

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

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The presentation will be available on the CADRE website:  
<https://www.cadeworks.org/events/what%E2%80%99s-new-and-trending-special-education-law-and-why-it-matters>

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# Endrew F.: Game Changer?

*“The cumulative conclusion [is] that Endrew F. is not a ‘game changer....’”*

Perry A. Zirkel, Ph.D., J.D., LL.M.,  
*West’s Education Law Reporter,*  
v. 363, pp. 1-13 (2019).



# Slow Progress Alone, Not Enough

*C. S. v. Yorktown Central Sch. Dist.* (p. 4, ¶ C.1.)

“It would be irrational to expect [the student] to suddenly begin reading at a fifth-grade level after a year ... when she began that year at a first-grade reading level.”

*M.L. v. Smith* (p. 6, ¶ C.4.)

“[A]t the start of the third grade, [the student] could only identify four words on the ... Kindergarten list.... But by January, [the student] could correctly read and identify 24 out of 25 words....”

# Slow Progress Alone, Not Enough

*K.D. v. Downingtown Area Sch. Dist.* (p. 7, ¶ C.5.)

“While courts can expect fully integrated students to advance with their grades, they cannot necessarily expect the same of less-integrated students.”

*Johnson v. Boston Pub. Schs.* (p. 8, ¶ C.6.)

The student “moved from a substantial inability to communicate or understand spoken or signed language to gradually signing, vocalizing, and demonstrating comprehension of other linguistic concepts.”

# Slow Progress Alone, Not Enough

*D.F. v. Smith* (p. 11, ¶ C.10.)

“Every single ... witness, *along with the Parents*, testified [that the student] made progress while he was [in the public school]’ because ‘[e]very single objective on the IEPs was recorded as making sufficient progress to meet goal.’”

*Perkiomen Valley Sch. Dist.* (p. 12, ¶ C.12.)

[The student’s] “IEP ‘need not necessarily provide the optimal level of services that parents might desire for their child.’”

# Repeated Goals / Identical IEPs

## *Compare*

- *C.S. v. Yorktown Central Sch. Dist. (p. 4, ¶ C.1.)*
- *K.D. v. Downtown Area Sch. Dist. (p. 7, ¶ C.5.)*



*with*



- *Matthew B. v. Pleasant Valley Sch. Dist. (p. 13, ¶ C.13.)*

# Severity of Disability

1

***C.S. v. Yorktown Central Sch. Dist.* (p. 4, ¶ C.1.)**

“...expected to perform below grade level given ... disability.”

2

***Rosaria M.* (p. 5, ¶ C.2.)**

“...nor is it proper to assume that [Student] should have advanced ... on the same timetable as her peers.”

3

***K.D. v. Dowingtown Area Sch. Dist.* (p. 7, ¶ C.5.)**

“...[g]iven [Student’s] impairments and circumstances..., fragmented progress could reasonably be expected...”

4

***Johnson v. Boston Pub. Schs.* (p. 8, ¶ C.6.)**

“...speed of advancement and the educational benefit must be viewed in light of a child’s circumstances.”



# Severity of Disability

5

***E.R. v. Spring Branch Indep. Sch. Dist. (p. 8, ¶ C.7.)***

“Given [Student’s] condition..., excessive goals could have put her in a position where success would have been exceedingly unlikely.”

6

***D.F. v. Smith (p. 11, ¶ C.10.)***

“That [Student] only achieved one IEP goal during [two] school years ... is more likely evidence of difficulties of educating students with autism.”

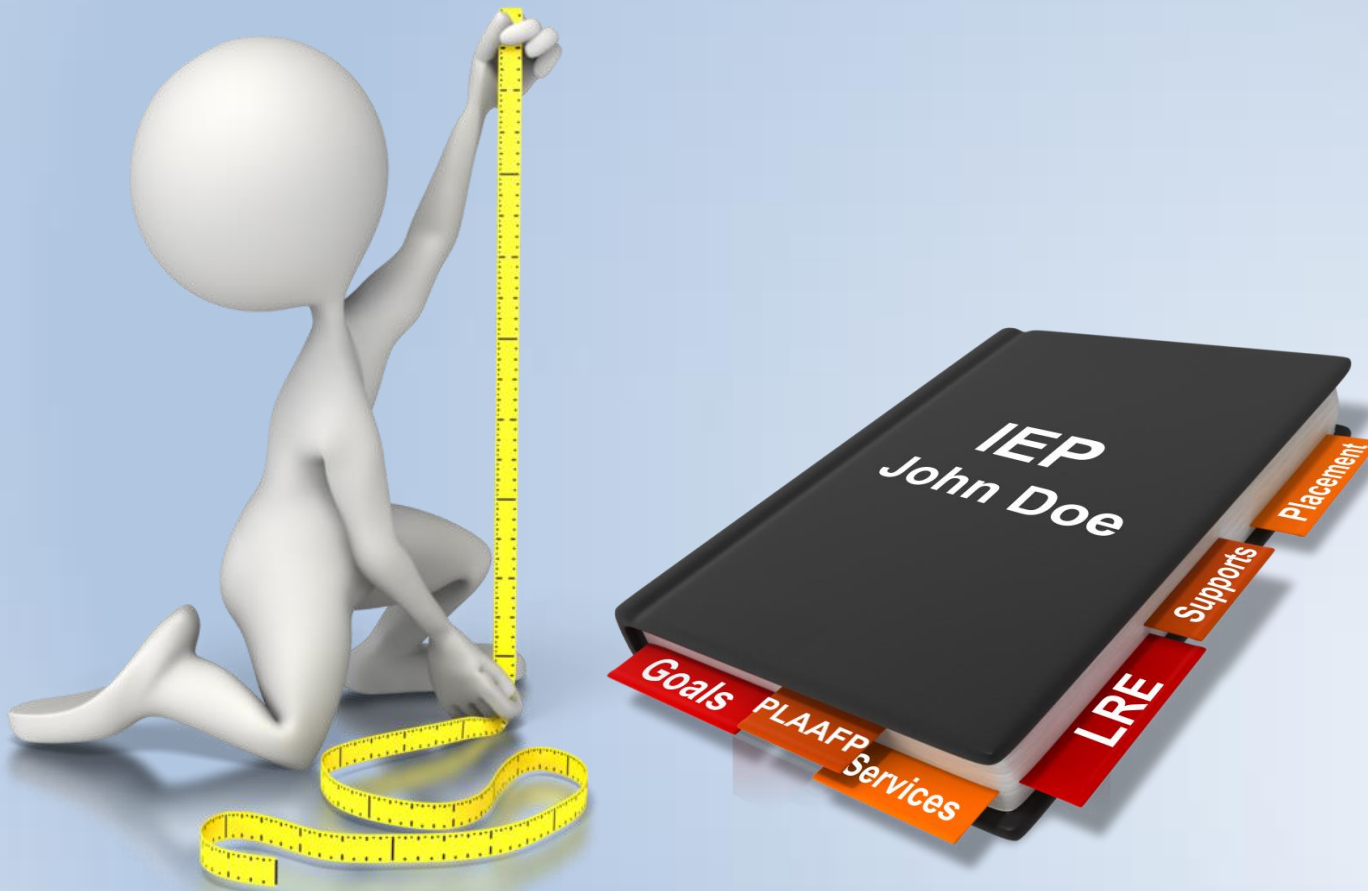
7

***Perkiomen Valley Sch. Dist. v. S.D. (p. 12, ¶ C.12.)***

“...the IEP ‘was reasonably calculated to enable’ [Student] to ‘receive meaningful educational benefits in light of [her] intellectual potential.’”

# IEP as a Whole

- *R.F. v. Cecil Cnty. Pub. Schs.* (p. 9, ¶ C.8.)
- *C.F. v. Radnor Township Sch. Dist.* p. 10, ¶ C.9.)



# Deep Dive Review of FAPE Claims

- ✓ PLAAFPs identify needs
- ✓ Baseline for each need included
- ✓ Rate of progress
- ✓ Potential for growth
- ✓ Able to achieve/exceed grade-level proficiency
- ✓ Reasonable, measurable goals



# Stay-put

- Stay-put is a procedural safeguard that requires a school district to maintain a student in the then-current educational placement until litigation concludes.
- If then-current educational placement *no longer available*, courts have required the school district to place the student in a materially/substantially similar program.

# iHope/iBrain Cases

Some New York federal district court judges have extended the substantially similar theory to stay put *even when the pendent placement continues to be available.*

- *Abrams* (p. 17, ¶ D.2.b.)
- *Navarro* (p. 17, ¶ D.2.c.)
- *Soria* (p. 20, ¶ D.2.f.)
- *Melendez* (p. 20, ¶ D.2.g.)

# iHope/iBrain Cases



***De Paulino* (p. 16, ¶ D.2.a.)**

“...risks violating [Student’s] right to a stable learning environment.”



***Angamarca* (p. 18, ¶ D.2.d.)**

“...the Brain Institute was not able to provide these services...”



***Neske* (p. 19, ¶ D.2.e.)**

IDEA “...does not require a portable voucher...”



***Hidalgo* (p. 21, ¶ D.2.h.)**

“...providing parents unfettered discretion to choose ... runs counter to ... stay-put provision.”

# So what?

Should the Second Circuit buy into the substantial similarity theory, expect similar arguments in whatever jurisdiction you are in.

*Angamarca* and *Hidalgo* puts in question stay-put provisions included in settlement agreements, with courts willing to take a functional view of the operative placement.



# FERPA



An analog law in a digital world

*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 academics' eye, and on the other, the social media environment in which information is churned and transformed in a nanosecond or less.*

Morgan Hill Concerned Parents Ass. (p. 24, ¶ B.9.)



# “Maintained” means ...



- *Washoe County* (2014) (p. 23, ¶ B.2.)
- *Burnett* (2018) (p. 28, ¶ B.14.)

# Photos & Videos



Photos and videos may qualify as education records

- ✓ Includes personally identifiable information about a particular student
- ✓ It is maintained by the school district



*See FAQs on Photos and Videos under FERPA, (p. 26, ¶ B.15.)*

# Consider



Adopting an electronic records retention policy



Printing/filing substantive emails



Keeping email content to one student



Providing access without delay



Following through on what is promised



# Consider



Voluntarily addressing apparent concerns



Preserving records for litigation



Keeping law enforcement records away from education records



Limiting use of personal, smart devices



Limiting the use of texting

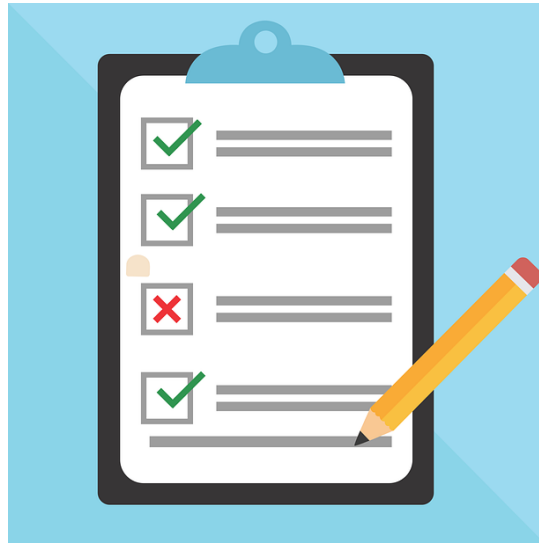




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