DIANE: I'd like to welcome you to session number five, Key Issues in Special Education Law: Present and Future. It gives me pleasure to introduce our presenter, Dr. Perry Zirkel, who is a university professor of education and law at Lehigh University. Dr. Zirkel has written more than 1,300 publications on various aspects of school law with an emphasis on legal issues and special education. Dr. Zirkel has received numerous awards. Most recently in 2013, he received the University Council for Educational Administrator's Edwin Bridges award for significant contributions to the preparation and development of school leaders. Please join me in welcoming Dr. Zirkel.

DR. PERRY ZIRKEL: Thank you, Diane. And thank the rest of you for coming on this snowy day. We'll have some fun together. We go until 5:15. We're not taking a break but you can self-break yourselves without a 504 plan, just accommodate. Before we get to the main session, my colleague, Jen Escala has kindly reminded me to remind you, we have two upcoming programs at Lehigh, our 43rd one-day annual conference is May 9th, and you can either Google that, just Special Ed Law Conference or there's the actual URL. We also have our one week symposium which can be taken for graduate credit or none credit and that's at that website. With that little non-commercial commercial, we'll get to the materials that you have hopefully in front of you in terms of handouts. It's a PowerPoint called Key Issues, and what I've done for these key issues is taken a look across the world of special ed law. Currently, in Pennsylvania, within the third circuit which is our federal circuit and nationally, to try to identify for you and keep you legally literate, what are some of the current hot-button issues and for each one of them, as you'll see when we get to the first one, I have divided up my notes to you into two sections. One, what appears to be going on right now and then with due caution, since no one can actually predict, but to make some cautious projections to the future as to what might happen. And I've identified something like about 18 different items and we're going to go through them now. I'll try to--because I was a former high school teacher and that means I have to cover the curriculum even if you learn nothing. So I have to get through all of my slides, but you're special ed folks, which means that you'll stop me at times to make sure individually that we go into depth where you have questions or comments. So don't wait for the end and don't be timid, either raise your hand or just call out and I often find that we not only get good questions, but sometimes, good correction because, you know, I make errors as we go along. So jump in and let's interact despite the size of the group. These 15 or so items are not listed in order of priority. They're just sort of as I was writing down. So for some of you at least a big numero uno is what Pennsylvania calls RtII, what some states called SRBI. Those who talk about the future, predict that it will change its name to MTI Multi-Tiered Interventions. It's all basically the same thing. But looking at it legally not educationally, which is the way you look at things and keep looking at it that way. But legally, RTI is a narrow sliver. The only recognition nationally of RTI in the law and the IDEA, it's not in 504, is specifically for identification of one of the 10 or so classifications, specific learning disability. It doesn't mean you can't use it for other areas or other categories like OHI. That's a matter of local practice of state law. But federally, only SLD and federally, the choice is each state can either mandate RTI or permit. We are one of the group of approximately 38 states which is permissive, leaving it up to the district to ultimately

choose. Where we differ from the majority of other states is, you choose if you are an LEA but you got to come to the SEA to get approval because we want to make sure you do it right. And many people, the researchers and scholars out there, say RTI has great benefits for individual kids and the system if you do it right. And it's that thought that went into our notion of application process. At the other extreme, there are states like West Virginia and New Mexico and nearby Delaware, which mandated it upfront with a quick deadline and everybody had to get on board and there are obviously trade-offs for each approach. Before we leave it, when I talk about state special ed laws, there are a couple of states which are very unusual. In law, when you have an unsual state, it's often Louisiana, because it's the only state that doesn't have the British tradition of law but rather the French Napoleonic Code in its background. But for whatever reason, Louisiana is unusual in that it mandates RTI for all classifications. That's very unusual compared to the federal law. But back to Pennsylvania, it is just simply legally a permitted approach for identifying LD kids. What I find very troubling from my point of view but is actually good news from many of your points of view is very little case law. I kept waiting and waiting for all of the predicted court decisions about either districts who do RTI wrong, that is they--for example, what is very common in some districts is they take the old IST process, the school building problem solving instructional support team like an old bottle of wine and relabeled it RTI. I kept waiting for cases where parents were going to challenge that and cross examine some of you and saying, "How is what you called IST now somehow magically RTI?" I have seen no such cases. Similarly, there were predictions about child find cases. You would do RTI in good faith, have a given child in Tier 2, let's say, and I, the parent, am getting frustrated because I want my child to get that magic serum called special ed. And so I file for a hearing or file a complaint with the state, arguing, "You violated child find because Tier 2 shows that you had, magic language, get ready for some ambiguity, reason to suspect that the child might be eligible as LSD and did not do promptly an evaluation. Those cases have not occurred at the court level. A couple have occurred at the hearing officer level in states like Texas, very disappointing decisions from a legal point of view because they're short differential to you saying in one Texas case for example, the district is trying hard and in good faith to help your child and although arguably, there's reason to suspect, I as a hearing officer don't think so and don't think I should interfere with good faith processes to help children. Boom, end of case. And so far, I would not, if I were in your seat, be fearful about doing RTI because it's going to cause a ton of litigation. Rather, I would be making a judgment as to whether it's worthwhile based upon the culture of my community of views and values of best practices, resources, teacher attitudes, et cetera, something that you're much better at doing than I am, the whole change process for the benefit of children. One other little things that some find--people find useful in the legal area before we move. What is RTI? In IDEA, it is not defined. It is just simply a--it's talking about--as a matter of fact, it doesn't even use the expression RTI. It talks about, if the child does not respond to scientifically based or scientifically research-based interventions. But OSEP, the agency in Washington that administers IDEA, the Office of Special Ed Programs has issued several letters including one to me, letter to Zirkel, but it was also one memorandum to state directors of special ed and another one to another person. They

have consistently held to the point of view that RTI, although like an elephant, may differ from an Indian elephant to an African elephant and some other elephant. They all have certain characteristics as core elements such as like special ed directors, thick skin, after a while, as well a trunk, et cetera. So what are the characteristics? OSEP has identified three core characteristics. So that if you did have an IST process and claimed that it was RTI. And if we really were going to try to apply legal criteria with the notion that OSEP is not biding, but most courts would find their interpretations because they're the administrating agency, persuasive. Criterion number one, which is going to be obvious to many of you, multi-tiered instruction or interventions and the typical IST type process has, at the most if you stretch things, two tiers. The regular and universal education and for that kid who's not doing well, we then develop something for you. Now, I wonder whether, first of all, the thing we develop for you is necessarily a tier as compared or just some strategies we passed on to the teacher and second, we say multi-tiered, I wonder whether just regular and this is enough, does multi mean sort of three or more. As I question it because we don't have any clear applications yet, I'll just leave that as a question mark, maybe so but let's go to number two. And here's where many of you will get caught if you were doing this and if in fact someone blows the whistle when we go to hearing and we use the OSEP second criterion. What some of you as special educators find as part of intrinsic good education, at least good special education, but for a high school teacher, my initial reaction would have been, "Not my job, not me, I give a midterm and a final and you'll thank me someday." I'm still waiting for your thanks, Dave. But in any event, the -- what I'm looking for is the second criterion. Continuous Progress Monitoring and the way most people interpret that, it's not just simply a bunch of data that we throw at the IST team. It's usually very disciplined, periodic, chart-like data that is measuring the progress of the individual child toward particular goals and many folks don't do that. And if they don't, then at least according to these legal criteria, it is not RTI. The third criterion is the most flexible of all and here you probably get a pass because it is state of the art. All the interventions that you used, now, it used to be and in the law, I would have said scientific research-based but after the OSEP sort of cheats in your favor, they sometimes use the expression, research-based, which is less rigorous because you don't need experimental or quasi-experimental research or the later to me and I don't know if they did this on purpose or not. They said evidence-based, which, to me, is even less rigorous. Those are the three key criteria like the elephant's thick skin and a trunk and the big feet if you will. In literature, this is a fourth criterion that some of you, as administrators or leaders, know is very important but so far it has not gotten legal recognition and that is fidelity. So we sort of put that off to one side as a possibility. Now, how about the future? We asked Melody Musgrove, the director of OSEP, at our last Lehigh conference that she key noted, what she thought represented the administration. And she said candidly and openly that the administration strongly endorses RTI and would like to move us from a permissive to a mandatory approach. But as some of you sometimes point the finger, she says however they would prefer not to have it in IDEA but to move it into No Child Left Behind which some people now refer to as an ESEA, the old name for that. Because it's a regular, general ed law with money and RTI needs money and it's a general ed responsibility although

coordinated with special ed and will there be the litigation that I keep waiting for. I'm thinking less and less that it's likely because although Pennsylvania has only approved a small number of districts, we already have four or five years experience in at least ten states that have mandated RTI. And I'm sure they've had some chaotic problems but litigation has not been one of them. I'm going to move unless I hear a question, a comment, or a correction to my next item. Not hearing one, I turn to the issue at the threshold that comes off of RTI but little bigger. What sorts of legal issues do we tend to see recently in terms of whether Johnny or Jenny is eligible for an IEP. And as I look across the classifications, I find that the old lots of case law under SLD where RTI was, the numbers of SLD are going down regardless of RTI and the litigation has somehow settled down. The biggest one that I find litigation about is emotional disturbance. Because number one, the criteria are vague and number two, these kids are hurting buckaroos, they're -- pardon the expression, a pain in the rear end or what some of you would call socially maladjusted, some are. Which -- so here's two quick examples of what I'm talking about that causes litigation. First, an example of the ambiguous language. It talks about -- if you look at the definition legally, five criteria, any one or more of which if the kid exhibits it, such as sort of a socially abnormal behavior like wearing a hat all over the place. That might well qualify me but then it adds two things somewhat like 504 does when it's substantial. It says to a marked degree and I've gotten so bad about this that I -- except when I go to sleep, it follows me, you know, around the house. And for a long period of time and I've been doing it ever since I started balding about eight years ago. My male vanity kicked in at that point. But in the -- forget me for a second, in this case it was a suburban district of Philadelphia, the child went into a tailspin because of a traumatic experience at home. Her grades dropped, her behavior changed tremendously. She had huge emotional issues in controlling her emotions and her behavior and ultimately being a suburban family that had the wherewithal to help their children, having the sort of extra supports that goes along with more wealth, put her in a therapeutic hospitalized setting where they were able to ameliorate her problems so that at least her suicidal thoughts seemed to abate sufficiently and then she came back home and was going to be reintegrated into the school system. But at that point the parents started thinking with advice from others that she really ought to get an IEP and that the district was at fault. And of course if you're a parent, I'm now a grandparent, this happened to my grandkid, I get one of my grand -- I get very emotional myself and I'm looking for a scapegoat and say, "I'm going to sue you for Child Find because it's your fault and that you should have identified this kid when she first went into her tailspin." The district defended itself based upon the language I just talked about. It said, "Yes, she exhibited more than one of the five criteria and it was to a marked degree because she had to go the hospital, but it wasn't for a long period of time." Because she was only in the hospital for, let's say, a month. And the court essentially said, "Come on, I mean, although there's no definition for a long period of time, we don't just measure her hospitalization. You had reason to suspect before her hospitalization, we consider that period of time that is certainly sufficient. So certainly hospitalization is a red flag, but this flag even started waving before that point in time." But I -- but you don't get from me what some of you want, mathematically precise definition of long period is like

pregnancy, nine months. I -- the law doesn't say that. It's just ambiguous. The second one I mentioned was social maladjustment. Many of you believe, and you could be a school psychologist who's sort of in charge of this stuff. And if a kid is socially maladjusted which itself is a problem because there is no such thing in DSM five of social -- but if you translate it that is something like conduct disorder. And some of you believe, "Ah, that child is not because there's exclusion in the law." When you look carefully, it's one of those circular Venn Diagrams. And the kid can often be right in the middle covered by both circles. Verbally what the language says is a child who is socially maladjusted is excluded, now, but stop there, you're out. But then it says unless the child needs the criteria we just talked about. Well, to me that's a non exclusion because if the kid needs the criteria and he's also socially maladjusted they meet the criteria, they're still there. Although it's simple to me with at least a visual organizer, it is not simple, not only to districts but I can show you court decisions from around the country where parents have lost because a parent's attorney did not educate the judge well enough to exactly what the language says, and judges are not particularly sympathetic to these kids because these kids are the future congested court criminal kind of at least to the judge's perception. And finally Child Find itself which I start predicting hopefully will evolve in the future legally. Child Find is a problem. It surfaced by a few recent cases. Example, one of them in Texas. The district is Flour Bluff Independent School District. Nice name what significant, legally is 5th Circuit, high court of appeals and under IDEA, although that's not binding, high court decisions tend to spread around the country and what an elegant, intellectual, but what some of you going to regard as a stupid decision as I explained it. This particular child started exhibiting problems academically and some of you may if you had been an objective consultant then looked at the data on this child at a given point of time may have said, "Red flag, this kid is exhibiting maybe dyslexia kinds and transpositions of letters, et cetera." And you have reason to suspect and to do an evaluation. Now, that's a given point in time. They did not do the evaluation. Later in time, about a year later, they belatedly did an evaluation and in this particular case which makes it a little confusing concluded that the kid was illegible, but not based upon SLD. Now, stop there for a minute. It was a Texas case. Texas like Pennsylvania is permissive. Her district had not elected to do RTI. They did severe discrepancy and they concluded either, I don't remember which it was, either she didn't have a severe discrepancy despite her dyslexia or this part I do remember, she doesn't need Special Ed because in their minds, Special Ed is this magic serum over here and what they did, not RTI, but they just did informal interventions to help her with -- pick a multi-sensory kinds of approaches, et cetera which seemed to have mix results and we'll revisit this a little bit later, but my favorite, gave her a 504 Plan as a sort of consolation price or we'll try that before we try an IEP with mix results. The district ultimately concluded that she was illegible based upon some sort of physical condition which required adaptive PE like some sort of muscular, like a dystonia problem, but not her SLD because of either not severe discrepancy or not needing Special Ed, they concluded she was not illegible. We go to hearing. Hearing officer disagrees with the district and said, "Even though you may be right in your evaluation, you did it too late. You had reason to suspect. You should have evaluated her and got a consent a year ago." Thus, you all compensatory education for

a year minus the period that would have taken you to do an evaluation, maybe 60 days, I'll subtract off of that. The parents go to court. Now they've won. They've got comp ed. They've got a decision. They go to court saying, "Pay my attorney's fees." Which in this complicated long every serial case was $40,000. "And give me my comp ed." District says, "We don't have to give you a comp ed because we're appealing the case also." And so stay put would be that, "You don't get it because we don't think that the hearing officer was right." And the court, lower court, and ultimately the 5th Circuit ended up with this analysis. They said, "Assuming that there was a Child Find violation, it didn't affect this harmless error because when they finally did the evaluation they concluded the kid was not SLD. Don't be distracted by the muscular problem. She's not LD. She's not illegible. And since she's not illegible, she doesn't have a disability and since she doesn't have a disability, she's not covered under the act and since she's not covered under the act, she doesn't get attorney's fees and she doesn't get compensatory education. Now, that's intellectually correct, but it's totally countered to what Child Find is all about because Child Find is not saying, "My kid is illegible." It's saying, "You had reasons to suspect and you're supposed to identify her and I should get some." And so I'm saying that if you look carefully at it and some district attorneys really looking at this case and now arguing it depending upon whether the kid and for some of you who are Special Ed Directors, it's flip a coin because if you violate the magical red flag whenever that was and we haven't done the evaluation yet, you're going to get nailed if she is illegible, but if she's not illegible if you follow this theory, you wouldn't get nailed. And it all seems very strange to me and I would hope that we could straighten it out either by legislation or more refined court decisions. But the other issue which is lying in the background and I've never been able to solve. It's the one article I've never succeeded in writing and I've started it about 10 times. I tried to write an article for judges to help them, since they don't have time to specialize in this area, define what is Special Education. So when you have an illegibility case and if a kid does have a severe discrepancy or the criteria for emotional disturbance and you get to the second key issue in illegibility which is, does the kid need Special Ed? What is it? And predictably given Special Eds can be a multi-factor tests. It's going to be certain criteria like RTI but I've only been able to name one of them, individualization and that ain't enough because some of you sneakily have -- some of you are infectious like my wife was a Special Educator. I was a high school teacher. I'm a slow learner, but slowly I've learned I've got to do some individualization and the more I do in regular Ed, the more Special Ed doesn't look any different to what I'm doing. RTI is contributing to that problem. And what else? Differentiated instruction and all these other innovations that's -- and also a cyber instruction. They're all fussing that boundary as to ultimately what is Special Ed. Questions or comments? If not, moving along chapter three. Oh, I'm having fun. And boy, this is certainly interactive. I'll boil this one -- we're not going through the whole thing, I'll boil this one down to the heart of the matter. Here is a problem that I had predicted and did come through -- true. We have three cases from around the country. In all three cases, the child had an IEP. Now, if I were better, technologically, I'd jump to one of the documents, but just if you can picture this as a visual organizer. Blue circle, that's kid with an IEP. Blue circle. About 12 percent of our population. Red circle bigger than the blue circle overlaid on top of

the blue circle is 504. The definition of disability which is wider covers more kids than the IDEA. No one argues about that red and that the middle is purple. The middle, it creates two classes of kids. A double covered kid, that's an IEP has the benefit of IDEA and 504, and the 504 only kid. Food allergy who doesn't have any impact on instruction but it in -- impacts her breathing would be entitled under 504 for the substantial problem or food allergy with breathing or with eating. Okay. Now here's the problem that happens. We changed the red circle, the IDEA to say a parent can put in writing and revoke. And a couple of years ago, I came to this conference and I say, "What if a parent wrote you the letter and said, I changed my mind, I do not consent any longer to Special Ed. Take my kid out of the IDEA IEP process?" Thus remove the circle. So if I we're -- legally, it's understandable even though practically you'll start to wonder why would the parent do this, but so far it's okay. But then there's a final paragraph, but don't take the blue away. Continue to give me now instead of an IEP, a 504 Plan and in the 504 Plan, put Special Ed because of those some of you think and last year, I came here and told you that the lore, the belief is 504 only provides accommodations, if you look carefully, 504 says, FAPE, regular or Special Ed and related services. And so mom says in essence, "Take away the IEP. Give me the -- " well, this is obviously a problem including the fact that 504 is an unfunded mandate as well as belief systems, et cetera. Now, in one case called Lone Star out in Missouri, the court came out the way you would like it. The court said, "Mom, you don't maybe realized it but 504, the blue circle where it says, district must provide FAPE." That's 104.33 A, in B says, "One means that a district may choose to provide FAPE is through an IEP." Thus the court reasoned, "The district when it gave you as a double covered kid, an IEP, killing two birds with one stone and when you revoked -- " I don't know if it's the bird or the stone here, "but when you said, "No. I don't want the IEP." Whether you realized it or not even if you're letter didn't say so legally speaking since the district chose to do both through this and you said you don't want this, district does not have to do this." Now as you digest this the second case called Kimball which appeared the year after that its facts were similar except in this case -- watch this is a -- this is a tricky one, in this case mom says, "I revoke." She didn't say, oh, she want a 504. The district in an effort to help the kid says, "Mom, you're going through some kind of thing and I've got to respect what you say and so, I'll take the IEP away, but I'm going to sneakily give the kid Special Ed through 504." And mom sued them and said, "You can't do that." Because the other case said two birds and this court again came out in your favor and said, "This ain't the two birds. They originally did two birds you knocked them out then they brought one of the birds back. That's their choice." And so, you want -- so, it gives you -- those two case, it seems to me give you the flexibility depending on a parent and your culture to either agree or not agree to provide through 504 what the kid used to get. The slight problematic case is the case that just was decided in December from at out of the -- out of Florida another federal district court case. Here was a deaf child and the parent revoked services but wanted a particular and I -- frankly, I don't remember what it was, what -- one part of the IEP. Let's say an FM tuner or a speech therapy or some part and the district said, "No. No. Remember back that Missouri case, if you did -- you give -- you're losing that two birds. We're not -- an we could, but we're not going to give you anything." And you'd wonder why they

would do that. Probably they're not mean. Probably they're hoping that mom will change her mind and continue to help her deaf child through their services. But this court oddly enough looked at the other two cases differently from the way I looked at it and said, "No. No. In this case what happened is we erase from the board everything and now mom is putting in place part of a bird one related service which is entitled to under 504, you got to give it to her." Now I would have -- what I would suggest that most of you do is you say don't let this last case trouble you because if you look at IDEA, mom could have gotten the same thing. Whether you realize it or not and some of you don't like this, but a parent can selectively revoke consent. I -- say, I no longer want speech therapy and counseling but I want the resource room. Now, what OSEP has said -- it's on of these it depends is, a parent can be selective if the services are separable, but if that service is intrinsically needed for FAPE and mom drops it then she drops the whole thing, but that's too complicated for me to figure out. So, my view is this mom who wanted, let's say, the FM tuner and said -- I would have just given her the FM tuner, try to talk with her separately to try to come to terms, but nevertheless do under IDEA. But my point is simply this, watch out for the interaction of IDEA and 504 because it happens in so many problematic ways otherwise when I'm about to -- oh, and my future -- this idea of revocation it seems to me if you think about it politically is just one latest step in a movement towards more and more parental rights and lesson less in loco parentis trust of school districts and you see cyber schools and charter schools and all other things. And if you look around what I see happening in some states which may or may not come to Pennsylvania is -- and Florida is a leader in this, a voucher program where in Florida if you are the parent of a child with a disability and you're not happy with what we're providing, there's a formula sort of matrix depending upon what your child's classification and severity that says, "Okay, your child is worth 15,000. Your child is worth 25,000. Here's a 15,000, here's a 25,000, sign here." Sign here means you got this voucher and you could use this money for -- it's got to be education, but it could be for Sylvan Learning Center or a special -- at home -- whatever you want. But when you sign here, you're giving up all your rights to the -- you can't file due process against us. We have no obligation to do anything for you and it's become very popular in Florida and some other states have adopted it and I find it very strange in some states either budgetary or politically like Ohio has got this, but only for autism. So if I'm a parent of a kid with an intellectual disability or another problem, how come you get the voucher and I don't because you're politically stronger and make a bigger noise than I do? But to me it's all part of the tension of parent rights versus district rights, responsibilities, whatever you want to call it. Next. Question.

AUDIENCE MEMBER: I just have a question about the 504…

DR. PERRY ZIRKEL: Sure.

AUDIENCE MEMBER: …the lore that you speak of. 504 not just accommodations, but as special -- can you just give a clarifying example for that?

DR. PERRY ZIRKEL: Yup. And we did this a little bit last time, but what I want to do if I can find it -- let me see if I can find it or not, because it's much easier for us is visual organizer to have those circles in front of me. So…

AUDIENCE MEMBER: Can you repeat the question?

DR. PERRY ZIRKEL: His question was -- could you give me a little more -- he wants something that I don't do, clarification. He wants me to be a little clearer about how this 504 work in special ed. Did you say that a kid could get special ed under 504? And what I'm trying to find for a second is my little 504 PowerPoint. Yup. Yup. This will just make it easier to -- for me to answer the question. Here's my red and blue. I'll make it the clear way. By the way, before we get to the real answer, this was -- the red circle is IEP kids, about 12%. The blue circle are 504, the pure blue is the 504 alone. A Lehigh doctoral student, a principal, now a curriculum director did a dissertation on what percent of the national school population was 504. Was, because she did her dissertation before January 01, 2009 and she found that the percentage average is one percent if you're an elementary school. Now of course it's going to vary in your community, et cetera, but about one percent. But what happened in January 2009 is Congress amended the ADA and had a last -- which is the Americans with Disabilities Act and because the ADA and 504 are twin sisters, the last sentence called a conforming sentence said everything we just said above about disability under ADA applies as well to 504. What happened then is it expanded the number of 504 kids and currently we're trying to get some data as to how big is this percentage. I'm guessing that it's going to be about two or three percent. We don't have data yet, although I just finished a study based upon 2010 data that OCR produced for the first time. Now the fall of 2010 was only a year and a half after the January date. And oddly enough, the fall of 2010 data had, to me, three pieces of news which I found perplexing. First, the average percentage nationally one percent. It had not changed. It's as if districts either didn't know the law and didn't apply it or they were over-identifying earlier and thus ended up with the same thing. Second disturbing thing in our capitalist system, poverty. I compared the average percentage of 504 kids, remember the national is one percent, in titled one schools versus non-titled ones school. Titled one schools, the average percentage was like 0.5. Non-titled one like 1.7. In other words, it was -- you're three times more likely to get a 504 plan if you're middle class and somebody would say, "Yeah. That's the way the system works." Maybe so, but that ain't social justice. And compounded with it, I also -- because they identified kids by race, White kids versus Hispanic kids versus Black kids. White kids was about 1.6%, Black kids was about 0.5, Hispanic about 0.6. Are you telling me that these folks somehow don't get the impairments that the other kids get? Weird stuff, but I'm going to his question. His question is, do I have to do special ed under 504? Now watch. I'm going to do some magic. The answer is going to be yes, but not on a -- not on a 504 plan, but I have to do some magic here. Now why would you want to do this magic, because I don't like magic usually? I'm doing this because 504 and the ADA are unfunded mandates. You get no extra money and at least you get some help with special ed. And many people, because of lore get confused about 504 and step in doo-doo. Under IDA, there's a better idea of how do the thing. So we go this way. You've got a kid who's out here

and he's got, let's -- we'll pick bipolar disorder is one example out here. What I'm looking for is an impairment that is not listed directly in IDA or remember the kid we kicked out before -- erroneously, but kicked out, social maladjustment, you're a conduct disorder kid, or ODD like oppositional defiant disorder. Now I'm purposely picking diagnoses not diabetes, not -- what's the -- Chron's disease. I'm not getting in to health issues that affect other -- I'm purposely picking things that have a leaning impact, but they don't fit neatly into the classifications of IDA. So that's why I picked bipolar, that's why I might pick social maladjustment, that's why I might pick high functioning Aspegergers if you say. Well, somehow the kid doesn't need whatever it may be. So I put the kid out here and now the family is smart enough to say, this bipolar child that you've concluded is 504, meaning there are three elements of 504, impairment that's the bipolar, major life activity, in this case leaning, and substantial. Now the parent says, "Well, if it's so substantial with learning, she doesn't just need preferential seating or other -- an extra time on a test. She needs special education." I say," You know, now that you think about it, we're going to reconvene our IDA evaluation because even though she's not, let's say, ED, although some bipolar kids could be or some ODD, but I've always got my joker. What's the joker in your deck, the classification? She says OHI. If ADHD is in there along with sickle cell, but once ADHD is there along with Tourette Syndrome as examples, then why not ODD or why not bipolar or why not anything else -- a conduct disorder? Thus, if you really have a substantial problem with learning 504, you are not blue, you are purple. You need special ed. We agree and we will give you special ed and kill two birds with one stone. By doing that little bit of magic, I'm left as residue with food allergies, diabetes, and other issues that don't need special ed. I give them a 504 plan. And now when people complain to OCR or whatever and the other little thing I do is I -- I'm not absolute about anything. I don't say, "You can't get special ed." I just say, "We take each case on its own and we will examine for possible OHI, ED, and if somehow you don't fit in any of those, and you do, we'll do it. And of course, nobody ever does and that's how you get out of it. Otherwise, if you take the other approach and start providing special ed under 504 plans, you not only have cost issues, you have auditors coming in and saying, "Well, who's paying the funds for that teacher?" If it's an IDA person, and that's supposed to be [inaudible] and then you get this lemming-like flow of other parents saying, "Well, now that you're doing it, I'll -- " so that was my little lore versus law. And the other -- did anybody dare ask a question after that? So we'll hold that off to one side if we can and we will come back to our PowerPoint if I can find it again. Is that us? No. There's key issues and here's the thing and is that where we're up to? No, we were -- yeah. All right. Let come down there with you. You're ahead of me. There's some balloons up here. I don't know if there's any latex. Now if you -- here we go. Now some people look at me and say, "Oh, boy, I had to come to hear Zirkel, I knew this ahead of time." But I'm a slow learner. I got to go collect data and stuff. So I did this study where I took a cross section of IDA cases. I found that 90% of court decisions that went to court and were published decisions were FAPE cases, not eligibility, not discipline, FAPE. And half of the FAPE cases, when I went through to see who was the -- what was the classification of the child, half were autism. Now autism, although it's increased substantially in the federal figures from about, well, zero percent 1991 when it was first

recognized, to about 10% of all special ed. If ten -- one in ten kids in special ed has autism, but they're causing half the litigation, then obviously that family is five times as likely to bring a case than exactly the same kid who has SLD, ED, or whatever. So the sort of practical impact of that is be very careful in dealing because parents and grandparents who face this issue, there's something in the multiple factors which will cause me to run off and take you all the way to court and obviously that's not to anyone's advantage if you can understand the parent's point of view and work with them and develop that thing called trust which is the opposite of law. It is well worth it and these are the folks which tend to be for whatever reason. You'd know more about it than I would. I just see the figures. And the other little issue is I'm finding that many of -- the old cases, many of the cases that parent said, "I want an ABA therapy, or Lovaas, or Discrete Trial Training, or verbal -- some methodology and I also want you to cure my kid. And if you don't, I'll get so mad at you that I'm going to -- not only will you place my kid over here where they do it and I'm going to sue for tuition reimbursement. And the old cases, the court sort of religiously followed the mantra, a methodology case, we defer to the district. And just as long as whatever they were doing is reasonably calculated given the benefit of the doubt, no tuition reimbursement. But parent attorneys for children with autism focus primarily not in Pennsylvania, but the best cases of all as far as these attorneys are in New York City like Gary Mayerson is one who travels around the country and is very passionate about this. They become very sophisticated and they make it clear right in there complaint, this is not a methodology case. It is a FAPE case. Now, it's the same case. They're just redressing it up, but they focus on procedural violations, they focus on the substance of standard and they do better overall than they used to do when they faced this methodology barrier. Stop me if I'm again going too quickly. Next. FAPE, I mentioned before is 90% of the cases. Most of you know, if you're taking special ed law, have any experience with this is, it is predictable. That if we go to a hearing officer or to the state complaint process that person has been trained to look at things two ways. They don't look at height and weight. They don't look at from and function. They look at procedure and substance. And Rowley 1982, the landmark decision involving a deaf child, who now is a professor of deaf education by the way, Amy Rowley's case, the supreme court said the Act, IDA, is largely procedural to open a door of access. Thus -- when I read Rowley, it said to me districts better be strongly compliant on procedures. And if they are, that would seem to solve it because the Congress is making a presumption that if you do all the procedures right, what comes out of the faucet will work, the substantive side. So Rowley said," I thought strict procedure, but relaxed substance." Substance is reasonably -- now first, I hate that word if I'm a parent or grandparent. I want for my child the best reasonably. Second, calculated, which means you could get away with an IEP that didn't work for my kid. But based on the data you had at the time of the IEP, third circuit uses a snapshot approach saying, "What did the IEP team know or have reason to know when they met nine months ago?" And now we know more information, but this information is inadmissible at the hearing unless the district had reason to know of it last June when they did their IEP. Thus, if you made a calculation then that ended up being wrong, but it was a calculation that was reasonable, you would win. And finally, reasonably calculated for what? Not

to cure the kid, for benefit. And what the heck is benefit? I looked at a Pennsylvania case some years ago. LD kid in reading, didn't appear to be terribly disabled with regard to reading, but had some problems with comprehension and so they had an IEP for her and they had these goals, et cetera, but the objective data anyway looking at multiple sources, at the most she made two months progress in the 10-month school year. And the issue was, was it reasonably calculated? And the family lost the case. Now some of you, as matter of best practice, would be able to do much better with this child and would require and hopefully will continue to strive for a much higher standard. But the courts have done two things about this two-part test. We stick with substance first of all. They have refused to raise it. Nothing has raised the substantive standard. So if we go for a moment to the next -- since I did it in that order. We go to this one and then I'll come back to you. There have been all sorts of law review articles saying that we should raise the substantive standard. Look at Congress's ID -- new IDA 204, emphasis on outcomes. Court say, "Congress has got to explicitly change the definition and standard of FAPE and the preamble doesn't count." What about the peer reviewed research requirement, Your Honor? Well, congress said that the specially designed instruction must be base upon peer reviewed research. As a professor, I saw this as the opening towards best practices for requirement. The courts have focused in on the language at the end of that phrase which says, "Must be based upon peer-reviewed research to the extent practicable." And an IEP team is not a doctoral defense and we must differ to them, blah, blah, blah. Peer-reviewed research cases, I can point to one in Iowa where the parents won. I can point to nine including two in Pennsylvania where the parents lost. My view of the law, it's subject to what she's going to say in a moment might be different, but my view of the law is Congress, I mean, the courts have kept the legal minimum substantively embarrassingly low despite how many years since 1982 that we've invested money, training, and the science of special ed. Your point? .

AUDIENCE MEMBER: Teacher effectiveness then impede law's attribution rating.

DR. PERRY ZIRKEL: Interesting.

AUDIENCE MEMBER: You would think that.

DR. PERRY ZIRKEL: Interesting. Very interesting. Her point is always some new angle. And -- but my problem is, the judges are not as nuanced as you are. You would think, she says, that PVAAS -- so if I'm a special ed teacher and you're not going to be evaluating me on the achievement of my children, so if I do FAPE, which is low two months for everybody, I might not have my job. You may be right about my job, but I will bet you 10 to 1, like Seattle, as if I knew that they were going to win, but I'm going to bet you 10 to 1 to be like the Seattle -- that the courts will not look at -- they'll say PVAAS is for accountability for the teacher and you go and you may lose your job, but unless Congress imports that to FAPE, it is not part of FAPE. I really think so because they have refused to do it in -- for example, how about a kid with a special -- a kid who takes the -- what do we call them in Pennsylvania? PSSA? Is it…

AUDIENCE MEMBER: Yeah.

DR. PERRY ZIRKEL: Keeps changing. I've been around so long, but the kid fails the PSSA in reading. And the parent shows this non-proficiency score to the hearing officer the court saying, "How can it be reasonably calculated for FAPE? They fooled you, Your Honor. They had all these goals, they showed all these charts that said progress and yet, this kid is non-proficient according to the state standards and she wasn't even close." The vast majority of courts have said the NCLB tests are valid for evaluating schools not for children and are irrelevant to FAPE. Same concept will happen with PVAAS.

AUDIENCE MEMBER: You think?

DR. PERRY ZIRKEL: I do.

AUDIENCE MEMBER: I -- because I'm looking at, you know, now, we're -- we have a bunch of teachers who are very worried. It's 50 percent, so I don't think they're going to lose their job.

DR. PERRY ZIRKEL: Yeah.

AUDIENCE MEMBER: But they're still very worried. But we're still looking at one year's growth. So even though we have a kid who is below basic, you know, every time, they're still making -- you're supposed within that PVAAS, but then they couldn't do it.

DR. PERRY ZIRKEL: So if you didn't hear her, she is predicting that the requirement about progress, which in our state law is limited to 15 percent of your rating, is based on the progress of this kid on a one year basis. You're predicting that if, let's say, I'm a teacher who's not so great at getting my kids' scores up even though the family loves me and the kids love me, et cetera, you think that if a case is brought against the district for one of my kids, the district does likely to lose because we'd use PVAAS dated to show it. I'm -- what I'm saying is, I don't really think so. I don't -- I think the court will say there are two -- courts have a way of compartmentalizing things and don't see the cross connection. I mean, you can't blame courts in our society it's because we sue so much and we leave so much to the courts that if you're a judge, you're overworked and you have to be a generalist for a criminal law and for securities violations and rape and terrorism and everything else, you develop calluses and you starting seeing the worst of humanity and then you see this one family coming in, saying, "My kid didn't make…" And the PVAAS?

AUDIENCE MEMBER: Who cares?

DR. PERRY ZIRKEL: Who cares? That's my -- yeah. Unfortunately. I'm just going back to this for a second. Here's my -- now, this is me talking, not the court so far. I'm back one slide. How about the procedural side? Even if I give you this grim news, which some of you, by the way, think is not grim, that's wonderful. Because it means, oh, I could get away with all kinds of stuff. Now hopefully what it really means is it liberates you not to worry about me and that you can go about your business, doing what you think is best for kids, totally dedicated to that, and don't have to worry and look behind you every second you're going to get a ticket. It doesn't mean you're going to crash or speed, it just means you've -- you're not going to spend your time checking out the cops. But what about the procedural side? Aren't

the cops strict on procedure? Now if a family called me and said, "You know, at the IEPT, no -- there's no general ed teacher, and it says there's supposed to be." Well, they didn't do the evaluation within the 60 days or -- and, you know, picked your procedure or my child's behavior impedes his or her learning and he didn't get an FBA and he didn't get a BIP. First of all, as an educator, I would think that those are substantive issues. But courts look at all of that stuff, they always presume that -- those are procedures just like you have to write a measurable goal, that's procedural, an FBA is procedural, a BIP is procedural, the 60 days is procedural. Now if a family calls me, what I say is if you really can prove that they've -- that the general ed teacher wasn't there, and if you really want to make a legal case of it, don't file for due process, in most cases. File a complaint with PDE and their complaint resolution process because those folks are not lawyers and judges, they're not callused, and their compliance people. They are orthodox religious about procedures. And they'll come and if you didn't do what you're supposed to do, they'll order a corrective action plan, train all your people in BIPs and even give compensatory education. And the only other little thing that just -- because I'll revisit it in a minute. They can only go back in the regs, comp ed through the complaint resolution process, one year. We're going to revisit how long it is through the hearing process, adjudicative, but this is the complaint process. But the courts have developed a two-part test that congress actually codified in 204. And it says, If there is a procedural violation, and sometimes the parent perceives it and there wasn't, or I can remember in the old days when on the appeals panel, I had a colleague who was a parent of a child with a disability with three people in the panel and mom said the general ed teacher wasn't there. She was there, mom was there, she knew who the general ed teacher was, there was an empty seat. And she testified very credibly. But there was a sign-in sheet that they had an exhibit that had the person's signature and all the other teachers said, "Oh, I -- she was there. She might have gone through the bathroom, but she was there and you know, wink, wink, wink." And so the other colleague and I who are just you know, ignorant professors, "We just said the evidence is preponderate. Here, these eight people said she was there, mom says she wasn't. But the parent of the child with a disability, her perspective was parity. This is like doctors with their conspiracy of silence. There's going to be pressure for them to say she was there, et cetera, et cetera. And so you get in to this notion. Can you prove procedural violation? But if you can, you still have a second step. And this is harder. You've got to connect the absence of the general ed teacher to the substantive side. This kid only made one month progress, not two months progress and that the general ed -- well, what -- how could I ever prove that the general ed teacher's absence especially when she doesn't say anything anyway? Well, she doesn't say anything anyway, then it's harmless error if we go back to the Super Bowl, it's like, you know, one of these Washington guys, the Seattle, you know, hitting the end of the other thing when they're not supposed to, but the quarterback never had time to throw the ball anyway. They violated procedure, but it was harmless error because they wouldn't catch the pass. That's what happens with parents in the procedural side. And the only one that they could argue is an exception, but so far, the courts haven't bought it, but I really believe if you look objectively as it is, if you look at the codification, it seems to say there is one cardinal sin that if you make this violation and I prove

it, it is a automatic, it is sort of like, you know, I can -- I go back to football, you hit the quarterback in the head. I don't care if he didn't pass or anything, that's going to be a flag. You're going to be penalized. And the cardinal sin is -- and some of you are going to say, no problem because watch the way it's worded, adverbs, et cetera, you got to do it badly, significantly impeded the parent's opportunity for participation. But in some cases, parents believe that you've predetermined before they ever got the IEP meeting. And if they can show it, even though you came up with a good IEP, I believe they're going to win. So I'm suggesting, just like I said, the squeaky wheel gets the grease in terms of autism for FAPE. If you're going to concentrate on procedures from an adjudicative point of view, not compliance, not -- then I think it's the parental related issues that you should bend over backward to have that parent -- and one recent case out of Hawaii, the Ninth Circuit, the district kept reconvening the IEP meeting to fit mom's schedule and they finally ran into a deadline where I can't remember if it was IDA or state law, but you had to have the IEP in place, let's say, in 90 days. We're now at the 89th day and mom calls up and says, I can't make it." They go ahead to the meeting without her. The Ninth Circuit says, "I know you had that other deadline, but you could have asked mom for an extension and that impeded and if she were there and blah, blah, blah, and they nailed this, that's the kind of, view it seems to me that I'm…

AUDIENCE MEMBER: In that case, they actually put the kid in a different school district, too. That was why the mother was so determined and why the change of…

DR. PERRY ZIRKEL: In other words, just…

AUDIENCE MEMBER: They changed displacement…

DR. PERRY ZIRKEL: They changed displacement. So you're saying it was sort of a harmful error, but the way I read it, the rationale is the court didn't focus on that.

AUDIENCE MEMBER: No.

DR. PERRY ZIRKEL: They focused on you could just reschedule and you didn't and you should have and at least you'd ask them for a waiver of the extension.

AUDIENCE MEMBER: But I mean, I'm a school district person but I read it like, "Wow, they snuck that one in."

DR. PERRY ZIRKEL: Yes. Yes.

AUDIENCE MEMBER: They got kicked out of the school.

DR. PERRY ZIRKEL: Yes. Well…

AUDIENCE MEMBER: [inaudible] participation.

DR. PERRY ZIRKEL: Yes. Yes. So, she's pointing out that any of these cases can be read more than one way. Now, there are really three types of FAPE denials. Rowley talked about procedural and

substantive. But, you modern, new generation, I find a lot of the IEP cases the parents is saying, look, maybe they didn't do procedures perfectly and maybe it's not the best IEP or even reasonable. But my case is it said my kid would get two hours a week of occupational therapy, hours, 60 minutes. And they changed the scheduling for the occupational therapist and gave him travel time and school schedule, block sched, I don't know, whatever they did. My kid got 45 minutes. Thus, I bring a implementation, a really non-implementation case. They didn't do what they promised to do. Now again, we're into lore versus law. Some of you would say you owe 15 minutes times twice a week, times the number of weeks of comp ed and maybe you're right. But if you went to court, the odds of it is the parent would lose the case because courts do not use a hundred percent compliance standard. The prevailing standard is they look at two things: one is the thing in the IEP that didn't get implemented. Is it a material part of the IEP? Meaning a significant part of the IEP where the district could argue. No. That's just -- the occupational therapy is helpful, but it's not key like the resource room. And second, if it is material, did they substantially comply? And the argument is, well, Your Honor, 45 minutes is 75 percent and 75 percent is pretty damn close. And I've read a case recently. It was 82 percent. And the court said, "That's substantial." So, I'm saying those of you who feel that you owe the parent, go ahead because I think you're right. You should do your full thing. But, again if I were a parent, I'd say -- if I were advising a parent, I'd say, don't go to court and fuzz about that. Go to the complaint process again because the complaint process, those folks use a hundred percent standard unless it's a trifling amount like a teacher who's sick that day. So, that's what I mean by SEA enforcement. Bullying. Now, if I ask you if you had time to interact, is bullying a big deal? You would say yes. And if I said, "Where is it law?" Oddly enough, you would point to like I give multiple choice tests. I would trap you into picking a distracter. Here are the choices. In a bullying case for a child with a disability, what is mom or dad's best shot at suing you and winning? IDA, 504, or Pennsylvania's Anti-Bullying Law, which is quite strict about things that principals need to do in response to bullying. You know, prompt investigation, send data into the state, notification to the parents, blah, blah, blah, blah. Now, I'm -- I purposely raised my voice in the third one because that's the distracter. This is not the right answer. It is the right answer in terms of sort of a validated evidence-based practices to respond to bullying. I'd look at this for a framework of how I developed an anti-bullying program. But, oddly enough, and this is going to be strange again about law, the way the courts have interpreted law currently in this country is take the statue FERPA, the student records act. There was a Supreme Court case where a university, Gonzaga University, the basketball power, violated the FERPA rights of a student alleged rapist. He allegedly raped a co-ed. They're both students. And Gonzaga being every strongly against it not only disciplined them, et cetera, but shared the information. His name is blah, blah, blah, with the newspapers in Spokane. And it made big news. And so he sues Gonzaga for various things including defamation, but his main claim was FERPA. That it was student identifiable information. He's over age 18, thus, you need his consent. You did not have his consent. You violated FERPA. The jury gives him a large verdict of which a big chunk was FERPA violation. Gonzaga appeals all the way to the Supreme Court. Supreme Court says reversed on FERPA.

They violated FERPA, but FERPA nowhere says you have a right to sue. There is an alternative remedy built right into the law, which is you go to see Le -- it used to be LeRoy, LeRoy Rooker, but I think he's now been replaced by a younger person. He's probably retired now, but it's some federal bureaucrat who is the FPCO office who is supposed to investigate and do corrective action for any violations. And since LeRoy exists and it doesn't say you can sue, no right to sue. And now courts have taken that concept. Lower courts have taken Gonzaga and said, if the anti-bullying law does not have a right to sue on it, and I did a study with one of my students where we looked at all the anti bullying laws around the country, we could not find one that explicitly gave a right to sue. What we predicted was if you go to sue for a violation, they're going to say nope, you got to go to the state department, have them, you know, do corrective action, terminate funding or whatever. So, I don't think that's the right place to sue. Rather, you have two choices. The best choice in general is 504 because it explicitly prohibits disability based harassment. And so, if the child has a disability and the bully is picking on that child and you haven't done anything about it or enough about it, you could be liable and not just for comp ed. You could be liable for money damages which I cannot get under the IDA. But -- there's two buts. But number one, limitation. And it's going to sound silly to some of you because this kid maybe really the victim who has a disability, maybe really hurting as a result. Factually, the first thing I've got to find out is, is it disability-based bullying? If I bully the hell out of you because you're smaller than me and I'm mean and all these and I say, "Hey, small person, blah, blah, blah, blah." Smallness is not a disability category. If I say, "Hey, retard", pardon the expression, but kids do that. Now, we've got disability-based bullying. And second, even worse -- and now the Third Circuit has joined to all the other circuits. Even if you show that I did not do enough and I didn't follow OCR guidelines with regard to the response to the disability-based bullying, if you sue me for money damages, you must prove what happens in sexual harassment cases. Not just negligence but deliberate indifference, sort of, boys will be boys. Bullies will be -- and it's very hard to prove. There was one Philadelphia case were the court, the Third Circuit recently said, "What you did," this is called chambers, "to this kid is so flagrant Philadelphia that it might be -- and I'm not dismissing it, we're going to have a trial to find out. But it makes it a -- so, it's a narrow disability-based and an uphill slope. Final choice, you cite TK which is a well-written published opinion in New York City back in 211 that other courts have found to be very convincing, to say even if it the disability -- even if the bullying is not based on the kid's disability, any bullying. If I can show that it was so severe and pervasive that it denied FAPE, you are giving me a multi-sensory program for my reading but I was so fearful of -- now, believe it or not, I'm now thinking of who bullied me when I was back in middle school, Fred Nicodemus. I was -- he's still burned in my mind 60 years later. I'm still looking. Is Fred here? I'm going to run here. If I'm so scared about Fred and what he's going to do to me when he gets me in the hall or after school that I can't really -- your program is not reasonably calculated because unless you do something about Fred, I can't access this -- then, it's a FAPE violation. I can't get money from you but I can't get compensatory education and attorney's fees which will cost you something. So, those are the -- so, I'm saying for bullying when you boil it down through legal [inaudible] -- now, the rest of you will do the

humanity, the sociology, the pedagogy, I just do the little, limited, legal stuff. I'm saying anti-bullying laws, huff and puff if you're a parent, but either 504 possible money damages or denial of FAPE or you're out of luck. Just work with the district and try to do something about Fred. Question or comment about this one? Good Lord, folks. We were talking about 504 before. I'll give you one that's not on your handout that I just put in because someone asked me in the hall. We are becoming very, very, sensitive these days. We're aware of children with concussions just like NFL players with concussions, and all of the things that can happen. But, what it boils down to legally is, is a child with a concussion entitled to a 504 plan? Now, if you think for a minute, the three criteria for disability under 504, which are broader. Three things, you have to tick off each one. First, is there a mental or physical impairment? Yes. By definition, concussion is a recognized diagnosis and it can be much more serious. You can get post-concussive syndrome. But -- so I've got the first the first part, mental impairment, just like ADD, just like physical impairments, like Crohn's Disease. Second, even though some psychologist, some physicians called that a disability like Crohn's Disease, in 504 terms it's an impairment. It's necessary but not sufficient. Second, major life activity. And congress expanded in the amendment I was telling you about, the list of major life activities, to include some that I would argue on behalf of a child with concussion. Such as thinking, however, he's just not thinking right now the way he did before. Or even better because it's more precise and yet obviously connected, concentration, is a major life activity. And most of you seemed to be concentrating very well. I don't know if you've -- you're silent, you at least look at it and stuff like that, so you've learned. But the third criterion, which will depend on the concussion, is substantial. So right after like this NFL player is hit we measured his thinking or concentration right now. He didn't even know where he is right now. So if you look at that the odds are the kid would qualify. But I will tell you in a minute that the general answer is presumptively no. It would be the exception to the rule for a kid with a concussion to be entitled to 504, because the missing element that is assumed to be there is duration; temporary versus permanent. And the courts and the administering agencies, the court started with a much longer period than I would've expected; two to three years, pre-ADAAA, before the amendments. Since the amendments I have found more than one indirect indication such as the OCR frequently asked questions answers, too, that seems to be moving toward from two or three years liberally towards six months. But if you ask physicians what the typical concussion, how long it is that that kid is affected substantially, it's usually, you get a figure like two or three weeks, not six months. Thus, unless it's repeated concussions, that really has that post-concussive effect. Legally speaking, and don't accuse me of being stingy or whatever, I'm just try to apply the law objectively, is I don't think most kids are entitled to a 504 plan. What they are entitled to is a matter of common sense and liability is what might be the equivalent, an individual health plan. So if the kid needs to get some help with my notes because of his concentration and if he tunes out that I don't -- we can write all these down if you want. It's all common sense. We can get the nurse to help out and to monitor him. And we can make it very formal, but what's the difference between that and 504? It's law again. The health plan is something we develop informally based on partnership, trust; the nurse is a nice person, she gets along with the parent,

go do it. The problem is, if you import it into my world of 504, and now we're into: the nurse did the plan; well, wait minute, you need three people on the team; you didn't fill out this form; did you have consent; complaint to OCR; you now need extra time in the test; my kid is unhappy; and off you go into the world of law. So my point is, I don't think you should overdo. 504 is expanded but don't -- watch out for using it as a consolation prize on the way in or the way out of an IEP. And by the way, if the kid really did have a severe concussive syndrome for a long period of time, et cetera, I think like the one I told him about, he's very likely to get an IEP. Because he would have a OHI that require Special Education. Now, there's one little case that come up recently just to make you legally literate. But I wouldn't overdo it. I'm going to give you an acronym that a few of you know. And to show you how stupid I am, I'm going to need you to remind me because I -- I have seen it several times. I still don't -- I can't remember what it is. In this case TM versus Tustin, a recent Ninth Circuit case, a deaf -- a child of a deaf parent -- no, a deaf child, his parent was at the IPT meeting, discussing what the kid needed. And they figured out goals, objectives, et cetera, and they got to this acronym, mom says, "I want…" -- now I remember what it is but let's see if you know, "…CART, C-A-R-T." district says, "Nope, we're not doing it. We don't think the child needs it." And one of the reasons is, because it could be expensive but we're not going to talk about money. Anybody know what CART is for a deaf child? Has something to do with it's like me watching a foreign film. It's the automatic transcription so when the teacher is talking the kid has got a screen there and it's immediately translating what the teacher -- and you could see how that would be obviously helpful but it also could be costly and potentially distracting and other people jumping on board. The IP Team concludes the kid does not need it. The court -- oh, and so we went to court, the parent is suing under IDA. And a smart parent will, now these days, will bring out all three statutes; you're violating IDA and or 504 and or the ADA. The ADA, turns out, has specific provisions for CART. The family lost on IDA, lost on 504, but won on the ADA. So there are these limited differences that you have to watch out for among the three of them. Otherwise that's pretty much the story on this one. I'm having fun and I'm making progress and you -- if you're falling asleep I'll try not to…

AUDIENCE MEMBER: Not a [inaudible] like yours.

DR. PERRY ZIRKEL: Thank you.

AUDIENCE MEMBER: What about like if -- I know you gave those statistics about, you know the different…

DR. PERRY ZIRKEL: Yeah, yeah.

AUDIENCE MEMBER: [inaudible] groups and racial groups. What about if like a doctor is saying [inaudible]

DR. PERRY ZIRKEL: Yes, yeah, this is very common and we did this last year but there's nothing wrong with doing it again because it's so common. It goes back to my point about the language we use. I said earlier that some physicians and psychologist call a disability things what they diagnose, like ADHD. So

I'm a doctor, and I send you a document that says, "This kid needs a 504 plan." And I'm a doctor, you better listen to me. And some of you do because doctors get a lot of, you know, this extra respect. And I'm--since I'm looking at this I might as well show you one of these that a friend gave me. 504. This is a prescription pad from a doctor to a 504 coordinator who's also a Special Ed Director in, of all places, La Jolla, California. Now, I'm looking for a document, this is all these 504 docs. You see -- this is it. Now, hold on. This is not the one I want to show you. Here it is. Now, it's a real -- it's a real thing that happened back in 2000 -- was the year. And notice it say, "Pediatric Group." It's not obstetricians, neurologists, but for those who can't read it from where you are, the doctor has prescribed that a child needs a 405, it is first aid for ADHD. Now, maybe the doctor is 504 with this -- or maybe the doctor wants to get on the highway away from this family on the 405. But the concept -- what my point is, I will welcome, if I'm a district, medical, psychological, neurological, pathological, whatever you got you've, you're -- you know, I'll take it all and I'll give it what my wife gives my opinion. Do wait. Which in this case is what? Is de minimis. And in some other case -- now, here's another one. Here's another one, Sandra Eastman, MD, FAAP ADD Specialist. She's not just a pediatrician. And she designed a form, now this was back a couple of years ago. But she designed a form, keyed in to DSM-IV, or then IV, now DSM-5, as to which type; is it the hyperactive type or the non-hyperactive type. And she also list what medication she's giving and what dosage. And so, she does and went into spelling problems, just checks off needs a 504. Now, oddly enough this is older. This doctor made a mistake because if she's really going to do well she should've marked this. Because this is showing that the kid doesn't have a substantial problem and we don't give a lot of weight. She gets a lot of weight to the diagnosis of ADD, not to the need for a 504 plan. But one of the changes we talked about is, in the old days when a doctor said they're giving certain medication with consent. The doctor though it strengthened the case for a 504, but the old rule used to be, we measure substantial -- remember; impairment, major life activity, substantial. The old rule was with medication. So doctor, if you're giving this and if it's helping the kid an alleviating it, the kid has a moderate problem or a fair problem, you've reinforced he's not eligible. But the new 504, this doctor could still win because the kid could have fair with the medication, but now we measure without the medication which obviously will increase the odds. My long answer to your question is do not, just like with me, don't give me undue respect and don't give doctors. They've got their place, I know the law, doctors no diagnosis, but the rest of it, like the effect on learning, the teacher and the nurse are entitled to more weight to a judge than the doctor. Okay. We were at -- in our key issues and a key issue politically, but not a big one for us, is restraints and seclusion. Why not big for us because Pennsylvania has long been a leader in law as well as practice, to be anti-aversive. And other states are moving in our direction and congress keeps threatening to move in our direction to severely restrict, like we say, no Prone Restraints, and all kinds of rules about other forms restraint. There have been movements to do that congressionally. I do not think they will every pass as a separate bill given the current administration. Especially, because Senator Harkin, who has brought it back three times and has been the real champion, recently announced that he is retiring. But if it does come to law I think it will come in as part

of reauthorization of either NCLB or IDA. But again Pennsylvania, not a big deal, in some states a huge deal. If we ever get to reauthorization, and I asked this question this morning and some of the PDE people. What's very technical to you but is practically significant is, "Who has the burden of proof?" Because I find that often a case that ends up in court is relatively close. Why relatively close? Because if the parent has a super good case, you're likely to settle it, and if the parent has a super bad case, they're likely to ultimately drop it. But in a close case, it's like the video replay when you watch sports and stuff, if the referee said, "You're out of bounds." unless the replay shows that's the -- it's clearly in bounds, we defer. The point is that the Supreme Court said the burden of proof is on the parent, that's in a closed case, district wins. I predict because I've seen it on their websites that if we ever get to reauthorization, one of the number one changes parents are going to argue and probably get through because they're going to be -- they'll say it at Congress, it won't cost you anything, it won't raise taxes. But actually, it does cost in the long run because if they win more cases but maybe they should win more cases. But the second one that goes along with it is many people miss this. The following year, the Supreme Court said if a parent prevails in a case, they get attorney's fees. But for me, level the playing field as a apparent. I need to hire some experts and they're expensive. And if I prevail, I want you to pay for my attorney's fees and experts. The Supreme Court said the language is ambiguous, it just says cost, we think it means filing fees. Parents are going to push to level the playing field to have experts paid for. Your argument will be yes, it cost you but it'll only cost you if I win and I shouldn't win because you should be able to solve that through your own experts. But what's also happening is New Jersey and New York, close states, have by state law changed the burden of proof and one state out in the mid west has changed the law in expert witnesses.

AUDIENCE MEMBER: Pennsylvania has legislation coming up.

DR. PERRY ZIRKEL: On which?

AUDIENCE MEMBER: On burden of proof.

DR. PERRY ZIRKEL: On burden of proof, that's it. I was going to -- and if for anything is I asked one of the PDE people and they didn't even know about it but you people that sort of follow and you apparently follow it. So, she's saying there's a -- and if you have a strong interest for or against that, beware because it'll have an effect on the outcomes of cases and this whole idea of the playing field. Oh, and if I have not given you -- a lot of the news I've given you is either are not new to you or it's good news to the extent that it's not in favor of parents like on the bullying but here's one I've highlighted here. I want to make sure I got to the so called statute of limitations. If a parent brings a FAPE case saying you denied FAPE and the parent wants either tuition reimbursement because they unilaterally place their kid in expensive private school or a compensatory ed. How long are you on the hook for? How long is the period for which you may be liable for either of those remedies? You're like my graduate seminar. They start the class by giving me an answer that seems very sensible and clear and then I say, "Wrong." And after a while they say, "Gee, for the final exam, I'll think of what's the right answer and then I'll do the

opposite and somehow that'll be right." But what would naturally come to your mind that it -- that in 2004, Congress actually wrote for the first time a limitations period. And how long is it? She says two years and most of us understood and I'd understood, two years. We now have a Pennsylvania case that is rocking that boat. Watch out for the case, it is called -- it's from the western part of the state that some of you can pronounce this better, I think, Ligonier Valley.

AUDIENCE MEMBER: Yeah.

DR. PERRY ZIRKEL: GL but spell the I-E-R. GL versus Ligonier Valley School District, a federal district court not a Pennsylvania Commonwealth Court. On December 30th, 2013 so it's very recent, most of these cases, we don't see them that quickly. At the very end of 2013, this judge wrote a very, again, intellectually rigorist, thorough, and convincing decision that you will not like. The judge says, first, if you read the law, you got to -- and the judge makes an acronym out of this. K-H-O-S-K, I don't even know how to pronounce it. It -- now, what does it stand for? It's essentially this, although, I know forgot the letters. When did the parent know or have reason to know of the violation? So, two years ago, mom was on the internet after 10 years of an IEP. Two years ago, she's on the internet and she reads about what they're doing and she's, "Oh, my god. This district, you've been screwing me all this time, you violated." It says from the date, whatever date that is, and that's a factual issue that a hearing officer may have to decide but if it's my client again, I'm going to push it back to as close to two years without not being over. So, exactly two years ago before filling, we first -- my client had reason enough, she had two years to file. That's where we got the two-year. GL says, "Yes, that's true." But look a little further in the statute, it goes on to say, once we have that date, that KHOSK date, it's when the parent knew or had reason to know of a violation that occurred then or up to two years before then. Thus, in the right case, the parent could get four, two plus two, two to file and two going back to when the violation first occurred, that doubles the cost of that private school or that comp ed. Now, it is -- and what the judge did was said, "Hearing officer," who had said two years, like I would have told the hearing officer, "You have just made an illegal error, I remand the case back to you to redo it." And the hearing officers in Pennsylvania are now all skewed because number one, the case is not a published case. When a judge issues a decision, if the judge thinks it's really legally significant here, she will send it in to the publication where it ends up in the law books. But today with the internet and everything else, it -- even if it's not an official publication, it's all -- you can access it very easily, you can probably just Google GL versus Ligonier, I wouldn't be surprised if some parent organization or somebody else put it out there. And to me, it's like what we used to have in the appeals panel, we had this case called Mantours before the two year that said one thing and the third -- and we didn't know which way to go hearing it. But it looks like, I think, most hearing officer probably going to say, "Until I hear differently, I guess, I'll apply this new." And so, what I've got to do if I'm a hearing officer is first calculate what was that date that I think you knew or had reason to know. And then, did the violation occur -- and if so, it will be longer than two years. And I talked to a friend of mine who was the lobbyist that helped write the bill. And I said, "Chris, how is long is this set?" He said, "Two years." I said, "If you look carefully, it's actually four." And he says, "Oh, my god. I went out

drinking that night and I did -- I didn't think we quite drafted it as carefully as we should have." The other little issue here while we're talking about compensatory education is that we have always been a jurisdiction which uses the quantitative approach meaning if you denied FAPE for 8300 minutes, you owe 80 -- it's minute for minute, hour for hour, day for day. But there is another way like when those of you are doing doctoral dissertations, at many institutions today for a doctoral dissertation, they ask you, "Do you want to do a quantitative or a qualitative approach?" And the D.C. Circuit in 2005 and then, in 2006, the Sixth Circuit and then, more recently, the Ninth Circuit and more recently, some courts in the Seventh Circuit have now adopted the qualitative approach which is again, more intellectually attractive and more sensible but a headache and a half for parent attorneys, district attorneys to figure out how to do just like a dissertation qualitatively looks seductively easy but I've seen doctoral students. When you do the qualitative approach really well in terms of triangulation, multiple sources, transcribing, et cetera, I would rather sit down with my computer and do a quantitative any day in the world. So, my point is we have always been in an hour for hour approach but if you look at the current state of law, it's in a state of flux. And if I were doing hearing officer training, I would say to the hearing officers, "I would advice you to use the quantitative approach but the odds are one in three that you may get overturned." Why? Because some years ago, we had a gifted case where the Pennsylvania Commonwealth Court said, "I am not bound by the presidents for IDEA and I don't think the quantitative approach works. I dictate the qualitative approach for comp ed in gifted cases." More recently, two different Pennsylvania Commonwealth Court cited that gifted case for IDEA cases, either because they didn't see the distinction or they just thought it made sense and they pointed out legally and I didn't know this when I graduated from law school that a state court is not bound by the presidents of the federal courts. That state courts could have one approach and federal courts could have another and the Third Circuit could say that and the state courts don't have to abide by it. The state courts seem to be moving toward a qualitative approach and the Third Circuit in a recent case in Philadelphia used qualitative language citing the Reed case which is the District of Columbia case so that right now, I'm not sure whether the hour for hour is the approach and if it's qualitative, the thing I forewarn you is number one, it could be the amount, it could be far less or far more than hour for hour. And number two, it puts a huge burden on the parent through expert testimony to show -- it goes like this if you want to follow how complicated. It's all sensible but I don't know how you'd ever prove it because of the cause of problem. First, what is the kid's present level? He's one year behind in reading, it's usually not that easy but let's just say it's one year behind. How much of the one year behind in reading is due to the denial of FAPE because he might have been a year behind anyway. So, you say. "Okay. Two months." Third factor, how much comp ed would it require to get him up the two months that he lost? Well, he lost his window of opportunity and now, it's going to be -- it's like teaching me to play golf or tennis as an adult, a lot more instruction. Those are the questions that are asked and like each one is logical but how you get at them, it gets very tricky. I think the rest of this is pretty much -- I'm just trying to hit highlights here. Here are issues that I don't see right now being major issues but are potential issues. I just read an article about they called them 2e kids and

I said, "What's 2e?" Twice exceptional kid is SLD and gifted and trying to figure out what's FAPE for that kid can sometimes be very -- or is the kid eligible in the first place because the giftedness could mask his need for special education. And I would think that parents in this area could, if they really went -- like, parents with autism really could make this into a litigation nightmare. Secondly, parents of children who are English language learners but are also having a disability under 504 IDEA. It raises issues as to is the school psychologist supposed to be fluent in that native language and culture for -- is the teacher supposed to be and are you getting to possibly bilingual special education. Assistive technology can be costly and complicated for a dummy like me. If you saw me start off here just trying to get my thing, I would think it would be a soft spot. Now, somehow, in Pennsylvania at least and more nationally, I use with their assistive technology evaluations and somehow funding seem to solve a lot of this but to me, it's a potential area of litigation where the parent want -- you would give me an iPad but I want the iPad 5 with the, you know, blah, blah, blah. Many of you, I find, when I talk to my students who are teachers tell me that they really are not very good at writing transition plans, it's just not within their realm of expertise and they sort of throw down some kind of boilerplate that looks good but really is not that good. Well, it seems to me that that's a soft spot that may end up being a FAPE case. The whole mind field of disciplinary change is in placement, manifestation determinations, Interim Alternative Educational Settings, the 10-day rule, the 15-day rule to me is a mind field. But again, in our capitalist system, these kids often don't have the attorneys. Just like in jails, you have potential cases that are very rare and finally, something that some of you like. Predictably, we were going to see an increase backlash in the law which says the law says as of 2004, the part that it always said is if you parent prevail, you would have to -- I would have to pay your attorney's fees. But in 2004, they made it a slight two-way street in the other direction saying if I, the parent, or my attorney brings a frivolous or harassing case, my attorney or I may have to pay your attorney's fees and most of these cases, the court says what you see is frivolous is not, because after all, that's like complaining that boxers are hitting each other. You get into cases, you always come up with new theories, Brown v. Board of Education was a frivolous case because the Supreme Court had already said separate but equal. But there's an occasional case that is now successful, the most recent being my home district Bethlehem Area School District versus Zhou, Z-H-O-U, where a federal district court concluded that Dr. Zhou who had brought several due process hearings on behalf of her two siblings had engaged in harassing action and that she should pay Bethlehem's attorney's fees which amounted to huge amounts and they're now negotiating with a potential judge coming in and saying, "How much will she have to pay?" She's, of course, moved off to North Carolina at this point but nevertheless, is on the hook for this and we may see more of this sort of backlash. Next, one of the things you may not realize because you live in a separate little oasis or really not the oasis, maybe it's the dessert. But it is that there are two worlds of special education law and I want to show you a study I just finished last night. I looked at the last six years of available data on due process hearings across the country -- across the country from 2006 school year to 2011. And when you see there the black bar in the bottom is the number of due process hearings that are adjudicated meaning you went all the way to get a decision and

you will see that they have dropped. Now, before 2006, it was a big uphill flow, more and more cases every year. What some of you don't realize is the tide turned, there were 4000 plus cases in 2006, six years later, there are half the number of cases. Second, the gray bar are not the adjudications, they're the filings, it's when the parent files for a hearing. And you will see number one that that has dropped. Number two, the ratio of filings, the hearings has gone up and the average is 6.2. In other words, for every six cases that parents file, five of them gets settled, withdrawn, dismissed, one of them goes to a decision. What we're seeing more and more of is alternative dispute resolution, use mediation, resolution sessions, facilitated IEPs and other innovations to try to come to one mind and stay out of this crazy world of adjudications. Now, all of that, it seems to me when you look at it, maybe relative good news where you get the concept of two worlds is as follows. These -- oh, wait a minute. I'm not going to show it to you for a minute. Oh, you're looking already, but six jurisdictions account for 90% of the adjudications. In other words, if you're in one of these six, you're in one world. If you're in Wyoming, Utah, North Dakota, West Virginia or any other beyond the six, you get two due process hearings a year for the whole state, not for your district. They're almost unheard of and they don't give me my case law that I end up citing. It always is from places like New York and DC. What was surprising to me is who's the top six and are we in it. Now, look. Now, the left side is the top six for adjudications. The right side is the top six for filings. The same top six account for 90%. It's just that their positions change depending upon their settlement ratio. And of all places, I don't understand this one bit and I personally think it's the secretary who doesn't understand English who filed the wrong numbers. But when I contacted OSEP, OSEP said that's what they gave us and we're going with it. Puerto Rico is the place that I got to retire to and move to because that -- they do more cases than 6,000. We do 400 in a 6-year period but we are in that world and if you'd knock out Puerto Rico as either being wrong data or at least not a state and DC not a state. Well, I mean if you said "What are the top states?" We're fourth in the -- of the 50 states, so we're pretty active along with our neighboring state, New Jersey. But other places, like, you might think like Michigan, Connecticut, Illinois are just not there. And again, 90% of the jurisdictions and final piece is -- remember that reduction that we saw, that we thought "Oh, good, resolution sessions, et cetera, working."? If you look at the top six states you find that 75% of the reduction is attributable to one jurisdiction, DC. They dropped, of the 2,000 cases, they dropped about 1500 cases right there and have stayed level ever since. And I've asked people what happened in DC, and they said "One, they hired two new chief hearing officers who went in and cleaned up the shop, got rid some of the bad hearing officers, developed the process to be more predictable and well done." Second -- the second is sort of a weird reason, DC purposely, I guess, stopped paying the parent attorneys and some of them went out of business because they owed millions of dollars and weren't able to collect. So, that's another sort of strange reason. Third, DC is -- along with Hawaii is the only jurisdictions where the SEA and the LEA are the same. That is DC has an SEA. Now, it actually has several LEAs now because they're charter schools. But they don't supervise each other or didn't historically. And a Philadelphia Administrator, Amy, I can't remember, Mastera went down and cleaned up the SEA down there. It has improved their special ed and they're

using mediation for the first time even though it's always been a law, resolution sessions for the first time even though it's always been in the law since 2004, and what else, and their complaint resolution process. So DC made improvements, Puerto Rico has stayed, you know, up and down, dropped a little. New York dropped a little but we, relatively speaking are -- but there hasn't been any major changes as far as reductions in the past 60 years. So that's what I mean by sort of two worlds. Questions or comments on this by anybody?

AUDIENCE MEMBER: How many data and how many cases were settled?

DR. PERRY ZIRKEL: Well, remember that ratio. The ratio was overall -- oh, you want to know the…

AUDIENCE MEMBER: Yeah, because you just said it settled it…

DR. PERRY ZIRKEL: …yeah.

AUDIENCE MEMBER: …rather than [inaudible]

DR. PERRY ZIRKEL: Let me go back. Now, first of all, typical professor…

AUDIENCE MEMBER: Yeah.

DR. PERRY ZIRKEL: …my last sentence is somebody else ought to go in and look at how -- what degree the settlement.

AUDIENCE MEMBER: I was asking…

DR. PERRY ZIRKEL: But actually, there is a column. They have a column for settlements. They have a column for mediations. They have a column for pending cases. And frankly, I found it also confusing, I figured I'll just stick with this and you can go out do that. But the ratio is the key. So, if you look at Pennsylvania, you'll see that -- you see where there's 11.60, it means for -- one in twelve cases go to -- so the 11 -- other 11, some high percentage got to settle but what exactly the percentage is? I don't know. You'd have to look at the data. Any other questions?

AUDIENCE MEMBER: Yeah. I'm here.

DR. PERRY ZIRKEL: Yeah.

AUDIENCE MEMBER: I'm curious. How could the District of Colombia just [inaudible] with parents' attorneys?

DR. PERRY ZIRKEL: You would wonder because they are just -- the craziest things happen in the District of Colombia. I mean, you could also ask -- another thing that they've historically done is they have not enforced to do process hearing. When they do process hearing, officer says "You owe two months or a year of comp ed." They didn't do it. You'd wonder how could they not do it because it's just this big bureaucratic paralyze system. And they're under a court decree, the Blackman court decree and they're so sort of a siege mentality that they just sort of feed certain -- and don't others, and you wonder how --

they also had a attorney's fee cap, that then was removed. So there's a lot of strange stuff that goes on at DC.

AUDIENCE MEMBER: Another question is I know in Pennsylvania, a family can approach an attorney, a parent's attorney and start the case and that attorney will take it on whatever that's called.

DR. PERRY ZIRKEL: Yeah, contingency.

AUDIENCE MEMBER: Right. And other states don't allow that.

DR. PERRY ZIRKEL: No, not true.

AUDIENCE MEMBER: Oh.

DR. PERRY ZIRKEL: If, like, if [inaudible] what you said is, historically, when you see advertisements for attorneys with as best as, et cetera, these big personal injury cases, many attorneys will say seductively it won't cost you anything because they take a percentage like a third or more of a final verdict. And if they're very clever about screening their cases so such that one in three cases or more would win or settle, they can make a lot of money. Her point is some parent attorneys in some states, there's no prohibition. It's just the choice they make as a business, have taken that concept but the trick is if I'm doing that as a parent attorney, I'm not getting a third of a million dollar judgment. What I'm doing is I'm screening my cases for good ones especially a place like Philadelphia because the -- that screws up where I figure I'm going win most of these case or they're going to settle them. Thus, I say to the parent, "You don't have to pay me anything because I'll get it from Philadelphia." And in some places, some parent attorney -- but there's no prohibition. It's just a cultural business choice that goes on as a business model, if you will.

AUDIENCE MEMBER: I have a question.

DR. PERRY ZIRKEL: Yup.

AUDIENCE MEMBER: [inaudible] and if they jump, do you have any information about how [inaudible]

DR. PERRY ZIRKEL: Because we're running out of time, I had mentioned -- remember I did the minority and the title one. I've got separate numbers on title one, I mean, 504. But what I don't have because oddly enough it doesn't really exist, hardly at all, is 504 hearings. You see, a parent has a right to an impartial hearing under 504. And if you actually -- and no one's collected the data but if you did, you'd find that the number of 504 hearings are so small because parents don't know and don't bring it. And in most states, they can't do it through the hearing officer system. So I don't have that data. I've got data on 504 eligibility but not adjudications. In closing, so that we do finish on time because I don't want to win -- owe you any compensatory education or much less dinner.

AUDIENCE MEMBER: Perry, you have the time [inaudible]

DR. PERRY ZIRKEL: Oh, yes, thank you very much, but some of them are exhausted at this point. So I'll save the last 15 minutes for any individual or small group and stuff but let's try to finish for most of you by 5:00 because I didn't you give a break. My first point that I've reinforced, what I did last year when I did my session called "Lore versus Law." Is, remember, you may find me interesting, my wife would say "Yeah, that -- you only just met him. Wait 'til you see how he gets grease all over his shirt and all of this stuff." But in any event, I know the law can make it fairly -- but I'm just -- I'm not what you should do. I'm what you must do. I'm the minimum. So do not confuse minimum requirements with, number one, where most of you are. Best practice, you should continue, as a matter of fact, learning that you win more often at my level instead of reducing down, that should liberate you to do even more best practice. Second, don't confuse this concept of risk management. Lehigh, for example, we have all kinds of stuff. We're on the side of the hill in terms of, you know, what we closed yesterday, today we closed again. We -- why do we close within the old days? Because some insurance person or risk manager said, there could be more accidents and stuff. The law doesn't require us to close. My point is that some of you engage in preventive law where you do things that you don't have to do and I'm all for that if it's moving towards best practice. But some of you said "Oh, we could get sued for evolutions, so give her the biology." And we can get sued for the new math, give her the new math and you're finally left with this empty school with padding where you're doing, I don't know, something that is purely safe and innocuous or not. So I don't blame you for getting rid of your trampoline. But otherwise, my view is, don't be so aversive to law that you're scared to take any risk and do innovative things with kids. Remember that if you build trust and partnership, you don't need as much law. I only want it in writing. I only want 504 idea if I don't trust you. But if you're a person of your word and I know you're committed to my kid and I know you're committed to this community, continue to do that. Do not come over to my world. And of a final example, take something like FBAs and BIPs, if you really carefully in a nuance look, look at Pennsylvania's chapter 14. I would suggest to you that we don't really require a BIP or an FBA when a kid's behavior impedes their learning because if you look carefully, what we say is -- we don't say if a kid's behavior impedes his learning, you must provide. What we do is we have a definition of a BIP which says a BIP is based on an FBA and it's for a kid whose behavior impedes his learning. Now, that's the definition, meaning that, you know, this bag is to carry your glass or whatever else, but that doesn't mean you're entitled to this bag. It just is defining the bag which may be used to carry but you may have other things that you carry on your own but you're not entitled to the bag. So, I'm saying -- and I once wrote a thing for the state, and they said write an objective, user friendly, of discipline in Pennsylvania for PDE, about eight years ago. I wrote this thing and when I got to that, I said, "I've got to say honestly that we don't require an FBA, BIP." They censored me. They paid me and they said -- they published it there when they took my name off of it. And I was mad at that time and then I realized, no, they made a correct decision. I may be legally correct but that's pushing people again down to the minimum. We should encourage and even bluff and huff and puff to get -- because they're good for kids and it's the right thing to do. And so when it's a ambiguous area, err on that side. But remember, when you ask me and don't e-mail me because my wife doesn't let

me answer it anymore because I never came home answering all these e-mail and stuff, but if you did get through to me, sometimes the answer you get from me is so nuance than correct. That it's legally wonderful but it's not practically useful. Thus, you wasted two hours of your time again this afternoon but I -- but I thank you for sticking with me. I hope that I get to see you again in the future. Have a good conference, drive safe. Thanks.