Key Issues in Special Education Law: Present and Future

Perry A. Zirkel © 2013
Lehigh University
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1. Response to Intervention (RTI)
   • present:
     - specific to SLD identification under IDEA
     - largely limited to state special ed laws, not court decisions
   • future:
     - move to NCLB and extended generically beyond SLD?
     - ripening of predicted litigation?

2. Eligibility Issues
   • present:
     - identification of ED
     - overall emphasis on prong 2
     - confusing overlap with “child find”
   • future:
     - evolution of “child find”
     - definition of “special education”
3. Parental Consent

• present:
  - absolute (i.e., unilateral), including revocation, for initial services
• future:
  - continuing increase in state voucher-type sp. ed. laws

4. FAPE Litigation: Autism

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

5. FAPE Litigation: Parental Participation

• present:
  - IDEA 2004 procedural-violations exception to two-part test?
  - frequent claims with limited results (e.g., pre-determination)
• future:
  - increasing judicial acceptance?
6. **FAPE Litigation: Elevation of Substantive Standard?**

- **present:**
  - relaxed approach to qualified requirement for peer-reviewed research (PRR)
  - limited use of NCLB test results
- **future:**
  - outcomes approach: more likely for Congress than for courts

7. **FAPE Litigation: The Implementation Issue**

- **present:**
  - predominant adjudicative standard of substantial and material, not 100%
- **future:**
  - continuing alternative standard for SEA enforcement?

8. **FAPE Litigation: Bullying**

- **present:**
- **future:**
  - increasing claims with limited success and § 504 alternative (not state bullying laws)
8. FAPE Litigation: Bullying

• present:
  - recent recognition (T.K. v. NYC Dep’t of Educ. – S.D.N.Y. 2011)
• future:
  - increasing claims with limited success and § 504 alternative (not state bullying laws)

9. Increased Use of § 504

• present:
  - mostly on behalf of “double-covered” students
  - dangers of “consolation prize”
• future:
  - concomitant increase for “504-only” students due to ADAAA

10. Seclusion and Restraints

• present:
  - proposed federal legislation but mostly increased state laws
  - largely unsuccessful litigation
• future:
  - part of reauthorized NCLB or IDEA?
11. Other Legislative Changes?

• present:
  - *Schaffer v. Weast* (2005) – B/P

• future:
  - likely limited to state laws re B/P in the short run

12. Litigation Remedies

• present:
  - tuition reimbursement – e.g.,
    residential-placement test

• future:
  - compensatory education
    (e.g., interaction, calculation,
    limitations period, and
    implementation issues)
  - standard for money damages
    under § 504?

13. Other Litigation Issues?

• not present, but possibly future:
  - “twice exceptional” students
  - ELL students
  - assistive technology
  - transition services
  - disciplinary changes in placement
  - reverse attorneys’ fees
14. Dispute Resolution

• present:
  - frequency: “two worlds”
  - outcomes: perception of bias
  - process: legalization
  - emphasis: “alternatives”

• future:
  - increased use of complaint resolution systems (SEA and OCR)

15. Concluding Caveat

• law:
  - minimum requirements
  - risk management

• lore:
  - misconceptions of law
  - distinctive role of “best practice” norms (e.g., FBAs/BIPs)