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FROM THE SCHOOLHOUSE TO THE COURTHOUSE:

Special Education Cases, Guidance, Legislation and Other Developments

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I. COURT AND HEARING DECISIONS

FAPE - EDUCATIONAL BENEFIT – "MEANINGFUL" OR "SOME?"

Endrew F. Douglas County Sch. Dist RE-1, 798 F.3d 1329 (10th Cir. 2015) *cert. granted* --- S. Ct. ----, 2016 WESTLAW 5416228 (September 29, 2016).

The United States Supreme Court has granted review in *Endrew F. v. Douglas County School District RE-1*, a case asking what level of educational benefit must a child receive under his IEP for a school district to have provided an appropriate level of service under the Individuals with Disabilities Education Act ("IDEA").

The Supreme Court will seek to resolve the split between various circuits of the United States Court of Appeals. In 2015, the U.S. Court of Appeals for the Tenth Circuit ruled that because an autistic student's public school IEP had provided him with "some educational benefit," Douglas County School District ("DCSD") had provided a free, appropriate public education ("FAPE") under the IDEA. The court of appeals rejected the parents' request for

private school reimbursement when the parents pulled him from public school after a dispute over his 5th grade IEP.

The Tenth Circuit court acknowledged that several other federal courts of appeals have adopted a higher standard that requires an IEP to result in a "meaningful educational benefit." However, it agreed with a lower court that a key 1982 Supreme Court precedent on special education, *Board of Education v. Rowley*, merely requires an IEP to provide "some educational benefit."

The parents' brief supporting their petition for certiorari said:

> This Court should grant certiorari and overturn the 10th Circuit's erroneous holding that states must provide children with disabilities educational benefits that are 'merely … more than de minimis' in order to comply with the IDEA. The 10th Circuit's approach is not consistent with the text, structure, or purpose of the IDEA; it conflicts with important aspects of this court's decision in … *Rowley*, and it has the effect of depriving children with disabilities of the benefits Congress has granted them by law.

DCSD's brief opposing the parents' petition argued that the asserted split among the federal appeals courts is "shallow" and that only the U.S. Court of Appeals for the 3rd Circuit, in Philadelphia, "has consistently applied a purportedly more demanding 'meaningful benefit' standard."

EXHAUSTION OF ADMINISTRATIVE REMEDIES – SERVICE DOGS

Fry v. Napoleon Community Schools, 788 F.3d 622 (6th Cir. 2015) *cert. granted* 136 S. Ct. 2540 (Mem)(June 28, 2016).

The United States Supreme Court has granted review in *Fry v. Napoleon Community Schools.* The issue in *Fry* is whether the parents of a special education student were required to request a special education due process hearing (i.e. "exhaust administrative remedies") to challenge the District's refusal to allow a student to be accompanied by a service animal prior to filing suit under Section 504 and the Americans with Disabilities Act ("ADA").

The United States Court of Appeals for the Sixth Circuit (which covers Michigan and Ohio) ruled for the District and the dismissed the parents' ADA claim for failure to exhaust.

An elementary student with spastic quadriplegic cerebral palsy wanted to bring her service dog, a hybrid goldendoodle named Wonder, to school. She could not handle Wonder on her own. Her IEP included a human aide.

The IEP team determined that the student was being successful in the school environment without Wonder, and all of the student's needs were being met by the program and services in place such that adding Wonder would not be beneficial to the student. The District refused to

allow Wonder to come to school because he would not be able to provide any support the human aide could not provide.

The parents filed a complaint with OCR. Two years later, OCR found the District's refusal to be a violation of the ADA. The District then agreed to allow Wonder to attend school; however, the parents decided to enroll the student in another District. The parents filed suit seeking monetary damages. The District Court granted the District's motion to dismiss because the parents did not comply with the IDEA's exhaustion requirement. The Sixth Circuit affirmed finding that the parents' claim was essentially that the District did not provide a *sufficient* accommodation because the aide did not help the student learn to function independently as effectively as Wonder would have and perhaps because the aide was not as conducive to the student's participating confidently in school activities as Wonder would have been. Arguably, developing a working relationship with a service dog should have been one of the "educational needs that result from the child's disability" to be addressed in the student's IEP. "[T]he exhaustion requirement must apply when the cause of action 'arise[s] as a result of a denial of a [FAPE]' -- that is, when the legal injury alleged is in essence a violation of IDEA standards.

CARE AND TREATMENT PLACEMENTS - TRANSPORTATION

Eveleth-Gilbert Public Schools, Independent School District 2154, 67 IDELR 279 (SEA Minn. 2015)

Parent enrolled her child in a day treatment program outside the boundaries of the resident school district. At the time of the student's enrollment, the day treatment facility provided transportation to the student, permitting him to join elementary classmates in time for recess and lunch, a 12 mile trip. The student's IEP reflected this arrangement. At the beginning of the 2015-2016 school year, however, the day treatment facility notified the parent that the facility would no longer provide transportation services for the student following his treatment sessions and that some other means of transporting him to school would need to be arranged.

The school district disclaimed responsibility for providing transportation because it (the district) did not place the student in the day treatment program and no educational instruction under the IEP had occurred in the day treatment program. In support of its position, the school district cited guidance from the Minnesota Department of Education which concluded that transportation services were not required when the educational programming is not delivered alongside mental health services at the day treatment facility.

In ruling for the student, the ALJ concluded that the MDE interpretation of state law was not entitled to deference for several reasons, including the fact that in 2012, MDE expressed the direct *opposite* view. The ALJ also observed that the MDE interpretation was an unpromulgated rule (i.e. a rule that was not adopted through state rulemaking procedures) and thus did not have force and effect of law.

DUE PROCESS HEARINGS - HEARING OFFICERS' SCOPE OF AUTHORITY

B.S. v. Anoka Hennepin Pub. Sch., 799 F.3d 1217 (8th Cir. 2015).

An ALJ did not deprive a student's parents of their due process rights when he limited the number of hours each side was given to present their IDEA claims. During a prehearing conference, in consultation with the parties, the ALJ allotted nine hours of hearing time (eighteen hours total, divided evenly) for each party to present the testimony and cross-examination of its witnesses. The attorneys were directed by the ALJ to plan their hearing presentations accordingly.

On the first day of hearing, the parents' attorney used up five of his nine hours examining the special education administrator. The attorney was warned that the nine-hour time limitation would be enforced and was given an opportunity to reorder the presentation of evidence accordingly. The attorney objected to the enforcement of the time limitation but continued with a lengthy examination of a second witness, the special education case manager. The nine hours expired during while examining the case manager, and the attorney was not allowed to question witnesses further or cross-examine the school district's witnesses. Ultimately, the ALJ concluded that the parents did not meet their burden of proving that the student was denied a FAPE under the IDEA.

The parents appealed. On appeal, the parents alleged that the time limits were a denial of due process. The District Court found in favor of the school district, and the Eighth Circuit affirmed.

Letter to Snyder, 67 IDELR 96 (OSEP 2015).

The hearing officer lacks authority to extend the timelines in an expedited hearing even at the request of either party. The hearing officer may, at his or her discretion, decide to bifurcate a hearing in which the due process complaint includes discipline and removal issues, as well as other nondiscipline/removal issues. The parties may also agree to permit the filing party to withdraw and re-file the complaint without prejudice to either side to buy time.

ATTORNEY'S FEES

Can parents receive attorneys' fees during the due process hearing for any order that is in their favor?

Tina M. v. St. Tammany Parish Sch. Bd., 116 LRP 6559 (5th Cir. 2016).

The court held that obtaining a "stay put" order obtained in a due process hearing does not qualify as "prevailing" for purposes of attorneys' fees.

The court held: "Unlike a judgment on the merits or a consent decree, the relief obtained here was an automatic stay that did not address the merits or permanently alter the legal relationship

of the parties. Therefore, attorneys' fees are only available when the decision on the merits permanently alters the legal relationship of the parties.

A.P. v. Bd. of Educ. for City of Tullahoma, Tennessee, 67 IDELR 69 (E.D. Tenn. 2016).

Te court awarded attorneys' fees to the plaintiff for obtaining a stay put order from the federal court after it was denied by the hearing officer. As the court points out, this case did not involve a perfunctory, automatic stay put. The issue was strongly contested by the school district and the parent was forced to appeal to court to obtain stay put relief after the hearing officer turned down the request.

D.A. v. Meridian Joint School District No. 2, 65 IDELR 253 (9th Cir. 2015)

The parents initiated a lawsuit for attorneys' fees. The Court found that the parents prevailed in the due process hearing because the school district's evaluation was not appropriate and ordered the district to pay for an independent educational evaluation.

However, in a companion decision, the Court also held that the student was not eligible for special education. Although the parents were prevailing parties and brought their attorneys' fees claim in a timely manner, the Court denied reimbursement. The Court held that since the parents were not a "parent of a child with a disability" under the IDEA (a child with a disability who is in need of special education), the Court was bound by the clear language of the IDEA limiting the award of attorneys' fees to a parent of a child with a disability.

BEHAVIOR AND DISCIPLINE

Bristol Township Sch. Dist. v. Z.B., 67 IDELR 9 (E.D. Pa. 2016)

A manifestation determination review must be conducted consistent with legal requirements, including relevant members of the IEP Team, a review of all relevant information in the child's file, including the IEP, teacher information, and information from the parent. 34 C.F.R. § 300.530(e)(1).

In *Bristol*, the court ordered the district to re-do the manifestation determination. A district employee filled out the manifestation determination form prior to the meeting, answering the two questions and then asking at the meeting if anyone objected. The court found this to be improper. Also, the Team approached the process "globally" rather than "diving into the specifics."

The court decided that the failure to consider the specific circumstances of the incident and the alleged conduct rendered the manifestation determination deficient because it precluded any meaningful discussion of whether Z.B.'s behavior was a manifestation of his disability. Being prepared to complete the paperwork is not the same thing as completing it before the meeting occurs. A court could determine that the school personnel engaged in prohibited

predetermination

Molina v. Bd. of Educ. of Los Lunas Schools, 67 IDELR 18 (D. N.M. 2016)

Can parents request a due process hearing when they disagree with a manifestation determination? Yes, of course. The due process hearing proceeds according to expedited timelines.

In *Molina*, the court held that parents who were challenging disciplinary action were not required to seek an "expedited" due process hearing. The school district argued that the failure to seek an expedited hearing meant that the parents had not exhausted administrative remedies. Although the expedited timeframe is not available unless a disciplinary change of placement is the issue, the fact that the parent does not request an expedited hearing does not deprive the parent the right to request a hearing.

BULLYING/ HARASSMENT

A.T.K. v. New York City Dep't of Educ., 32 F. Supp. 3d 405 (E.D.N.Y. 2014) *aff'd* 810 F.3d 869 (2d Cir. 2016).

The district court held that the school district's failure to address peer harassment of an LD third-grader – who became emotionally withdrawn, gained 13 pounds, and frequently arrived late to school due to fear of bullying by classmates – in the student's IEP or BIP resulted in a denial of a FAPE.

The court explained that the school district denies FAPE when it is deliberately indifferent or fails to take reasonable steps to prevent bullying that substantially restricts the educational opportunities of a student with a disability. The court developed a **four-part test to determine whether bullying resulted in the denial of FAPE**: **(1)** was the student a victim of bullying; **(2)** did the school have notice of substantial bullying of the student; **(3)** was the school "deliberately indifferent" to the bullying, or did it fail to take reasonable steps to prevent the bullying; and **(4)** did the bullying "substantially restrict" the student's "educational opportunities"? If the answer to these questions is yes, the IEP team must consider evidence of bullying and must address the bullying in the student's IEP.

On appeal, the Second Circuit Court of Appeals did not find it necessary to address the substantive bullying issue, thus the Court did not pass judgment on the four-part test. Rather, the Second Circuit ruled that the school district's refusal to discuss the incidents of bullying during two IEP meetings resulted in a denial of a FAPE because it violated the student's parents' procedural right to participate in the development of the student's IEP. The Court was not persuaded by the school district's argument that some anti-bullying strategies are better addressed through channels other than the IEP. The Court explained that not discussing bullying during the drafting of the IEP "not only potentially impaired the substance of the IEP but also prevented [the parents] from assessing the adequacy of [the student's IEP]."

NOTE: The court does not hold that the bullying itself deprived the student of FAPE. Rather, it was the repeated refusal of the district to discuss it in IEP Team meetings that prompted the court's decision. In such situations, the IEP Team should consider, for example, whether social skills goals and objectives should be added, and whether the student needs goals and objectives to promote self-advocacy.

DUE PROCESS HEARINGS – RESOLUTION CONFERENCES

Letter to Cohen, 116 LRP 6068 (OSEP 2015)

The Office of Special Education programs issued a guidance letter addressing issues that may arise as a result of a due process hearing being filed.

Regarding a resolution session, OSEP affirmed the option of amending the IEP during a resolution session without the need of having a full IEP Team meeting. The IDEA allows an IEP to be amended after the annual IEP Team Meeting without holding another IEP Team meeting if both the parent and school district agree. *See* 34 C.F.R. § 300.324(a)(4)). OSEP stated: "The IDEA does not place any restrictions on the types of changes that may be made so long as the parent and the public agency agree."

OSEP also clarified, that unlike mediation, the IDEA has no provision that requires that resolution discussions be kept confidential. Therefore, absent any enforceable agreement by the parties requiring resolution discussions be kept confidential, such discussions can be introduced in a subsequent due process hearing or civil proceeding.

ELIGIBILITY

Memorandum to State Directors of Special Education, 65 IDELR 181 (OSEP 2015)

The school district has student with a high IQ who is in all advanced placement classes. The parent just requested a special education evaluation. Is the district required to evaluate the student?

The district needs to respond appropriately to any request for evaluation. Either the district evaluates the student within timelines, or a prior written notice is issued refusing to evaluate the student.

In *Memorandum to State Directors of Special Education*, OSEP reminded school districts that students with high IQs should not be automatically excluded from consideration for special education services. In particular, the letter encouraged state directors to re-distribute *Letter to Delisle*, 62 IDELR 240 (OSEP 2013). In *Delisle*, OSEP quoted the Analysis of Comments and Changes in the 2006 final regulations implementing Part B of the Individuals with Disabilities Education Act ("IDEA") as follows: "In responding to a public comment specifically addressing students who are gifted and who have difficulty with reading fluency, the Department stated as follows: "No assessment in isolation, is sufficient to indicate that a child has an SLD ["Specific

Learning Disability"]. Including reading fluency in the list of areas to be considered when determining whether a child has an SLD makes it more likely that a child who is gifted and has an SLD would be identified." 71 Fed. Reg. at 46652.

EVALUATIONS – PRESENCE OF PARENT

J.M. v. Cumberland Pub. Sch., 65 IDELR 231 (D.R.I. 2015)

The district court reversed the hearing officer's finding that the failure of the school district to allow the parent to observe the student in a special education classroom was a procedural violation of the IDEA in that the district impeded the parent's opportunity to participate in the decision-making process. The Court reasoned that that the IDEA does not give parents or their representatives the right to review current or prospective placements, and that OSEP has simply encouraged school districts to give parents the opportunity to observe classrooms. The school district attempted to do just that when it offered to allow the parent to observe the classroom when no other student was in attendance.

Student R.A. v. West Contra Costa Unified Sch. Dist., 66 IDELR 36 (N.D. Cal. 2015)

A parent does not have a right under the IDEA to observe, participate in, or otherwise set conditions on testing of the student. Here, the parent of an 11-year old student with autism was up for triennial reassessment and the parent requested that the reassessment be conducted in a room with a one-way mirror to enable the parent to observe the process. The school district declined the parent's request.

The court found that the parents' condition that they be allowed to see and hear the assessment was unreasonable, and they effectively withdrew their consent by insisting on that condition. The ALJ accurately concluded that the school district's failure to complete the required assessments was caused by Parents' interference and denial of consent, and that the request to observe the assessment amounted to the imposition of improper conditions or restrictions on the assessments, which the [school district] had no obligation to accept or accommodate.

IEP TEAM MEETINGS - ATTORNEY PARTICIPATION AT IEP MEETING

Letter to Andel, 67 IDELR 156 (OSEP 2016)

A parent has no duty to notify the school district that his or her attorney will be attending an IEP meeting. The IDEA only obligates the school district to notify the parent in advance of the meeting on who will attend the meeting. There is no such corresponding obligation on the part of the parent. A school district cannot condition the conduct of an IEP meeting on the parent's attorney not participating. Doing so would interfere with the parent's right to invite individuals who have knowledge or special expertise regarding the student. It would be permissible for the public agency to reschedule the meeting to another date and time if the parent agrees so long as

the postponement does not result in a delay or denial of a free appropriate public education to the child.

PRIVATE SCHOOL PLACMENTS – ENTITLEMENT TO FAPE

R.M.M. v. Minneapolis Public Schs, 2016 WESTLAW 475171 (D. Minn. 2016)

This case involved the alleged failure of Minneapolis Public Schools ("MPS") to timely and appropriately identify and evaluate R.M.M. as a student with learning disabilities, and to provide her with timely and appropriate special education services. The School District provided special education services to students enrolled in both public and private schools located within the District. The student was a resident of MPS who was voluntarily enrolled in Annunciation Catholic School ("ACS"), a private school, from kindergarten through fifth grade.

During elementary school, the student struggled in the classroom, especially with reading. She received extra support and instruction at ACS, and she was referred to MPS for a special education evaluation in the fifth grade. That evaluation was completed on January 6, 2014, and it was determined that the student was eligible for special education services in the areas of reading and writing.

The individual service plan ("ISP") that was developed for the student provided for one hour of direct instruction, twice per week, at a MPS school located near ACS, to which the student would be bused during the middle of the school day. In order to receive these services, R.M.M. was enrolled in MPS in February 2014 on shared-time basis. The extra instruction commenced in March 2014, but R.M.M.'s parents declined further services after only four sessions. ACS subsequently informed the parents that it could not meet R.M.M.'s needs and encouraged them to enroll the student in MPS. The parents complied and enrolled the student in MPS, and requested a due process hearing.

At issue in the due process hearing was whether the School District denied the Student a FAPE when it refused or failed to propose an IEP reasonably calculated to meet Student's unique needs resulting from her disability and to enable her to be involved in and make progress in the general education curriculum after she was determined to be a child with a disability in January 2014.

MPS argued that parents in Minnesota who enroll their children in private school do not have the right to a due process hearing on issues other than child find.

The Administrative Law Judge (ALJ) denied the motion and later held that MPS denied the Student a FAPE when it proposed an individualized services plan (ISP) that was not reasonably calculated to meet the unique needs of the student was not designed to enable her to be involved in and make progress in the general education curriculum. As compensatory education, the ALJ ordered MPS to provide or pay for a set amount of additional instruction for R.M.M. in reading, writing, and mathematics. The ALJ also dismissed the parents' "child find" claim because MPS had actually identified the student as eligible for special education. Bothe MPS and the parents' appealed the ALJ's ruling to the United States District Court for Minnesota.

In that court, MPS argued that: (1) the parents were not entitled to a due process hearing on a FAPE claim because voluntarily enrolled private school children with disabilities are not

entitled to a due process hearing, except on matters of identification or child find. Additionally, under the IDEA, such students are not entitled to a full FAPE.

Citing *Independent School District No. 281 v. Minnesota Department of Education*, 743 N.W.2d 315 (Minn. App. 2008), the court held that not only are parentally-placed private school students in Minnesota entitled to a full FAPE (with the exception that the school district may determine the location at which to provide the special instruction and services), they also are entitled to a due process hearing regarding whether a FAPE was, in fact, provided.

NOTE 1: MPS also argued that even if R.M.M. was entitled to a due process hearing on her FAPE claims, those claims were barred under *Thompson v. Special School District No. 1*, 144 F.3d 574 (8th Cir. 1998). In *Thompson*, the Eighth Circuit held that a student had no right under the IDEA to challenge the educational services provided by a school district because he was not a student in that school district when he requested the due process hearing. MPS asserted that *Thompson* applied because, prior to requesting a due process hearing, R.M.M.'s parents disenrolled R.M.M. from MPS when she declined services. The court rejected this argument, finding that, unlike in *Thompson*, the school district that was responsible for the allegedly problematic services (MPS) is the same school district that was responsible for the requested due process hearing (MPS). And, the request for the due process hearing would have put MPS on notice of the perceived problem with the educational services it had provided to R.M.M., and thus would have provided MPS with the opportunity to address the alleged problem.

NOTE 2: MPS has appealed this decision to the U.S. Court of Appeals for the Eighth Circuit.

DUE PROCESS HEARINGS – SETTLEMENT AGREEMENTS

Monroe Township Bd. of Educ., 67 IDELR 49 (SEA N.J. 2016)

How does a settlement agreement impact a due process hearing filed after the parties reached a settlement on the extended day placement?

In *Monroe,* the administrative law judge dismissed the parents' due process complaint seeking to add extended day services to a prior settlement agreement. The parents of an eleven-year-old student with profound hearing loss reached a settlement agreement with the Board of Education providing for participation in an extended day program to address academics and included transportation provided by Katzenback School for the Deaf. Services included a personal paraprofessional throughout the School day. Extended day services were to be terminated if the student participate in nonacademic programs. One month later the parents wanted an additional thirty minutes daily with a meal.

The hearing officer held: "A settlement cannot be voided or avoided simply because a party later determines that maybe they could get a better deal, or in this case, a dinner before leaving for the day."

SERVICE ANIMALS

Alboniga v. Sch. Bd. of Broward County, Fla., 65 IDELR 7 (S.D. Fla. 2015)

The school district argued that the Department of Justice exceeded its authority in promulgating its regulations pertaining to service animals. The court disagreed, noting that regulations are entitled to deference under Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc. Since Congress has not spoken directly to the issue of service animals, the regulations are entitled to deference "if they are reasonable in light of the language and purpose of the ADA and unless they are arbitrary, capricious, or manifestly contrary to the ADA."

The court further held that the school district violated the law by requiring the parent to provide liability insurance and proof of vaccinations that exceeded state law requirements. The court also held that the severely disabled child was serving as "handler" of the dog by having it tethered to his wheelchair. The school was ordered to have someone accompany the boy and the dog when the dog needed to urinate. This was not considered "care and supervision."

The court held that that term refers to "routine or daily overall maintenance of a service animal." This dog did not eat or drink during the school day, and required no "care or supervision" beyond having someone accompany the boy when he took the dog out to urinate. The court acknowledged that this was a close call, but held that this was considered an accommodation of the boy, rather than "care of supervision" of the dog.

II. LEGISLATION AND REGULATIONS

Every Students Succeeds Act ("ESSA")

A. Teacher Qualifications - The term "highly qualified" teacher is removed from the IDEA.

It is replaced by amending the IDEA at 20 U.S.C. § 1412(a)(14(C) to read that each person employed as a special education teacher:

1. has obtained full State certification as a special education teacher (including participating in an alternate route to certification as a special educator, if such alternate route meets minimum requirements described in section 2005.56(a)(2)(ii) of title 34, Code of Federal Regulations, as such section was in effect on November 28, 2008), or passed the State special education teacher licensing examination, and holds a license to teach in the State as a special education teacher, except with respect to any teacher teaching in a public charter school who shall meet the requirements set forth in the State's public charter school law;

2. has not had special education certification or licensure requirements waived on an emergency, temporary, or provisional basis; and

3. holds at least a bachelor's degree.

   (ESSA, Section 9214(d))

B. Accommodations

The ESSA requires that students on IEPs and those students receiving accommodations under Section 504 are provided "appropriate accommodations, such as interoperability with, and ability to use assistive technology" on assessments. (Section 1111(b)(2)(B)(vii)(II))

In addition, each State Plan must address how the State will develop, disseminate information on and promote the use of appropriate accommodations. The purpose is to increase the number of students with significant cognitive disabilities participating in academic instruction and assessments for the grade level in which the student is enrolled.

C. Alternate Assessments

A State may provide an alternate assessment for students with significant cognitive disabilities that is aligned with the State's academic standards. The IEP Team will make this determination.

The parents must be "clearly informed" that their student's academic achievement will be measured based on alternate standards and how the alternate assessment may delay or otherwise affect their student's ability to complete the requirements for a regular high school diploma.

The total number of students assessed for each subject (math, reading/language arts, science) using the alternate assessment cannot exceed 1 percent of the total number of students assessed in the State who are assessed in that subject.

The law prohibits a cap on any local education agency (LEA) of the percentage of students administered an alternate assessment. An LEA exceeding the 1% state cap shall submit information to the SEA justifying the need to exceed the cap.

The SEA shall provide "appropriate oversight" of such LEA as determined by the SEA. (Section 1111(b)(2)(D))

D. Staff Training

The ESSA requires that each State Plan describe how general and special education teachers and "other appropriate staff" will know how to administer alternate assessments and make appropriate use of accommodations for students with disabilities on all assessments. (Section 1111(b)(2)(D)(i)).

E. Supplement Not Supplant

The ESSA includes a general requirement that Title 1 funds supplement and not supplant State and local funds. The ESSA requires that a school district "demonstrate that the methodology used to allocate State and local funds to each Title 1 school ensures that such school receives all of the State and local funds it would otherwise receive if it were not receiving assistance under Title 1". This section of the ESSA goes into effect in July 2017.

IDEA Regulation Update

A. Alternate Assessments Based Upon Modified Academic Standards

On August 21, 2015 the United States Department of Education issued final regulations amending the ESEA and the IDEA to no longer authorize a State to define modified academic

achievement standards and develop alternate assessments based on those modified academic achievement standards for eligible students with disabilities. *See* 34 C.F.R. § 300.160(c)(2) and (3))

NOTE: Nothing in the final regulations changes the ability of States to develop and administer alternate assessments based on alternate academic achievement standards for students with the most significant cognitive disabilities or alternate assessments based on grade-level academic achievement standards for other eligible students with disabilities in accordance with the ESEA and the IDEA, or changes the authority of IEP teams to select among these alternate assessments for eligible students.

B. IDEA Proposed Regulations on Significant Disproportionality

The United States Department of Education has proposed regulations amending the IDEA's "significant disproportionality" requirements based on a student race or ethnicity. The proposed rules were published in the Federal Register of March 4, 2016.

The Summary in the proposed regulations states:

With the goal of promoting equity in IDEA, the regulations would: (1) establish a standard methodology States must use to determine whether significant disproportionality based on race and ethnicity is occurring in the State and in its local educational agencies (LEAs); (2) clarify that States must address significant disproportionality in the incidence, duration, and type of disciplinary actions, including suspensions and expulsions, using the same statutory remedies required to address significant disproportionality in the identification and placement of children with disabilities; (3) clarify requirements for the review and revision of policies, practices, and procedures when significant disproportionality is found; and (4) require that LEAs identify and address the factors contributing to significant disproportionality as part of comprehensive coordinated early intervening services (comprehensive CEIS) and allow such services for children from age 3 through grade 12, with and without disabilities.

The proposed regulations could be found at: https://www.gpo.gov/fdsys/pkg/FR- 2016-03-02/pdf/2016-03938.pdf. The public comment period has closed.

ADA/SECTION 504 – AMENDMENTS TO ADA TITLE II REGULATIONS

In August, the Justice Department issued a final rule that implements the ADA Amendments Act of 2008 into Title II and Title III regulations. **The regulations went into effect on October 11, 2016.**

In certain places, the Title II regulations borrow almost word-for-word from the amended Title I regulations. Both Title I and Title II regulations emphasize that a student with LDs could be academically successful but still be substantially limited in one or more major life activities compared to most people in the general population.

Congress passed the ADAAA in 2008 to correct what it viewed as the court's improper narrowing of ADA coverage. With that passage, the ADAAA expanded coverage for students under Section 504 by removing the consideration of most mitigating measures for eligibility purposes, adding examples of major life activities, and stating that impairments that are episodic

or in remission, when active, may still be substantially limiting.

Taken together, the amendments to Title I and the recently amended Title II and III regulations offer schools the same message: that school districts should not spend significant time debating whether or not a child is disabled; school districts should err on the side of identifying more students under Section 504.

Once eligible, these students receive antidiscrimination protections. From there, teams still need to determine if accommodations are necessary.

A. Major Changes to Title II Regulations

Changes to the regulations include the following:

1. Understanding that the definition of "disability" shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. 28 C.F.R. Part 35.108(a)(2)(i).

2. Addition of the immune system and the circulatory system as examples of bodily systems that may be affected by a physical impairment.

3. Addition of dyslexia and ADHD to the non-exhaustive list of physical or mental impairments

4. Recognition that certain impairments will in "virtually all cases" result in coverage including: deafness, blindness, intellectual disability, partially or completely missing limbs, mobility impairments requiring the use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy/muscular dystrophy and multiple sclerosis, HIV, major depressive disorder, bipolar disorder, PTSD, TBI, OCD, and schizophrenia.

5. Addition of examples of major life activities including all the 2010 examples plus: eating, sleeping, standing, sitting, reaching, lifting, bending, learning, reading, concentrating, thinking, writing, communicating, and interacting with others. 28 CFR Part 35.108(c).

6. Recognition that "major life activities" includes the operation of major bodily functions.

7. Description of mitigating measures including AT, modifications, and learned behavioral or adaptive modifications.

8. Recognition that an impairment does not have to prevent or severely restrict the performance of a major life activity to qualify as a disability. 28 CFR Part 35.108(c)(2).

9. Explanation that Title II entities only need to provide reasonable modifications to individuals with disabilities or individuals with a record of disability, not to an individual who is only regarded as having a disability.

10. Addition of a provision stating that nondisabled individuals do not have the right to sue districts and other public entities for discrimination based on the absence of disabilities. 28 C.F.R. Part 35.130(i). This means that individuals without disabilities can't sue districts for failing to provide them with reasonable modifications that it made available to individuals with disabilities.

B. What Does “Substantially Limits Mean?”

"Substantially limits" is not defined in the Title II regulations; however, it includes **nine rules of construction**. These rules "provide ample guidance on determining whether an impairment substantially limits a major life activity." 81 Fed. Reg. 53,229 (2016). Those nine rules are as follows:

1. "Substantially limits" is not intended to be a demanding standard.
2. The threshold issue of whether an impairment substantially limits a major life activity should not demand extensive analysis.
3. An impairment does not need to substantially limit more than one major life activity.
4. An impairment that is episodic or in remission qualifies as a disability if it would substantially limit a major life activity when active.
5. An impairment does not need to prevent or significantly or severely restrict an individual from performing a major life activity to be substantially limiting; the question is how the impairment limits the individual's ability to perform the major life activity as compared to most people in the general population.
6. The determination of whether an impairment substantially limits a major life activity requires an individualized assessment.
7. An individual with an impairment generally does not need to produce scientific, medical, or statistical evidence to show how his performance of a major life activity compares to the performance of most people in the general population (however, the individual may present such evidence where appropriate).
8. Public entities may not consider the ameliorative effects of mitigating measures when determining whether an impairment substantially limits a major life activity.
9. The effects of an impairment lasting or expected to last less than six months can be substantially limiting for establishing an actual disability or a record of a disability.