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A Change Would Do You Good...

Maybe.

ICASE Fall 2016

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Out with the Old?

- FAPE – Is the *Rowley* Standard Changing?
- Prior Written Notice
- Exhaustion of Administrative Remedies

In with the New?

- Website Accessibility
- eLearning
- Transgender Students
- Restraint & Seclusion

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OUT WITH THE OLD?

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FAPE

What standard, or level, of educational benefit has to be afforded to children with disabilities?

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IDEA Defines FAPE Procedurally

20 U.S.C. § 1401(9)

FAPE: special education and related services that are

- free;
- meet the state standards;
- include appropriate preschool, elementary, or secondary education; and
- are provided in conformity with the student's IEP.

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Rowley Defines FAPE Substantially

Board of Education of Hendricks Hudson School District v. Rowley (U.S. 1982).

A school district provides FAPE to a child with a disability if it develops the child's IEP in accordance with IDEA procedures and the IEP is "reasonably calculated to enable the child to receive educational benefits."

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IEP is "reasonably calculated to enable the child to receive educational benefits."

But what level of educational benefits?



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7th Circuit: "[A] school provides a FAPE so long as a child receives **some** educational benefit, meaning a **benefit that is more than minimal or trivial**, from special instruction and services." *M.B. v. Hamilton Southeastern Schools*, 668 F.3d 851, 862 (7th Cir. 2011).

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Does the “educational benefit” provided by a school have to be more than *de minimis* in order to satisfy the FAPE requirement?

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Andrew F. v. Douglas County School

- Student has ADHD and Autism with behavior issues, was educated at School K-4th grade
- Parents believed 4th grade IEP had produced no meaningful educational progress and rejected proposed 5th grade IEP because it was largely unchanged from 4th grade
- Parents withdrew Student and placed him in private school specializing in children with autism
- Parent alleges that School failed to provide FAPE, seeks private school tuition

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Hearing officer

Federal district court

10th Circuit Court of Appeals

Supreme Court

10TH Circuit: FAPE = Benefit must be more than *de minimis*

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Solicitor General Advises SCOTUS

- The 10th Circuit's "merely more than *de minimis*" standard is wrong
- "[SCOTUS] should hold that States must provide children with disabilities educational benefits that are **meaningful in light of the child's potential and the IDEA's stated purposes**. Merely aiming for non-trivial progress is not sufficient."
- "Only 'meaningful' or 'significant' benefits can afford [access to education that is actually 'meaningful']."

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- Not yet set for argument
- Expect a decision by summer 2017

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Other FAPE Issues

Students with Communication Disorders

- OCR/DOJ/OSERS 2014 Dear Colleague Letter: let's follow 9th Circuit in *K.M. v. Tustin Unified School District*
- In some cases, compliance with IDEA for students who have a hearing, vision, or speech disability may not automatically mean that the school has complied with Title II of ADA

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"A public entity shall take appropriate steps to ensure that communications with [individuals] with disabilities are **as effective as communications with others**"

28 CFR 35.160(a)(1)

- ADA = equal access vs. FAPE = meaningful access
- So for students with communication disorders, Schools have to meet obligations of IDEA (FAPE), Section 504, and Title II of ADA
- Aids/services have to be *necessary*
- Aids and services must protect the privacy and independence of the individual

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Practical Tips for Communication Disorders

- Do a functional communication evaluation
- Take effective communication decisions out of IEP team and put it in the hands of your Title II coordinator. These aids and services must be provided ASAP, even if Article 7 evaluation and IEP processes are still pending.
- Consult an audiologist who understands Cochlear implants and the system being requested (including whether it's age-appropriate)
- Train every staff member who works with a child who is deaf to gain an understanding of auditory impairments, the technology being used, and the limitations of the technology; take data on the effectiveness of any device that is used and whether the child wants it; and make sure the child is always part of the decision-making and feedback process regarding a device

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Prior Written Notice

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When is Prior Written Notice Required?

20 U.S.C. 1415(b)(3) states:

Prior written notice is required whenever the local educational agency:

- proposes to initiate or change; or
- refuses to initiate or change,

the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child.

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Prior Written Notice must include:

- A description of the action proposed or refused by the agency
- An explanation of why the agency proposes or refuses to take the action and a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;
- A statement that the parents of a child with a disability have protection under the procedural safeguards of this part [20 USCS §§ 1411 et seq.] and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;
- Sources for parents to contact to obtain assistance in understanding the provisions of this part [20 USCS §§ 1411 et seq.];
- A description of other options considered by the IEP Team and the reason why those options were rejected; and
- A description of the factors that are relevant to the agency's proposal or refusal.

20 USC 1415(c)(2)(B)(i)(I) and 34 CFR 300.503(b)
See also 511 IAC 7-42-7(b)

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Longstanding practice in Indiana ...

- Provide the proposed IEP as prior written notice.
- Indiana's Article 7 states that the IEP may be used as part of the prior written notice as long as it meets all the prior written requirements. 511 IAC 7-42-7(c).

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Prior Written Notice Violations

New Mexico Public Education Department, 115 LRP 31994 (March 18, 2015)

- Complaint filed with the State education department investigated whether prior written notice had been provided to the parents.
- As a team, the school officials and the parent met to review a teacher's concerns regarding student's behavior and academic areas of concern.
- The team developed a intervention plan, that included a referral to the special education department for an evaluation.
- The school stated that the intervention plan constituted prior written notice of its proposal to evaluate.
- This district's assertion that an "intervention plan" constituted proper notice of a proposal to evaluate was unconvincing where the plan indicated the district "may" use various types of assessments, with no basis or explanation for its decision.
- The ED cited the district for its noncompliance. As part of a corrective action plan, the district must demonstrate that it reviewed its policies, procedures and practices regarding prior written notice. It must also develop a timeline for completing the steps outlined in the plan and fully document how it implemented each of those steps.

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Prior Written Notice Violations

Indiana State Educational Agency, CP-067-2015, 115 LRP 26178

- Student had an IEP stating the LRE was in the general education classroom for 80% of the day.
- Student transferred to a new school and the school placed the student in a self-contained classroom for purposes of remediation and "to monitor the transition to a new learning environment."
- The parent verbally agreed to this change in placement, but there was no prior written notice of this change.
- The complaint investigator found there is no record of any written notice of a proposal to change the educational placement of the student. Thus, a violation of 511 IAC 7-42-7(a) & (b) was found.
- Even with verbal consent, this was a change of placement that triggered prior written notice requirements.

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Other things to consider with Prior Written Notice

- When the IEP listed "E-Therapy" as the location of the child's services, prior written notice was required when the district decided to continue providing therapy online and refused the parents requests for services be provided in-person. *Alaska State Educational Agency, 116 LRP 15983 (March 29, 2016)*
- The Ohio Education Department pointed to the absence of the parent's signature on the student's February 2015 IEP when stating there was insufficient documentation that the parent received notice of her safeguards during the 2014-15 school year.
- The ED acknowledged that the IEP stated that the parent received the notice. Moreover, it observed that the district asserted in its response to the parent's complaint that IEP team members provided the notice to the parent at the February IEP meeting. However, "since the Parent did not sign the February 2015 IEP, there is no documentation that the Parent received the Procedural Safeguards at that meeting," the ED wrote. – *Ohio State Educational Agency, 116 LRP 11536(March 11, 2016)*

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**Exhaustion of
Administrative Remedies**

Can parents sue schools for money
after the case conference goes
bad?

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Poll the Audience

If Parents disagree with the case
conference committee's decision, can
they go straight to court and ask for their
proposed educational remedy and
monetary damages for pain and
suffering?

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What [We Thought] We Knew...

Plaintiffs (parents) must exhaust all
administrative remedies under the IDEA before
filing a lawsuit under another federal statute
(such as the ADA, which allows for monetary
damages)

i.e., File due process first ... then go after the \$

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IDEA's Exhaustion Provision

Nothing in this title [20 USCS §§ 1400 et seq.] shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973 [29 USCS §§ 790 et seq.], or other Federal laws protecting the rights of children with disabilities, **except that before the filing of a civil action under such laws seeking relief that is also available under this part [20 USCS §§ 1411 et seq.], the procedures under subsections (f) and (g) shall be exhausted** to the same extent as would be required had the action been brought under this part [20 USCS §§ 1411 et seq.].

20 USCS § 1415(l)

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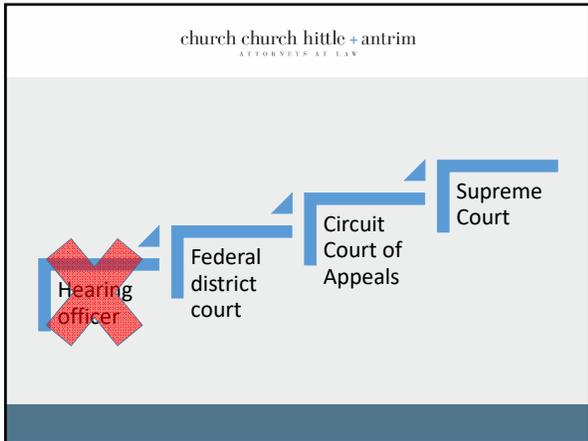


7th Circuit: "Perhaps ... in the end money is the only balm. But parents cannot know that without asking, any more than we can. **Both the genesis and the manifestations of the problem are educational; the IDEA offers comprehensive educational solutions ...**" *Charlie F. by Neil F. v. Board of Educ.*, 98 F.3d 989 * (7th Cir. 1996)

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Fry v. Napoleon County Schools

- During a CCC, Parents requested Student with cerebral palsy to bring a service dog to school
- CCC members believed that the child's human aide, provided as part of her IEP, satisfied her needs
- OCR complaint sided with Parents, School allowed dog
- The parents sued the school district under the ADA, seeking the service dog and monetary damages due to the "social and emotional harm caused by the school."



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Fry Arguments

Parents: We sued under the ADA. We sought money damages at trial, which IDEA can't provide, so we shouldn't have to go through IDEA first.

School: You wanted money and the dog, go through IDEA first.

Solicitor General (for U.S.): School had already agreed to allow the dog, Parents had moved to another school. There was no educational remedy here, so no need to go through IDEA.

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Solicitor General: Parent who seeks relief that is available under the IDEA cannot avoid exhaustion simply by tacking on a request for damages. The people who will bypass IDEA exhaustion process:

- (1) do not believe that the IDEA was violated,
- (2) have already reached a resolution with the school providing them with whatever IDEA relief they may be entitled to receive, or (
- (3) no longer seek IDEA services from the school district for the child at issue.

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- Set for argument
10.31.16
- Expect a decision by
summer 2017

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IN WITH THE NEW?

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Website Accessibility
Your Next OCR Complaint

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Can blind community members access our district's website?

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Dramatic Increase in Website Accessibility Complaints

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Website Accessibility Complaints

- National advocacy group
- Section 504 equal access issue – public facing websites
- No mention of websites in Section 504 or ADA
- No case law that says what websites have to include to be compliant

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Low contrast

Tiny font that people with low vision cannot read. Isn't this frustrating to try to read? Are you squinting? Headache setting in?

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Basic 302 Resolution Agreements

1. Develop policies and procedures
 - Content now, content later
 - Fundamental alteration / undue burden
2. Perform audit of website (pre-approved by OCR) - \$
3. Develop Corrective Action Plan
4. Notice
5. Training (at least annually)
6. 6-month reporting

<http://www.ed.gov/news/press-releases/settlements-reached-seven-states-one-territory-ensure-website-accessibility-people-disabilities>

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Web Content Accessibility Guidelines (WCAG) 2.0 Level AA Standards

Web Accessibility Initiative Accessible Rich Internet Applications Suite (WAI-ARIA) 1.0

Ask your tech dept!

<https://www.w3.org/WAI/intro/wcag.php>
<https://www.w3.org/TR/wai-aria/>

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Bigger Issues

Closed captioning on all video broadcasts?
Third party websites (lunch website)?

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WebAIM
web accessibility in mind

WAVE
web accessibility evaluation tool

www.cchalaw.com

Powered by WebAIM

WAVE Report of 10/4/16

www.cchalaw.com

WAVE
web accessibility evaluation tool

Details

Filter: Full

Errors (8)

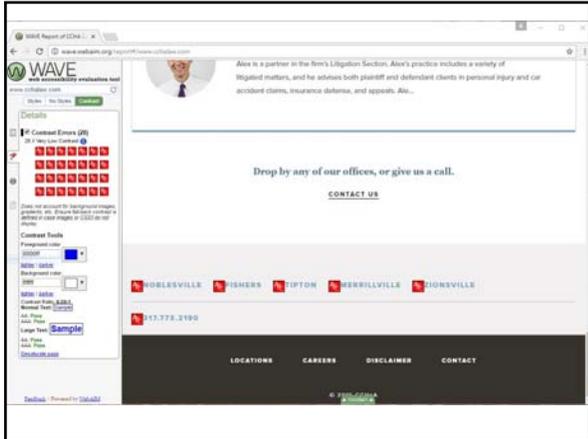
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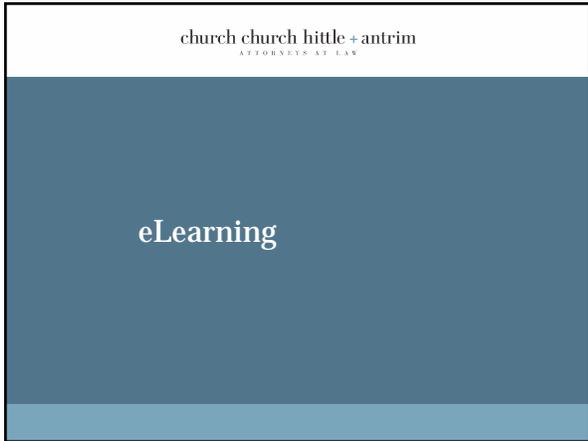
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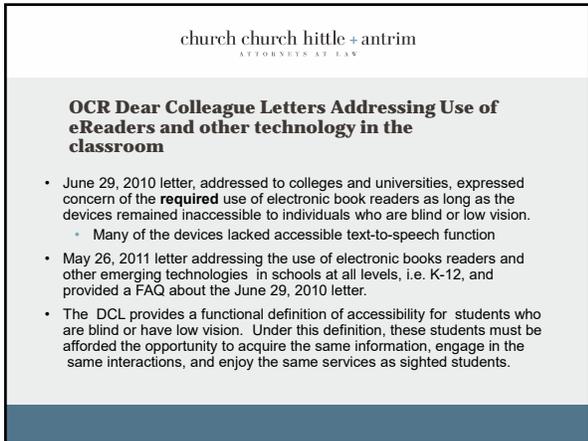
Structural Elements (40)

We're your advocate so much more

Since the establishment of Church Church Hittle + Antrim in 1980, our neighbors, community leaders, business and educational institutions have placed their trust in us to solve their most challenging issues. We have a rich history of helping our clients when







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OSERS – Dear Colleague Letter on Virtual Schools

Some key points...

- Child Find obligation with virtual schools around you - should review child find policies and procedures to ensure that children with disabilities who attend virtual schools are identified, located, and evaluated.
- For children who have IEPs and have been determined eligible for special education and related services prior to their enrollment in the virtual school, child find responsibilities also include ensuring that periodic reevaluations are conducted.
- As the LEA responsible for the provision of FAPE, make sure FAPE is made available to the child and continue to implement the requirements of IDEA regarding education in the least restrictive environment, including ensuring the availability of a continuum of alternative placements to provide special education and related services.

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Things to consider with eLearning Days

- Flexibility in how you write services within the IEP minutes/days/week/reporting period
- “Sub” test
- Accommodating students without assistive technology for kids who do not work well with computers/digital textbooks
- Do NOT put specific methodology (i.e. PLATO) within the IEP

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Transgender Students

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Transgender & Special Ed

- Anxiety & depression associated with transitioning may require IEP or Section 504 evaluation
- Child Find obligations
- Remember: academic success may be irrelevant
- Students already identified as disabled who also come out as LGBTQ may need re-evaluation for other associated issues

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Fast & Complicated Timeline

April 2016 4 th Circuit	May 2016 OCR/DOJ Guidance	June 2016 States' Lawsuit	August 2016 SCOTUS
School cannot adopt policy forcing students to use restroom of biological sex. School ordered to allow transgender male to use boys' restroom.	Title IX requires schools to allow transgender students to use restroom of gender identity	OCR/DOJ don't have authority to change Title IX's prohibition on "sex" discrimination to "gender" discrimination	Stay the 4 th Circuit's decision ... now what?



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Restraint & Seclusion Training

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R&S Plan

- Co-op vs. individual school corporation having a policy.
 - I.C. 20-20-40-14 required each public, charter or accredited nonpublic school to adopt a restraint and seclusion plan by July 1, 2014, and the plan must contain certain elements as set forth in the statute.
 - Confirm that the plan has been adopted.
- Different theories for training: NCI, Pro-ACT, etc.

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Thank you.

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