charts the relevant court decisions in chronological order. The various columns identify (1) the case in terms of the latest relevant decision (columns A–C); (2) the basis in terms of the IDEA or direct alternative and thus, less frequent—alternatives are Section 1927, Federal Rule of Appellate Procedure 38; and (3) the outcome in terms of the defendant agency’s extent of success (column F). For the decisive part in cases based on the 1986 IDEA amendments or the approximate parallels for the alternate avenues, the options were as follows:

\[
P = \text{whether the defendant qualified as prevailing}\\
1 = \text{the frivolousness prong} \\
2 = \text{the improper-purpose prong} \\
\]

For the outcome, the coded categories were as follows:

\[
+ = \text{court awarded the full requested amount} \\
(+) = \text{court awarded a reduced amount} \\
[+] = \text{court ruled in favor of district but postponed determination of the amount} \\
+/- = \text{court awarded offsetting amounts} \\
[+/-] = \text{inconclusive (i.e., remanded or preserved for further proceedings whether district was entitled to attorney fees)} \\
- = \text{court denied award altogether} \\
\]
Finally, the Comments column provides clarification or supplementation of the entries in the identified columns. The Appendix is located on pages 24-27 in the back of this issue.

Results

This section reports the findings for each of the aforementioned research questions in sequence. Based on the empirical design and overview purpose, the cases are not limited to published court decisions nor otherwise differentiated in terms of precedential weight.

1) What was the total number of these decisions and their distribution between the IDEA and alternate avenues, such as Rule 11?

As the Appendix shows, in cases with underlying IDEA claims, at least 66 court decisions have contained rulings concerning reverse attorney fees since the 2004 amendments. Two of the decisions included additional, alternative rulings to the IDEA, specifically based on Rule 11 and/or Section 1927. Thus, the 66 court decisions yielded 68 rulings. Of the 68 rulings, 56 were specific to the pertinent provisions in the IDEA amendments, ten were based on Rule 11, and the three miscellaneous others were based on Appellate Rule 38 and Section 1927.

2) What was the overall longitudinal trend in these decisions?

The longitudinal trend, although less consistent on a year-by-year basis, was markedly upward in three-year intervals: 15 cases in 2006–08, 19 cases in 2009–11, and 24 cases in 2012–14. The remaining eight cases were in the first eight months of 2015, which is too limited a period to include in the trend analysis.

3) Which jurisdictions account for the majority of these decisions?

The leading jurisdictions were as follows in order of descending frequency:
- Ninth Circuit – 13, including 5 at the federal appellate level and 10 from California
- D.C. Circuit – 10, including 2 at the federal appellate level
- Fifth Circuit – 8, including 3 at the federal appellate level, and all from Texas
- Second Circuit – 7, including 4 at the federal appellate level and 5 from New York.

4) What is the outcome distribution of the rulings under a) the IDEA, and b) Rule 11?

The outcomes distribution of these two major categories of reverse attorney fees rulings was as follows:

|                | – Denied | ±/– Inconclusive | +/– Offset Am’t | |/– Postponed Am’t | +/– Reduced Am’t | + Fully Granted |
|----------------|----------|------------------|----------------|-----------------|-----------------|-----------------|
| IDEA (n=56)    | 40       | 6                | 1              | 2               | 2               | 5               |
| (71%)          | (11%)    | (2%)             | (4%)           | (4%)            | (9%)            |                 |
| Rule 11 (n=10) | 4        | 1                | 1              | 1               | 2               | 2               |
| (40%)          | (10%)    | (10%)            | (10%)          | (20%)           | (20%)           |                 |

Thus, under the 2004 IDEA amendments, courts ruled that the defendants were entitled to attorney fees in slightly less than one-fifth of the cases (attributable to the combination of the final four columns), but the amount was offset, postponed, or reduced in half of these cases. For the five cases where the defendant was fully successful, the average amount was $18k. Conversely, for the pre-existing and overlapping authority of Rule 11, the number of rulings was much lower, but the success rate was more favorable for the defendants. Another difference was that a higher proportion of the Rule 11 awards, as compared with the percentage of the IDEA awards, was against pro se parents.

5) For the IDEA rulings, which part of the analysis—prevailing status, prong 1, or prong 2—tended to be the decisive step in the courts’ decision making?

The deciding step most frequently was both prongs together, followed by prong 1. The courts disposed of approximately one-fifth of the IDEA cases at the initial step of whether the defendant qualified as a prevailing party. Finally, prong 2 was the deciding step for only a handful of cases.

Discussion

The findings in response to questions 1 and 2—that the total number of reverse attorney fees decisions is not inconsequential and is on the rise—reflects the increasing legalization of special education. The two-pronged amendment to the IDEA in 2004 was a response to this development. As one federal appeals court observed, “[b]y amending the statute, Congress implicitly recognized that IDEA was being distorted; it was no longer simply a means to improve primary education, but was becoming a breeding ground for vexatious and costly litigation.”

Ironically, in providing a “judicializing” response, Congress fueled further litigation. Yet, the total of 65-plus decisions pales in comparison to IDEA case law overall, and even in comparison to the cases concerning “direct” attorney fees. Thus, as another federal appellate court correctly concluded in 2011: “There is [relatively] little case law governing the IDEA's provisions allowing school districts to recover attorney fees.”

The findings for the third research question largely correlated to the relatively high frequency of litigation in particular circuits and states, reflecting the “two worlds” of IDEA case law activity within the United States. However, although the periods of the analysis do not specifically square with each other, the leading positions of California and Texas for the reverse attorney fees case law is disproportionately high in relation to their rankings in the frequency of IDEA court decisions, suggesting a possible propensity among the defendant districts in these two states to resort to this particular tactic.

In response to the fourth research question, the low success rate of education agencies in recovering attorney fees under the 2004 IDEA amendments is not surprising. As another court recognized, “[a]wards of attorneys’ fees to prevailing defendants under the IDEA are unusual. Cases in which the court has granted attorneys’ fees to the prevailing governmental defendant have generally rested upon egregious failures of counsel.”

The higher success rate under Rule 11 is reflective of the much smaller number of cases, with “sanctions” reserved for exceptional circumstances.

In relation to the final question, the relatively high frequency of decisions based on prongs 1 and 2 together, or on prong 1 alone, reflects the focus on claims that defendants perceived primarily, if not
exclusively, as frivolous. Conversely, the relatively small number of decisions based on prong 2 appears attributable to the interpretation, led by the Ninth Circuit, that improper purpose has a prerequisite of a frivolous claim, thereby reversing an award of approximately $150k against the parents and their attorney. The same reasoning explains why the liable individual is much more often the attorney, not the parent: “It’s . . . harder for a school district to collect attorney fees against parents than against their lawyers: Collecting against parents requires a showing of both frivolousness and an improper purpose, while collecting against their attorneys requires only a showing of frivolousness.”

Finally, the outcomes of these reverse attorney fee cases reflects the courts’ balancing of the competing interests of stemming vexatious litigation and, yet, not chilling ardent advocacy on behalf of students with disabilities. The courts understandably provided ample weighing of the latter interest. However, on occasion they also supplied the sobering reminder of not taxing the limited resources for education with the transaction costs of litigation.

Overall, it appears, subject to more in-depth research, that the 2004 IDEA amendments for reverse attorney fees have been more symbolic than consequential in terms of IDEA policy. Reflecting rather than resolving the increasing litigiousness under the IDEA, in some of these cases the ruling concerning reverse attorney fee is merely one step in on ongoing line of litigation. Moreover, the cases of awards under this two-pronged provision have been few and far between, with the rate of district success less potent than that under the pre-existing alternative of Rule 11 sanctions. The partial awards under the 2004 amendments were often a significant reduction from the requested amount. The rare full awards were not particularly large amounts, typically being more a matter of the district being conservative in its requested amount than coming close to the district’s total cost for legal representation, much less each side’s investment in witness time, document collection, and court costs. Thus, the reverse attorney fees provisions of the 2004 amendments amount to only one small part of an ongoing policy experiment to obtain more effective and efficient education for students with disabilities. Even when limited to the picture of a counterbalancing road, this analysis reveals that its course is narrow, bumpy, and uphill.

**ENDNOTES**

5. See, e.g., Alyeska Pipeline Serv. Co. v. Wilderness Soc’y, 421 U.S. 240, 245 (1975) (referring to “the general ‘American rule’ that the prevailing party may not recover attorneys’ fees as costs or otherwise”).
8. The earlier countering steps, which were part and parcel of the aforementioned 1986 amendments, were to limit or negate attorney fees awards to parents rather than to proceed in the reverse direction of awarding attorney fees to local and state education agencies. For example, one provision precluded attorney fees to the plaintiff-parents subsequent to a timely offer of settlement where the parents unjustifiably did not accept the offer within the requisite period and their ultimate relief was not more favorable than the offer. 20 U.S.C. §§ 1415(i)(3)(D)(i)–1415(i)(3)(E) (2013). Moreover, another provision authorized reduction of the attorney fee award to the plaintiff-parents where they “unreasonably protracted the final resolution of the controversy” and the defendant education agency did not. Id. § 1415(i)(3)(F)(i)(ii). As with the 1986 amendments (supra note 4), the Congressional intent was to follow the model of the burden-shifting precedents of federal civil rights acts. See, e.g., 150 Cong. Rec. S5250 and S5349.
12. For the current criteria of this threshold issue of prevailing status, see, e.g., Dist. of Columbia v. Straus, 590 F.3d 898, 901 (D.C. Cir. 2010) (citing three-part test).
13. For the reasonableness boundaries, see 20 U.S.C. § 1415(i)(3)(C) (prevailing community rates without any bonus or multiplier) and id. § 1415(i)(3)(F)(ii) (reduction for excessive hours). For the resulting multi-step test of (a) prevailing, (b) prong 1 and/or 2, and (c) reasonable amount, see, e.g., Bridges Pub. Charter Sch. v. Barrie, 796 F. Supp. 2d 39, 46–47, 273 Ed.Law Rep. 736 (D.D.C. 2011).
14. For prior use of this term in the same context, see, e.g., Boreto v. Fenty, 2009 WL 4034987 (D.D.C. Nov. 17, 2009) at n.5.
15. Fed. R. Civ. P. 11. (2013). The four specified bases under this Rule, though not using identical language, broadly encompass the frivolousness and improper-purpose prongs, and the sanctions include “[i]f warranted, . . . attorney fees.” Id. 11(b)(c). For the breadth of this sanctioning authority, which extends beyond attorney fees specifically and monetarily awards more generally, see, e.g., In re Kuntzler, 914 F.2d 505 (4th Cir. 1990).
to provide related, or supportive, services to students with disabilities when children need such assistance to benefit from their special education programs. Under the IDEA’s definition, services such as art, music, and dance therapy could be identified as related services. Further, under the appropriate circumstances, students’ involvement in extracurricular activities, particularly when participation helps them benefit from their special education programs, could come under the umbrella of related services that need to be included as part of their individualized education programs (IEPs). At the same time, students are entitled to accommodations under Section 504 of the Rehabilitation Act of 1973 (Section 504), which prohibits recipients of federal funds from discriminating against individuals with disabilities, or similar provisions in the Americans with Disabilities Act (ADA). Section 504 and the ADA require school boards to provide reasonable accommodations to individuals with disabilities so that they may participate in the district-operated programs, including nonacademic and extracurricular activities.

This article reviews the obligations of school boards to take steps to make sure that students with disabilities have appropriate opportunities to participate in extracurricular activities. It begins by briefly reviewing the requirements of Section 504, the ADA, and the IDEA regarding students with disabilities’ participation in extracurricular activities. In so doing, the article pays par-
By extrapolation, the total number of court decisions in special education during the corresponding period is more than 1,000. See, e.g., Perry A. Zirkel & Brent L. Johnson, The “Explosion” in Education Litigation: An Update, 263 Ed.Law Rep. 1 (2011).

For example, a quick search of the West key no. 141EK989(5), which is for “costs and attorney’s fees” under “Children with Disabilities; Special Education,” yields more than 500 decisions for the time period of this analysis.


California ranked fourth and Texas ranked eighth in their overall IDEA litigation frequencies. See Bailey & Zirkel, supra note 43. Conversely, the rate for Pennsylvania was disproportionately low in relation to its overall frequency. Id. The regional results reinforced this conclusion to the extent that the Ninth Circuit and Fifth Circuit regions respectively ranked third and eighth overall (in comparison to first and sixth here) and, conversely, the Third Circuit ranked second overall (in comparison to fifth here). See Karanxha & Zirkel, supra note 42.

Alternatively or additionally, perhaps the defendant districts in these states have a perception—which the courts apparently do not largely share—that the parents’ bar exhibited an unwarranted litigation culture. See supra note 33 and accompanying text. See also id. at 955 (“Given [the plaintiff attorney] extreme and—we hope—unique combination of behaviors, including the refusal to accept all offered relief, the continued litigation of a claim for compensatory services arguably unnecessary [much earlier], and stonewalling tactics, we conclude that the district court properly determined from the undisputed evidence that [he] continued to litigate claims after they clearly became frivolous, unreasonable, and without foundation such that an award of attorneys’ fees to the District was permissible”).

The appellate court also addressed the basis under the interrelated underlying Section 504 claim. A.M. v. Monrovia, 627 F.3d at 782.

The appellate court also disposed of the award based on the ancillary underlying Section 504 and ADA claims. R.P. v. Prescott, 631 F.3d at 1127.

Id. at 1126 (“So long as the plaintiffs present evidence that, if believed by the fact-finder, would entitle them to relief, the case is per se not frivolous and will not support an award of attorney fees”)

Id. (“Collecting against parents requires a showing of both frivolousness and an improper purpose, while collecting against their attorneys requires only a showing of frivolousness”).

This ruling is separate from the 2008 decision supra concerning the same parties.

As part of its determination under 1a, the court rejected the district’s contention that the parent’s Section 504 retaliation claim was frivolous.

The court observed the relative rarity of attorney fees awards to districts to show why the standard is strict. Bobby v. Sch. Bd. of City of Norfolk, 54 F. Supp. 3d at 479 & n.6 (noting the absence of any such decisions in the Fourth Circuit).

Separable from the decision cited supra in the Appendix, this case has the same parties but a subsequent set of facts.
**Guidelines for Safe Administration of Medications in Schools**

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**Education Law Into Practice**
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**Introduction**

As increasing numbers of students take prescription medications in school—whether under the Individuals with Disabilities Education Act (IDEA) and Section 504 of the Rehabilitation Act of 1973 (Section 504), or other applicable state or federal laws—it is important for school boards to adopt policies regarding their administration. Medication policies are needed not only to protect school nurses and other educational personnel who may be responsible for dispensing medications, but also so that students, parents, teachers, nurses, and other school personnel clearly understand the procedures to be followed. Insofar as the administration of medications to students is one of the more common duties of school nurses and health aides, guidelines are necessary.

The increase in the number of students who take medications in school is due, in part, to the fact that more children with medical problems are now enrolled in public elementary and secondary schools. As noted, these children have specific rights under the IDEA and Section 504, including the right to be educated in the least restrictive environment. These statutes, as outlined in greater detail below, mandate that children with disabilities are entitled to health services, such as those provided by school nurses.

Properly administering medications to identified students with disabilities can increase opportunities for their learning success. Depending on state law, prescription drug distribution usually can be provided either by school nurses or other designated and trained school employees, such as health aides. Older students may be able to self-administer their medications, but should do so only under supervision.

A noteworthy change included in the latest version of the IDEA expressly forbids school officials from requiring parents to have their children take behavior-controlling psychotropic medications, such as Ritalin, that are covered by the Controlled Substances Act as a pre-condition to attending school, being evaluated, or receiving special education services. Even so, nothing in the IDEA prevents parents from obtaining prescriptions for their children to control their behavior, so that students may need to take medications during the school day, depending on how their medications are prescribed.

While qualified and appropriately trained school personnel may legally administer prescription drugs or supervise students who self-administer, in light of increasing difficulties with and litigation over illicit drug use in school, it is important to point out that many school board policies forbid student possession of medications, including nonprescription items such as aspirin, antacid, and/or vitamins in school. Such restrictions are grounded, at least in part, on the fear that these may be abused or could be “look-alikes” for controlled substances.

Inasmuch as myriad legal issues surround the distribution of medications, some of which could lead to costly litigation, this article offers practical recommendations to educational leaders and their attorneys for dealing with how prescription medications are distributed in schools. These recommendations should help to ensure the safe and proper distribution of medications, with the goal of protecting the well-being of students. Sound policies will help school boards avoid unnecessary, and potentially costly, legal actions in disputes over the distribution of medications in school settings.

**The IDEA and Section 504**

The IDEA requires school boards to provide related services to students with disabilities. Related services are described as developmental, corrective, and other supportive services that are given to students with disabilities to assist them in benefiting from their special education. The IDEA's definition of related services specifically references “school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child.” The IDEA’s regulations define school nurse services as those performed by qualified school nurses that are designed to enable students with disabilities to receive a free appropriate public education. The distribution of medication certainly falls within this definition. However, the IDEA's definition of related services does specifically exempt medical services, unless they are needed for diagnostic or evaluative purposes.

The first Supreme Court case to address the related services mandate was Irving Independent School District v. Tatro (Tatro). The Tatro Court provided some guidelines on the types of health-related services that schools must offer to children eligible for special education under the IDEA. The Justices ruled that a school board in Texas was required to provide clean intermittent catheterization to a child who could not voluntarily empty her bladder. Because the student needed to have the procedure performed during the school day, the Court viewed it as necessary for the child to be in class physically. Further, because the procedure could be performed by a school nurse or trained health aide, the Court made it clear that it was not an exempted medical service.

The Tatro Court also made it clear that the IDEA's related services mandate applied only to students with disabilities requiring special education, and only when related services were necessary for students to benefit from the receipt of special education. Nevertheless, students with disabilities who do not require special education or related services to benefit from special education placements are protected under the terms of Section 504.

Section 504 obligates school boards to provide reasonable accommodations to students with disabilities to allow them to access school programs. Students with chronic medical conditions can qualify for protection under Section 504. These children are entitled to the reasonable accommodation of having school nurses or other qualified school personnel dispense their medications if they are required to take those medications during school days. It is a simple access issue analogous to providing wheelchair ramps or curb cuts.

In a second case, Cedar Rapids Community School District v. Garret F. (Garret F.), the Court affirmed that a school board in Iowa was required to provide full-time nursing services for a student who was quadriplegic. The Court wrote that although continuous nursing services may cost more and may require additional personnel, they...
still did not fall under the medical services exemption.

It is thus well-settled that school boards must make provisions to dispense medications to students with disabilities. Even so, school personnel may not be required to administer prescribed doses that exceed those recommended by the Physician’s Desk Reference.

In two separate cases, both originating in Missouri, the Eighth Circuit ruled that the refusal of school nurses to administer the higher doses did not violate Section 504. In the first decision, the court ascertained that the school nurse’s refusal to administer the prescribed dose was not based on the child’s disability, but rather was based on her school board’s policy and her concerns about liability. Further, the court pointed out that expecting the school board to waive its policy was not a reasonable accommodation. In the second dispute, the court found that the board’s policy prohibiting the administration of medications in doses exceeding the manufacturer’s recommendations was neutral, because it applied to all students regardless of disability.

**Recommendations**

When children must take medications during the school day in order to be able to participate in educational activities, public policy considerations require educational leaders to ensure that they are dispensed competently and consistently. As in so many areas of the law, there is no guarantee that school boards can completely avoid litigation. Still, to the extent that educational personnel comply with sound policies, the likelihood that school systems will be found liable decreases. Accordingly, school boards, working in conjunction with their attorneys, should adopt policies regarding the administration of medication if they do not already have them in place, and review policies that are in force. In doing so, they may consider the following suggestions in establishing both policies and procedures.

Admittedly, federal law does not mandate school boards to hire physicians, psychiatrists, or nurses to supervise the medication of students, and there is little state law on the subject. Inasmuch as local board policy plays a crucial role in maintaining student safety, school board officials would be prudent to consult medical professionals from local health departments and professional medical societies, such as the American Society of Pediatrics, when developing policies. Doing so should help to ensure that appropriate medical procedures are used and that correct, up-to-date information is shared. As with all policies, medication distribution policies should be reviewed by school board attorneys to make sure they comply with all federal and state laws.

**General Policy Considerations**

Boards should assemble broad-based teams involving representatives of key constituencies on committees drafting guidelines, both when initially developing medication policies and when they are revised, because ensuring cooperation can be of invaluable assistance. At a minimum, committees should include board members, the board lawyer, administrators, teachers, a school nurse, non-instructional staff, parents, and appropriate public health professionals—as well as students, particularly at the secondary and middle school levels, because children may be involved in self-medication.

Policies should address the administration of prescription and nonprescription medications, as well as herbal and other supplements. As far as nonprescription medications and supplements are concerned, boards may want to consider requiring parents or guardians to provide a doctor’s note justifying the need for the medications and providing instructions on how and when they should be given.

Policies should spell out which personnel are authorized to administer medications. In this respect, provisions should be made for how and by whom medications will be administered when the designated personnel are not available.

School boards should require personnel to keep written authorizations on file, both from parents and prescribing physicians or other medical personnel (such as dentists or ophthalmologists), with regard to the needs of students who must take medications during the school day. It is important to have authorizations from medical personnel on file to verify that the medications that students are taking are appropriately prescribed and administered. All authorization forms should be updated at the beginning of each school year and whenever new prescriptions are issued, regardless of whether modifications or changes are made. All authorizations should be kept up-to-date, even if medications are to be self-administered.

In addition to authorization forms, board policies should require building-level personnel who have a need to know to read, and keep available for reference, information on the possible reactions or side effects to medications. By the same token, all personnel should be instructed in the appropriate emergency care in the event of complications. Insofar as this information is now readily available from pharmacies and online, it is a minor task to complete. In fact, since many pharmacies regularly include printed instructions with prescriptions and refills, these materials should be filed with students’ medical records.

Policies should require designated personnel to keep home and/or emergency phone numbers for students handy, along with the name(s), strength, and prescription numbers of all medications, the names and phone numbers of the physician(s) and pharmacist(s), and storage instructions, such as avoiding sunlight and or storing them in locations where temperatures remain between thirty-five and sixty degrees.

Consistent with the provisions of the Family Educational Rights and Privacy Act (FERPA) and other applicable laws to protect the privacy rights of students, their medical records, like all of their records, should be kept strictly confidential, with access limited to school personnel with legitimate need to access this information.

Policies on medication administration should include statements indemnifying school personnel who administer drugs or supervise self-medicating students. Also, school boards should carry adequate liability insurance, or establish self-insurance plans that are large enough to cover possible litigation.

Board policies should stipulate that students are not allowed to carry their medication to and from school. Instead, all
medications should be delivered to school health offices, by parents or other responsible adults, with their original pharmaceutical labels and packaging intact. Each label ought to include the student’s name, the medication’s date of expiration, and directions for consumption, such as dosage, time of consumption, and what, if anything, should be eaten or drunk during or before consumption.

For security purposes, especially when dealing with controlled substances, policies must require school personnel to store all medication in locked compartments or storage areas that are not readily available to students.

Personnel who dispense medications, whether school nurses or others, must be adequately prepared professionally and regularly updated. At the same time, educational officials should maintain appropriate records of any training sessions that staff members have attended, such as professional development sessions on the proper dispensation of medications, the effects of the specific drugs in use, and appropriate techniques in the handling and disposing of such potentially dangerous items as needles and syringes. By the same token, detailed records must be maintained regarding the receipt, use, return, and disposal of drugs, syringes, and needles.

Policies should spell out whether students are allowed to carry medications, either prescription or nonprescription, with them during the school day. Practices in this regard should take into consideration students’ ages and cognitive abilities. School boards should consult state laws before prohibiting students from carrying emergency medications.\(^{17}\) In this respect, policies should address how emergency medications, such as epinephrine pens or bronchial inhalers, can be made readily accessible to students if they are not allowed to carry them on their persons.

In a related matter, school personnel should be provided with regular professional development sessions so that they can be prepared to deal with the use of emergency medications should the need arise.

Unfortunately, errors in the administering of medication can occur.\(^ {18}\) Policies should address how and to whom errors will be reported.

Medication policies, which should be incorporated into student, parent, and faculty-staff handbooks, should be posted online for parents in the languages prevalent in school communities.

### Practices for Administering Medications

Those charged with the duty of dispensing medications, or supervising students who take medications themselves, should ensure that the students have consumed all medications before they leave the area where they ingest the substances. In this respect, it is wise to have students who have taken medication remain in the presence of school nurses or other supervisory personnel for a short time, to be sure that they do not suffer from any immediate side effects from the medication.

Properly supervising students, to ensure that they have actually consumed medications such as pills and are not hiding them in their mouths, can help them stay well by keeping whatever conditions they may have under control. In addition, ensuring that students have actually consumed their medication can prevent them from secreting it in their mouths, not consuming or disposing of the medicines, and possibly even selling such drugs to peers (especially if they are controlled substances such as Ritalin).

Personnel should make anecdotal notes for future reference regarding how students behave after consuming their medications. Staff members should also be reminded to pay attention to any unforeseen, medication-related changes in students’ behaviors, especially for children who take potentially mood-altering drugs such as Ritalin.

As a reminder, students who are permitted to self-administer their medication should do so only in the presence of trained personnel. Moreover, in order to protect their privacy, children should not be permitted to self-administer in front of other students.

In order to maintain confidentiality of student records, all verbal and written communications should occur per the provisions of FERPA, as well as possibly the Health Insurance Portability and Accountability Act,\(^ {19}\) more commonly referred to as HIPAA, and state laws.

Finally, at the risk of being overly punitive, policies should address possible sanctions against school personnel and students who fail to comply with these directives.

### Conclusion

Insofar as so many students in schools take medications during the school day, either for chronic conditions or short-term illnesses, it is important for school boards to establish and regularly update their policies dealing with the dispensing of medication. As with all policies, school administrators should work with their school boards and attorneys to make sure that established medication policies are workable and meet their intended purpose of ensuring student safety. Regular reviews ensure student safety by keeping policies up-to-date in terms of the ever-changing legal landscape and medical advances.

At the same time, reviewing policies regularly can help in the event that school boards face litigation. Such reviews can help to limit, if not eliminate, liability because updating policies regularly should serve as a clear defense, or reminder, to the courts that educational leaders have done all that they could have to look after the well-being of the children under their care.

### ENDNOTES

1. Education Law Into Practice is a special section of the Education Law Reporter sponsored by the Education Law Association. The views expressed are those of the author and do not necessarily reflect the views of the publisher or the Education Law Association. Cite as 317 Ed.Law Rep. 6 (July 2, 2015).
2. Dr. Russo is Panzer Chair in Education and Director of the Ph.D. Program in Educational Leadership in the School of Education and Health Sciences plus and Adjunct Professor of Law, University of Dayton, Dayton, OH. Dr. Osborne is Principal (Retired), Snug Harbor Community School, Quincy, MA; Drs. Russo and Osborne are both Past Presidents of the Education Law Association. Dr. Young is an Assistant Professor in the Department of Educational Administration in the School of Education and Health Sciences at the University of Dayton, Dayton, OH.
3. As a reminder, students who are permitted to self-administer their medication should do so only in the presence of trained personnel. Moreover, in order to protect their privacy, children should not be permitted to self-administer in front of other students.
6. See National Association of School...
For a case that predates inhalers), from carrying emergency medications, such as (prohibiting schools from preventing students

7 20 U.S.C. § 1412(a)(25). For a case that predates


9 Id.

10 34 C.F.R. § 300.34(c)(13).


12 See also, Dept of Educ., State of Hawaii v. Katherine D., 531 F. Supp. 517, 2 Ed.Law Rep. 1057 (D. Haw. 1982), affirmed 727 F.2d 809, 16 Ed.Law Rep. 378 (9th Cir. 1983)(affirming that a school board was obligated to provide a student with cystic fibrosis with health services attendant to a tracheotomy tube such as reinserting the tube when it became dislodged and suctioning mucus from her lungs).


15 DeBord v. Ferguson-Florissant Sch. Dist., 126 F.3d 1102 (8th Cir. 1997).


17 See, e.g., MASS. GEN. LAWS, ch. 71, § 54B (prohibiting schools from preventing students from carrying emergency medications, such as inhalers).


This is an update of an article⁴ that provided, in the form of an annotated outline, a comprehensive yet concise compilation of the federal laws, state laws, and court decisions⁵ concerning students with dyslexia in K-12 public schools.⁶ The added material is underlined to show the updating information. The two twin focal areas are eligibility, or identification, and services, or interventions—especially, but not exclusively, school districts’ obligation to provide a free appropriate public education (FAPE) under the federal laws specified herein. The highly litigated subject of methodology is a primary example and subset of the FAPE category.

The document contains three successive sections: 1) federal legislation and regulations, 2) state legislation and regulations, and 3) court decisions. The entries provide illustrative annotations, with detailed footnotes according to standard legal citation style. The author’s personal comments are designated in italics; the overall perspective is that of an impartial legal observer, not a dyslexia expert or advocate. In any event, this material is not intended as legal advice, and the reader should examine the cited sources in consultation with legal counsel for his or her independent interpretation and application.

**Federal Legislation and Regulations**

A. Section 504 of the Rehabilitation Act (§ 504) and the Americans with Disabilities Act (ADA)

For eligibility for free appropriate public education (FAPE), the definition of individual with a disability⁴ requires three essential elements, interpreted under the new standards of the Americans with Disabilities Act Amendments Act (ADAAA):⁸

1. physical or mental impairment – listing “specific learning disabilities” as one of the examples” and, in the accompanying commentary with analogy to the IDEA, dyslexia as one of the specific learning disabilities⁸

2. substantially limiting – determined without mitigating measures, such as assistive technology, learned behavioral or adaptive neurological modifications, and reasonable accommodations or auxiliary aids/services

3. a major life activity – listing “reading” among the examples as a result of the ADAAA⁹

Thus, having necessarily met the first of the three essential elements, a student with dyslexia does not automatically qualify under § 504. However, the ADAAA increases the possibility, upon an individualized determination of the other two elements, of eligibility.

For FAPE, § 504, requires “special or regular education and related aids and services that are (i) designed to meet individual educational needs of [individuals with disabilities] as adequately as the needs of [nondisabled] persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of 104.34 [educational setting – LRE], 104.35 (evaluation and placement), and 104.46 [procedural safeguards, including an impartial hearing].¹⁰

Thus, if the student is eligible, the school district may serve the student either under the overlapping coverage of the IDEA if the student meets its generally narrowed definition of disability or solely under § 504. For formal dispute resolution, the parent may resort to the administrative investigatory and adjudicatory avenues under § 504/ADA¹¹ and—if the student is double-covered—the corresponding avenues under the IDEA.¹²

B. Individuals with Disabilities Education Act (IDEA)

For eligibility for FAPE, the definition of child with a disability¹³ requires two essential elements:

1. meeting the criteria of one or more specified classifications, including “specific learning disability” (SLD)¹⁴
2. “by reason thereof,” needing special education

Thus, a student with dyslexia is not automatically eligible under the IDEA: s/he must meet either the remaining criteria of SLD, depending on whether the state uses a severe discrepancy or response to intervention model (RTI),¹⁵ or the criteria of another IDEA classification,¹⁶ and need special education as a result.

For FAPE, the IDEA requires special education and, if necessary, related services that meets a two-pronged standard:

1. procedural compliance: strict via the state’s complaint resolution process¹⁷ but a relatively relaxed, harmless-error approach—with a parental participation exception—via the adjudicative process¹⁸
2. substantive sufficiency: “reasonably calculated to enable the child to receive educational benefits.”¹⁹

Thus, disputes as to whether a district has met its FAPE obligation are subject to different, individualized formal resolution depending on the avenue²⁰ and the individual aspects in the forum.²¹

**State Laws**

Under the concept of “cooperative federalism,”²² it is generally understood that state laws may add to, not take away from, the districts’ obligations (or, conversely, the students’ rights) under these federal laws. Thus far, a handful of states have enacted legislation or issued regulations specific to K-12 students with dyslexia.²³ These laws vary in their strength and specificity. They apply to state education agencies (SEAs) and, through them, to local education agencies (LEAs).²⁴

Here is what I found in order of what appears to their relative strength in terms of scope and legal force:

**Strong:**

Arkansas recently enacted legislation requiring each LEA to provide (a) dyslexia screening using DIBELS in grades K-2; (b) RTI and for students with resulting markers of dyslexia; (c) a dyslexia evaluation where RTI indicates the possibility of dyslexia; (d) defined dyslexia therapy where the evaluation indicates the need for such; and (e) the necessary accommodation or equipment under § 504 if the identified student has “functional difficulties in the academic environment due to dyslexia.” The legislation also requires the SEA to have at least one dyslexia specialist and to assure that each teacher in the state has defined
dyslexia professional awareness. Finally, the legislation also includes requirements for dyslexia-related teacher preservice training, a resource guide, and regulations.25

Louisiana similarly has a series of statutes, regulations, and guidelines. First, one statute requires screening of K-3 students for various specified “impediments to a successful school experience,” including “dyslexia and related disorders.”26 Second, another statute requires the SEA, upon appropriations, to select and monitor at the LEA level “pilot program[s] to provide for universal screening of students in prekindergarten through third grade for characteristics of dyslexia and related disorders.”27 Third, the most significant legislation is not limited to any particular grade level and requires testing and remediation for dyslexia.28 The state has issued Bulletin 1903 entitled REGULATIONS AND GUIDELINES FOR IMPLEMENTATION OF THE LOUISIANA LAW FOR THE EDUCATION OF DYSLEXIC STUDENTS.29

New Jersey also recently enacted legislation requiring the state education department to issue regulations incorporating the IDEA definition of dyslexia and to mandate 1) two hours per year of intervention/ accommodation training to K–3 general education teachers and all special education teachers and specified specialists (e.g., ELL teachers and S/L therapists); 2) dyslexia screening by the end of grade 2; 3) comprehensive assessment of the screening-identified students, and 4) “appropriate evidence-based intervention strategies” to the resulting students identified with dyslexia.30

Texas starts with a set of statutes. One requires LEAs to administer a reading diagnosis instrument at grades K-2 and to notify the parent of children determined, on the basis of results, “to be at risk for dyslexia or other reading difficulties” and to implement for these children “an accelerated reading instruction program.”31 A second one, without limitation to any grade level, requires LEAs to provide testing and treatment for “dyslexia and related disorders.”32 A third one, which requires the SEA to develop criterion referenced assessment instruments in basic skills, also requires the development of alternate assessments for certain students with dyslexia or a related disorder who qualify under § 504.33 A fourth one authorizes use of state funding allotment for compensatory education to “a program for treatment of students who have dyslexia or a related disorder.”34 Finally, Texas regulations require each LEA to implement “procedures for identifying a student with dyslexia or a related disorder and for providing appropriate instructional services to the student” in accordance with the “**Dyslexia Handbook: Procedures Concerning Dyslexia and Related Disorders,” a set of flexible guidelines for local districts that may be modified by [the state board of education] only with broad-based dialogue that includes input from educators and professionals in the field of reading and dyslexia and related disorders from across the state.”35

MODERATE:

New Mexico requires an RTI-type approach for students who “demonstrate[] characteristics of dyslexia” that includes referral to a student assistance team and the team’s use of “timely, appropriate, systematic, scientific, research-based interventions,” progress monitoring, and—at the third-tier—evaluation for special education eligibility.36

MODERATE/WEAK:

Connecticut requires the following: A) “On and after July 1, 2006, any program of teacher preparation leading to professional certification shall include, as part of the curriculum, instruction in literacy skills and processes that reflects current research and best practices in the field of literacy training. Such instruction shall (1) be incorporated into requirements of student major and concentration, and (2) on and after July 1, 2015, include the detection and recognition of, and evidence-based interventions for, students with dyslexia”37; B) “Not later than January 1, 2015, the Department of Education shall add ‘SLD—Dyslexia’ under ‘Specific Learning Disabilities’ in the ‘Primary Disability’ section of the individualized education program form used by planning and placement teams for the provision of special education and related services to children requiring special education and related services”38; and C) establishment of the state Office of Early Childhood, Expanding Opportunities for Early Childhood Education and Concerning Dyslexia and Special Education.39

Mississippi requires the SEA to adopt “pilot programs” at the LEA level for assessment and appropriate services for students with “dyslexia and related disorders” who do not qualify for special education services.40 A separate law establishes a choice program, including vouchers for nonpublic schools, for children with a diagnosis of dyslexia in grades 1–6.41

Pennsylvania also recently required a pilot program that will have the participation of at least three school districts for a three-year period, including evidence-based kindergarten screening, evidence-based core reading program and interventions, and an evaluation.42

WEAK:

California encourages district professional development programs with a focus on SLD, “including dyslexia and related disorders” according to required state guidelines.43

Colorado authorizes (i.e., permits) the SEA to provide technical assistance and training to LEAs “concerning issues faced by students with literacy challenges, including dyslexia,” with an annual report to the state board of education and to the legislative education committees.44

Florida authorizes a three-year demonstration program for parental awareness of early childhood signs of “learning problems and learning disabilities, including dyslexia.”45

Illinois requires the SEA to issue regulations incorporating the international definition of dyslexia, and subject to funding, to establish an advisory committee to develop training modules.46

Iowa requires the early literacy interventions center to provide, “subject to an appropriation of funds by the general assembly,” professional development for LEA personnel in strategies that formally address dyslexia, defined in accordance with the International Classification of Diseases 10th edition (ICD 10).47

Kentucky defines dyslexia and requires web-based access to teachers of screening strategies and instructional tools.48

Ohio defines dyslexia and dyslexia specialist and authorizes training by dyslexia specialists for teachers in grades K–4.49

Washington requires the SEA to develop, “[w]ithin available resources,” an educator training program and a handbook for teachers and parents of students with dyslexia.50

NEGligible:

Missouri requires the state education department to issue guidelines for reading intervention plans that “may include . . . screening for and treatment of auditory dyslexia.”51

Tennessee defines dyslexia and requires institutions of higher education “within available resources” to report to the legislature by 3/1/15 preservice training in dyslexia.52

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Virginia, in its special education regulations, defines dyslexia but merely uses the term, akin the IDEA, solely in the context of SLD identification.53

Thus, as largely exemplified in New Jersey,44 parents and advocates of students with dyslexia need to consider lobbying for stronger state laws, based on the Louisiana-Texas model and with clearer coordination with the IDEA and § 504,55 if they view legislation or regulations as the appropriate course of action for more extensive district efforts at identification and intervention.

Court Decisions
A. Under § 504/ADA:

Eligibility: The case law is limited to one brief decision where the court ruled that the child was not eligible under § 504 prior to the ADAAA.56

FAPE: Similarly, the case law concerning interventions is, thus far, sparse and largely district-friendly.57

B. Under the IDEA:

Eligibility: The case law concerning SLD eligibility is extensive,58 but that concerning the diagnosis of dyslexia is rare.59

FAPE: Per the applicable standards,60 the dyslexia-specific FAPE cases were based on procedure,61 substance,62 or both.63 A substantial segment concerned tuition reimbursement, especially for SLD-specialized private schools.64 Finally, the case law for students with dyslexia is limited for the overlapping issue of placement in the least restrictive environment (LRE) and largely adverse to the plaintiff-parents.65

Much of the FAPE case law concerns Orton-Gillingham methodology. A systematic study found 64 decisions from 1980 through 2005, with slightly more than half of them at the IDEA hearing or review officer level and with the highest concentration during the late 1990.66 Parents won, either partially or completely, only 23% of these cases, in notable part attributable to the deference that courts accord to districts when the issue is methodology.67

In many IDEA cases, the student’s dyslexia is one of several diagnoses or is incidental rather than critical to the FAPE issue, such as whether § 1983 is available to obtain money damages under the IDEA or § 504,68 whether parents had viable claims against the district’s legal counsel and state’s review officer,69 or whether the parents were entitled to attorney fees.70 Other cases focus on rather technical adjudicative issues under the IDEA and § 504.71

Thus, litigation is typically a matter of the eligibility, FAPE, and other provisions of the IDEA, which are not specific to dyslexia per se. Given the outcomes trend and their particular concerns, parents of students with dyslexia should be careful about pursuing litigation, as compared to other avenues of legal recourse and dispute resolution.72 The factors of this cost-benefit analysis specific to litigation under these federal laws include the effectiveness of the selected attorney, the factual contours of the case in relation to the applicable federal law, and the culture/competence of the district defendant. In any event, unlike the parents’ concern, dyslexia will not typically be the key to the case outcome.

C. State Law

Relevant court decisions based on state common law or legislation/regulations have been negligible.73 Consequently, absent stronger state laws or innovative judicial precedents, state adjudicative claims do not significantly change the litigation landscape.

ENDNOTES

1. Education Law Into Practice is a special section of the EDUCATION LAW REPORTER sponsored by the Education Law Association. The views expressed are those of the author and do not necessarily reflect the views of the publisher or the Education Law Association. Cite as 318 Ed.Law Rep. 603 (Aug. 13, 2015).
2. Dr. Zirkel is University Professor Emeritus of Education and Law, Lehigh University, Bethlehem, PA. He is a Past President of the Education Law Association.
4. The following more marginal or less available legal sources are only briefly mentioned incidental to these primary sources of law: 1) § 504 or ADA policy interpretations and letters of findings of the Office for Civil Rights (OCR), 2) IDEA policy interpretations of the Office of Special Education Programs (OSEP); 3) hearing/review officer decisions under the IDEA or § 504/ADA; and 4) complaint investigation reports under the IDEA state complaint resolution process. The items in the first two categories specific to dyslexia are relatively few and targeted to the IDEA. See, e.g., Houston Indep. Sch. Dist., 65 IDELR ¶ 52 (OCR 2014); Letter to Anonymous, 22 IDELR 460 (OSEP 1994); Letter to Wilson, 22 IDELR 20 (OSEP 1994); Letter to Anonymous, 21 IDELR 70 (OSEP 1994); Letter to D’Amato, 17 IDELR 466 (OSEP 1991); Letter to Arons, 16 IDELR 1028 (OSEP 1990) (explaining that IDEA focuses on SLD eligibility and FAPE, not dyslexia or a particular dyslexia methodology).
5. Thus, it does not extend to employees or other non-students in the K-12 context. Similarly, it does not extend to students in, or other related aspects of, postsecondary education (e.g., certification or training programs for teachers).
6. For a comprehensive and current two-volume reference, see PERRY A. ZIRKEL, SECTION 504, THE ADA AND THE SCHOOLS (2011) (available from LRP Publications – www.lrp.com). § 504 extends obligations to parochial and other private schools that receive federal financial assistance, such as Title I compensatory reading services, and the ADA further extends these nondiscrimination obligations to other, secular private schools even without federal financial assistance; however, the focus here is on K-12 students in public schools.
7. § 504: 29 U.S.C. § 705(20); 34 C.F.R. § 104.3(j).
8. ADA: 42 U.S.C. § 12101(1); 28 C.F.R. §§ 35.104 and 36.104. OCR has made clear that the other prongs of the definition—“record of” and “regarded as”—are rarely applicable to students (as compared to employees) and not the basis for FAPE. See, e.g., Office for Civil Rights, Frequently Asked Questions (2009), http://www.ed.gov/about/offices/list/ocr/504faq.html; Senior Staff Memorandum 19 IDELR 894 (OCR 1992).
12. However, by way of contrast, the recognized areas of SLD under the IDEA are narrower, specifically including three reading components. See infra note 14.
13. 34 C.F.R. § 104.33(b)(1). Showing the overlap of the IDEA, the next subsection provides that implementation of an IEP under the IDEA is one means of complying with this FAPE requirement. Id. § 104.33(b)(2).
14. The investigatory avenue under § 504 and the ADA for K-12 students is the complaint process of OCR. The generally available dyslexia-related rulings are sparse and with mixed outcomes. Compare Dallas (TX) Indep. Sch. Dist., 16 EHLR 902 (OCR 1990) (inappropriate evaluation), with Wake Cnty. (NC) Sch. Dist., 23 IDELR ¶ 177 (OCR 2004) (appropriate evaluation); cf. Stafford (TX) Mun. Sch. Dist., 37 IDELR ¶ 132 (OCR 2002) (discontinuation of dyslexia portion of the IEP was not significant change in placement).
15. Perry A. Zirkel & Brooke L. McGuire, A Roadmap to Legal Dispute Resolution for Students with Disabilities, 23 J. SPECIAL EDUC. LEAD. 100 (2010). For students only covered by § 504, the adjudicative avenue starts with an impartial hearing, and the administrative-investigative avenues are the impartial hearing process and the complaint resolution process of the state education agency. Id.
16. 20 U.S.C. § 1402(3)(A); 34 C.F.R. § 300.8(a).
17. The definition lists dyslexia as one of the disorders in basic psychological processes. 20 U.S.C. § 1402(30); 34 C.F.R. § 300.8(c)(10)
under subsequent amendments of the IDEA, see, e.g., Perry A. Zirkel, Is It Time for Elevating the Standard for FAPE under IDEA? 79 EXCEPT.

CHILD. 503 (Dec. 2013); Perry A. Zirkel, Have the Amendments to the Individuals with Disabilities Education Act Razed Rovely and Raised the Substantive Standard for “Free Appropriate Public Education”? 28 J. NAT'L ASSN ADMIN. L. JUDICIARY 396 (2008). The standard may vary depending on state law and federal jurisdictions.

For the alternate avenues, see Zirkel & McGuire, supra note 12.

Such aspects include the particular child, the child's parents, the district, the investigator/adjudicator, and the attorneys, if any, on each side. For impartial hearings, the Supreme Court has interpreted the IDEA as putting the burden of proof in FAPE cases on the challenging party, i.e., the parent. Schaffer v. Weast, 546 U.S. 49 (2005). The laws in a minority of states put this burden on the district. See, e.g., Perry A. Zirkel, Who Has the Burden of Persuasion in Impartial Proceedings Under the Individuals with Disabilities Education Act? 13 CONN. PUB. INT. L. J. 1 (2011).

(ii)  Significantly impeded the parent's child; or

(iii) Caused a deprivation of educational benefit.

ELIP Articles in Next Quarter’s ELA Notes, continued
continued from page 8

In this commentary a tabular analysis canvases the major similarities and differences between the complaint resolution process (CRP) and the impartial hearing officer (IHO) process under the Individuals with Disabilities Education Act (IDEA). In contrast with the IHO process, the CRP process has received insufficient attention in the literature to date. These alternate avenues of IDEA dispute resolution merit a systematic and synthesizing comparison. The table in this commentary provides, in general chronological sequence of processing of complaints, various features of the CRP and IHO avenues, respectively, along with supporting citations, highlighting similarities and differences.

From A Comparison of the IDEA’s Dispute Resolution Processes: Complaint Resolution and Impartial Hearings by Perry A. Zirkel, Ph.D., J.D., LL.M. Dr. Zirkel is University Professor Emeritus of Education and Law, Lehigh University, Bethlehem, PA.

Record Keeping for Students with Disabilities*
Charles J. Russo, J.D., Ed.D., Allan G. Osborne, Jr., Ed.D., and David A. Dolph, Ph.D.**

Introduction

Record keeping for students with disabilities is governed by a combination of the Family Educational Rights and Privacy Act (FERPA)1 and the Individuals with Disabilities Education Act (IDEA).2 FERPA, which applies more broadly to recipients of federal financial aid, protects the privacy of educational records by affording parents and eligible students access to records, while limiting the access of outsiders, or third parties, to these records.

At the same time, consistent with FERPA, the IDEA specifically requires educational officials to take steps to ensure the confidentiality of “personally identifiable data, information, and records” maintained by schools,3 while its regulations incorporate FERPA into its statutory scheme.4 Further, the IDEA and its regulations include provisions about parental rights to examine records,5 the transmittal of special education records when students move6 (including disciplinary records),7 and the forwarding of data.8

FERPA and, by incorporation, the appropriate provisions in the IDEA both focus on educational records maintained by schools containing personally identifiable student information. The statutes and their regulations further cover directory information such as students’ names, addresses, telephone listings, and other miscellaneous data.

Confidentiality of Records - FERPA Requirements

Insofar as FERPA applies to all students, it covers children with disabilities. As such, this section provides a brief overview of FERPA’s major provisions.10

Types of Records Covered

FERPA applies to educational records generated by school staff containing personally identifiable information about students.11 The most common form of student records preserved by school officials are their so-called cumulative files containing a range of information such as transcripts, report cards, and standardized test results. Other types of records may be kept separately, such as those specific to health, guidance, or special education. Further, most school systems retain directory information, which includes demographic data on students such as their names, addresses, telephone numbers, dates and places of birth, major fields of study, participation in officially recognized extracurricular activities and sports, weight and height measurements of athletes, degrees and awards received, and the most recent previous educational agency or institution attended by the student.12

Not all documents kept by school personnel are classified as educational records subject to FERPA’s provisions.13 For example, records made by educational personnel kept in their sole possession and which are unavailable to others, except temporary substitutes,14 are exempt. This includes notes teachers commonly make and retain for their own use in the course of their duties.

In Owasso Independent School District v. Falvo,15 a case involving FERPA in a K-12 context, the Supreme Court upheld the practice of “peer grading,” whereby teachers permit students to grade each other’s assignments, because this does not turn the papers into educational records covered by FERPA. The Justices held that a school board in Oklahoma did not violate the law by allowing teachers to employ the practice, over the objection of a mother whose children attended schools in the district. Rather, the Court explained that students’ papers do not become educational records within the meaning of FERPA until their teachers enter their marks into their grade books.16

Notification

FERPA mandates that school personnel notify parents and eligible students annually of their right to inspect and review, request amendment of, and consent to disclosure of educational records, as well as to file complaints with the federal Department of Education (DOE) concerning alleged failures of schools to comply with the statute.17 School personnel must notify parents and eligible students before releasing directory information about current students, informing them of the categories of records that are considered directory, and allow them sufficient time to request that the information not be released without their consent.18

Rights to Access Student Records

Parents and eligible students have the right to inspect and review records containing personally identifiable information regarding the education of their children.19 FERPA affords noncustodial parents the same right of access to educational records as custodial parents, unless their rights have been restricted by court order.20 Moreover, FERPA requires school officials to give parents and eligible students reasonable interpretations and explanations of the information contained in students’ records.21

Students who have reached their eighteenth birthdays, or who attend postsecondary institutions, have the right to inspect and control access to their own school records.22 FERPA does allow educational officials to take the age and types or severity of students’ disabilities into account when considering whether to grant rights of access to special education students.23 Third parties are allowed access to students’ records, other than directory information, only if parents provide written consent.24 However, exceptions to this rule

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allow for the efficient daily operation of schools. For example, school employees who have legitimate educational reasons can access student records. In emergency situations, school personnel can allow individuals charged with protecting the health and safety of students to view records. Student records also may be subject to judicial subpoenas.

Third parties seeking access to student records must have written consent from parents identifying the information to be released, the reason for the requested release, and to whom the information is being given. Parents and eligible students have the right to receive copies of documents that are released. In this respect, school staff must maintain logs of all individuals or groups, except exempted parties, granted access to student records. These accounts must be kept with the students’ records and should explain the legitimate interests of those who were allowed access.

Officials of educational agencies that maintain student records must comply with parental requests for review without unnecessary delay. More specifically, unless parents and qualified students agree otherwise, officials must grant them access no later than forty-five days after receiving their requests. Needless to say, nothing prohibits officials from granting requests for access to records more quickly. Agencies receiving requests for access to records cannot charge fees to search for or to retrieve student records. Once materials are located, officials can charge for copies as long as a payment does not effectively prevent parents and qualified students from exercising their rights to inspect and review educational records.

Correcting or Amending Records

Parents or qualified students who disagree with data in educational records have the right to ask school officials to amend the disputed information. If school authorities refuse their requests to amend the records in question within a reasonable time, parties are entitled to hearings at which hearing officers evaluate whether the challenged material is accurate and appropriately contained within the educational records. If hearing officers agree that challenged materials are inaccurate, misleading, or otherwise violate the rights of students to privacy, school personnel must amend the records accordingly. Conversely, if hearing officers determine that the contested materials are not inaccurate or misleading, or do not otherwise violate students’ privacy rights, the records do not have to be removed or amended. Still, parents and qualified students may add statements explaining their objections to the records, and these declarations must be kept with the contested information for as long as the records are kept on file.

Enforcement

School officials who deny parents or eligible students the opportunity to review requested educational records, or release them without authority, can be charged with violating FERPA, thereby triggering its enforcement provisions. As the Supreme Court confirmed in Gonzaga University v. Doe, the sole remedy available to aggrieved parties is to file written complaints detailing the specifics of the alleged violation with the DOE’s Family Policy Compliance Office (FPCO). Parties and eligible students must file complaints of FERPA violations within 180 days of either claimed violations or the date when claimants knew or reasonably should have known about the alleged violations. When FPCO officials receive complaints, they notify authorities at educational institutions in writing, outlining the alleged violations and asking them to respond before they decide whether to proceed with investigations. If FPCO officials agree that violations occurred, the DOE can withhold future payments under its programs, issue orders to compel compliance, or ultimately terminate institutional eligibility to receive federal funding if officials refuse to comply within a reasonable time.

The IDEA and Student Records

The special education process generates mountains of data on students with disabilities, most of which finds its way into their records. In addition to the information contained in the records of all students, files of children with disabilities may include materials such as their individualized education programs (IEPs), progress reports, test reports, health and medical information, reports from various therapists and service providers, and data provided by parents. Although FERPA dictates requirements for all school records on students, including those in special education programs, the importance of keeping information on these students confidential is so important that Congress added additional requirements in the IDEA. As noted earlier, FERPA has been incorporated into the IDEA by reference and is reiterated in its regulations.

Confidentiality

In the IDEA, Congress charged the Secretary of the DOE to “take appropriate action, in accordance with [FERPA], to ensure the protection of the confidentiality of any personally identifiable data, information, and records collected or maintained by the Secretary and by State educational agencies and local educational agencies.” A separate section specifically requires state agencies to comply with this mandate.

Two federal cases highlight the importance of safeguarding the confidentiality of the records of students with disabilities. In the first, the Eighth Circuit, agreeing that public policy favors protection of the privacy of minors where sensitive matters are concerned, affirmed an order of a federal trial court in Missouri that judicial proceedings under the IDEA can be closed to the public. The court observed that the IDEA restricts the release of information about students with disabilities without parental permission. In order to safeguard the information while preventing the child’s stigmatization, the panel explained that access to the courtroom could be restricted and the files sealed. It should also be noted that the IDEA’s regulations give parents the option of having administrative due process hearings open to the public.

In the second case, the federal trial court in Connecticut reasoned that school board officials violated the privacy rights of parents when they released their names and that of their son to a local newspaper following a due process hearing conducted pursuant to the IDEA. The court wrote that the parents and their child had an expectation of privacy based on the IDEA and its procedural safeguards. The court pointed out that the IDEA’s regulations not only prohibit disclosure of personally identifiable information, but also require school boards to protect such data. The court found that the board violated these safeguards when the names were publicly disclosed, and that such a violation constituted a deprivation of the rights secured under Section 1983 of the Civil Rights Act.

Opportunity to Examine Records

The IDEA’s due process procedures require school boards to provide the parents of students with disabilities opportunities to examine all records relating to their children as part of their right to participate in any meetings regarding the children’s identification, evaluation, and placement. In addition, boards must provide parents and
eligible students with notice of the procedural safeguards available to them, and the notice must state that they have the right to access desired records.64

Disciplinary Information

The IDEA allows states to require school boards to include information about current or past disciplinary actions in the records of students with disabilities, and to transmit this data to the same extent as with students who do not have disabilities.55 The records may include descriptions of behavior requiring disciplinary actions, the actions taken, and other data that may be important to the safety of the students or others who may be in contact with them.

Transmittal of Records

When students transfer to new districts, personnel in their new schools must act promptly to obtain their records from their previous schools, including their IEPs and any other significant information regarding the provision of a free appropriate public education.56 Another section requires officials in the students’ former schools to take prompt action supplying these records.57 While the statutory provision applies only to students who transfer to districts within a state, the regulations apply to children who transfer to systems in other jurisdictions. When disciplinary information is transmitted to students’ new schools, it must include copies of their current IEPs along with statements of current or previous disciplinary actions.58

The IDEA includes a clarification declaring that school officials are not prohibited from reporting crimes committed by students with disabilities to appropriate authorities.59 However, when officials do so, they must also transmit copies of the children’s special education and disciplinary records.60 The regulations add a disclaimer that this may be done only to the extent that the transmission is allowed by FERPA.61

Destruction of Records

The files of students with disabilities, especially those with severe disabilities who are in special education programs throughout their schooling, can become voluminous. At some points, then, much of this information may no longer be relevant because it is outdated. Recognizing how records can quickly become cumbersome, the DOE promulgated regulations allowing for the destruction of those no longer needed. Although neither the IDEA nor its regulations specify precisely what and when records can be destroyed, they indicate that this may be done when the information is no longer needed to provide children with services.62

Documents that may be destroyed include, but are not limited to, outdated IEPs and evaluation reports. The regulation states that parents must be advised when records are no longer needed and the information must be destroyed at the parents’ request.63 Further, the regulations specify that school officials can save, without time limitations, records including students’ names, addresses, phone numbers, grades, attendance records, classes attended, and grade levels completed, along with the years they were completed.64

Recommendations for Practitioners

In light of the complexity of FERPA, and the additional record-keeping requirements outlined in the IDEA, educational leaders and their attorneys may wish to consider the following recommendations in developing policies and responsible practices:

- Periodically, and at least annually, convey notices to parents and eligible students explaining their rights to inspect, review, request amendment of, and consent to disclosure of educational records. Notice can be sent via newsletters, student handbooks, brochures, district websites, local access TV, and/or e-mail. Notices sent to parents of students with disabilities, informing them of their rights under the IDEA, must inform them of their right to examine the records of their children.
- Notify parents that if they wish to amend the records of their children, but school officials refuse, they may attach statements to the files noting their disagreement with the contents that must be included whenever records are disclosed.
- Include information in all notices on how parents can enforce their rights by filing complaints with the DOE for alleged failures to comply with FERPA.
- Recognizing that parental permission or consent is transferred to students who turn eighteen, provide all notices to those who have reached this age. However, as to students with disabilities, establish procedures for taking their ages and the types or severity of their disabilities into account when considering whether to grant them access. This is best done in consultation with their parents.
- Ensure access to records within the forty-five days set by FERPA. Policies should pay particular attention to giving timely access to the records of students with disabilities, particularly since parents may require these files for outside evaluations or to prepare for IEP meetings. Failure to provide records prior to IEP meetings could be viewed as limiting parental rights to participate fully in the IEP process.
- Inform stakeholders that records made by, and in the sole possession of, educational personnel and not accessible to others except temporary substitutes are not subject to release.
- Inform stakeholders that permission is unnecessary before data can be accessed by school staff with legitimate educational interests in the content of the records. For example, personnel conducting assessments as part of a special education evaluation may access students’ records to obtain pertinent information about the students’ educational histories. Further, in emergencies individuals who protect the health and safety of students may access records if necessary.
- Principals should appoint a custodian of records to supervise access to records in order to prevent access by unauthorized parties. Custodians should keep logs including names, dates, times, and durations that users had materials, of all who access files. Electronic files should be password-protected, and the password should be changed periodically.
- Take great care in guarding the confidentiality of the records of students with disabilities. While it is important to respect the confidentiality of all students’ records, failure to keep records of special education students confidential can have a stigmatizing effect on children.
- While ensuring the confidentiality of special education records, develop efficient procedures to share important information with all staff responsible for implementing the IEPs of students with disabilities.
- Even though the Supreme Court ruled that the practice of peer grading of assignments does not violate FERPA, educators should consider whether this is a prudent practice, especially when students with disabilities are involved.
who may be stigmatized by having their peers view their work.

- Provide annual professional development sessions to remind staff of record-keeping requirements and to keep them abreast of changes in the law or school board policy. Since many IEPs are revised annually in the spring, it would be wise to review all record-keeping requirements with special education staff at that time.

- It is equally as important to review FERPA’s and the IDEA’s requirements, along with the board’s record-keeping procedures, with administrative and secretarial staff prior to the beginning of each school year.

- Create posters outlining FERPA’s major requirements and display these prominently in faculty lounges to serve as reminders.

- Insofar as most new teachers may not be aware of FERPA, it would be prudent to include detailed information in their orientation packets and provide them with an overview as part of any orientation sessions. By the same token, new special education teachers should be instructed in the IDEA’s requirements regarding confidentiality and record keeping.

- Due to the importance of continuity of programming for students with disabilities, immediately request that the records of students transferring from another school system be forwarded. By the same token, immediately send to their new schools the records of students with disabilities who are moving to a new district. It would be helpful to give their parents copies of their current IEPs to hand-carry to the new schools. For purposes of the efficient transfer of records, it is good practice to establish and maintain good working relationships with school officials in neighboring districts.

- Develop procedures to allow access by noncustodial parents who have the same access rights as custodial parents. These procedures need to include safeguards to make sure that parents whose rights have been abrogated by court decrees are denied access to restricted records. As such, custodial parents should be notified that they need to keep school personnel informed of any changes in noncustodial parents’ rights to access records.

- Develop a systematic means of destroying records, with parental consent, that are no longer needed. In this respect, keep in mind that the IDEA has a two-year statute of limitations for parents to request hearings, and state law may provide a longer limitations period.

- Insofar as jurisdictions may have their own student records laws, school personnel need to be cognizant of any differences between federal and state laws.

- Document all steps the school district has taken to notify parents of their rights under FERPA and the IDEA, as well as those to train staff.

- Review and update all procedures annually.

**ENDNOTES**

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3 20 U.S.C. § 1417(e).
5 20 U.S.C. § 1341(b)(1); 34 C.F.R. § 300.501(c)(4).
6 20 U.S.C. § 1414(d)(2)(C)(ii); 34 C.F.R. § 300.323(g).
7 20 U.S.C. § 1413(i); 34 C.F.R. § 300.229.
11 For more complete coverage of FERPA, see Chapter 8 in Allan G. Osborne & Charles J. Russo, *The Legal Rights and Responsibilities of Teachers: Issues of Employment and Instruction* (2011).
14 34 C.F.R. § 99.3(b).
20 20 U.S.C. § 1323g(a)(1)(A); 34 C.F.R. § 300.613.
21 34 C.F.R. § 99.4.
22 34 C.F.R. § 99.10(c).
23 20 U.S.C. § 1323g(d); 34 C.F.R. § 300.625(b).
24 34 C.F.R. §§ 300.574, 300.625(a).
31 20 U.S.C. § 1323g(b)(4)(A); 34 C.F.R. § 300.614.
32 20 U.S.C. § 1323g(a)(1)(A); 34 C.F.R. § 99.10(b).
33 34 C.F.R. §§ 99.11(b), 300.614(b).
34 34 C.F.R. § 99.20(a), 300.618(a).
35 34 C.F.R. §§ 99.20(b)(c), 300.616(b)-1(c).
37 34 C.F.R. §§ 99.21(b)(1), 300.620(a).
38 34 C.F.R. §§ 99.21(b)(2), 300.620(b).
39 34 C.F.R. §§ 99.21(c), 300.620(c).
41 34 C.F.R. § 99.63.
42 34 C.F.R. § 99.64.
43 34 C.F.R. § 99.65.
44 34 C.F.R. § 99.67.
45 20 U.S.C. § 1417(c).
46 34 C.F.R. § 300.610.
47 20 U.S.C. § 1417(c).
50 34 C.F.R. § 300.512(c)(2).
54 20 U.S.C. § 1415(d)(2)(D); 34 C.F.R. § 300.504(c)(4).
55 20 U.S.C. § 1413(i); 34 C.F.R. § 300.229(b), (c).
58 20 U.S.C. § 1413(i); 34 C.F.R. § 300.229(c).
61 34 C.F.R. § 300.535(b)(2).
62 34 C.F.R. § 300.624(a).
63 34 C.F.R. § 300.624(a), (b).
64 34 C.F.R. § 300.624(b).
## Appendix: Court Decisions and Their Rulings Specific to Reverse Attorney Fees

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<td>1–2</td>
<td>–</td>
<td>E: parent’s claims were arguably well-considered, reasonable, and within state law allowance for hearing request withdrawal and re-filing</td>
</tr>
<tr>
<td>T.R. v. St. Johns Cnty. Sch. Dist.</td>
<td>50 IDELR ¶ 254</td>
<td>M.D. Fla. 2008</td>
<td>IDEA</td>
<td>1–2</td>
<td>[+/-]</td>
<td>F: ancillary to denial of plaintiff’s motion for Rule 11 sanctions (thus marginal case) - undecided but not frivolous</td>
</tr>
<tr>
<td>Oscar v. Alaska Dep’t of Educ.</td>
<td>541 F.3d 978 236 Ed.Law Rep. 570</td>
<td>9th Cir. 2008</td>
<td>IDEA</td>
<td>P</td>
<td>–</td>
<td>E: not prevailing under Buckhannon (dismissal w/o prejudice)</td>
</tr>
<tr>
<td>Bingham v. New Berlin Sch. Dist.</td>
<td>550 F.3d 601 239 Ed.Law Rep. 901</td>
<td>7th Cir. 2008</td>
<td>Rule 38</td>
<td>~1b</td>
<td>[+/-]</td>
<td>E: court issued show cause order (thus, notice to plaintiffs’ attorney)</td>
</tr>
<tr>
<td>E.K. v. Stamford Bd. of Educ.</td>
<td>52 IDELR ¶ 133</td>
<td>D. Conn. 2009</td>
<td>IDEA</td>
<td>1b</td>
<td>+</td>
<td>E: no dispute re prevailing and, here, “continued” subpart of prong 1 F: $16k (reasonable, including limited to IDEA claim)</td>
</tr>
<tr>
<td>Kelly v. Saratoga Springs City Sch. Dist.</td>
<td>53 IDELR ¶ 110</td>
<td>N.D.N.Y. 2009</td>
<td>IDEA</td>
<td>2</td>
<td>–</td>
<td>E: zealous advocacy, not bad faith</td>
</tr>
<tr>
<td>R.W. v. Ga. Dep’t of Educ.</td>
<td>48 IDELR ¶ 279, aff’d mem. 353 F. App’x 422</td>
<td>N.D. Ga. 2007 11th Cir. 2009</td>
<td>IDEA</td>
<td>1–2</td>
<td>[+</td>
<td>]</td>
</tr>
<tr>
<td>El Paso Indep. Sch. Dist. v. Richard R.</td>
<td>591 F.3d 417 252 Ed.Law Rep. 92</td>
<td>5th Cir. 2009</td>
<td>IDEA</td>
<td>P</td>
<td>–</td>
<td>E: only succeeding in reducing plaintiff-parents’ attorney fees award was not sufficient for prevailing status</td>
</tr>
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<td><strong>Part</strong></td>
<td><strong>Outcome</strong></td>
<td><strong>Comments</strong></td>
</tr>
<tr>
<td>Dist. of Columbia v. Straus</td>
<td>590 F.3d 898 252 Ed.Law Rep. 66</td>
<td>D.C. Cir. 2010</td>
<td>IDEA</td>
<td>P</td>
<td>–</td>
<td>E: not prevailing under <em>Buckhannon</em> (here, dismissal due to mootness - district provided the requested relief)</td>
</tr>
<tr>
<td>Z.A. v. St. Helena Unified Sch. Dist.</td>
<td>54 IDELR ¶ 25</td>
<td>N.D. Cal. 2010</td>
<td>IDEA</td>
<td>1–2</td>
<td>[+/-]</td>
<td>E: premature at this early juncture in the proceedings (motion to strike)</td>
</tr>
<tr>
<td>Wood v. Katy Indep. Sch. Dist.</td>
<td>54 IDELR ¶ 82</td>
<td>S.D. Tex. 2010</td>
<td>IDEA</td>
<td>(1)</td>
<td>–</td>
<td>E: sought under prong 1 but lack of subject matter jurisdiction here</td>
</tr>
<tr>
<td>El Paso Indep. Sch. Dist. v. Berry</td>
<td>400 F. App’x 947 264 Ed.Law Rep. 705</td>
<td>5th Cir. 2010</td>
<td>IDEA</td>
<td>1b</td>
<td>(+)</td>
<td>E: waiver of prevailing issue, and “unique facts” that were “more than a ‘refusal to settle’”59: F: unappealed amount of $10k as reduction from district request of $80k + distinguishing Rule 11 (safe harbor provision)</td>
</tr>
<tr>
<td>A.M. v Monrovia Unified Sch. Dist.</td>
<td>627 F.3d 773 263 Ed.Law Rep. 44</td>
<td>9th Cir. 2010</td>
<td>IDEA+60</td>
<td>1b</td>
<td>[+/-]</td>
<td>F: vacating and remanding award of $49k, which had been erroneously based on mootness, to determine remaining issue of waiver</td>
</tr>
<tr>
<td>R.P. v. Prescott Unified Sch. Dist.</td>
<td>631 F.3d 1117 264 Ed.Law Rep. 618</td>
<td>9th Cir. 2011</td>
<td>IDEA+61</td>
<td>1–2</td>
<td>–</td>
<td>E, F: reversing award of $149+ based on high standard for prong 1 and even higher standard for prong 2 against parents based on chilling-effect rationale</td>
</tr>
<tr>
<td>Dist. of Columbia v. Ijeabuonwu</td>
<td>642 F.3d 1191 268 Ed.Law Rep. 698</td>
<td>D.C. Cir. 2011</td>
<td>IDEA</td>
<td>P</td>
<td>–</td>
<td>E: not prevailing under <em>Buckhannon</em> (here, moot due to district providing the requested relief)</td>
</tr>
<tr>
<td>Alief Indep. Sch. Dist. v. C.C.</td>
<td>655 F.3d 412 268 Ed.Law Rep. 698</td>
<td>5th Cir. 2011</td>
<td>IDEA</td>
<td>P</td>
<td>[+/-]</td>
<td>E: prevailing (where district filed and won declaratory ruling at hearing officer level) but remanded to decide prongs 1–2 + subsequent ruling denying attorneys’ fees for plaintiffs - 713 F.2d 268 (9th Cir. 2013)</td>
</tr>
<tr>
<td>Bridges Pub. Charter Sch. v. Barrie</td>
<td>796 F. Supp. 2d 39 273 Ed.Law Rep. 736</td>
<td>D.D.C. 2011</td>
<td>IDEA</td>
<td>1–2</td>
<td>+</td>
<td>E: prevailing under the <em>Straus</em> test, and all 3 claims were frivolous and even more so upon 1b (continued subpart) F: awarded almost entire requested amount of $16k (only exception was $.5k for paralegal)</td>
</tr>
<tr>
<td>L.P. v. Longmeadow Pub Sch.</td>
<td>59 IDELR ¶ 169</td>
<td>D. Mass. 2012</td>
<td>IDEA</td>
<td>P + 1–2</td>
<td>–</td>
<td>E, F: unclear whether prevailing but not showing of either prong in any event—dismissed w/o prejudice + subsequent attorneys’ fees award to parents at 60 IDELR ¶ 15</td>
</tr>
<tr>
<td>I.S. v. Sch. Town of Munster</td>
<td>58 IDELR ¶ 186</td>
<td>N.D. Ind. 2012</td>
<td>IDEA</td>
<td>2</td>
<td>[+/-]</td>
<td>E: ruling that an award against a parent-attorney requires, as against any other parent, must prove both prongs – here, the parent-attorney meritless shotgun approach meets threshold standard for discovery</td>
</tr>
<tr>
<td>W.V. v. Encinitas Unified Sch. Dist.</td>
<td>59 IDELR ¶ 289</td>
<td>S.D. Cal. 2012</td>
<td>Rule 11</td>
<td>~2</td>
<td>(+)</td>
<td>F: ordered pro se parent to pay district $2.5k</td>
</tr>
<tr>
<td>Smith v. Indian Hill Exempted Vill. Sch. Dist.</td>
<td>60 IDELR ¶ 14</td>
<td>S.D. Ohio 2012</td>
<td>IDEA</td>
<td>2</td>
<td>+</td>
<td>F: magistrate’s recommended award of full requested amount of $42k against pro se parent after no response in opposition (original ruling at 57 IDELR ¶ 198)</td>
</tr>
<tr>
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</tr>
<tr>
<td>M.M. v. Lafayette Sch. Dist.</td>
<td>59 IDELR ¶ 160, appeal allowed, 60 IDELR ¶ 5</td>
<td>N.D. Cal. 2012</td>
<td>IDEA+65</td>
<td>1b</td>
<td>+/-</td>
<td>E: rejected 1a but agreed with regard to 1b F: awarded offsetting amounts of $5k in response to parent’s request for $262k and district’s request for $76k in attorney fees + subsequent ruling in parent’s favor on another claim, with order for possible attorneys’ fees for plaintiff - 767 F.3d 842 (9th Cir. 2014) + recent ruling to hold attorneys’ fees rulings in abeyance in light of subsequent decisions on the merits in the three interrelated cases 2015 WL 5064078 (N.D. Cal. Aug. 27, 2015)</td>
</tr>
<tr>
<td>Moyer v. Long Beach Unified Sch. Dist.</td>
<td>60 IDELR ¶ 126</td>
<td>C.D. Cal. 2013</td>
<td>IDEA</td>
<td>1</td>
<td>–</td>
<td>E: not frivolous in terms of precedent</td>
</tr>
<tr>
<td>Doe v. Attleboro Sch. Dist.</td>
<td>960 F. Supp. 2d 286 301 Ed.Law Rep. 345</td>
<td>D. Mass. 2013</td>
<td>IDEA</td>
<td>1–2</td>
<td>–</td>
<td>E: award against parents requires both prongs (based on R.P.), and parents’ claim was not frivolous, which would have required completely false and nonsensical, rather than plausible, evidence</td>
</tr>
<tr>
<td>Candeo Sch., Inc. v. Bonno</td>
<td>60 IDELR ¶ 245</td>
<td>D. Ariz. 2013</td>
<td>IDEA</td>
<td>1</td>
<td>–</td>
<td>E: not at the requisite level (citing R.P. v Prescott Unified Sch. Dist.)</td>
</tr>
<tr>
<td>S.M. v. Taconic Hills Cent. Sch. Dist.</td>
<td>60 IDELR ¶ 284</td>
<td>N.D.N.Y. 2013</td>
<td>IDEA</td>
<td>P</td>
<td>–</td>
<td>E: not prevailing (and footnote that that even if prevailing, would deny based on lack of prong 1 and court’s discretion)</td>
</tr>
<tr>
<td>Bolduc v. Norwood Pub. Sch.</td>
<td>61 IDELR ¶ 16</td>
<td>D. Mass. 2013</td>
<td>IDEA</td>
<td>1–2</td>
<td>–</td>
<td>E: dismissed, with focus on subpart 1b</td>
</tr>
<tr>
<td>Bethlehem Area Sch. Dist. v. Zhou</td>
<td>61 IDELR ¶ 9</td>
<td>E.D. Pa. 2013</td>
<td>IDEA</td>
<td>2</td>
<td>[+</td>
<td>]</td>
</tr>
<tr>
<td>M.M. v. Plano Indep. Sch. Dist.</td>
<td>63 IDELR ¶ 49</td>
<td>E.D. Tex. 2014</td>
<td>Rule 11</td>
<td>~1–2</td>
<td>+</td>
<td>E: granted full requested amount of $4k against parents’ counsel as justified and reasonable based on frivolousness and improper purpose</td>
</tr>
<tr>
<td>Capital City Pub. Charter Sch. v. Gambale</td>
<td>27 F. Supp. 3d 121 311 Ed.Law Rep. 879</td>
<td>D.D.C. 2014</td>
<td>IDEA</td>
<td>1</td>
<td>+</td>
<td>E: no dispute re prevailing and both claims were frivolous F: awarded full requested amount of $12k as reasonable</td>
</tr>
<tr>
<td>Dawn G. v. Mabank Indep. Sch. Dist.</td>
<td>63 IDELR ¶ 63</td>
<td>N.D. Tex. 2014</td>
<td>IDEA</td>
<td>1–2</td>
<td>–</td>
<td>E: lack of specific supporting evidence – plaintiff’s lack of success is not enough – policy against deterring good faith challenges under the IDEA</td>
</tr>
<tr>
<td>A.L. v. Jackson Cnty. Sch. Bd.</td>
<td>63 IDELR ¶ 136, adopted, 63 IDELR ¶ 168</td>
<td>N.D. Fla. 2014</td>
<td>Rule 11</td>
<td>~1</td>
<td>(+</td>
<td>)</td>
</tr>
<tr>
<td>G.M. v. Saddleback Valley Sch. Dist.</td>
<td>583 F. App’x 702</td>
<td>9th Cir. 2014, cert. denied 135 S. Ct. 1705 (2015)</td>
<td>IDEA</td>
<td>1</td>
<td>–</td>
<td>F: technically remanded but clearly disagreeing that the claim was frivolous</td>
</tr>
<tr>
<td>A</td>
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</tr>
<tr>
<td>Oakstone Cnty. Sch. v. Williams</td>
<td>59 IDELR ¶ 214, rev’d for non-IDEA rulings, __ F. App’x __</td>
<td>S.D. Ohio 2012</td>
<td>IDEA</td>
<td>1–2</td>
<td>–</td>
<td>E: award for prong 2 also requires violation of prong 1 (based on R.P.), which district failed to show here F: rev’d sanction against parents’ counsel of $7,500 – not repeated (Am. I and FERPA)</td>
</tr>
<tr>
<td>Horen v. Bd. of Educ.</td>
<td>63 IDELR ¶ 290</td>
<td>S.D. Ohio 2014</td>
<td>Rule 11</td>
<td>–1b</td>
<td>+</td>
<td>F: awarded sanction of full requested amount of $33k against pro se parents who continued groundless litigation after repeated warnings</td>
</tr>
<tr>
<td>S.M. v. Hendry Cnty. Bd. of Educ.</td>
<td>64 IDELR ¶ 75</td>
<td>M.D. Fla. 2014</td>
<td>Rule 11</td>
<td>–1</td>
<td>–</td>
<td>E: not at requisite deliberately indifferent level + subsequent dismissals of “shotgun” claims, including Section 504 and Section 1983 in addition to IDEA (at 64 IDELR ¶¶ 109 and 164)</td>
</tr>
<tr>
<td>G.M. v. Dry Creek Joint Elementary Sch. Dist.</td>
<td>59 IDELR ¶ 223, <em>aff’d</em>, 595 F. App’x 969 315 Ed.Law Rep. 88</td>
<td>E.D. Cal. 2012</td>
<td>IDEA</td>
<td>2</td>
<td>+</td>
<td>E: upheld hearing officer’s award of $4k against based on prong 2</td>
</tr>
<tr>
<td>Intravaia v. Rocky Pont Union Free Sch. Dist.</td>
<td>64 IDELR ¶ 274</td>
<td>E.D.N.Y. 2014</td>
<td>Rule 11</td>
<td>–1</td>
<td>–</td>
<td>F: procedural defense of safe harbor provision F: not at the requisite even narrower level</td>
</tr>
<tr>
<td>A.L. v. Jackson Cnty. Sch. Bd.</td>
<td>64 IDELR ¶ 266</td>
<td>M.D. Fla. 2015</td>
<td>IDEA</td>
<td>1</td>
<td>–</td>
<td>E, F: district’s claim suffers from “hindsight bias”</td>
</tr>
<tr>
<td>Turton v. Va. Dep’t of Educ.</td>
<td>64 IDELR ¶ 305</td>
<td>E.D. Va. 2015</td>
<td>Rule 11</td>
<td>–1–2</td>
<td>(+)</td>
<td>E: utterly inadequate investigation and inferable improper purpose (though not based on $20M claim) F: further proceedings to determine reasonable form and, if monetary, amount</td>
</tr>
<tr>
<td>A.A. v. Clovis Unified Sch. Dist.</td>
<td>65 IDELR ¶ 18</td>
<td>E.D. Cal. 2015</td>
<td>IDEA</td>
<td>1</td>
<td>–</td>
<td>E: declined to decide, instead exercising discretion to decline “at this time” due to small victory and ongoing litigation</td>
</tr>
<tr>
<td>C.W. v. Capistrano Unified Sch. Dist.</td>
<td>784 F.3d 1237, 317 Ed.Law Rep. 53</td>
<td>9th Cir. 2015</td>
<td>IDEA [Sec. 1988]</td>
<td>1 [2]</td>
<td>–</td>
<td>E, F: reversing lower court award for not meeting requisite standard of Christiansburg; however, agreeing in part with prongs 1–2 under Section 1988 (for underlying ADA and Section 1983 claims, not the Section 504 claim) and remanding for further proceedings to determine amount</td>
</tr>
<tr>
<td>Salmeron v. Dist. of Columbia</td>
<td>__ F. Supp. 3d __</td>
<td>D.D.C. 2015</td>
<td>Rule 11</td>
<td>–1,2</td>
<td>(+)</td>
<td>sua sponte show cause order on plaintiff’s attorney</td>
</tr>
<tr>
<td>Shadie v. Hazleton Area Sch. Dist.</td>
<td>66 IDELR ¶ 106</td>
<td>M.D. Pa. 2015</td>
<td>IDEA Sec. 1988</td>
<td>1</td>
<td>–</td>
<td>refused to apply prevailing party analysis to defendant in the absence of frivolousness or other such exception</td>
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