SPECIAL EDUCATION LEGAL ALERT

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This month's update concerns issues that were subject to recent relevant court decisions and are of general significance: (a) racial and ethnic disproportionality in discipline, and (b) eligibility of students with dyslexia under the IDEA classification of specific learning disabilities (SLD). Materials relating to both of these issues are available on my website **perryzirkel.com**.

In *Council of Parent Attorneys and Advocates v. DeVos* (2019), the federal district court in D.C. faced a challenge to a July 2018 Department of Education regulation that postponed for two years the effective date of a regulation under the previous Administration concerning "significant disproportionality" of minority students in school disciplinary actions, including suspensions and expulsions. More specifically, in response to a GAO recommendation for an improved approach for implementing this prohibition in the 2004 IDEA amendments, which included a 15% allocation of IDEA funding to rectify its violation, the December 2016 regulation required each state to develop a uniform methodology for determining significant disproportionality based on "risk ratios" for analyzing disparities for seven racial and ethnic groups. The July 2018 regulation postponed the compliance date for two years, citing concerns about incentivizing "de facto quotas." The court issued its decision on March 7, 2019.

In response to the Department's initial defense, which was a challenge to COPAA qualifying for plaintiff status, the court concluded that the resulting reduction in access to information about districts engaged in disproportionate discipline sufficed for both organizational and associational standing.	The court did a rather thorough analysis of the applicable precedents, which especially but not exclusively in the D.C. Circuit are rather broad for this threshold litigation requirement as applied to informational access that is publicly required and that is germane to the mission and functioning of advocacy organizations.
Next, examining the merits of the challenge, the court ruled that the Department violated the federal Administrative Procedures Act in two ways: (1) failing to provide a reasoned explanation for the delaying regulation; and (2) failing to consider the costs of the delay, rendering this regulation arbitrary and capricious.	The court's reasoning for the respective conclusions was: (1) the 2016 regulation had already considered and addressed the issue of racial quotas, and the Department's "concerns" were superficial and speculative, and (2) the Department failed to adequately account for the reliance cost of the states and the delay cost for children, parents, and society.
After considering the various relevant factors, including the seriousness of the deficiencies, with due weight to the 18 months that states already had to prepare for the revised methodology, the court decided that the appropriate remedy was to vacate the delaying regulation rather than to remand the matter to the Department for further explanation.	It is not yet clear what the Administration will do in response to this unqualified nullification of its attempted change in the previous administration's strengthened steps to implement the disproportionate discipline prohibition in IDEA 2004. One option is an appeal to the D.C. Circuit, with a possible subsequent attempt for Supreme Court review. However, the issue depends in part on current political priorities.
The bottom line appears to have a dual message: (1) the Trump Administration has hit another bump in the road in the Education Department's rather consistent pattern of reversing the previous administration's direction; and (2) states and districts should be prepared to address the requirement for more rigorous enforcement of the significant disproportionality prohibition for disciplining minority students.	

Two recent lower federal court decisions in Texas illustrate the problems of determining eligibility under the IDEA for students with dyslexia, particularly against the overlapping backdrop of the increasing number of state laws specific to dyslexia and the widened scope of Section 504 in the wake of the ADA amendments of 2008.	
In *William V. v. Copperas Cove Independent School District*, issued in December 2018, the basic facts were: (a) in grade 4, the district identified the student and provided him with dyslexia services in in accordance with the state's dyslexia law, (b) in grade 5, the district conducted an IDEA evaluation that determined that he was not eligible as SLD. After filing for and losing a due process hearing, the parents appealed to federal court. The court concluded that (1) the district violated the IDEA by determining that the student did not qualify as SLD after diagnosing him with dyslexia, but (2) this violation was procedural and did not result in educational loss to the child, because the district continued to provide him with the same services after the evaluation. Thus, the court granted summary judgment to the district.	This decision is factually blurry because (a) the student already had an IEP for speech impairment (SI), and (b) the district continued to provide the IEP to the student despite the evaluation's conclusion that he was no longer eligible as SI. However, the primary problem with the decision is the court's confusion with dyslexia as one of the qualifying conditions for the IDEA classification of SLD without considering the second essential element for eligibility for all of the classifications—the need for special education. Instead, however, regarding eligibility as merely procedural (which is a clearly questionable characterization), the court effectively added a second negative, by seeming to conclude that the dyslexia services that the student continued to receive amounted to special education. The two negatives made for a positive for the district. The parent has appealed the decision, and the Fifth Circuit will hopefully provide a clearer and more completely correct analysis.
In *T.W. v. Leander Independent School District*, issued in March 2019, the basic facts were: (a) in grade 8, upon his enrollment in the district, the student received dyslexia services and accommodations under a 504 plan, (b) he earned a GPA of approximately 3.5 in grades 9–12 and performed generally well on the state's proficiency tests, and (c) in response to his parent's request in February of his senior year for an evaluation, the district concluded that he did not qualify under the IDEA because he did not need special education.	This decision was also blurry to the extent that (a) the students was a star athlete who claimed that he received special treatment from teachers and coaches, including inflated grades and special help, (b) the court did not focus on SLD or any other classification, and (c) the IDEA issue here was a conflation of child find and eligibility. Nevertheless, in contrast to the other recent Texas case, this court addressed what is often the key determinant for qualifying under the IDEA—the need for special education. In doing so, however, the court did not provide a nuanced, much less clear, analysis of this essential criterion.
The bottom line is that the typical state dyslexia law, Section 504, and the IDEA represent successively smaller concentric circles with fuzzy separating lines. First but incidental to these two cases, dyslexia does not automatically and necessarily suffice for a 504 plan. Second and specific to the focus here, the diagnosis of dyslexia should not equate to IDEA eligibility w/o determination of the need prong. Ultimately, both at a practical and legal level, the dividing line between (a) current practices in general education, including differentiated instruction, RTI/MTSS, and at least some dyslexia services, and (b) the IDEA eligibility criterion of special education need inevitably amounts to a judgment call that—among evaluators and adjudicators—is not entirely clear, consistent, and devoid of the circumstances.	