

# Legal Update

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FEDERAL LAWS, REGULATIONS, COURT DECISIONS, AND AGENCY REGULATIONS/GUIDANCE

JULIA BAUER & DEREK TOWSTER



# Agenda

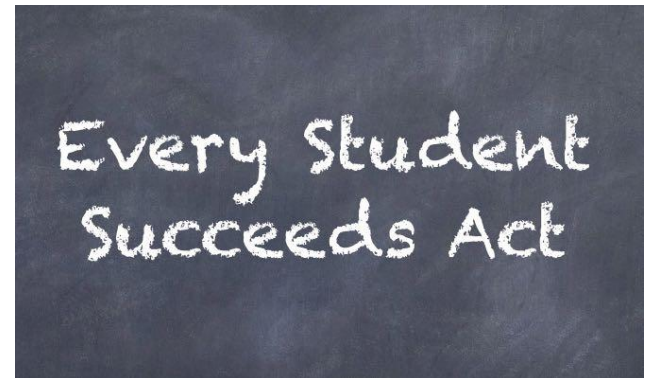
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- **Federal Statutes**
  - McKinney-Vento
  - ESSA
- **Federal Courts**
  - U.S. Supreme Court
  - 6<sup>th</sup> Circuit (covers Ohio)
    - Transgender
- **Break**
- **Federal Agencies**
  - 504 v. IDEA
  - Dear Colleague Letters/Recent Guidance
  - FERPA 201/FPCO Letters
- **New Developments at the State Level**

# Federal Statutes: McKinney-Vento

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- Provide stable, high quality education to students experiencing homelessness.
- Preference for “school of origin”.
- Requires transportation to school of origin.
- Removes barriers to enrollment.
- Local liaison responsibilities.
- ~~Amended~~ as part of Every Student Succeeds Act (ESSA).



# McKinney-Vento: Homelessness

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- Defining homelessness:
  - Lacking a fixed, regular, and adequate nighttime residence.
- Examples:
  - Sharing house due to economic hardship (doubled-up).
  - Transitional shelters.
  - Cars, campgrounds, hotels, substandard housing.
  - Migratory children (e.g. farm workers).
  - ~~“those awaiting foster children”.~~

Primary Nighttime Residence of Homeless Children and Youth	Number of homeless children/youth excluding preschoolers (total for LEAs with and without sub grants)
Shelters	5951
Doubled-up	12326
Unsheltered (e.g., cars, parks, campgrounds)	209
Hotels/Motels	627

# McKinney-Vento: School Selection

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- Defining “School of Origin”:
  - School that child attended when permanently housed
  - School where child was last enrolled
  - **Feeder school & designated school of matriculation**
  - **Preschool**
  - Could be a community school or non-public school
- Defining “Local Area School”:
  - The public school that non-homeless students would be eligible to attend if residing in the same area in which the homeless student is actually living.

# McKinney-Vento: School Selection

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- Student-centered (“best interest” determination).
  - ~~To extent feasible, keep in school of origin (“best interest” determination).~~
  - **Strong presumption that remaining in the school of origin is in the student’s best interest.**
  - Consider: impact of mobility on achievement, education, health, and safety.
- Priority to parent’s/guardian’s request.
- Decide *not* school of origin → written statement to parents, including:
  - School selection;
  - Best interest-based explanation for placement;
  - Parent’s/guardian’s right to appeal; and
  - Student’s right to attend the school of parent’s/guardian’s choosing during appeal.

# McKinney-Vento: Enrollment

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- Immediately enroll in selected school.
  - Despite guardianship issues
  - Despite a lack of documentation (e.g., immunization records, proof of residency, etc.)
- Consider related services.
  - Transportation
  - Suspect disability?
  - School nutrition program
- Enrollment can be appealed to ODE McKinney-Vento Coordinator.
  - District should keep written notes documenting conversations with family in case of a dispute.

# McKinney-Vento: Transportation

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- Provide transportation from residence to “school of origin,” at request of parent/guardian.
- Costs to be apportioned between the district of residence and the district of origin by agreement or equally.
- Transportation should begin promptly.
- Losing homelessness status mid-year → finish school year at school of origin.
  - Must continue providing transportation.





# McKinney-Vento: Local Liaison

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Point person between homeless students families, district staff, and service providers responsible for:

- Identifying students experiencing homeless **(including preschoolers)**.
- Enrolling in school, informing about social programs **(health care, dental, mental health, substance abuse, housing, etc.)**.
- Obtaining immunizations and/or medical records.
- Informing parents about transportation services; coordinating services.
- Mediating enrollment disputes.
- Providing public notice of educational rights **(schools, shelters, public libraries, soups kitchens, etc.)**.
- Participate in professional development.
- Identifying students eligible for IDEA services.
- **Resources for transition to postsecondary education.**

# McKinney-Vento: Summary

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- Changes to “school of origin” definition.
- Student-centered “best interest” determination.
- Mandated local liaison with more clearly defined responsibilities.

# Every Student Succeeds Act




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- Federal government → State government.
  - Standards, accountability, and assessments
- States: Align standards with college and career skills.
- High quality assessments to compare schools.
  - Academic proficiency
  - Graduation rates
  - Growth
- Identify and support low performing schools.

# ESSA: Waiting on ODE

## Every Student Succeeds Act (ESSA)

### FULL DRAFT PLAN AND TECHNICAL SUBMISSION OF OHIO'S DRAFT EVERY STUDENT SUCCEEDS ACT STATE PLAN

The Ohio Department of Education is proud to release the [draft state plan](#)  and the [technical submission of Ohio's Every Student Succeeds Act state plan](#)  with [appendices](#) . **There is still time for you to weigh in.** You are invited to [review and provide comment on the draft state plan and technical submission](#) through **March 6**. The Department will continue to incorporate input throughout the development of the final Ohio plan.

Ohio's plan takes a detailed look at the state's education system and makes important improvements based on the feedback of our stakeholders and requirements in the law.

# ESSA: State Plan Highlights

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## ESSA assessment flexibility

- Subject area testing grades 3-8, once in high school
- Reporting by subgroups (smaller subgroups than before)
- Computer-adaptive testing
- 95% of students participate in state testing

## Maintain school and district report cards

- Including Performance Index and Indicators Met
- Revise Gap Closing metric

## Low performing (bottom 5%, graduation rate <67%, gaps in subgroups)

- Priority, Focus, Watch

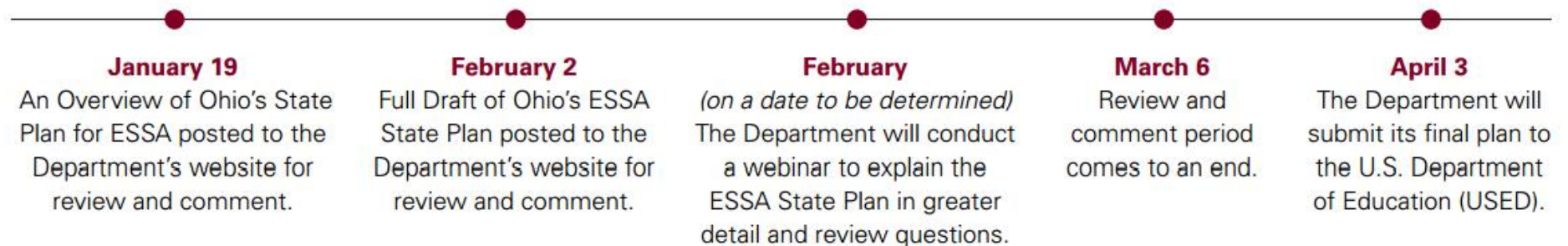
## Locally driven improvement planning

# ESSA: Waiting on ODE

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## Submitting the Final Plan

The Department will adhere to the following timeline for submitting the final plan:



USED has **four months** to approve or submit suggestions for Ohio's ESSA State Plan.

# Questions?

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# Federal Courts

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- U.S. Supreme Court
- 6<sup>th</sup> Circuit (covers Ohio)





# Court System Background

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## ○ **State Court**

- Organized by County/Municipality → Districts (multiple counties) → Supreme Court of Ohio
- General jurisdiction (almost everything—state and federal law)
- Elected Judges

## ○ **Federal Court**

- Districts (sub-states) → Circuits (groups of states) → Supreme Court of the US
- Limited jurisdiction (federal law and people from different states +\$75,000)
- Nominated by President and appointed by Senate
- Life tenure



# U.S. Supreme Court Cases

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- *Endrew F. v. Douglas County School District*
- *Fry v. Napoleon Community Schools*
- *G.G. v. Gloucester County School Board*

# *Andrew F. v. Douglas County Schl. Dist.*

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- Facts:
  - Andrew attended public school from K-4<sup>th</sup> grade, made some gains, but had significant behavioral issues.
  - At the start of 5<sup>th</sup> grade, his parents withdrew him, enrolled him in a private school for autistic students and demanded tuition and transportation reimbursement.
  - Lawsuit: School district failed to provide/offer a free appropriate public education (FAPE) and therefore owed tuition reimbursement.
- Issue: What is the level of benefit school districts must confer on students with disabilities to provide FAPE as required by IDEA?
- Rowley standard: “reasonably calculated to receive educational benefits.”

# FAPE?

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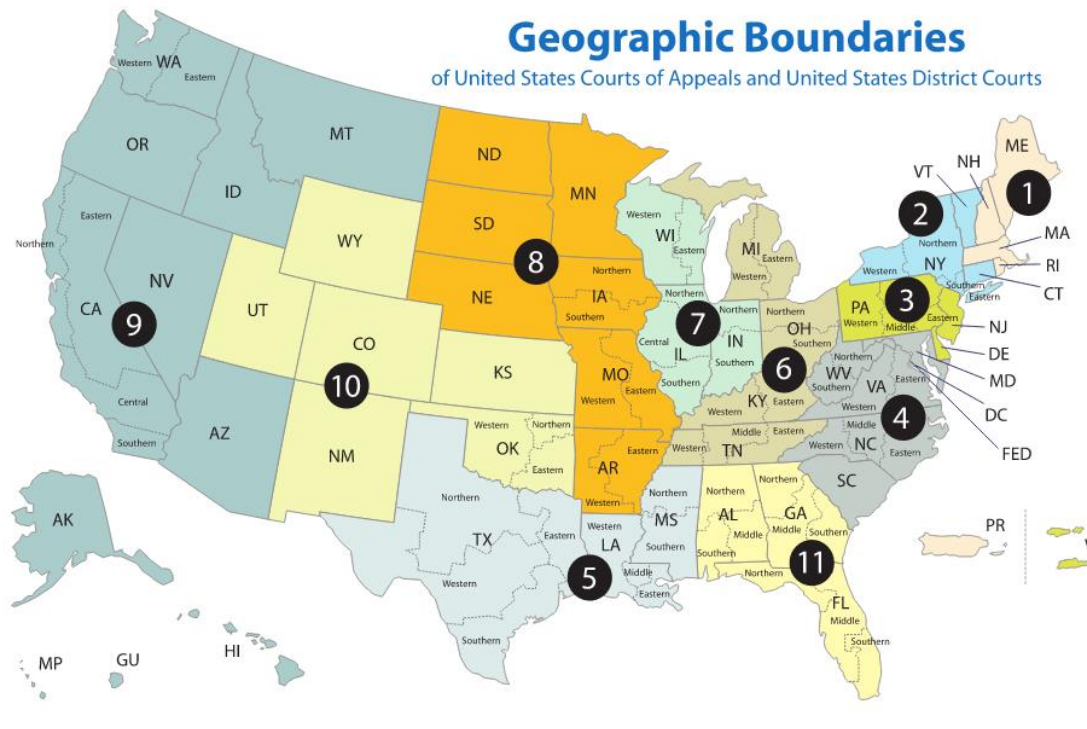
- 2<sup>nd</sup> Grade: 6 goals; 26 objectives. Progress only reported for one reporting period, conclusory statements about progress.
- 3<sup>rd</sup> Grade: 6 goals; 23 objectives. Parent maintains goals were merely carried over from prior year with little or no increase in difficulty. Progress reported for only a few objectives. Parents assert 21 of the 26 goals from 2<sup>nd</sup> grade were discontinued or abandoned due to lack of progress.
- 4<sup>th</sup> Grade: 7 goals; 23 objectives. Same general goals with addition of self-advocacy goal. Included progress reporting in all four quarters for all but two goals. Progress noted at conclusory levels.
- 5<sup>th</sup> Grade: Objectives not completed from 4<sup>th</sup> grade carried over; revisions to self-advocacy and social interaction goals. Was modified after withdrawal with input from private school.
- Teacher and special education director admitted progress reporting was conclusory and did not convey data, but asserted that it was adequate.

# FAPE Standards

- 10<sup>th</sup> Circuit: “more than *de minimis*” (more than trivial); “some educational benefit”.

6<sup>th</sup> Circuit (Ohio): “meaningful benefit”

- *Deal v. Hamilton Ct. Bd. Of Ed.*, 392 F.3d 840 (6<sup>th</sup> Cir. 2004)



# SCOTUS: *Andrew F.*

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- District Court: “While some of the objectives carried over from year to year, and some are only slightly modified, it is clear that the expectation in the objectives are increased over time.”
- District Court: “Petitioner made progress towards his academic and functional goals in his IEPs and although this does not mean that he achieved every objective, or that he made progress on every goal, the evidence shows that he received educational benefit while enrolled in the District... Parents have failed to show that the District’s IEPs—both past and proposed in the future—were not reasonably calculated to provide him with some educational benefit.”
- Court of Appeals: “This is without question a close case, but we find there are sufficient indications of Drew’s past progress to find the IEP rejected by the parents was substantively adequate under our prevailing standard.”

# SCOTUS: *Andrew F.*

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C.J. John G. Roberts, Jr.:

- It says "some benefit," but you're reading it as saying "*some* benefit," and the other side is reading it as saying "some *benefit*," and you know that makes a difference.
- And I -- one reason I think that it -- it's problematic for you is because *Rowley* just doesn't say "some benefit." It tells you what it is. *And it's enough benefit to keep track with grade progress.* (emphasis added)
- And if that's what the standard is, that's certainly more than -- you know, slightly more than *de minimis*. And, now, obviously, you can't take that actual substantive standard and apply it in a case such as this, *but it does seem to indicate that there is a substantive standard and it's not just some benefit.* (emphasis added).
- <https://www.oyez.org/cases/2016/15-827>
  - 33:29

# SCOTUS: *Endrew F.*

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- J. Alito:
  - “blizzard of words”
- Expectation:
  - More “bite” to FAPE standard?
- Decision likely issued in June.



# *Fry v. Napoleon Community Schools*

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# *Fry v. Napoleon Community Schools*

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- Facts:
  - Student wanted to bring “Wonder” the goldendoodle to school as a service dog.
  - School refused (student then attended different school).
  - Parents filed complaint with OCR; OCR found District to have violated the ADA.
  - Lawsuit alleged District violated ADA and Sec. 504, seeks damages.
- Issue: Does plaintiff have to exhaust administrative proceedings under IDEA before filing suit under the ADA and Sec. 504?
- 20 U.S.C. Sec. 1415(l): Before filing a lawsuit seeking relief that is available under the IDEA, must exhaust administrative remedies.

# Administrative Remedies

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- Complaint to ODE
- Complaint to OCR
- Due Process Complaint
- Lawsuit

# Background (Ohio) –Due Process Complaints

## **Ohio Department of Education**

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- Heard by an impartial hearing officer.
- Complaint filed with ODE and district.
- Very short timeframes.
- District must pay for hearing officer and transcript.
- Decision may be appealed to state level review officer and then to state or federal court.
- Outcome published on [edresourcesohio.org](http://edresourcesohio.org).

## **Section 504**

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- Heard by an impartial hearing officer.
- Process is pursuant to board policy.
- Broader range of damages may be available under Section 504.
- Appeals may be made.

# SCOTUS: *Fry*

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- Exhaustion required?
  - No: Seeking damages, which is not available under IDEA, so no exhaustion is required (can sue school instead going through IDEA process).
  - Yes: The dog could arguably be available under the IDEA/IEP, meaning exhaustion should be required (have to use complaint process).
- “[I]t would be fairly easy by how you write the word “damages” in your complaint to have judges deciding IEPs without the preliminary negotiation and views of the school board, which would seriously undercut and hurt the -- this statute, which is designed to get the educational plan. The trouble with deciding it your way is, I think, exactly what Justice Kagan said: Almost anything can be written into an educational plan having to do with the child's day at school.” – J. Breyer
- Worry → Will parents simply bypass process and sue districts during IEP process?

# SCOTUS: *Fry*

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- This is the “perfect” case for this issue:
  - Damages under the ADA make sense in this case as a remedy.
  - Supreme Court is worried about all the other cases.
- Decision expected in June.

# Service Dogs

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- The ADA generally requires a school district to modify its policies, practices or procedures to permit a student with a disability to use a service animal. (ADA Amendments in 2011).
- The Individuals with Disabilities Education Improvement Act (IDEIA) or Section 504 of the Rehabilitation Act of 1973 (504) also may require school districts to allow a child to bring a service animal to school as part of a free appropriate public education (FAPE). Whether or not a child needs a particular accommodation is an IEP team/Section 504 team decision.
- **Service animal defined:** Any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. Emotional support animals do not qualify as service animals.

# *G.G. v. Gloucester Co. Sch. Bd.*

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## ○ **Facts:**

- Dept. of Ed. Issued guidance regarding transgender students in 2014 stating discrimination on gender identity is sex discrimination under Title IX.
- A Virginia school permitted a transgender boy to use the boys' restroom at his high school for seven weeks.
- Later, the school board passed a policy requiring students to use the restroom associated with their biological sex.
- Student filed a lawsuit alleging discrimination under Title IX and the Equal Protection Clause.
- Trial court dismissed the Student's Title IX claim; student appealed and Court of Appeals sided with student. The School Board appealed to the Supreme Court.

## ○ **Issue:**

- Does Dept. of Ed. guidance receive deference? Does Dept. of Ed. Interpretation receive deference?
- Title IX reach this conclusion anyway?



# Title IX & Equal Protection Clause

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- **Title IX:** “[N]o person . . . shall, on the basis of sex . . . be subjected to discrimination under any education program.”
  - Case law extends this to “gender non-conformity,” such as boys with long hair; effeminate males.
  - But, regulations permit separate facilities based on sex.
- **Questions and Answers on Title IX (2014):** “Under Title IX, a recipient generally must treat transgender students consistent with their gender identity in all aspects of the planning, implementation, enrollment, operation, and evaluation of single-sex classes.”
- **Equal Protection Clause:** Part of the Fourteenth Amendment to the U.S. Constitution that no person shall be denied the equal protection of the laws.

# SCOTUS: *G.G.*

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- Court of Appeals held that pursuant to the OCR interpretation of the Title IX regulations, Title IX requires schools to provide transgender students access to restrooms congruent with their gender identity.
- Status: The Supreme Court granted an emergency stay to keep the student from using the boys' restroom.
- Oral Argument: March 28, 2017
- Expectation:
  - Transgender, Title IX?
  - Deference to agency interpretation of regulations is ultimately a much bigger issue.

# DOJ & OCR *Dear Colleague Letter*

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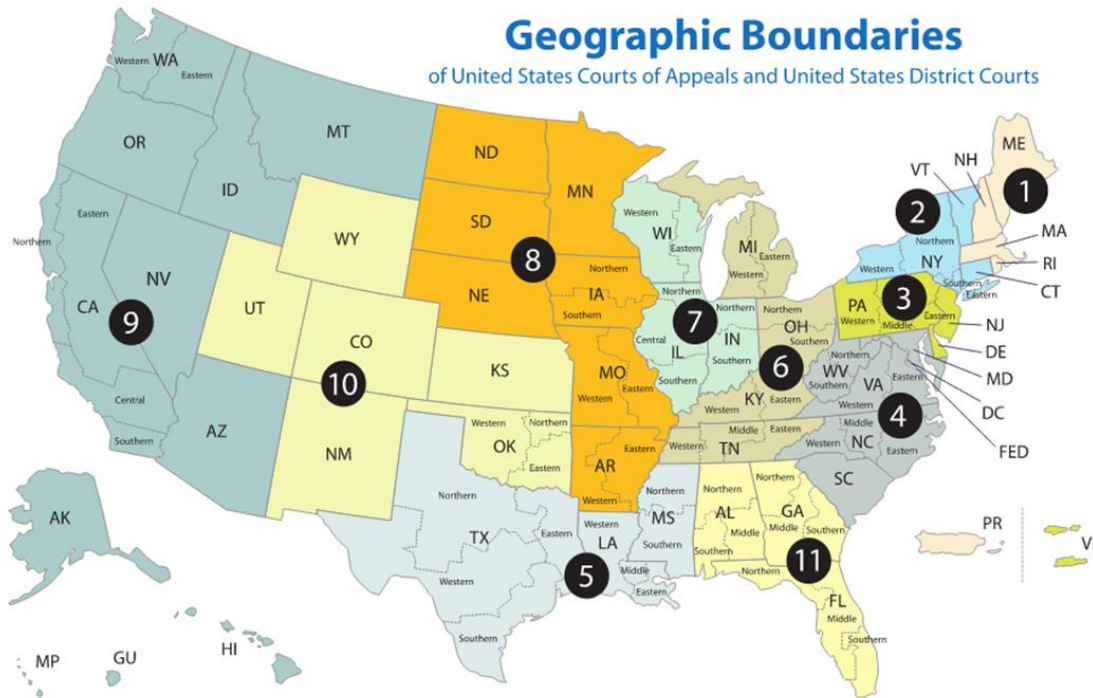
- U.S. Dept. of Education guidance Since *G.G.* litigation started (May 13, 2016).
  - The student's gender identity should be considered the student's sex for purposes of Title IX and its regulations.
  - "This means that a school must not treat a transgender student differently from the way it treats other students of the same gender identity."
  - "A school may provide separate facilities on the basis of sex, but must allow transgender students access to such facilities consistent with their gender identity."
- Guidance mandates:
  - Treat students consistent with gender identity.
  - No medical diagnosis, treatment required.
  - Keep information related to transgender status confidential.
  - Use name and pronouns consistent with student's gender identity.
  - Revise records consistent with FERPA.

# Quick Look at Transgender Right Now

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- Guidance enjoined
  - Department is prohibited from enforcing the guidance.
  - But, can interpret Title IX this way anyway?
  - Unclear how US DOE/OCR will handle these complaints rights now.
- Ohio case – *Highland Local*

# 6<sup>th</sup> Circuit Cases



## 6<sup>th</sup> Circuit Cases

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- *Highland Local S.D. v. U.S. Department of Ed.* (S.D. Ohio 2016).
- *Gibson v. Forest Hills, Sixth Circuit, July 15, 2016.*
- *Gohl v. Livonia Public Schools, et. al., Sixth Circuit, September 8, 2016.*

## *Highland Local v. U.S. Dept. of Ed.*

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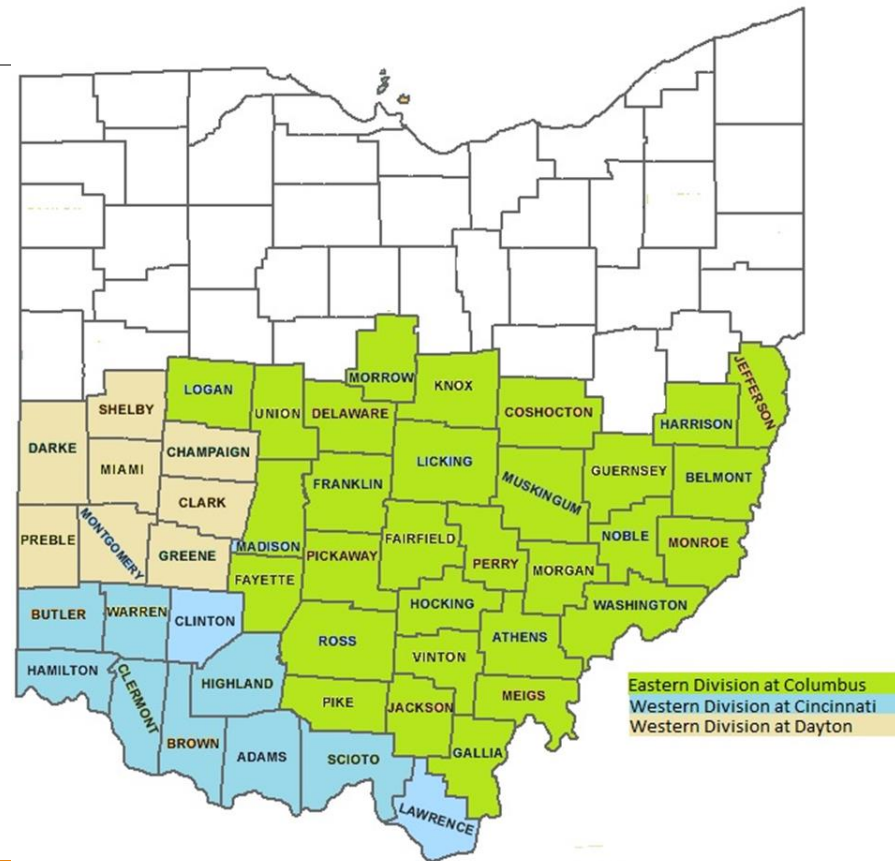
- Highland would not permit a transgender girl to use the girls' restroom.
- Highland required her to use a restroom in the teachers' lounge. OCR found that this violated Title IX.
- Highland asked the court to enjoin OCR and DOJ from enforcing Title IX.
- OCR issued a letter of impending enforcement action.
- The student intervened and asked the court to order Highland to permit her to use the girls' restroom and otherwise treat her as a girl.

## *Highland Local v. U.S. Dept. of Ed.*

- The district court ruled against the district and for the student.
- The court's order was narrowly tailored to permit the student to use the girls' restroom and does not implicate locker rooms or overnight accommodations at the middle- and high-school levels.
- The court found the student was likely to prevail on her Title IX and the Equal Protection Clause claims.
- Board appealed and requested a stay pending appeal. The 6<sup>th</sup> Cir. denied the stay.
- 6<sup>th</sup> Cir. Court of Appeals denying stay: "Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination."



# *Highland Local v. U.S. Dept. of Ed.*



# Transgender: What's Next?

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- President-elect Trump
  - Clarify or rescind the Dear Colleague Letter?
- Supreme Court decision in G.G.
  - Oral arguments March 28<sup>th</sup>
- Legislative action
  - Federal, state or local action?
- Local court action
  - Coming to a court near you?

# Transgender: Strategies

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- Make informed decisions.
  - Stay up-to-date.
  - Base decisions on facts not assumptions.
- Weigh risks and options.
  - Risk of OCR complaint and loss of federal funding.
  - Possibility of litigation. Advocacy groups are on “both” sides.
  - Media attention.

# Transgender: Strategies

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- Know your board's anti-discrimination policies and decide whether you want to amend them.
  - Board desire and/or pressure from the community to be "proactive."
  - Decision to be flexible under the law.
- Make practical, common sense decisions.
- Many districts use a case by case approach to determine access to school facilities, services and programs.

# Transgender: Strategies

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- When the parent of a transgender student, or a transgender student, identifies the student's status to the district, the building administrator meets with the parent, student, and any other individuals with relevant information (e.g., guidance counselor, school psychologist, athletic director).
- The team considers the following:
  - Evidence regarding whether the gender identity is consistently and uniformly held;
  - Procedures to be put in place to ensure the student has equal access to, and an equal opportunity to participate in, the District's education programs;
  - Student safety and comfort; and
  - Safeguards to protect student privacy and minimize stigmatization of the student.

# Transgender: Strategies

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- The meeting is an opportunity for the administrator, the student and the student's parents to discuss the student's circumstances and develop a plan to support the student.
- The meeting will give the administration a process to cite to address a common question from opponents: "So, a student can just claim to be a boy one day and a girl the next?" Having a standard process for decision-making will help the administration.

## *Gibson v. Forest Hills*, Sixth Circuit, July 15, 2016

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- Parents of Chloe, 24, alleged various procedural and substantive violations of the IDEA with regard to their daughter.
- Chloe – development delay, seizure disorder,  $43 < IQ < 57$ .
- School district focused on a functional/life skills curriculum and a transition plan to supportive employment/adult programming.
- Parents wanted a more academically rigorous curriculum and a transition plan leading to competitive employment.

# *Forest Hills*—Additional Facts

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- Parents filed for due process challenging various aspects of the IEPs.
- Parties had a 26 day due process hearing.
- School district prevailed on most issues; Impartial Hearing Officer (IHO) found that Forest Hills denied Chloe a FAPE when it failed to provide her with adequate reading and math goals and programming.
- IHO ordered 480 hours of compensatory math and reading education.
- IHO declined to award attorneys' fees; Parents appealed.



# *Forest Hills*—History

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- State level review officer (SLRO) affirmed the IHO.
- Parents appealed.
- District court found that Forest Hills had failed to comply with three of the IDEA's transition-related procedural requirements, and concluded these failures denied Chloe a FAPE.
- Parents asked for \$800,000 in attorneys' fees.
- District court awarded \$327,000 in attorneys' fees.
- Forest Hills appealed.

# *Forest Hills – Affirmed*

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- Sixth Circuit found the following procedural errors:
  - Forest Hills never invited Chloe to any of her IEP team meetings, including meetings where transition was discussed.
  - Forest Hills did not take adequate steps to ensure that the child's preferences and interests were considered.
  - Forest Hills did not provide measurable postsecondary goals based on age-appropriate assessments.
- Sixth Circuit found the second two violations caused substantive harm to Chloe as she “lost educational opportunity.”
- Sixth Circuit remanded the fee award to the district court to explain why it reached the amount it did.

# Practical Transition Guidance

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- Transition plans matter and are part of FAPE.
- Follow the law with regard to transition.
  - “Transition services” means a coordinated set of activities for a child with a disability that... is based on the child’s needs, taking into account the child’s strengths, preferences, and interests. (O.A.C. 3301-51-01(B)(65)).
  - The IEP must include appropriate measurable postsecondary goals based upon age-appropriate transition assessments. (O.A.C. 3301-51-07(H)(2)).
  - The school district must invite a child with a disability to attend the child’s IEP team meeting if a purpose of the meeting will be the consideration of the postsecondary goals for the child and the transition services needed to assist the child in reaching those goals. (O.A.C. 3301-51-07(I)(2)(a)).
  - If the child does not attend the IEP meeting, the school district must take other steps to ensure the child’s preferences and interests are considered. (O.A.C. 3301-51-07(I)(2)(b)).

## *Gohl v. Livonia Public Schools, et. al.*

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- Teacher is alleged to have put her hand on the head and face of a preschooler with hydrocephalus and yelled at him to redirect him after throwing a toy.
- Teacher was alleged to be harsh with students, holding chins and faces tightly, yelling in their faces, using too much force, rough treatment.
- Parents sued alleging constitutional violations and violation of Section 504 and the ADA.

## *Gohl v. Livonia Public Schools, et. al.*

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- Courts look to four questions with excessive force cases in schools to determine whether conduct is so “egregious” to “shock the conscience” and rise to the level of a constitutional violation:
  1. Whether the teacher had a pedagogical justification for using force;
  2. Whether the force was excessive in light of the teacher’s goal;
  3. Whether the force was applied in a good faith effort to maintain/restore discipline; and
  4. Whether the child suffered a serious injury.
- District Court and 6<sup>th</sup> Circuit found in favor of the school district/teacher.

# *Gohl* – Lessons Learned

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- Make sure parents are aware of the devices, strategies, restraints, etc., used with their children.
- Watch for special education teachers who are burned-out, short-tempered, intolerant of their chosen population of student.
- Take every allegation, report from fellow educators seriously and investigate.
- Document all incidents and be specific about what precipitated the event, why there was danger to the student/staff/other students, the length of time, the type of hold, whether the child was injured in the process.
- Make sure anyone who may need to engage in emergency physical interventions is appropriately licensed, trained and certified.

# Questions?

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# Break!

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# Federal Agencies and Regulations

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- 504 & IDEA
- New Dear Colleague Letters/Recent Guidance
- FERPA 201/FPCO Letters



# IDEA v. 504

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# IDEA v. 504: Who is covered?

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## IDEA

- Certain students



## 504

- ” Certain students
- ” Employees
- ” Parents
- ” Extracurricular activities
- ” Facilities



# IDEA v. 504: Funding

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## IDEA (underfunded mandate)

- Provides additional funding for eligible students.

## 504 (unfunded mandate)

“ Does not provide funding



# IDEA v. 504: Eligibility

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## IDEA

- Specifically identified students who need special education and related services.
- Students who meet criteria and need specially designed instruction/special education
- Form for eligibility determination request yes boxes checked:
  1. Child meets state criteria for having disability
  2. Child demonstrates an educational need that requires specially designed instruction

## 504

- Has a physical or mental impairment that substantially limits a major life activity (such as learning).
- Case-by-case basis
- Need not “significantly or severely restrict” performance of a major life activity.
- Record of impairment.
- Regarded as having such impairment.

# IDEA v. 504: FAPE

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## IDEA

- Special education and related services
- “Appropriate education” means a program designed to provide meaningful “education benefit.”  
Related services are to be provided if need to benefit from education.

## 504

- Regular or special education and related aids and services, accommodations, and/or modifications
- “Appropriate” means an education that is designed to meet the needs of students as adequately as needs of non-disabled students are met. Related services may be necessary to meet this goal.

# IDEA v. 504: Documentation

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## IDEA

- IEP—required form

## 504

- None required, but suggested.
- Practically speaking, need a document.



# IDEA v. 504: Evaluation

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## IDEA

- Must be conducted at least every three years.
- Comprehensive multi-factored evaluation on mandatory state forms.

### \*Advice:

- Use the ETR planning form.
- When in doubt, evaluate an area.

## 504

- Evaluations to be done “periodically” and before any significant change in placement.
  - Evaluation documentation subject to local decision.
  - Less onerous standard than under IDEA.
- Evaluation Procedures
  - Materials have been validated for the specific purpose and administered by trained personnel.
  - Materials include those tailored to assess specific areas of educational need (not just IQ).
  - Materials selected and administered so as best to ensure that the test results accurately reflect the student's aptitude or achievement level. 34 C.F.R. 104.35.



# IDEA v. 504: Discipline

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## IDEA

- A manifestation determination is required. Can never cease educational services

## 504

- A manifestation determination is required.
- Can cease services as would for non-disabled students.

# IDEA v. 504: Transition Services

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## IDEA

- Mandated.

## 504

“ Not required.



# IDEA v. 504: Procedural Safeguards

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## ○ IDEA

- State determines.
- Stay-put requirement.
- Parents have right to independent evaluation at public expense.

## 504

- School district determines.
- No stay-put requirement (but see evaluation requirement and OCR decisions).
- No right to independent evaluation at public expense.

# IDEA v. 504: Enforcement

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## IDEA

- OSEP/State.
  - IDEA Funds only.
- Due Process.
- Court.

## 504

- OCR.
  - All federal funds.
- Due Process.
- Court.

# Dear Colleague Letters and Resources

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- [Dear Colleague Letter \(Restraint and Seclusion\)](#)
- [Dear Colleague Letter \(Community schools\)](#)
- [Parent and Educator Resource Guide to Sec. 504](#)



- (remember G.G. and deference issues)

# Dear Colleague Letter

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- Restraint
  - Use of device or equipment to restrict a student's movement unless provided as a related service (mechanical).
  - Personal restriction that immobilizes student's movement (physical).
- Seclusion
  - Involuntary confinement of a student alone in a room.

# Dear Colleague Letter

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- Restraint and seclusion may result in discrimination in violation of Sec. 504.
- Sec. 504 prohibits discrimination against individuals with disabilities.
- Students served by IDEA → 12% population, but 67% of R&S.
- Discrimination occurs when:
  - Unnecessarily treating students with disabilities different from other students.
  - Implementing policies/practices that have a discriminating effect.
  - Denying FAPE.

# Dear Colleague Letter

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## Evaluation

- Behavioral problems (particularly those leading to a justified restraint) should trigger a question as to whether the District suspects a disability.
- Behavioral challenges could be reason to suspect a disability, even if the student is performing well academically.
- Behaviors outside the expected range for his/her age (immature and overly-mature) could be cause to suspect a disability.



# Dear Colleague Letter

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## Example 1

Student A, an 8<sup>th</sup> grader, has a 504 Plan due to a panic disorder – primarily assistance with medication administration. Student B is a non-disabled peer. One day Students A and B run around with scissors. Eventually, they respond to the teacher's request to put the scissors away and sit down. Due to Student A's disability, the teacher called an SRO to restrain Student A, who is still sitting, and remove him to the principal's office. Both Students A and B were prohibited from attending certain extra-curricular activities as discipline.

Result: Unlawful different treatment. Teacher treated Student A differently than Student B based on teacher's generalized knowledge of disability.

Wrinkle: If SRO made decision to restrain, then still unlawful.

# Dear Colleague Letter

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## Example 2

Student C has an IEP. Positive supports and interventions are in place for when student gets frustrated and tears out book pages and/or verbally threatens staff. The IEP permits the use of seclusion when Student C poses a danger to himself or others. Student C exhibits new behavior—running around classroom. Although Teacher (and aide) do not believe his running poses a danger, they believe that seclusion is the quickest method to get him back on track for the day so he can work toward his academic goals. So, they send Student C to seclusion room to calm down.

Result: Should not have sent Student C to seclusion room. If Teacher truly believed that seclusion is the best response to the new behavior, she should have asked to reconvene the IEP team.

# Dear Colleague Letter

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## Example 3

Student D has an IEP providing small group education in the resource room. Despite teacher's implementation of IEP to transition student into different lesson, Student becomes very agitated and starts banging head against wall. Teacher eventually has to restrain student using standing restraint technique, for which she has received proper training. When Student D no longer present an imminent risk of seriously harming himself the teacher discontinues restraint and immediately takes him to the school nurse. The teacher then documents the use of restraint in accordance with school policy. Within ten school days, Student's IEP team meets to discuss circumstances of behavior and whether the current IEP strategies are adequate or should be augmented, whether another evaluation is warranted, and what sort of alternative, appropriate behaviors could be taught to Student D.

Result: No violation. Teacher followed the IEP when changing lessons and was properly restrained in response to an emergency. Restraint was discontinued once imminent danger passed. IEP team properly reconvened to review and examine the current PBIS and other strategies.

# *Dear Colleague Letter* Community Schools

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- A community school is a school district for purposes of special education law.
  - R.C. 3323.012.
- Guidance reaffirms that community schools are responsible for providing special education and related services.
  - “The [community school’s] responsibilities are generally the same as any other [school district] and include implementing child find and conducting periodic evaluations and reevaluations, developing, reviewing, and revising [IEPs], and providing or arranging for the provision of required special education and related services in the child’s least restrictive environment.”
- Sponsors “play a critical role in educating charter schools about their responsibilities under IDEA and the regulations, policies, and procedures for implementing an IDEA structure or methods of administration.”

# Parent and Educator Resource Guide

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- An *excellent* resource for Section 504 compliance.
- Helpful summaries of law and example scenarios.
- Insight into OCR's expectations. For example:
  - "OCR encourages schools to document a student's Section 504 services in a written plan to help avoid misunderstandings or confusion about what Section 504 services the school offered the student."

# Parent and Educator Resource Guide

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## Scenario 1

- Rosita is a fourth grade student at her local public elementary school. Her teacher notices that Rosita has trouble concentrating during class and that it takes Rosita significantly longer than most students to complete in-class assignments. While the teacher acknowledges that it is very difficult for Rosita to stay seated and on-task, she does not think Rosita needs special education services because she is earning B's and C's. What should the teacher do?
- Result: It is only through an evaluation process that a school district can properly determine if a student has a disability and needs Section 504 services. Note that grades alone, whether good or bad, do not necessarily indicate a student's eligibility under Section 504.

# Parent and Educator Resource Guide

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## Scenario 3

- Doctors diagnosed Omar with cancer at the beginning of the summer break, between fourth grade and fifth grade. When initially diagnosed, Omar was weak and tired all the time, and, at times, unable to even get out of bed or dress or feed himself. He received chemotherapy in July and August and returned to school in September without any symptoms of his disease. In November, doctors declare his cancer to be in remission. Is Omar eligible under Section 504?
- Result: Yes, a student who has an impairment that is episodic (for example, epilepsy or post-traumatic stress disorder) or in remission is considered to be a person with a disability if, when active (that is, when symptoms are evident or reoccur), the impairment substantially limits a major life activity.

# Parent and Educator Resource Guide

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## Scenario 5

- Mr. Williams is very concerned. In September, two weeks after the new school year began, his 16 year-old son told him that he was having a hard time hearing his teacher and, as a result, he is unable to take detailed notes during class lectures. The school promised to evaluate the student, and Mr. Williams consented to the evaluation before the end of September. However, it is now December and his son has not been evaluated. Should the school have completed the evaluation before December?
- Result: Most likely, yes. Section 504 does not provide a specific amount of time for school districts to complete an evaluation. However, under the IDEA an initial evaluation must be conducted within 60 days of receiving parental consent for the evaluation. OCR generally looks to the IDEA timeline, or if applicable, to State requirements or local district policy to assess the reasonableness of the time it takes the school to evaluate the student once parental consent has been obtained.



# Parent and Educator Resource Guide

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## Scenario 9

- Ricardo has a peanut allergy. His fourth-grade class is going on a field trip to the local aquarium and Ricardo's father is told that he must chaperone Ricardo on the trip because the teachers will be very busy and cannot ensure that Ricardo will be protected from exposure to peanuts or peanut products while on the trip, especially during the lunch break. Ricardo's father cannot go on the field trip because he has to go to work. As a result the teachers tell Ricardo he cannot attend the field trip. Ricardo's father complains to the principal, noting that no other parent is required to attend the field trip. Should the school have required Ricardo's father to attend the field trip?
- Result: No. In this case, none of the parents of students without disabilities were told that they must attend the field trip; therefore, the school may not require Ricardo's father's attendance simply because Ricardo has a disability. Under Section 504, the school is responsible for making it possible for Ricardo to participate in this learning opportunity like his peers, without parental assistance.

# Questions?

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# FERPA 201



# Education Records

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- Protected under Family Educational Rights and Privacy Act, 20 U.S.C. 1232g; 34 C.F.R. 99.
- Protected under Ohio Revised Code section 3319.321.
- General Rule: Education records, and personally identifiable information contained within education records, must be kept confidential and not disclosed, unless the parent/eligible student consents to disclosure or an exception applies.

# “Education Record” Defined

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- Defined as: records, files, documents and other materials which:
  - (a) contain information directly related to a student; and
  - (b) are maintained by an educational agency or institution or by a person acting for such agency or institution



*Administrator  
Question:*



How do I respond to a request from a parent to provide all education records to her attorney?

# FERPA Exceptions - Consent

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- Consent.
- Must be in writing and signed.
- Must include:
  - Records to be disclosed;
  - Purpose of the disclosure; and
  - Identify to whom the disclosure may be made.

*Administrator  
Question:*



A board member is asking me for confidential student records and information. How do I respond?



# FERPA Exceptions – School Officials

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- Must have a “legitimate educational interest.”
- A “legitimate educational interest” is the person’s need to know in order to:
  - perform his/her professional responsibilities;
  - perform a supervisory or instructional task directly related to the student’s education or school-related activities;
  - perform a service or benefit for the student or the student’s family such as health care, counseling, student job placement or student financial aid.

# FERPA Exceptions – School Officials

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- Can also be a consultant, volunteer, or other party, so long as outside party:
  - Performs an institutional function for which it would otherwise use employees;
  - Is under the direct control of the school with the use and maintenance of the records;
  - Is subject to rules governing use and redisclosure.
- Should be listed in your annual FERPA notice.



*Administrator  
Question:*



My personal notes are  
confidential though, right?

# FERPA Exception - Personal Notes

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- “Education record” does not include:

Records that are kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record.

- *Sole possession of the maker;*
- *Personal memory aid; and*
- *Not accessible or revealed to any other person.*

## A “Public Record” is held by a public office and...

- Stored on a fixed medium (tape, video, film, photos, etc.);
- Created, received or sent under the jurisdiction of a public office; and
- Documents what the office does



# Public Record Exception – Personal Notes

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- Employee notes have been found not to be public records if they are:
  - Kept as personal papers, not official records;
  - Kept for the employee's own convenience (for example, to help recall events);  
**and**
  - Other employees did not use or have access to the notes.

*Administrator  
Question:*



How do I respond to this subpoena for records?

# FERPA Exception - Subpoena

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- Personal notes can be subpoenaed.
- Subpoena exception under FERPA: No prior consent required if disclosure is to comply with a judicial order or lawfully issued subpoena.
- Must provide notice to parent or eligible student prior to the disclosure to give opportunity to seek protective action.
- **NOTE**: If the parental notice provision is going to be a problem, court can order not to disclose.



*Administrator  
Question:*



We are worried about a student's mental health and what she might do next—who can I tell?

# FERPA Exception – Health & Safety

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- May disclose, without consent, personally identifiable information from education records to appropriate parties (typically law enforcement officials, public health officials, trained medical personnel, and parents) in connection with an emergency if the knowledge of that information is necessary to protect the health or safety of the student or other individuals.
- Must be a “articulable and significant threat”.
  - Rational basis standard – judgment not second guessed.
- Must record the threat and to whom disclosed.

*Administrator  
Question:*



What about those emails. It's been two weeks and I need to get back to this parent about that request...

# FERPA and Emails

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- Is the record directly related to the student?
- No definitive Ohio authority.
- Court case in California: “Emails, like assignments passed through the hands of students, have a fleeting nature. An email may be sent, received, read, and deleted within moments.” Only “education record” if maintained in student file.
- But see: “Record means any information recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche.” 34 C.F.R. 99.3

*Administrator  
Question:*



Can I show a parent a video of a cafeteria fight her son started?

# FERPA and Videos

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- Recording depicts only one student.
- Recording depicts multiple students.

*Administrator  
Question:*



A parent wrote an email requesting to have their child's ETR amended. How do I respond?

## Rights to Inspect Education Records

- Parents or eligible students may:
  - Inspect and review records.
  - Request that the district correct records believed to be inaccurate or misleading or in violation of the student's right to privacy.
  - No right to an ongoing basis.





*Administrator  
Question:*



Who are the FERPA police,  
anyway?

# Student Privacy Enforcement

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- No private right of action under FERPA.
- No history of cases under state law.
- Family Policy Compliance Office (FPCO) of the U.S. Department of Education investigates complaints.
- ODE
  - Special education complaints
  - Licensure Code of Professional Conduct for Educators.

# FPCO – *Letter to Anonymous* (May 19, 2016)

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- Parent alleged that principal was spreading rumor that her son was a drug dealer.
- FPCO: No FERPA violation. No evidence that information originated in a school record. FERPA does not protect the confidentiality of information in general, and therefore does not apply to the disclosure of information derived from a source other than education records.

# ODE – CP 0026-2015

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- Records from student's previous district that are received by, maintained, and used by new district are education records.
- Parent entitled to access to inspect and review those records.

# Licensure Code of Professional Conduct for Ohio Educators

## Licensure Code of Professional Conduct for Ohio Educators



Adopted March 11, 2008, State Board of Education  
www.ohio.gov

- Adopted by the State Board of Education on March 11, 2008.
- Eight Principles of Professional Educator Conduct.
- Disciplinary actions against an educator's license.
- Recommends discipline for the Board.
- Deference to the school district/employer for lesser "violations."

# Ohio Licensure Code: Principle 5

## Confidentiality

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- Educators shall comply with state and federal laws related to maintaining confidential information.
- ...the educator has the responsibility to keep information about students confidential unless:
  - disclosure serves professional purposes,
  - affects the health, safety, and welfare of students and others,
  - is required by law, or
  - parental permission has been given.



# Ohio Licensure Code: Principle 5— Confidentiality

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- Conduct Unbecoming the Teaching Profession includes:
  - Willfully or knowingly violating any student confidentiality required by federal or state law, including publishing, providing access to, or altering confidential student information on district or public web sites such as grades, personal information, photographs, disciplinary actions, or IEPs without parental consent or consent of students 18 years of age or older.
  - Using confidential student, family, or school-related information in a non-professional way (e.g., gossip, malicious talk or disparagement).

# Questions?

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# State Level Awareness

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- Lindsay's Law
- End-of-Course Exams
- CPR and AED Training
- Assessment Limitations
- Guidance Memos ODE/OEC
- State Board of Education Discipline Resolution

# Lindsay's Law (S.B. 252)

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- Effective Date: March 14, 2017.
- No student can participate in an “athletic activity” until the student submits a signed form stating that student and parent have received and reviewed information developed by ODH and ODE regarding sudden cardiac arrest.
- No individual can coach an “athletic activity” unless she has completed the annual sudden cardiac arrest training course approved by ODH.
  - The District must develop penalties for a coach who violates this provision.

# Lindsay's Law (S.B. 252)

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- No student can participate in an “athletic activity” if his family has a history of sudden cardiac arrest.
  - Unless the student is cleared by a physician.
- No student can participate in an “athletic activity” if she has exhibited fainting prior to or after an “athletic activity.”
  - Unless the student has been evaluated and cleared for return by a physician, certified nurse practitioner, physician assistant, or athletic training (licensed under R.C. Chapter 4755).

# Lindsay's Law (S.B. 252)

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- For purposes of this new law, “athletic activity” means any of the following activities:
  - Interscholastic athletics;
  - Athletic contests sponsored by or associated with the District (including cheerleading, club-sponsored sports, and sport activities sponsored by school-affiliated organizations);
  - Non-competitive cheerleading sponsored by school-affiliated organizations.
- Practices, interschool practices, and scrimmages count for any of the above-described activities.

# End-of-Course Exams (S.B. 3)

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- Effective Date: March 16, 2017.
- When using an advanced placement examination or international baccalaureate examination in lieu of an end-of-course examination:
  - A score of two on an advanced placement examination shall be considered equivalent to a proficient level of skill on the end-of-course examination.
  - A score of two or three on an international baccalaureate examination shall be considered equivalent to a proficient level of skill on the end-of-course examination.

# CPR and AED Training (H.B. 113)

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- Effective Date: 2017-18 School Year.
- Each school offering instruction in grades 9 to 12 shall provide instruction to all students in CPR and the use of an automated external defibrillator (“AED”).
- Caveat:
  - A student shall be excused from the above instruction upon written request from the student’s parent.
  - A student shall be excused from the above instruction if the student’s IEP indicates that the student is incapable of performing the psychomotor skills required for CPR / AED use.

# Assessment Limitations (S.B. 3)

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- Effective Date: Assessments administered after June 30, 2017.
- Students cannot spend more than 2% of the school year taking state assessments and/or district-wide, subject/grade specific assessments.
- Students cannot spend more than 1% of the school year taking practice or diagnostic assessments in order to prepare for the assessments described above.

# Assessment Limitations (S.B. 3)

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- The assessment limitations do not apply to:
  - Assessments for students with disabilities;
  - Any diagnostic assessment for students who failed to attain a passing score on the English language arts achievement assessment;
  - Advanced placement examination or international baccalaureate examination in lieu of an end-of-course examination; and
  - Assessments administered to identify a student as gifted.

*See R.C. 3301.0729*



# Resident Educator Evaluations (S.B. 3)

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Effective Date: 2017-18 School Year.

The Board may elect not to conduct an evaluation of a teacher who is participating in the teacher residency program for the year during which that teacher takes, for the first time, at least half of the performance-based assessment prescribed by the state board of education for resident educators.

See R.C. 3319.111(C)(2)(e)

# Guidance Memo OEC #2016-1

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- [February 3, 2016.](#)
- Service providers to school districts to educate their students. District of residence is responsible for providing and paying for FAPE to children who are committed to JDCs.
- Entity providing education is the district of service. May be:
  - District where facility is located
  - Community school
  - Chartered non-public school
  - ESC
- Adult Facilities
- Department of Education, Department of Justice, and ACLU enforcement

# Guidance Memo OEC #2017-1

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- [January 13, 2017.](#)
- “[T]he school district of residence is responsible for ensuring that all requirements under [IDEA] are met for every eligible child in its jurisdiction, regardless of where services are provided (e.g. separate or private facilities), unless otherwise stated in law.”
- “This responsibility includes not only the development and implementation of a student’s IEP, but also reporting requirements pursuant to applicable Education Management Information Stems (EMIS) rules.”

# State Board of Education Discipline Resolution – November 15, 2016

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- The State Board adopted a resolution clarifying the intent of student suspensions for Ohio school districts.
- Encourages districts to develop strategies for dealing with challenging behavioral incidents.
- Cites PBIS as method to improve behavior; alternative to suspension.
- Read it: <http://education.ohio.gov/getattachment/State-Board/State-Board-Reports-and-Policies/Certified-Suspension-Resolution.pdf.aspx>.

# Questions?

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