# SPECIAL EDUCATION LEGAL ALERT

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This periodic legal alert provides, as a two-column table, highlights (on the left) and practical implications (on the right) of major new legal developments. Here are my top three special education law items for this month:

| **1. A new Second Circuit decision holds that eligibility under the IDEA does not necessarily mean eligibility under Section 504 and its sister statute, the Americans with Disabilities Act (ADA).** | |
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| On Sept. 16, 2016 in *B.C. v. Mount Vernon School District*, the Second Circuit affirmed a pre-trial lower court ruling that rejected the plaintiff-parents disparate impact claim under Section 504 and the ADA because receipt of special education services under an IEP does not necessarily mean that the child's impairment is a substantial limitation. | The Second Circuit, which encompasses New York, Connecticut, and Vermont and is one of the most active jurisdictions for IDEA litigation, joined the Tenth and Fifth Circuit, which arrived at a similar conclusion about eligibility under the IDEA as compared with Section 504. It only addresses a very limited exception, instead simply requiring proof for each student. |
| • The disparate impact claim, which the court did not reach, was that students with disabilities had to take non-credit remedial courses during school hours than their nondisabled students did, thus negatively affecting their promotion from grade to grade. | • The disparate theory under Section 504 and the ADA is an unsettled and, for school districts, unsettling source of potential claims. |
| • Although reasoning that the IDEA and Section 504/ADA "serve different ambitions in different ways," the court acknowledged that many students with IEPs qualify under Section 504 and the ADA, ruling that the issue of substantial limitation requires an individual determination. | • This appellate decision is another example of the courts not necessarily agreeing with the U.S. Department of Education's Office for Civil Rights (OCR). Yet, school districts face OCR's opposing, automatic interpretation in its complaint investigation and compliance processes. |

| **2. The Supreme Court agrees to decide two special education cases, with one being centrally significant.** | |
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| • On June 28, 2016, the Supreme Court agreed to review the Sixth Circuit decision in *Fry v. Napoleon Community Schools*, and on September 29, the Supremes agreed to review the Tenth Circuit decision in *Endrew F. v. Douglas County School District Re-1*. | • These are the first Supreme Court forays into special education since the Court's tuition reimbursement decision in *Forest Grove School District v. T.F.* (2009). This gap was the longest one in the previous Court decisions in the context of special education. |
| • The *Fry* case is an adjudicative issue of interest primarily for attorneys rather than educators—in which student cases under Section 504 or the ADA the plaintiff-parents must exhaust the available mechanism of an impartial hearing under the IDEA before proceeding in court. | • The two competing approaches are the relief-centered and injury-centered approach. The relief-centered approach will not require exhaustion when plaintiff-parents seek money damages, even if the "injury" is educational in nature. Thus, school representatives tend to oppose the relief-centered approach because it removes one of the hurdles for to district liability. |
| • The *Endrew F*. case is of much more central interest to educators because it revisits one of the key issues in the landmark Supreme Court decision in *Board of Education v. Rowley* (1982)—whether the IEP must be reasonably calculated to yield meaningful or only some benefit. | • The *Rowley* substantive standard for FAPE is relatively low compared to "best" or "maximum," but the level of benefit can make either a semantic or a significant difference in the outcome of the many FAPE cases that are either directly substantive or indirectly so via the two-step approach for procedural violations. |
| **3. The Every Student Succeeds Act (ESSA), which replaces the NCLB Act, introduced some major changes in relation to students with disabilities.** | |
| • ESSA eliminates the highly qualified requirement for teachers, including special education teachers. | • Congress amended the IDEA to do the same, with the effective date September 2017 except to the extent that states arrange an earlier effective date. |
| • Eliminating the additional 2%, ESSA limits the cap to 1% for Alternate Assessments Aligned with Alternate Academic Achievement Standards (AA-AAAS) but changes the cap to a state, not local district basis. | • IEP teams under the IDEA still retain the authority under the IDEA to grant AA-AAAS without limit, but the consequences in terms of ESSA accountability remains cap based. The ESSA regulations are still pending but presumably will make the implementation of the cap clearer for school districts. |
| • The ESSA allows students in the AA-AAS category to count in the graduation cohort if they receive a state-designated alternate diploma that is (a) standards-based and (b) aligned to the requirements for a regular high school diploma. | • Again, the pending ESSA regulations are expected to fill in the details for applying this revision to the graduation measure as part of the accountability structure. |