What's New and Trending in Special Education Law and Why It Matters

Presented by Deusdedi Merced, Esq.

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Melanie Reese >> Hello, everyone. Thank you for joining CADRE's webinar, "What's New and Trending in Special Education Law and Why It Matters." I'm Dr. Melanie Reese, the director of CADRE. Today is webinar is presented by one of CADRE's senior consultants and a managing member of Special Education Solutions, Deusdedi Merced. Thank you for attending our seminar, and since 1997, Mr. Merced's legal career has focused on special-education law, where he has spent several years representing parents and children with disabilities and their children as well as serving as an IDEA hearing officer, mediator and facilitator in hundreds of matters. CADRE is excited to have Deusdedi joining us today to discuss how courts have addressed legal trends and their implications in the field. A few technical notes: Phone lines have been muted to minimize interruptions. At any point during the presentation, you can enter any questions into the questions box on your control panel. CADRE staff will be monitoring comments and questions throughout the webinar. Deusdedi will be taking questions at the end of his presentation, but you can enter them at any time. The PowerPoint for the webinar, as well as the Hot Legal Topics outline referenced during this presentation is available in the handouts section on the control panel and on the CADRE website. Just a reminder to all of today's participants: This webinar is being recorded and will be available on CADRE's website within the next few days. Go to the next slide, please. "The information shared in this webinar is not intended to serve as, nor should it replace, legal advice. Opinions expressed by today's presenter are not represented to be an official or unofficial interpretation of legal guidance from the US Department of Education or CADRE. Application of information presented may be affected by your state's statutes, regulations, departmental/local policies and practices and unique fact-finding patterns of a particular case. The services of a duly licensed attorney in your state should be sought in responding to individual situations." And with that, I bring you Deusdedi Merced. Thank you.

Deusdedi Merced >> Thank you, Melanie, Amanda, Noella. Good afternoon or morning for those East of Central Time. First, allow me to thank you for your gift of time. I hope I can do my best to repay you in the next hour. Today we're going to be discussing and looking at three areas of special education litigation that continue to evolve. The first is Endrew F. The second is "Stay Put," and the third is electronic records. In our limited time together, I'll share some observations on how these areas are trending as well as some practical considerations for you to reflect on beyond today. A few comments about the outline before we begin: First, where I cite court cases, I've provided the federal citations and official citations to the extent that they were available to me. In any case, all citations included in the outline include a citation to the IDEOR, which is LRP's Special Education Connection reporter. Second, the outline includes a significant amount of information, not all of which I will have time to review and address today. This said, I will cover the intended topics within the time that we spend together. Third, this outline is not and was not intended to canvass all of the reported cases at the national level. Selection of the cases were based on a thematic approach. With that, let's begin. By now, Endrew F. is old news. Much was said after it was published and decided by the United States Supreme Court. It's a game changer. It raised the bar. Whether it's a game changer, that's not borne out by a review of the majority of cases, except in those few circuits, the Fourth Circuit, the Tenth Circuit, the D.C. Circuit and others like it, where the quantum of educational benefit to the child had to be merely more than de minimis. In fact, 2 years after Endrew F., our friend, Perry Zirkel, looked at 75 rulings and concluded that it

was not a game changer, at least not in the 2 years that followed the publication of the decision. Specifically, he said, "The cumulative conclusion is that Endrew F. is not a 'game changer' in terms of pre-postjudicial rulings. Indeed, a surprising number of substantive FAPE cases within the most recent 6-month interval continued to use the Rowley benefit standard without any mention of Endrew F. or its progress standard." Not a game changer. A big gray area is the question whether it raised the bar, and the answer to that question is, "It depends on what bar we're talking about." If the bar is that children with disabilities must be offered an education substantially equal to the opportunities that are provided to nondisabled children, the court rejected that argument in Endrew. That bar was not raised. If, however, the standard itself articulated by the court in Endrew is the metaphorical bar, certainly in the Fourth, Tenth, D.C. circuits and others like it, that bar is higher now. But the majority of the other circuits pre-Endrew fell in the meaningful camp, and in these circuits, many have said that their application of the Rowley standard comports with the holding in Endrew F. In other words, the bar remained the same. Perhaps our attention is needed elsewhere, away from the overall "How much benefit?" dialogue and rather on whether Endrew's focus on progress in light of the child's circumstances has raised the bar on the quantum of evidence needed to determine whether a free, appropriate public education was afforded to the student. The recent case law is instructive. Though Endrew uses the terms like, "Demanding," "Challenging," and ambitious to define progress appropriate in light of the child's circumstances, claims of slow progress made by parents have not fared well before the courts. Example of these cases are on your slide, and I will look at six cases in particular. C.S. v. Yorktown Central School District, page four of your outline, subparagraph C.1.: The court notes in C.S. whether the student, quote, "Achieved goals set forth in the student's June 2014 IEP is not the controlling issue. Rather it is her progress toward achieving them." M.L. v. Smith, case out of Maryland, page six, subparagraph C.4. in your outline: The court notes that, quote, "Uneven but steady progress is meaningful progress in light of the student's ability to identify more words than where she had started." K.D. v. Downingtown Area School District, a case out of Pennsylvania, page seven of your outline, subparagraph C.5.: Here the court notes that, quote, "Fragmented progress given the student's, quote, 'Impairments and circumstances,' is what, quote, 'reasonably expected of the student.'" Johnson v. Boston Public Schools, page eight, subparagraph C.6. of your outline, where the court remarks that, "The speed of advancement and the educational benefit must be viewed in light of the child's circumstances, individual circumstances." D.F. v. Smith, case out of Maryland, page 11, subparagraph C.10. in your outline: Here the court notes that students with autism may not progress linearly or consistently and that such intermittent progress is, quote, "More likely evidence of the difficulties of educating students with autism." Then finally we have the Perkiomen Valley School District case out of Pennsylvania, page 12 of your outline, subparagraph C.12., labeling the failure to meet an IEP goal of the student as, quote, "Troubling," but noting that that alone does not make the IEP inappropriate or inadequate. Bottom line in reviewing these six cases, slow progress alone, at least to these courts, has not been enough post-Endrew. Something more is needed. What about repeated goals? Goals are repeated time and again in the student's IEP. How about identical IEPs? This, too, has not fared well for parents before the courts, unless there is evidence that the student has mastered the goals in the IEP or the IEP show falls short of what the student can reasonably accomplish within the school year. Let's look at two cases. Let's look at three cases. Let's compare the C.S. v. Yorktown Central School District and the K.D. v. Downingtown Area School District with the Matthew B. case at the bottom of the screen, there. Let's start with C.S. C.S., as you recall, is the Yorktown case at Yorktown, New York. It's on page four of your outline. In C.S., the parents claim that the IEP in successive school years were virtually identical. The courts saw the similarities as being reflective of the student's progress or, as you

recall, the student's slow progress. For the court, the fact that the IEPs were identical did not mean that the IEP was inadequate or not well-written. It was a reflection that the student's disability and slow progress in meeting those annual goals required the student to need more time to accomplish the goals in the IEP. Similar is K.D. v. Downingtown, which is the Pennsylvania case on page seven of your outline. The court discounts here the parents' argument that carrying some of the goals from one year to the other was, in fact, a denial of a free, appropriate public education. The court here says that that is telling of or a reflection of the student's impairments and circumstances. Again, the student's disability and slow progress warranted additional time in mastering the goals. Compare those two cases with the Matthew B. case which is out of Pennsylvania, page 13, subparagraph C.13. of your outline where the student had nearly mastered all of the goals in the IEP, yet year after year, the school district repeated the goals on his successive IEPs. And the school district also, in the IEPs, continued to place greater demands on the student, suggesting, at least to the court, that he was capable of more with each passing year. Those pieces of facts, that evidence, convinced the court that, in fact, the parent was right that repeating the goals, having virtually identical IEPs, in fact denied Matthew a free, appropriate public education. The severity of the student's disability is also a factor that courts have considered in these slow/no-progress claims, and the severity of the disability has allowed the courts to justify where there is slow/no progress. Let's return again to the C.S.-Yorktown case out of New York, page four. In addressing the parents' claim that the student performed well below benchmark, the court notes that the student was expected to perform below grade level given her educational history and disability. Rosaria M., case out of Alabama, page five of the outline: The court notes that the student was not fully integrated. Keep in mind that Endrew made a distinction between those students who were fully integrated and those students who were not fully integrated. So here the court notes that the student was not fully integrated and as such, quote, "It is not a given that her IEP should have tracked the standards for timely advancement, nor is it proper to assume that the student should have advanced to the next grade level on the same timetable as her peers." Why? Her disability and the fact that she was not fully integrated. K.D., the case out of Pennsylvania, page seven of your outline: The court concludes, quote, "Given the student's impairments and circumstances, fragmented progress could reasonably be expected because there is no reason to presume that the student should have advanced at the same pace as her grade-level peers." Why? Because she was not fully integrated. Johnson v. Boston Public Schools, page eight, subparagraph C.6. of your outline, this is the case relating to the speed of advancement. The court connects the speed of advancement to the student's individual circumstances. E.R. v. Spring Branch Independent School District, page eight, subparagraph C.7. of the outline: This is a Fifth Circuit case, and if I remember correctly, it came out of Texas. Here the Fifth Circuit rejects the parents' request for, quote, "Robust academic goals." The parents wanted the student to have annual goals that tracked grade-level standards, and the court rejected the parents' claim that the IEP and the goals were inadequate in part because of the student's, quote, "Condition, and that her condition would have placed her in a position where success would have been exceedingly unlikely." And finally, the Perkiomen Valley School District case out of Pennsylvania, page 12 of your out ... Here again the court dismisses the parents' claims that the student did not master the goal, and again they noted it as troubling, but that was not enough to invalidate the IEP because it was, "Reasonably calculated given the student's," quote, "intellectual potential." The severity of disability, not fully integrated factually determinative post-Endrew in the cases that I reviewed. Let's look at the IEP as a whole and how that has been used by the courts. Measuring the adequacy of the IEP as whole despite perceived inadequacies, deficiencies in aspects of it has also gotten some traction by the courts, but parents have not been able to convince the courts that the deficiencies that they are outlining are

sufficient to deny the child the free, appropriate public education, at least in the cases I looked at. In part because the courts have looked at the IEP as a whole to justify a finding that a free, appropriate education has, in fact, been afforded to the student. We have two cases in this category, the R.F. v. Cecil County Public Schools out of the Fourth Circuit, that's on page nine of your outline, and the C.F. v. Radnor Township School District which is on page 10 of your outline. In R.F., the circuit rejects the parents' argument that the student's behavior plan which was incorporated into the student's IEP ... And I understand that in some jurisdictions the behavior plan is a separate document not incorporated into the IEP. In this school district, the behavior plan was, in fact, incorporated into the IEP. They rejected the parents' claim that the behavior plan was insufficient, deficient because it only focused on one maladaptive behavior. The parents said, "Hey. My child has many bad behaviors that need to be addressed by this behavior-intervention plan, and this behavior plan falls short because it only focused on biting, and my child is hitting, pulling hair, scratching, and the behavior plan does not address those behaviors." The court says, "No dice." The court says that the skill set to address the one maladaptive behavior, the biting, was adaptable to the other behaviors, and therefore the IEP as a whole addresses all of the maladaptive behaviors of the student because they can use the same skill set to address the hitting, the pulling of hair, the scratching. The second argument that the parents put forth before the Fourth Circuit is that the IEP lacked a social-skills goal. Here again, the parents were not able to convince the Fourth Circuit that the failure to include that goal was a denial of a free, appropriate public education to the student. Why? Because the court pointed out the IEP included the use of social stories to remind the student of appropriate interactions, and the IEP also included regular walks around the school building to greet other students. These two items included in the IEP addressed the social-skill deficits that the parents had wished had an IEP goal for, and therefore the IEP as a whole met the student's needs. C.F. is a case out of Pennsylvania on page 10 of your outline. Similar to R.F., the parents are not able to convince the court of the inadequacy of the IEP. Here the court holds that the IEP does not require distinct measurable goals for each recognized needs where more general goals sufficiently capture the student's need. In C.F., the parent complained that there were only seven annual goals, but the court pointed out that there were 31 short-term objectives and that as a whole, even though the annual goals were a little more general in nature, they met the needs of the student as identified in the present level of academic achievement and functional performance in the IEP. In all, I looked at 13 cases. Now, these 13 cases were selected not because I was trying to pick and choose which case I wanted to present today but because these 13 cases provided an appreciable discussion of the Endrew standard, and Endrew wasn't simply mentioned in a string cite. Many of the cases, as Perry Zirkel in his latest study suggests, have simply sided to Endrew without appreciable discussion. We're not just beginning to see courts really grapple with the language in Endrew F., and as a result, we're getting a little more in-depth look at how the courts are applying Endrew. Noteworthy of the 13 cases that were included in the outline, the parents prevailed in only two of the 13. So what can we distill from these cases? As I suggested earlier, post-Endrew courts are taking more of a deep-dive review of FAPE claims. So what are they looking for? Things that sound familiar to you. First, whether the student's needs are identified in the present level of performance statement. Those are the present levels of academic achievement and functional performance, and the last iteration of the IDA, whether the statement includes a baseline of current performance for each need that is identified, keeping in mind that as the cases suggested, the C.F. case, that there does not need to be a measurable goal for each recognized need in the present levels of academic achievement and functional performance. Of course, the courts will look at whether there is a corresponding annual goal that sufficiently address the needs that are identified in the PLAAFPs. The courts are also looking

at, and this is a biggie, whether the student's previous rate of academic and functional progress in learning, mastering the needed skills. They're looking at whether that potential for growth, that potential of progress correlates with what is expected of the student by the end of the school year in which the IEP goals are to be mastered. They're also, as I suggested just now, they're looking at the potential for growth given that student's educational history and disability. They want to know whether the student is on track to achieve or exceed grade-level proficiency, and again, they're looking at whether the goals are reasonably calculated to afford the student a reasonable opportunity to achieve them within 1 school year given the student's rate of progress. So what does that mean? It all sounds familiar. Endrew, if anything, reminds us to go back to basics. Go back to basics, whether that's at the IEP meeting between the parent and the school district, whether that is in presenting evidence as a school district or a parent to the hearing officer or in states where you are an office of administrative hearings the administrative-law judge or whether to the courts. Go back to basics. The statement of the present levels of academic achievement and fundamental performance matter, and as the student's circumstances change, so should the present levels of academic achievement and fundamental performance statement. Without an accurate PLAAFP, everything that comes after it is likely to implode because as we know, the IEP is a layered document with each subsequent layer building on the prior layer. Understanding the rate of progress and the potential for growth given the history and disability allows for an informed assessment of whether the IEP allows for progress in light of the student's circumstances. In the 13 recent cases that I cite to in the materials is evidence that post-Endrew courts will take a deep dive on assessing the claims placed before it, and they're placing a greater burden on the parties to provide the necessary evidence to determine whether the quantum of evidence supports or rejects the claims, the arguments that are before the court, before the hearing officer, before the administrative-law judge. Let's turn our attention now to stay put. A recent spate of federal district court cases out of New York and particularly New York City challenge our conventional thinking of stay put. Stay put as we know it requires a school district to maintain a student in the then-current educational placement until the litigation has concluded. What the actual stay-put placement is has enjoyed varying interpretations depending on what circuit you're in, but there are three conventional definitions of then-current placement. The first is it's typically the placement described in the most recently implemented IEP. The key words there are, "Recently," meaning the latest IEP and, "Implemented." The second interpretation of what is the then-current educational placement is the operative placement actually functioning at the time when the dispute arises. The dispute arises when the parent or the school district files the due-process complaint. Interestingly, the standard is operative placement actually functioning. Note that there is not necessarily a connection to an actual IEP. However, most cases, most courts define the operative placement by looking at an IEP, whatever IEP is in place at the time the dispute arises. And the last interpretation of what is the then-current educational placement is the last-agreed-upon IEP. Note that the last-agreed-upon IEP may be some years earlier than the operative placement at the time the dispute arises. We also know from the stay-put case law that when this stay-put placement is no longer available courts have typically required the school district to place the student in a materially/substantially similar program, a comparable program to what was the stay put. So when the placement is no longer available, courts require the school district to place the student in a materially/substantially similar program. This is key. The New York cases have expanded and have extended the substantially similar theory to stay put, even when the pendent placement continues to be available. The New York cases are extending the substantially similar theory to cases where the pendent placement continues to be available.

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Deusdedi Merced >> Sorry about that. The iHope/iBrain cases, starting on page 16 of the outline, share similar facts. iHope/iBrain are schools in New York City for children with traumatic brain injury, TBI. Initially whether by an unappealed hearing officer decision awarding reimbursement or by stipulation of agreement, the New York City School District was required to pay for the cost of the student attending the iHope program in school year 1. So the parents either won a decision seeking reimbursement at iHope, or as a result of the filing for due process seeking reimbursement the parties reached an agreement and the school district was required to pay, in school year 1, for the student to attend the iHope program. In school year 2, now, the parents unilaterally enroll the student in the iBrain program, and they file a due-process complaint seeking tuition reimbursement. The parents also sought, as soon as they filed, an interim order seeking stay put at the iBrain program under the theory that the iBrain program was substantially similar to iHope. Here is the kicker: The iHope program continued to be available to the students. In four of the eight cases included in the materials, the district court sides with the parents and required the school district to pay for the cost of iBrain during the pendency of the litigation even though the iHope program continued to be available to the student. Abrams on page 17, Navarro on page 17, Soria on page 20, Melendez on page 20, all of these cases the court orders the school district during the pendency of the litigation to determine whether iBrain is appropriate and whether tuition reimbursement should be provided to the parents, they ordered the school district to pay for the cost of iBrain during the pendency of the litigation despite the fact that iHope continues to be available to the students. In the other four cases, the district court sides with the school district for varying reasons. In de Paulino which is on page 16, subparagraph D.2.a. of your outline, the court notes that removing the student from iHope and allowing stay put to be in iBrain, quote, "Risks violating the student's right to a stable learning environment." The purpose behind stay put is to maintain the status quo, and the court felt that removing the child from iHope would in fact violate the student's right to that stable learning environment in iHope by moving that student to iBrain. Angamarca which is on page 18, subparagraph D.2.d., the court finds iBrain not to be substantially similar because it could not provide, at the time the student enrolled in iBrain, the student with two related services that had been provided in iHope, and those two related services were vision therapy and parent counseling. Note that Angamarca would have been on the side of finding for parents had iBrain been able to provide those two related services, so there would have been five cases on the parent side if you're keeping tally had iBrain been able to provide the services. So Angamarca, at least the Angamarca court, bought into and accepted the substantially similar theory, even though the operative placement continued to be available to the student. Neske which of the four cases listed on your slide provides probably the most in-depth analysis of the four rejected the parents' argument, and they reasoned that the IDEA did not provide, quote, "A portable voucher to parents, at least when, as here, the original placement remained an available option," that original placement being iHope. Hidalgo on page 21 adopts the Neske reasoning and finds that iHope is the student's pendent placement during the litigation of the underlying claim for tuition reimbursement in iBrain. So why does this matter to you if you're not sitting in New York City? I highlight these cases for two reasons. First, though as I suggested, these cases only carry persuasive authority outside of New York City. Like the G.L. case vs. Ligonier Valley School District out of the Third Circuit that addressed the statute of limitations, these cases are worth watching and worth keeping track. The Second Circuit has not weighed in. There are ... Some of these cases have been appealed to the Second Circuit, but they have not weighed in just yet. I suspect we will get a decision by springtime the latest. Should this second circuit buy into the substantial-similarity theory, even though the operative placement continues to be available to the

student, you can expect outside of New York City in whatever little cranny and jurisdiction you are sitting in right now while I speak that that argument is going to be made around the country just as the G.L. argument was made and started to be made as the case was progressing up to the Third Circuit, and once the Third Circuit made their decision, certainly the argument was made in other jurisdictions in other circuits. And this argument is an important one because although the iHope/iBrain cases are talking about non-public school to non-public school, it doesn't require much to make the argument for those students that are sitting in a public school in which the parent believes they've been denied a free and appropriate public education and remove the child to a non-public school and argue before the hearing officer before the administrative-law judge the court then, in fact, like what the courts in the iBrain cases have said, IDEA does allow for a portable voucher under the stay-put provision. So they're worth watching to see how that pans out in the Second Circuit. I suspect that if the Second Circuit buys into the argument, you will certainly hear this across the country. The second reason I cite to these cases has to do with the facts in Angamarca which is the case on page 18 and Hidalgo which is on page 21. In both these cases, the student initially attended the iHope program as a result of a settlement agreement between the parties. The settlement agreement expressly stated that iHope could not be relied upon to establish it as the student's pendent placement. It specifically excluded iHope as the pendent placement, and as you know, if you practice in this area, most settlement agreements, particularly where you have a reimbursement case where a parent places a child in a private program, a private placement, includes language that says that that private placement, that private school, is not the student's pendent placement. Nonetheless, not withstanding the settlement's agreement language and because the student's last-agreed-upon IEP exceeded the current placement by a number of years, the current placement being iHope ... And I believe in Angamarca it was 3 years, in Hidalgo maybe 4 or 5 years. Because of that, the courts set aside the stay-put language in the agreement and took a more functional view of the operative placement, allowing for continued funding of iHope during the pendency of the litigation regarding reimbursement for iBrain. Now, perhaps more so than the substantial-similarity theory that is working its way up to the Second Circuit, the second holding in Angamarca and Hidalgo has some more legs to it, and I could see that argument being brought before the courts outside of New York City in other jurisdictions. Let's turn our attention now to education records. This is an evolving area of law. As technology advances, there are more questions than answers. As one court put it, "The response to the notice thus far demonstrates on the one hand the imperfect fit between the FERPA regulation crafted in and largely unchanged since the 1970s, before the Internet as we know it was a gleam in any but an academic's eye and on the other hand the social-media environment in which information is churned and transformed in a nanosecond or less." Or as I put it, "FERPA is an analog law in a digital world." The decisions and federal guidance starting on page 22 of the outline highlight the challenges in applying a law conceived in the 1970s in a technology-infused society. Washoe County which is a case out of Nevada in 2014 on page 23 of your outline is illustrative of this dichotomy. In Washoe, a parent files a state complaint because the district delivered e-mails that she had requested and had hoped to receive prior to an IEP meeting after the IEP meeting had taken place. The complaint to the state educational agency determined whether the e-mails were considered education records. Under IDEA, as you know, parents are entitled to inspect and review education records prior to an IEP team meeting, a resolution meeting or a hearing and in no case no later than 45 calendar days from the request with the understanding that if that IEP meeting, that resolution meeting, that hearing is sooner than the 45 calendar days, that the parent would be entitled to the education records in the shorter of the two time lines. An education record under FERPA is any record that includes personally identifiable information of

the student and is maintained by the school district. Washoe said no, the e-mails were not an education record because they only existed in electronic form in the teacher's inbox and were not, quote, "Maintained," by the district. They were in the teacher's inbox, but not maintained by the district. Maintained, the state educational agency said, means the record is, quote, "Kept in a filing cabinet in a records room at the school or on a permanent-secure database." The two options were a physical file in a cabinet in some room in the school or a permanent-secure database. Washoe focuses on the first, the physical file. The e-mails were not included in the physical file. Washoe does not address the second part of that which is the permanent-secure database. One could reasonably argue whether you're technically advanced or not that an e-mail sitting in an inbox is in a permanent-secure database. At least from the provider of the e-mail, it's sitting in a permanent-secure database. Perhaps FERPA was not thinking that that's what they meant. They were thinking about more of a server that is controlled by the district or an iCloud system that the district had put in place, but nonetheless, the e-mail is not sitting in isolation in some old desktop, at least not in 2014 when Washoe was decided, on the teacher's desk. And as I'm suggesting in today's advancement, like cloud computing, central servers and even environmental and physical mandates conserve resources by not printing out every e-mail. How many of you have gotten those e-mails that says, "Please consider the environment. Do not print this e-mail unless it's absolutely necessary"? Right? That's the message that we've been getting. The rationale in Washoe County, it's not easily adaptable across district lines and is somewhat suspect. Yet the current case law in the guidance continues, if you'll allow me, this dark-age approach. Take, for example, Burnett which is a 2018 case out of the Ninth Circuit found on page 28 of the outline in subparagraph B.14. In Burnett, the Ninth Circuit holds that the school district had met its obligation on the FERPA when it provided the parent with only those e-mails that were printed and added to the student's physical file, and this despite the Ninth Circuit citing to a US Supreme Court decision that defined, "Maintained," as keeping the records in a permanent-secure database. Like Washoe County, the Ninth Circuit does not address what it means to keep a record in a permanent-secure database. If that was not confusing enough, let's look at photos and videos. Photos and videos present another host of problems, though the Family Policy Compliance Office has provided some guidance in this regard, and I cite to an FAQ on photos and videos that was recently issued by the Family Policy Compliance Office, and that is on page 26 of your outline in subparagraph B.15. Like e-mails, photos and videos may qualify as education records if they are directly related to a particular student and are maintained by the school district. However, if the record is created and maintained by a law-enforcement unit of the school district for a law-enforcement purpose, the record is not an education record. Education record if it includes information, personally identifiable information of the student and it's maintained by the school district. However, there's a carve out. If you are a law-enforcement unit of the school district and the record is maintained by that unit solely for law-enforcement purposes, it is not considered an education record. What's a law-enforcement unit? We're talking about the obvious: SROs, police officers that are retained by the school district, any security personnel who's hired by the school district to maintain law and order. However, here is the kicker: FERPA also defines law-enforcement unit to include any individual who is designated to refer to the appropriate authorities, i.e., a police department, the local police department, a matter for enforcement of any law or who's tasked with maintaining the security and safety of the school district as well. Any individual who has to refer it to law enforcement or an individual who's tasked with maintaining security in the school building. Who might that include? Think the building school principal. Think the vice principal. Think a school dean who addresses disciplinary matters. FERPA would include those individuals as a law-enforcement unit if they're there to keep law and order. Now, the inclusion of these individuals raises questions that likely will

require further clarification as these cases are brought primarily by state complaint to the SEA. Now, if the video is provided to the school district by the law-enforcement unit for a disciplinary purpose, that shifts from law enforcement to an educational purpose, and it makes it an educational record. Less clear, as I suggested just a few seconds ago, is where the principal, vice principal, dean is also serving as a law-enforcement unit and they are the custodian of that record. Now, the fact that the video includes multiple students does not bar access by the parent, provided it is considered an education record, and although efforts must be made by the school district at district expense to conceal the identity of the other students in the video, if it cannot be done reasonably or it destroys the photo or video, the parent of any of the students whose image is in the photo or video have the right to be provided with access to the entire record, even though it reveals personally identifiable information of other students. Interesting, interesting. A lot of confusion here because depending on the facts and circumstances, it raises questions on how this is enforceable, whether a parent can access educational records and whether, in fact, a video, for example, or photo that is held by the school dean, the principal, vice principal is considered an education record or simply a record held for law-enforcement purposes. If the principal, vice principal does not refer it out to the police, is it an education record under those circumstances? Time will tell, but keep in mind that although FERPA limits access to only those education records that are, quote, "Maintained," that does not afford the school district a complete shield. Parents may still compel the production of records through a subpoena if those records are relevant to the underlying issues or some public-records request act that exists in the state in which the parent resides. The landscape is evolving, but guidance case law has not kept pace commensurate with today's technological advances. However, school districts may spare themselves some considerable expense by adopting sensible policies and practices that allow for transparency and access by parents to information pertaining to their child, their children, even if that information would not typically be considered an education record. Taking this sensible approach will reduce the potential for considerable expense, both for the school district and parents alike. Here are some ideas for consideration. First, SEAs and school districts should require the adoption of an electronic-records- retention policy if one does not exist in the school district. That informs parents how how the school district handles electronic records. Second, SEAs and school districts should train their school personnel to print and file substantive e-mails in the student's physical file or in some central database. As I suggested earlier, the fact that it's not considered an education record because it is not, quote, "Maintained," does not mean that at some point if there is litigation the parent can't access it through a subpoena or court order. And as you know, forensic review of e-mail programs or any database is costly and would be a cost that's born by the school district. Third, school-district personnel should be trained to restrict the content of an e-mail to one student. And why I suggest that is that, again, if you are required to search for education records for the student, it makes it much easier, especially in a database, to look for one name or a variation of one name rather than doing cross- referencing with other students in a particular class or group that may mention the student who is the subject of the hearing or court proceeding. I would also suggest that a school district train their staff about being sensitive to how messages are worded, and I suggest that because in my role as a hearing officer, a state-review officer, I've come across a number of e-mails that don't necessarily cast the student or a parent in the best light, and obviously once that comes out, things only get worse from there, so I would just suggest a little training, a little sensitivity training, to that. Four, I would suggest that school districts provide access to education records without delay. Yes, the law affords the school district time, and IDEA, short of those three meetings, the hearing, the resolution meeting, the IEP meeting, the school district has 45 calendar days to provide the information, but absent some justifiable reason, the

sooner you provide the information to the parent, the better it is. Delays only make parents suspect. Five, speak openly with parents about the scope of the request. I understand that in the litigious world that we live in, sometimes the request is simply, "I want all of the records." A child who's been in special education for the majority of their school career, that could be a pretty thick file. When you talk to the parent and at least try to understand what it is that they're looking for and you follow through on the promise to deliver any documents that speak to what the parent is looking for, it only creates harmony and hopefully avoids later litigation. Six, this is an important one. If you're a school district who receives a request for records, reflect on what the reason is for those records. Why are the records being requested? And if a problem becomes evident to you, voluntarily agree to address the apparent concern, either by an informal meeting inviting the parent in or by scheduling an IEP team meeting. Why wait? Take the proactive approach to address any needs. If the G.L. case out of the Third District taught us anything, it's that if you kick the can down the road and the parent files the due-process complaint within the 2 school years, they can recover for further back than 2 years because on their IDEA discovery rule, the parent is entitled to file within 2 years of discovering the problem, and they can recover as far back as they need to, provided that there was a denial of a free and appropriate public education prior to those 2 years. Obviously, if you're in litigation, preserve the records for litigation. If litigation is foreseen, preserve the records. Speak to counsel as to what you need to do to preserve those records. And given the lack of clarity as to what's a law-enforcement unit in FERPA, clearly school districts should demarcate what it is, what records are simply being held for law-enforcement purpose and any other records, for example, that are also used for disciplinary matters should be turned over to the parent upon their request. With today's technology, policies that limit the use of personal smart devices should be in place. Think an IEP meeting where the parent wants to record the meeting. School district not anticipating this, one of the individuals from the school district pulls out their smartphone and says, "Well, I have an app that records it," and they record the meeting on that app. Some thorny issues are raised on that. What if that school-district personnel leaves the district and does not provide a copy of that document or that recording to the school district? Who's the owner of that recording? What if something happens to that individual and you cannot access the individual's smart device? It raises some thorny issues, so I think that school districts need to start thinking about limiting the use of personal devices. And finally, I wanted to caution about the use of texting to communicate with parents. We want our information in this day and age immediately, and texting is one of the best ways to communicate immediately. Think of the parent or the classroom teacher who want to communicate to each other as to what's happening with the student during the school day rather than having to go to the desktop and sit there and write out an e-mail. Why not text the parent? Why not the parent text the teacher early on in the day and say, "Hey. This is happening with the kid. This is what happened at home. I just want to give you heads up"? Why not do that? The problem here is that there's valuable information that's being captured in those texts, but when was the last time you printed out a text? When was ... And again, like the smart devices, the recording, how do you capture that? How do you get that to the student's physical file? How do you get that into a central database if the texts are in a personal device. Many questions here, a lot to think about. With that, I'll take questions.

Melanie Reese>> Thank you so much, Deusdedi. We do have a few questions. First one is, "Regarding e-mails directly relating to a student when a parent requests e-mails identifying the child, if those e-mails are accessible via a district text search, should they be available to parents via FERPA?"

Deusdedi Merced >> Can you repeat that second part of the question? If they're available through a basic ...

Melanie Reese>> It says, "If e-mails are accessible via a district text search, should they be available to parents via FERPA?"

Deusdedi Merced >> Well, if you follow the line of reasoning in the Washoe case and the Ninth Circuit case, it's going to come down to whether it's maintained and maintain has two aspects to it: physically printed and/or stored in a secured database. The question then becomes whether that is ... wherever the district is placing that information is in a secure database. One can argue that given what most districts do which is they have either cloud computing or a central server, that it is in a secure database, but that's the area of FERPA in that definition, in terms of that secure database that is yet evolving, and there has not been much said in either in SEA state-complaint decisions or in court and litigation that spells out what the obligations of the school district are. Certainly they would be ... They may very well be records that would need to be provided to a parent or an attorney if there is litigation and a judge, an administrative-law judge or a court judge has determined them to be relevant. Though, if the judge has determined them to be relevant, whether they're an education record or not, that school district would be compelled to turn over those records.

Melanie Reese>> All right. Thank you. Another question, "Would FERPA records include counseling notes from the school counselor or counselor contracted with the school district?"

Deusdedi Merced >> It depends on how those records are characterized. For example, if they are just simply notes to jog the memory of the school counselor, the answer is likely no, and that's addressed in my outline. However, to the extent that they are the notes of a counseling session with the student and they're personally identifiable, short of some privilege that the counselor can raise or the student can raise, they would seem to meet the definition of an education record because it includes personally identifiable information of the student. Again, depending on where those records are stored, you can make the argument that if the counselor keeps it in his or her desk but is not made part of the student's school file in that file cabinet that's kept in the back room of the principal's office, you could make the argument that they're not education records, though you could also make the argument that they are education records to the extent that they make themselves, for example, if you have a child with a disability, into the child's special-education file. And again, those records would be subject to a request that they be compelled to be turned over by a school district because they're relevant to an underlying due-process claim.

Melanie Reese>> Thank you, and related, "How do you address a parent's all-records request to a district when some are held by the district and some are at the school site?"

Deusdedi Merced >> I'm feeling like a broken record, and I don't mean to, but I think it comes down to, again, if we're working cooperatively, if we're working to just try to get information to the parent, then the answer is you provide a record. You do a search, a reasonable search, to provide the parent with information. The parent is entitled to information. If you're defending yourself against a lawsuit and you want to rely on the definition of what an education record is and you want to limit it to only those files that are kept in a physical filing cabinet in a central location, then only those files that are in that physical file would be what the parent is entitled to. But again, like I said with the two other answers, if this is in the midst of litigation, those files may very well be deemed relevant, and if they are available and have not been destroyed, those files would be ... If the hearing officer, AOJ or court determines them relevant, they would be required to turn them over to the parent. I liked ... Again, I go back to, you know, "What is it that the parent is looking for?" If you have that request for all files, short of maybe the parent saying, "I am moving to a different district, and I would like to have this so I can share it with the new district," it raises a flag, for me, as to, "What's going on here? Perhaps I

want to learn what the underlying concerns are because I want to address them. I want to be able to get ahead of any festering problems." Rather than be reactive, i.e., addressing a subpoena, I want to be proactive, and I want to address the issues with the parent so that we can move forward in the interest of the student.

Melanie Reese>> Great, so the webinar is scheduled, excuse me, scheduled to end at quarter to the hour, but Deusdedi has agreed to answer questions beyond that, but before anybody hangs up, I want to make sure that you fill out the survey, if you would. We'd really appreciate your feedback, and, Deusdedi, there's some other questions I'm going to pose to you here.

Deusdedi Merced >> Okay.

Melanie Reese>> So, "Should parents make requests to schools that specific e-mails be printed out and filed in a child's record?"

Deusdedi Merced >> They certainly can make that request, whether the school district ... Where the FERPA requires the school district to place those in the file I think would be subject to some local laws. I don't think FERPA itself requires that, but I'm going with my recollection here which may not be completely accurate, so I apologize for that, but I don't think FERPA requires a school district to necessarily put place in the child's file anything that the parent requests, but I do certainly think that the parent can certainly make that request, and if the parent is concerned about the importance of that information, certainly the parent should keep those e-mails in a secure file in their own home or office so that it's available later for purposes of any discussions that may occur during in IEP meeting or any other meetings pertaining to the child.

Melanie Reese>> Thank you. "Do parents have a right to access progress-monitoring data?"

Deusdedi Merced >> I'm not sure what is meant by progress-monitoring status. To the extent that ...

Melanie Reese>> I'm sorry. I said, "Data," the data that is taken to identify the progress that the student has made. The question is, "Do parents have a right to have access to the progress-monitoring data?"

Deusdedi Merced >> I think, and again, an argument can be made that those are education records to the extent that it includes personally identifiable information of the student and is maintained by the school district, whatever that might mean, as I mark up that definition based on what the reading of the case law and SEA decisions are. But the argument would be yes, that that data would be, can be considered education records, and based on my experience with working with hearing officers and AOJs across the country and my own practice as a hearing officer when I was doing that, those certainly would be relevant pieces of information depending on the issues before the hearing officer, that a hearing officer may compel a school district to provide to the parent, especially if it's the basis for any behavior-intervention plan, if it was part of a functional-behavior assessment or as the basis for why a reduced load or goals that are not considered ambitious by the parent are listed in the student's IEP.

Melanie Reese>> Thank you, and there was a question about educational records under IDEA and 504. Are they treated similarly?

Deusdedi Merced >> I'm going to have to defer on that. I'm sorry. I don't have the answer on the 504. I don't believe ... If by that you mean the entitlement to receiving records within 45 calendar days of the request or prior to a 504 meeting or a 504 hearing, there's no resolution process under 504 unless it's specifically provided for in state law. The answer would be no because 504 doesn't include much of anything. It's about three, four pages. However, many districts adopt the IDEA process scheme procedures in order to comply with

504, so to the extent that you live in a jurisdiction that does that, then you would have to look at how your state or your local school district because 504 is a local-school-district issue, not a state issue, how your school district implements the 504 procedures and whether they reference back to IDEA and what specifically in IDEA. That's the best answer I can give you given my understanding of the question or my lack of not knowing specifically what they're referencing with respect to 504.

Melanie Reese>> Okay, looks like there's just one more question. "With respect to recordings of IEP meetings and how they're maintained by the schools, would the recording be maintained, and if they're requested for them, do they have to transcribe and print them to store them or provide them to the parent?"

Deusdedi Merced >> I would say the answer is no, that they don't have to be transcribed, especially ... If the parents and school district agree to a recording and the school district agrees, for example, to furnish a copy of that recording to the parent, the school district would be in compliance by simply providing a copy of the CD or whatever it is that they use nowadays. They don't use tape recorders, although I suspect some jurisdictions do, but with one exception, and that one exception is if the transcription is needed to allow the parent to meaningfully participate in the process. I would think that the school district would be under the obligation in order to meet the requirements under IDEA, 504 and the ADA to transcribe the information for the parent.

Melanie Reese>> And as a follow-up, "If there is a recording of the IEP meeting maintained by the school, can they maintain it as a recorded file and not have it transcribed?"

Deusdedi Merced >> I believe that, yes, you can. Again, it should be placed in a central database. Maybe in the physical file of the child there should be some reference to its existence so that anyone who touches that file knows of its existence, and it should be secure and provide and be backed up so that it does not become compromised and would be disposed of in however consistent with the district's record-purging procedures, but, yes, it could be left in a recorded format unless absolutely necessary. I will tell you, however, that if it later is used at a hearing, that the preference by most hearing officers is going to be that they are going to want a transcription of it because they're not going to sit there. If they even allow it in, they're not going to sit there and just listen to a recording where it becomes difficult to even ascertain as to who is speaking.

Melanie Reese>> I believe that's the last of the questions, Deusdedi. Thank you so very much for doing this webinar for the field, and thank you, everybody, for joining us today. We appreciate your attendance and your feedback on our survey. Please click on the link in the chat box to fill out this very brief survey evaluating the webinar. We would greatly appreciate it, and just stay tuned to what we're offering through the CADRE Caucus Newsletter and our website for future webinars. We look forward to having you join us in the future. Thank you, again.

Deusdedi Merced >> Thank you.

Melanie Reese>> Bye.