

## **Key Issues in Special Education Law: Present and Future**

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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?

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### **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”

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### **3. Parental Consent**

- present:
  - absolute (i.e., unilateral), including revocation, for initial services
- future:
  - confusing fall-back to § 504
  - continuing increase in state voucher-type sp. ed. laws

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#### **4. FAPE Litigation: Autism**

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

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#### **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?

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#### **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

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

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

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## 8. FAPE Litigation: Bullying

- present:
  - recent recognition (Dear Colleague letter (OSEP 2012); *T.K. v. NYC Dep't of Educ.* – S.D.N.Y. 2011)
- future:
  - increasing claims with limited success and § 504 alternative (not state anti-bullying laws)

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## 9. Increased Use of § 504/ADA

- present:
  - mostly on behalf of “double-covered” students
  - dangers of “consolation prize”
- future:
  - limited differential – e.g., *T.M.*
  - stabilized increase for “504-only” students resulting from ADAAA?
  - settling the substantive standard?

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## 10. Restraint and Seclusion

- present:
  - proposed federal legislation but mostly increased state laws
  - largely unsuccessful litigation
- future:
  - part of reauthorized NCLB or IDEA?

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## 11. Other Legislative Changes?

- present:
  - *Schaffer v. Weast* (2005) – B/P
  - *Arlington Central* (2006) – expert fees
- future:
  - likely limited to state laws re B/P in the short run

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## 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? FAPE denial too?

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## 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

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## 14. Dispute Resolution

- present:
  - frequency: “two worlds”
  - outcomes: perception of bias
  - process: legalization
  - emphasis: “alternatives” (filings v. adjudications)
- future:
  - increased use of complaint resolution systems (SEA and OCR)

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## 15. Concluding Caveat

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

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