2019 CABE LEGAL ISSUES WORKSHOP

Spotlight On Special Education

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Presented By: Michael P. McKeon, Esq.

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Emerging Issues for Your School District

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- **"I'm not saying we wouldn't get our hair mussed."**
- *Dr. Strangelove* – Stanley Kubrick & Terry Southern

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BACKGROUND

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- In November 1975, Congress enacted The Education for All Handicapped Children Act of 1975, which was commonly referenced by the acronym "EHA."
- The primary goal of the EHA was to eliminate what was colloquially known as "warehousing," which segregated disabled children into facilities that provided little academic instruction.

BACKGROUND

- The EHA was eventually replaced by the Individuals with Disabilities Education Act, or as it is known in its current iteration, the Individuals with Disabilities Education Improvement Act of 2004, or "**IDEA**."
- In addition, Connecticut has implemented its own counterpart to the IDEA, at Conn. Gen. Stat. §§10-76a, *et seq.*

BACKGROUND

- In keeping with the original intent of the EHA, the foundational mandate under the IDEA is that school districts provide students with:
- 1. A **Free Appropriate Public Education** ["**FAPE**"]; in
- 2. The **Least Restrictive Environment** ["**LRE**"].

BACKGROUND

- The IDEA covers students who have one of the following thirteen physical or mental impairments and who, as a result thereof, require specialized instruction, or special education:

- Autism
- Blindness
- Deafness
- Emotional Disturbance (does not include students whose conduct is volitional and thus are considered conduct disordered)
- Hearing Impairment
- Mental Retardation or Intellectual Disability

BACKGROUND

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- Multiple Disabilities
- Orthopedic Impairment (including conditions such as cerebral palsy)
- Other Health Impairment (limited strength, vitality, or alertness due to a chronic or acute health problem)
- Specific Learning Disability
- Speech or Language Impairment
- Traumatic Brain Injury
- Visual Impairment

BACKGROUND

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- Despite the fact that students with Specific Learning Disabilities are already covered under the federal IDEA, Connecticut has seen fit to add an additional impairment: **Dyslexia**.

BACKGROUND

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- Students deemed eligible for special education services under the IDEA are provided with an annual **Individualized Education Program** ["IEP"], which sets forth the student's annual educational goals and the short-term objectives by which those goals will be realized.
- The IEP is created by the student's **Planning and Placement Team** ["PPT"]. The PPT is required to meet at least once each year to review the student's progress on his then-current IEP and devise a new set of annual educational or transitional goals

FINANCIAL IMPACT

- Each new iteration of the IDEA has spawned additional regulations and, in turn, greater, more financially burdensome obligations upon school districts.

FINANCIAL IMPACT

- Somewhat ironically given the inclusionary motivation for the EHA and the IDEA, the majority of disputes that are litigated between parents and school districts pertain to parents who are demanding private, out-of-district placements – some of which cost in excess of $300,000 per year – and districts who wish to educate the student within the district.

FINANCIAL IMPACT

- Not surprisingly, then, special education and related services have become one of the most expensive parts of school budgets.

FINANCIAL IMPACT

In the relatively recent CCJEF decision, Judge Moukawsher created a controversy when he questioned the wisdom of expending substantial funds on cases in which the cost of special education outweighs the benefit the student is receiving.

FINANCIAL IMPACT

- Similarly, during oral argument in Endrew F. v. Douglas County School District, 580 U.S. ---, 137 S. Ct. 988 (2017) several United States Supreme Court justices, citing the ever-increasing cost of educating severely disabled students, questioned whether there is any place for a kind of cost-benefit analysis to measure this cost against the possible results that can be achieved.

FINANCIAL IMPACT

- Despite these comments by both federal and Connecticut courts, school districts cannot consider costs, however staggering, when determining what constitutes an appropriate education program and placement.

Endrew F. v. Douglas County School District

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For the first time in 35 years – since the seminal case of Board of Education v. Rowley -- the United States Supreme Court considered the standard of education to which a special education student is entitled.

Rowley established that special education students are entitled to "some benefit," a standard that most courts have interpreted to mean "more than *de minimis*."

Endrew F. v. Douglas County School District

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- The case arose out of a parent's decision to remove their autistic son from the public school and place him in an expensive private school after a disagreement over the student's IEP.
- Attorneys for the parents argued that the IDEA requires school districts to offer special education to students that is "**substantially equal**" to the education provided to other students.

Endrew F. v. Douglas County School District

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The parents' attorneys defined this as education that is "tailored to allow the student to achieve in a general education curriculum at grade level for most students." If this is not possible for a particular student, then there should be alternative benchmarks that are the highest possible achievable by the student.

The Department of Education argued that the proper standard is "significant progress in light of the child's circumstances."

Attorneys for the District argued that the current standard should remain intact.

Endrew F. v. Douglas County School District

The Court seemed skeptical of all arguments.

- Some justices also questioned how the "substantially equal" standard would work for a student whose disabilities would not allow him to follow the general education curriculum.
- They appeared equally concerns about the current *de minimis* standard.

Endrew F. v. Douglas County School District

- Ultimately, the Court held that the IDEA's expectation is that "the IEP is reasonably calculated to enable the child to make progress appropriate in light of [her] circumstances." Endrew F. v. Douglas County Sch. Dist. RE-1, 580 U.S. ---, 137 S. Ct. 988, 993 (2017). Consequently, for most children "FAPE will involve integration in the regular classroom and individualized special education calculated to achieve advancement from grade to grade." Id., 137 S. Ct. at 1000.

Endrew F. v. Douglas County School District

- Subsequent to Endrew F., the United States Court of Appeals for the Second Circuit observed:

  Prior decisions of this Court are consistent with the Supreme Court's decision in Endrew F. Hence, this Court has emphasized that the substantive adequacy of an IEP is focused on whether an IEP was "reasonably calculated to enable the child to receive educational benefits" and "likely to produce progress, not regression."

- Mr. P. v. West Hartford Bd. of Educ., 885 F.3d 735, 757 (2nd Cir. 2018)

Endrew F. v. Douglas County School District

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- In other words, within the Second Circuit – which includes Connecticut – Endrew F. had no new substantive effect as Second Circuit precedent had already established the standard the Supreme Court articulated in Endrew F.

CHILD FIND

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- The IDEA requires that school districts have in place policies and procedures to ensure that:
- All children with disabilities residing in the district, including children who are homeless or wards of the State, and children attending private schools and are in need of special education are "identified, located, and evaluated." 34 C.F.R. §300.111.
- This obligation is commonly called: "**Child Find**."

CHILD FIND

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- **Child Find** requires school districts to have a process in place by which private and parochial schools located within the district can refer to them students they believe might be eligible for special education and related services, which the school district is then obligated to evaluate, regardless of the student's actual district of residency.
- If the students are deemed eligible for special education, their home districts are responsible for providing an IEP.
- If the students decline special education services, the district that evaluated the student has to provide a Service Plan, under which the student is entitled to services in the amount of their proportionate share of Part B (of the IDEA) funds.

Evaluations/Independent Educational Evaluations

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- Under the IDEA, a school district cannot find a student eligible for special education unless it first evaluates the student in all areas of suspected disability.
- The IDEA provides that school districts have the right to conduct their own evaluations of students who are suspected of being eligible for special education services and their own reevaluations of students already deemed eligible. P.S. v. Brookfield Board of Education, 353 F.Supp.2d 306 (D. Conn. 2005)

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Evaluations/Independent Educational Evaluations

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- The IDEA, however, also entitles parents to request an **Independent Educational Evaluation** [**"IEE"**] if they disagree with an evaluation that has been administered by the school district.

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Independent Educational Evaluations

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- Despite there being no legal authority for it, the Connecticut Department of Education's position is that parents have two years following the district's evaluation to request an IEE.
- Furthermore, despite federal case law such as the Brookfield case which entitles districts to conduct their own evaluations, and the plain language of the IDEA regulations requiring a prior district evaluation, both the United States and the Connecticut Departments of Education have recently asserted that parents have the right to an IEE in ***ANY*** area, **even one *not* previously evaluated or one over which the parent has *never* expressed a concern**.

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Independent Educational Evaluations

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Once a parent requests an IEE, the District only has two options:

- Initiate an administrative hearing before a Connecticut Department of Education hearing officer to defend the district's assessment; or
- Assume financial responsibility for the IEE, unless the district can prove at a hearing that the IEE did not meet the district's criteria.

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Independent Educational Evaluations

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- Unfortunately, citing this legally baseless interpretation of the IDEA, parents are increasingly using IEEs to pressure school districts into providing their children with private placements or additional services. Specifically, parents will request IEEs in every possible category of assessment, which compels districts either to incur the costs of litigating the parents' request or assuming IEE costs, which can be substantial.

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Independent Educational Evaluations

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- The recent case of D.S. v. Trumbull Board of Education, 357 F. Supp. 3d 166 (D. Conn. 2019), however, arguably calls into question the State Department of Education's position (which is almost ***never*** a bad thing)

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DISCRIMINATION AND SPECIAL EDUCATION

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- On December 12, 2016, the United States Department of Education's **Office for Civil Rights** ["**OCR**"] issued a "Dear Colleague" letter, reminding school districts of their obligation to ensure that all students, regardless of race, color, or national origin, have equitable access to high quality general and special education instruction, including:
- equitable access to general education interventions and to timely special education and Section 504 evaluation referrals; and
- equitable treatment in the evaluation process, in the quality of special education services and supports they receive, and in the degree of restrictiveness of their educational environment.

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DISCRIMINATION AND SPECIAL EDUCATION

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- To that end, OCR warns that districts **must not treat similarly situated students of different races differently**:
- With respect to evaluation procedures, unless the district can establish a legitimate, nondiscriminatory reason for doing so; or
- In the amount and type of documentation required to support educational placement decisions.
- Furthermore, districts **must not** use an evaluation procedure that has a disproportionate adverse impact on a racial or ethnic group if there is a comparably effective procedure that accomplishes the district's important educational goal with less adverse impact (e.g., less over-identification or under-identification).

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DISCRIMINATION AND SPECIAL EDUCATION

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- OCR further warns that school districts **must not discriminate against students based on race, color, or national origin** in the provision of special education or related aids and services under Section 504 or in the implementation of an individualized education program under the IDEA.
- Districts must give students equitable access, without regard to race, color, or national origin to the most integrated setting appropriate for the student.

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DISCIPLINE AND SPECIAL EDUCATION

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- On August 1, 2016, OCR issued a "Dear Colleague" letter, warning school districts that disciplinary removals strongly suggest that many disabled children may not be receiving appropriate behavioral interventions and other strategies in their IEPs.
- OCR further advised that the right to implement disciplinary removals does not negate the district's obligation to consider the implications of the child's behavioral needs, and the effects of suspensions (and other short-term removals) when ensuring the provision of FAPE.

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- In addition to suspensions, these "exclusionary disciplinary measures" also could include:
- A pattern of office referrals, extended time outs, or extended restrictions in privileges;
- Repeatedly sending children out of school on "administrative leave" or a "day off" or other methods of sending the child home from school;
- Repeatedly sending children out of school with a condition for return, such as a risk assessment or psychological evaluation; or
- Regularly requiring children to leave the school early and miss instructional time (e.g., via shortened school days).

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- Both the IDEA and Section 504 of the Rehabilitation Act have long provided that disabled students **cannot be expelled** unless the PPT or the Section 504 Team first determines that the conduct in question was ***not*** a manifestation of the student's disability.
- The rationale behind this mandate is to protect students from being punished for their disability.

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- A manifestation determination meeting is required when a student is facing a "change in placement," which can be either a proposed expulsion or a series of suspensions which constitute a "pattern of removals."

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- Whether a series of suspensions constitutes a "**pattern of removals**" is something of a subjective assessment which is predicated on their temporal proximity, the bases for suspensions, and the length of suspensions.

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- In any event, and contrary to what some districts believe, the mere fact that a student has reached the eleventh day of **cumulative – as opposed to *consecutive*, which would be an expulsion** – typically does not require a manifestation determination. Again, the relevant factor is whether there is a "pattern of removals."

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- Misconduct is considered a manifestation of the student's disability if:
- A) The conduct was caused by, or had a direct and substantial relationship to the child's disability; **or**
- B) The conduct was the direct result of the school district's failure to implement the IEP.

- If the student's behavior is deemed not to be a manifestation of the student's disability, then the student can be disciplined to the same extent as his or her typical peers.

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- If the conduct is determined to be a manifestation of the student's disability, he or she **cannot** be expelled.

- Furthermore, if the conduct is deemed to be a manifestation of the student's disability the PPT must conduct a Functional Behavioral Assessment ["FBA"] – unless one is already in place – and use that assessment to create a Behavior Intervention Plan ["BIP"].

- If a BIP is already in place, then the Team must review it and determine whether it needs to be revised.

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- The manifestation determination requirement is also applicable to students who have not yet been deemed eligible for special education if the district had "knowledge" that the student might have a disability, which "knowledge" is based upon:
- A) Parent expressed written concern to supervisory or administrative personnel or the student's teacher that the child needed special education;
- B) The parent requested an evaluation prior to the conduct in question; **or**
- C) School staff expressed specific concerns directly to the Special Education Director or other administrative personnel about a pattern of behavior by the student.

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- This "knowledge," however, is not applicable if:
- A) The student's parent has refused an evaluation of the child;
- B) The student's parent has refused services under the IDEA; **or**
- C) The student was previously evaluated and determined not to be a child with a disability under the IDEA.

DISCIPLINE AND SPECIAL EDUCATION

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- A school district is not required to provide any instruction to a special education student during the first ten days of suspension in any one school year. They must provide services upon the eleventh day and thereafter.

DISCIPLINE AND SPECIAL EDUCATION

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- A school district can place a special education student in a **45-school-day alternative placement** -- ***even if the misconduct is a manifestation of the student's disability*** – if the student:
- A) Carries or possesses a weapon on school grounds or at a school-sponsored activity;
- B) Knowingly possesses, uses, sells, or solicits the sale of a controlled substance on school premises or at a school-sponsored activity; or
- C) Has inflicted serious bodily injury upon another person while on school premises or at a school-sponsored activity.

DUE PROCESS HEARINGS

- Parents who dispute a PPT recommendation are entitled under both the IDEA and Connecticut law to request an administrative, due process hearing before a State of Connecticut Department of Education hearing officer
- Appeals from a hearing officer decision are typically to federal court, but they can also be filed in state court.
- During the pendency of hearings and subsequent appeals, the student is entitled to stay in his or her last mutually agreed placement, even if that placement is disputed by the district and the district prevailed before the hearing officer.
- This is very eloquently called: "**Stay Put**."

DUE PROCESS HEARINGS

- Typically, no more than approximately 5% of disputes result in a fully adjudicated hearing.
- This is because the State of Connecticut has, in its infinite wisdom, taken the position that the burden of proof is always on the school district (except in those situations in which the parents are seeking to establish the appropriateness of the out-of-district program into which they unilaterally placed their child);
- The cost of multi-day hearings can be quite substantial; and
- Parent attorneys are entitled to seek reimbursement of their legal fees and costs should they "prevail" in a due process hearing.

Questions…..

CONTACT INFORMATION

- **Michael P. McKeon**

Pullman & Comley, LLC
90 State House Square
Fourteenth Floor
Hartford, CT 06103-3702
Tel: 860.424.4386
Fax: 860.424.4370
mmckeon@pullcom.com

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