The Courts' Use of OSEP Policy Interpretations in IDEA Cases*

Perry A. Zirkel

The recent up-and-down course of the major transgender student case illustrated the issue of the legal weight of U.S. Department of Education agency interpretations. The Fourth Circuit's decision in favor of the plaintiff-student relied on the agency interpretation that the Title IX regulations extend to transgender.[1] The Supreme Court initially agreed to hear this case,[2] but when the Trump Administration rescinded this interpretation,[3] the Court remanded the case for re-consideration in light of this reversal.[4]

A pair of previous legal developments, which are generally at the opposite end of attention in the P–12 context, serve as a bridge to the focus of this article, which is the role of U.S. Department of Education interpretations in court decision under the Individuals with Disabilities Education Act (IDEA). First, as an apparent push-back dating back to the 1997 amendments in response to perceived agency activism,[5] the

---

* This article appeared in *West's Education Law Reporter*, v. 342, pp. 671–677 (2017). Updated material since publication is highlighted in yellow.

[1] *Gloucester Cty. Sch. Bd. v. G.G.*, 822 F.3d 709, 723, 331 Ed.Law Rep. 54 (4th Cir. 2016). For related trial court decisions, which differed from each other in relation to the agency interpretation, see *Bd. of Educ. of Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, 208 F. Supp. 3d 850, 341 Ed.Law Rep. 236 (S.D. Ohio 2016); *State of Tex. v. U.S.,* 201 F. Supp. 3d 810, 340 Ed.Law Rep. 200 (N.D. Tex. 2016).

[2] 137 S. Ct. 369 (2017).

[3] The issuing agencies were the Department of Education's Office for Civil Rights (OCR) and the Department of Justice's Civil Rights Division. Moreover, their notice identified the rescinded "statements of policy and guidance" as the OCR Letter to Prince on Jan. 7, 2015 and an OCR Dear Colleague Letter on May 13, 2016. Dear Colleague Letter (Feb. 22, 2017), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf

[4] 137 S. Ct. 1239 (2017). In contrast, a recent other federal appellate ruling in a transgender case did not rely on agency interpretation, instead basing its ruling for the plaintiff-student based on the Title IX regulations and the Fourteenth Amendment's Equal Protection Clause. *Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034, 343 Ed.Law Rep. 672 (7th Cir. 2017).

[5] Although based on the continuing ebb and flow of succeeding administrations, the likely immediate stimulus was the then recent controversy concerning OSEP interpretations of the suspensions/expulsions of IDEA–eligible students. E.g., *Va. Dep't of Educ. v. Riley*, 86 F.3d

IDEA includes specific provisions limiting the scope of the Department's interpretations[6] and requiring transparency with regard to their non-binding effect.[7] Second, approximately a decade later and applying to federal administrative agencies more generally, the Office of Management and Budget (OMB) announced policies and procedures to rectify perceived problems in prevailing guidance practices.[8] This bulletin was limited to defined "significant guidance documents,"[9] requiring federal agencies to have written approval procedures that met specified standards, such as "[exclusion of] mandatory language such as 'shall,' 'must,' 'required' or 'requirement,' unless the agency is using these words to describe a statutory or regulatory requirement . . . ."[10]

Focus of the Analysis

1337, 110 Ed.Law Rep. 552 (4th Cir. 1996), *rehearing en banc*, 106 F.3d 559, 116 Ed.Law Rep. 40 (4th Cir. 1997) (reversing, based on the clear statement rule for spending clause cases, the panel decision, which had upheld the Department's withholding of federal funds until the state complies with its interpretive, not legislative, rule that eligible students are entitled to continued services in the wake of a disciplinary change in placement unrelated to their disability).

[6] 20 U.S.C. § 1406(c) (2013):

> The Secretary may not issue policy letters or other statements (including letters or statements regarding issues of national significance) that—(1) violate or contradict any provision of [the IDEA]; or (2) establish a rule that is required for compliance with, and eligibility under, this [the IDEA] without following the requirements of [the APA for regulations].

[7] *Id*. §1406(d):

> Any written response by the Secretary . . . regarding a policy, question, or interpretation under [the IDEA] shall include an explanation in the written response that—(1) such response is provided as informal guidance and is not legally binding; . . . . and (3) such response represents the interpretation by the Department of Education of the applicable statutory or regulatory requirements in the context of the specific facts presented.

This provision extends to requiring the Department to widely disseminate, including quarterly publication publish in the *Federal Register*, topical lists of its interpretations. *Id*. § 1406(f).

[8] OMB, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3,432 (Jan. 25, 2007). For an example of the perceived problems, OMB cited *Appalachian Power Co. v. E.P.A*., 208 F.3d 1015, 1020 (D.C. Cir. 2000) ("Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations").

[9] 72 Fed. Reg. at 3439.

[10] *Id*. at 3440. The bulletin also specifies standards for Internet access and public feedback and more rigorous notice and comment for "economically significant guidance documents." *Id*.

The purpose of this brief article is to determine the frequency and role of U.S. Department of Education interpretations in court decisions under the IDEA. More specifically, these Department of Education interpretations are from the Office of Special Education Programs (OSEP) and, less frequently, its larger Office for Special Education and Rehabilitation Services (OSERS), which includes OSEP.[11] In addition to the commentary accompanying the IDEA regulations,[12] this guidance appears in two other forms of written guidance: (1) general "policy support documents," such as Dear Colleague Letters (DCLs) and frequently asked questions (FAQ) or question-and-answer (Q/A) documents; and (2) individual policy letters in response to inquiries from interested parties.[13]

In a prior ELIP article, I provided a flowchart-like checklist of the multi-step analysis that courts use in determining whether to defer to agency interpretations.[14] Although subject to lower court refinements, the primary source for this test is the Supreme Court's decision in *Auer v. Robbins*.[15] The relevant factors for what is

---

[11] For its organization, see https://www2.ed.gov/about/offices/list/osers/index.htmlhttps://www2.ed.gov/about/offices/list/osers/index.html

[12] These regulations, which are attributable to OSEP, follow after each of the successive reauthorizations of the IDEA, such as those represented by the 1997 and 2004 amendments. The commentary for the latest IDEA regulations starts at 71 Fed. Reg. 46,547 (Aug. 14, 2006).

[13] For this categorization and a compilation of this "policy guidance" dating back to 2001, see https://sites.ed.gov/idea/policy-letters-policy-support-documents/

[14] Perry A. Zirkel, *Do OSEP Policy Letters Have Legal Weight?* 171 Ed.Law Rep. 391 (2003). More precisely, because is quite clear that agency interpretations are not binding on courts, the questions concern whether the court will accord deference to the particular interpretation, and, if so, how much deference? *Id*. at 392–393.

[15] 519 U.S. 452 (1997). For a long line of related Supreme Court decisions, see, e.g., *Decker v. Nw. Envtl. Def. Ctr.,* 133 S. Ct. 1326, 1337 (2013) ("It is well established that an agency's interpretation need not be the only possible reading of a regulation—or even the best one—to prevail."); *Christopher v. SmithKline Beecham Co*., 567 U.S. 142, 158 (2012) (not in the absence of fair warning, such as where "an agency's announcement of its interpretation is preceded by a very lengthy period of conspicuous inaction"); *Pauley v. BethEnergy Mines, Inc*., 501 U.S. 680, 702 (1991) ("[I]t is axiomatic that the [agency's] interpretation need not be the best or most natural one by grammatical or other standards. Rather, [its] view need be only reasonable to

sometimes called *Auer* deference include, for example, whether the agency interpretation is (1) inconsistent with its own regulations, and (2) a fair and considered judgment on the matter.[16] An incidental finding of this earlier analysis was that only a handful of courts addressed this issue during the previous five years, with almost all deferring to the OSEP interpretation,[17] but a similar limited number of court decisions either side-stepped the issue[18] or cited the agency interpretation supportively but secondarily without directly addressing the aforementioned[19] paired deference questions.[20] Moreover, the impact of the pertinent IDEA amendments[21] was negligible.[22]

Method for the Analysis

The overlapping sources were the Westlaw and SpecialEdConnection® legal

---

warrant deference."); *Skidmore v. Swift & Co*., 323 U.S. 144 (1944) (according deference in proportion to the "thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade."). For the only one in the context of the IDEA, see *Honig v. Doe*, 484 U.S. 305, 325 n.8 (1988) ("The [IDEA] nowhere defines the phrase "change in placement," nor does the statute's structure or legislative history provide any guidance as to how the term applies to fixed suspensions. Given this ambiguity, we defer to the construction adopted by the agency charged with monitoring and enforcing the statute. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 . . . (1987). Moreover, the agency's position comports fully with the purposes of the statute."). For an elaboration of judicial deference, including an evaluation of the pertinent Supreme Court jurisprudence, see Anuradha Vaitheswaran &Thomas Mayes, *The Role of Deference in Judicial Review of Agency Action*, 27 J. NAT'L ASS'N OF ADMIN. L. JUDICIARY 402, 407–418 (2007).

[16] *Auer v. Robbins*, 519 U.S. at 461–462. This deference is separate from and lower than that accorded to agency regulations under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). See, e.g., *Ariz. State Bd. of Charter Sch. v. U.S. Dep't of Educ.*, 464 F.3d 1003, 1006–07, 213 Ed.Law Rep. 114 (9th Cir. 2006).

[17] Zirkel, *supra* note 14, at 394 n.19 and 395 n.27. The primary examples cited therein were *Hooks v. Clark Cty. Sch. Dist*., 228 F.3d 1036, 1040, 147 Ed.Law Rep.870 (9th Cir. 2000); *Michael C. v. Radnor Twp. Bd. of Educ.,* 202 F.3d 642, 650, 141 Ed.Law Rep. 495 (3d Cir. 2000). The single exception during that period was *Converse Cty. Sch. Dist. No. 2 v. Pratt,* 993 F. Supp. 2d 848, 859–60 (D. Wyo. 1997).

[18] Zirkel, *supra* note 14, at 396 n.28 (citing *St. Johnsbury Sch. Dist. v. D.H*., 240 F.3d 163, 171, 151 Ed.Law Rep. 74 (2d Cir. 2001).

[19] *See supra* note 14.

[20] Zirkel, *supra* note 14, at 396 n.27 (citing, for example, *Cavanagh v. Grasmick*, 75 F. Supp. 2d 446, 468, 140 Ed.Law Rep. 643 (D. Md. 1999).

[21] *See supra* notes 6-7 and accompanying text.

[22] Zirkel, *supra* note 14, at 395–96.

databases. The Boolean search used various terms, including "OSEP," "OSERS," "policy interpretations," "*Auer*," "*Skidmore*," and "Fed. Reg.,"[23] and in combination with "Individuals with Disabilities Education Act," for the 17.5-year period from Jan. 1, 2000 through June 30, 2017. The selection was limited to the final decision[24] where the court cited either (1) one of the twos types of OSEP or OSERS policy interpretations,[25] regardless of whether designated as being "significant guidance,"[26] or (2) the commentary accompanying the IDEA amendments.[27]

The exclusions, in two successive categories, further clarify the scope of the coverage. The first category consists of the obvious but nevertheless notable exclusions: (1) decisions specific to the weighting of the IDEA regulations alone[28]; (2) those specific to the Department's direct monitoring[29] or auditing[30] activities; (3) those citing either the Department's OCR interpretations of Section 504[31] or the Department of Justice interpretations of the Americans with Disabilities Act in the K–12 context[32]; and, the

---

[23] This purpose of this particular search term was to find references to the regulations' commentary. *See supra* note 12.

[24] "Final decision" in this context refers to the selection in a case with more than one decision that contained a relevant agency citation. E.g., *T.K. v. N.Y.C. Dep't of Educ*., 779 F. Supp. 2d 289, 270 Ed.Law Rep. 593 (S.D.N.Y. 2011), *further proceedings*, 32 F. Supp. 3d 405, 312 Ed.Law Rep. 603 (S.D.N.Y. 2015), *aff'd on other grounds*, 810 F.3d 869, 326 Ed.Law Rep. 609 (2d Cir. 2016).

[25] *See supra* text accompanying note 13.

[26] *See supra* text accompanying note 9.

[27] *See supra* note 12 and accompanying text.

[28] E.g., *Petit v. U.S. Dep't of Educ*., 675 F3d 769, 278 Ed.Law Rep. 735 (D.C. Cir. 2012).

[29] E.g., *Jamie S. v. Milwaukee Pub. Sch*., 668 F.3d 481, 277 Ed.Law Rep. 34 (7th Cir. 2012); *Angel G. v. Tex. Educ. Agency*, 41 IDELR ¶ 31 (S.D. Tex. 2004).

[30] E.g., *Ariz. State Bd. for Charter Sch. v. U.S. Dep't of Educ*., 464 F.3d 1003, 213 Ed.Law Rep. 114 (9th Cir. 2006).

[31] E.g., *D.L. v. Baltimore City Bd. of Sch. Comm'rs*, 706 F.3d 256, 259–60, 289 Ed.Law Rep. 493 (4th Cir. 2013); *J.M. v. Dep't of Educ. State of Haw*., 224 F. Supp. 3d 1071, 1086, 343 Ed.Law Rep. 839 (D. Haw. 2016).

[32] E.g., *K.M. v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 296 Ed.Law Rep. 800 (9th Cir. 2013); *Alboniga v. Sch. Bd. of Broward Cty*., 87 F. Supp. 3d 1319, 1333–34, 321 Ed.Law Rep. 331 (S.D. Fla. 2015).

obverse of our focus, (4) the OSEP interpretations that departed from or disagreed with court decisions.[33]

The second category were the marginal exclusions, where the court cited an OSEP or OSERS policy interpretation but only in the following more limited and ultimately distinguishable ways: (1) in the background, including case history, section of the opinion, (2) in the description of cited cases, (3) in the recitation of parties' positions, (4) when the interpretation was not generally available for guidance prior to the litigation, such as an amicus brief, or, closest of all, (5) when the court treated it as clearly inapplicable without addressing its deferential weight.[34]

Results of the Analysis

The systematic search and selection yielded seventy-three final[35] court decisions that cited the OSERS or OSEP policy interpretations as either support or not entitled to deference. However, the court directly addressed the deference issue in only thirty-one (42%) of the cases. These thirty-one cases fell into three small subgroups. In the first and largest subgroup, consisting of twenty-two decisions, the court found the agency interpretation to be persuasive.[36] In the second subgroup, limited to four cases, the court

---

[33] E.g., Letter to Goetz and Reilly, 58 IDELR ¶ 230 (OSERS 2012).

[34] The final subgroup is similar to but distinguishable from the included cases where the court addressed the agency interpretation's deferential weight while finding it inapplicable. *See infra* note and accompanying text.

[35] *See supra* note 24.

[36] *Avila v. Spokane Sch. Dist. 81*, 852 F.3d 936, 943, 341 Ed.Law Rep. 646 (9th Cir. 2017); *Doe v. Cape Elizabeth Sch. Dist.,* 832 F3d 69, 77 n.7, 335 Ed.Law Rep. 21 (1st Cir. 2016) (marginal); *G.L. v. Ligonier Sch. Dist. Auth*., 802 F.3d 601, 621, 322 Ed.Law Rep. 633 (3d Cir. 2016); *E.M. v. Pajaro Valley Unified Sch. Dist*., 758 F.3d 1162, 1174, 307 Ed.Law Rep. 713 (9th Cir. 2014); *D.L. v. Baltimore City Bd. of Sch. Comm'rs*, 706 F.3d 256, 259–60, 289 Ed.Law Rep. 493 (4th Cir. 2013); *Ridley Sch. Dist. v. M.R*., 680 F.3d 260, 276, 280 Ed.Law Rep. 37 (3d Cir. 2012); *Ector Cty. Indep. Sch. Dist. v. V.B.,* 420 F. App'x 338, 344, 269 Ed.Law Rep. 65 (5th Cir. 2011) (marginal); *R.B. v. Napa Valley Unified Sch. Dist.*, 496 F.3d 932, 942, 223 Ed.Law Rep. 559 (9th Cir. 2007); *Ms. S. v. Vashon Island Sch. Dist.*, 337 F.3d 1115, 1134, 179 Ed.Law Rep. 147 (9th Cir. 2003); *Taylor v. Vt. Dep't of Educ.,* 313 F.3d 768, 780, 172 Ed.Law. Rep. 87 (2d

directly addressed the deferential weight but avoided any reliance on the agency interpretation by merely noting its consistency with the court's independent ruling.[37] Finally and significantly, in five cases the court expressly applied the framework criteria[38] and rejected according any persuasive weight to the OSEP or OSERS agency interpretation at issue.[39]

Conversely, in the other forty-two (58%) of the seventy-three cases the citation was by way of support but the court did not specifically address the deference issue. In all but one of these decisions, the court appeared to assume, without discussion, the persuasive value of the agency.[40] In the remaining decision, the court did not address the

---

Cir. 2002); *Porter v. Bd. of Tr. of Manhattan Beach Unified Sch. Dist.*, 307 F.3d 1064, 1072, 170 Ed.Law Rep. 152 (9th Cir. 2002); *Hooks v. Clark Cty. Sch. Dist*., 228 F.3d 1036, 1040, 147 Ed.Law Rep. 870 (9th Cir. 2000); *Michael C. v. Radnor Twp. Sch. Dist.,* 202 F.3d 642, 650–52, 141 Ed.Law Rep. 495 (3d Cir. 2000); *C.C. v. Beaumont Indep. Sch. Dist.*, 65 IDELR ¶ 109 (E.D. Tex. 2015); *M.M. v. Plano Indep. Sch. Dist*., 61 IDELR ¶ 142 (E.D. Tex. 2013); *Moorestown Twp. Bd. of Educ. v. S.D*., 811 F. Supp. 2d 1057, 1073–74, 276 Ed.Law Rep. 196 (D.N.J. 2011); *Sterling A. v. Washoe Cty. Sch. Dist*., 51 IDELR ¶ 152 (D. Nev. 2008); *Fitzgerald v. Fairfax Cty. Sch. Bd.,* 556 F. Supp. 2d 543, 554 n.15, 234 Ed.Law Rep. 830 (E.D. Va. 2008); *Ringwood Bd. of Educ. v. K.H.J*., 469 F. Supp. 2d 267, 270–71, 216 Ed.Law Rep. 879 (D.N.J. 2006); *San Dieguito Union High Sch. Dist. v. Guray-Jacobs*, 44 IDELR ¶ 189 (S.D. Cal. 2006); *Porter v. Bd. of Tr. of Manhattan Beach Unified Sch. Dist.*, 105 LRP 40577 (C.D. Cal. Dec. 21, 2004); *Waller v. Bd. of Educ. of Prince George's Cty*., 234 F. Supp. 2d 531, 538 (D. Md. 2002).

[37] *D.P. v. Sch. Bd. of Broward Cty*., 483 F.3d 725, 731, 218 Ed.Law Rep. 826 (11th Cir. 2007); *Ariz. State Bd. of Charter Sch. v. U.S. Dep't of Educ.*, 464 F.3d 1003, 1006–07, 213 Ed.Law Rep. 114 (9th Cir. 2006); *Frank G. v. Bd. of Educ. of Hyde Park*, 459 F.3d 356, 373, 212 Ed.Law Rep. 35 (2d Cir. 2006); *St. Johnsbury Acad. v. D.H.,* 240 F.3d 163, 170–71, 151 Ed.Law Rep. 74 (2d Cir 2001).

[38] *See supra* notes 15–16 and accompanying text.

[39] *Seth B. v. Orleans Parish Sch. Bd.,* 810 F.3d 961, 968–69, 326 Ed.Law Rep. 620 (5th Cir. 2016); *Student X v. N.Y.C. Dep't of Educ.,* 51 IDELR ¶ 122 (E.D.N.Y. 2008) (finding conflict with express language of the IDEA regulations); *Pardini v. Allegheny Intermediate Unit*, 420 F.3d 181, 192 , 201 Ed.Law Rep. 44 (3d Cir. 2005); *D.F. v. Leon Cty. Sch. Bd*., 65 IDELR ¶ 134 (N.D. Fla. 2015) (finding lack of persuasiveness); *Bd. of Educ. of City Sch. Dist. of N.Y.C. v. Tom F.*, 42 IDELR ¶ 171 (S.D.N.Y. 2005), *vacated*, 193 F. App'x 26 (2d Cir. 2006) (finding lack of ambiguity in statutory language).

[40] Given the number and length of the dual citations, this footnote is limited to a representative sampling; a complete list of these cases is available from the author upon request. In the bulk of these decisions, the court cited the agency interpretation for additional support. E.g., *M. v. Falmouth Sch. Dep't*, 847 F.3d 19, 339 Ed.Law Rep. 619 (1st Cir. 2017); *White v. Ascension Parish Sch. Bd*., 343 F.3d 373, 180 Ed.Law Rep. 491 (5th Cir. 2003); *N.G. v.*

issue due to the district's conceding posture.[41] Finally, the overall frequency increased gradually during this 17.5-year period, although not in a consistently straight or steep line.

Discussion of the Findings

The OSEP and OSERS policy interpretations have served to resolve ambiguities and fill gaps in the IDEA regulations for a limited but notable number of court decisions under the IDEA. More specifically, these 73 decisions represented less than 5% of the very approximate total of 2300 decisions during the same period.[42]

For the vast majority of these seventy-three decisions, the OSEP or OSERS written guidance has had a supporting effect. Although this effect has been assumed

---

Tehachapi Unified Sch. Dist., 69 IDELR ¶ 279 (E.D. Cal. 2017); *T.S. v. Utica Cmty. Sch*., 69 IDELR ¶ 95 (E.D. Mich. 2017); *Greenwich Bd. of Educ. v. G.M*., 68 IDELR ¶ 8 (D. Conn. 2016); *West-Linn Wilsonville Sch. Dist. v. Student*, 63 IDELR ¶ 251 (D. Or. 2014); *M.J.C. v. Special Sch. Dist. No. 1*, 58 IDELR ¶ 288 (D. Minn. 2012); *Horen v. Bd. of Educ. of Toledo City Sch*., 655 F. Supp. 2d 794, 251 Ed.Law Rep. 252 (N.D. Ohio 2009); *Sch. Bd. of Manatee Cty. v. D.H*., 666 F. Supp. 2d 1285, 253 Ed.Law Rep. 189 (M.D. Fla. 2009); *Koehler v. Juniata Cty. Sch. Dist.,* 50 IDELR ¶ 71 (M.D. Pa. 2008); *Herbin v. District of Columbia*, 362 F. Supp. 2d 254, 197 Ed.Law Rep. 142 (D.D.C. 2005); *Grant v. Indep. Sch. Dist. No. 11*, 43 IDELR ¶ 219 (D. Minn. 2005); *Manalansan v. Bd. of Educ. of Baltimore City*, 35 IDELR ¶ 122 (D. Md. 2001). At one end, in very few cases, the use was at the sole basis of the ruling—e.g., *A.A. v. Goleta Union Sch. Dist.*, 69 IDELR ¶ 156 (C.D. Cal. 2017); *Stapleton v. Penns Valley Area Sch. Dist*., 67 IDELR ¶ 268 (M.D. Pa. 2016). At the other extreme, in approximately a dozen cases, the use was tertiary or otherwise relatively marginal. E.g., *Gibson v. Forest Hills Local Sch. Dist*., 655 F. App'x 423, 337 Ed.Law Rep. 21 (6th Cir. 2016); *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 285 Ed.Law Rep. 730 (3d Cir. 2012); *K.L.A. v. Windham Se. Supervisory Unit*, 371 F. App'x 151 (2d Cir. 2010) *Brandywine Heights Area Sch. Dist. v. B.M.,* 69 IDELR ¶ 212 (E.D. Pa. 2017); *L.M.P. v. Fla. Dep't of Educ*., 51 IDELR ¶ 36 (N.D. Fla. 2008).

[41] *T.K. v. N.Y.C. Dep't of Educ.*, 810 F.3d 869, 876 n.5, 326 Ed.Law Rep. 609 (2d Cir. 2016) ("In view of the [school district's] concession in this case, we need not decide the precise level of deference owed to the position outlined in the United States' amicus brief or to the other agency guidance supporting that position.").

[42] This estimated total represents a straight-line projection based on the first ten years of this 17.5-year period. Perry A. Zirkel & Brent L. Johnson, *The "Explosion" in Education Litigation: An Updated Analysis*, 265 EDUC. L. REP. 1 (2011) (finding an estimated 1318 special education cases for the ten-year period starting January1, 2000). The base figure was part of an ascending trend but, providing an approximate counterbalance, it included (1) disability cases in the K–12 context beyond the IDEA, such as those under Section 504, the ADA, and Section 1983, and (2) every, rather than just the final, decision in cases that had multiple decisions.

rather than addressed in a substantial segment of this majority,[43] for those decisions that have specifically addressed the deference issue, the box score was still twenty-two granting deference to five rejecting deference.[44] For the substantial minority that did address the deference issue, the courts used the various factors in the *Auer* line of Supreme Court jurisprudence, starting with the threshold prerequisite of regulatory ambiguity.

Moreover, the seventy-three decisions were devoid of any differentiation among the three forms of agency guidance[45] as well as for the "significant guidance" designation.[46] This lack of differentiation is not surprising because all three forms of written guidance stand on the same footing, and the only IDEA policy interpretations expressly designated under the aforementioned[47] "significant guidance" have been three recent DCLs on the general education curriculum,[48] behavioral interventions and supports,[49] and virtual schools.[50]

Finally, the generally ascending frequency among the seventy-three decisions within this 17.5-year period is likely largely attributable to the overall trend line in the frequency of IDEA litigation[51] and the gradual accumulation of OSEP and OSERS policy interpretations.[52]

In sum, OSEP and OSERS written guidance under the IDEA plays a secondary,

---

[43] *See supra* note 40 and accompanying text.
[44] *See supra* notes 36, 39 and accompanying text.
[45] *See supra* notes 12–13 and accompanying text.
[46] *See supra* text accompanying note 9.
[47] *See supra* notes 8–10 and accompanying text.
[48] 66 IDELR ¶ 227 (OSERS/OSEP 2015).
[49] 68 IDELR ¶ 76 (OSERS/OSEP 2016).
[50] 68 IDELR ¶ 108 (OSERS/OSEP 2016).
[51] *See supra* note 42.
[52] *See supra* note 13.

supporting—rather than starring—role in court decisions under the IDEA. More intensive research is recommended, but this second look confirms as to whether these IDEA agency interpretations have legal weight.[53] Although the determinative factors are multiple, leading to an "it depends" answer, in most cases where an OSEP or OSERS policy letter appears in the final court decision, the predominate view is that it is entitled to persuasive, although clearly not binding,[54] force, and this effect is usually in tandem with other legal authority rather than sole-source reliance.

[53] Zirkel, *supra* note 14.
[54] *See supra* text accompanying note 7.