

FRANCZEK RADELET

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Special Education Legal Update

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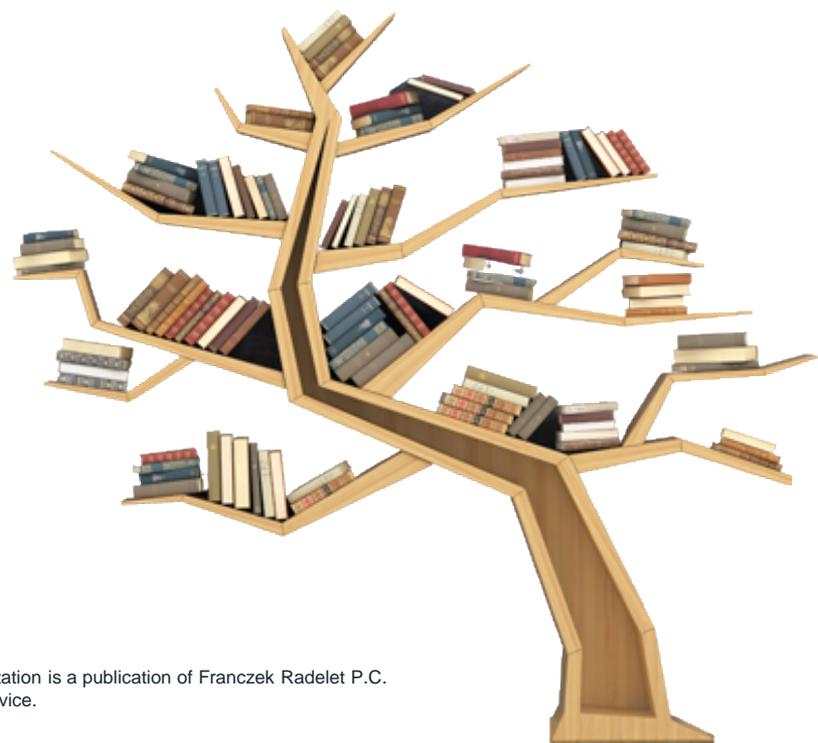
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**Franczek Radelet School Law Conference
February 10, 2017**



Agenda

- Dear Colleague Letters
- ADA Amended Regulations
- Supreme Court Cases
- IDEA Reauthorization and New Administration
- Asthma Update

Dear Colleague Letters

- Dear Colleague Letter and Resource Guide on Students with ADHD
 - Lists signs that can indicate a student may need to be evaluated
 - OCR will presume, absent evidence to the contrary, that a student with an ADHD diagnosis qualifies as a student with a disability
 - No stock accommodations

Dear Colleague Letters

- Inclusion of Behavioral Supports in Individualized Education Programs
 - Children with disabilities, and especially those of color, are at an greater risk of disciplinary removals that interfere with learning
 - Reminds school personnel of their obligation to put behavioral interventions in place for students with disabilities

Dear Colleague Letters

- Online and Virtual Schools and the Individuals with Disabilities Education Act
 - Requirements of IDEA apply to virtual schools
 - LEAs should review child find policies and procedures to ensure that children with disabilities who attend virtual schools are identified, located, and evaluated

Dear Colleague Letter

- Restraint and Seclusion of Students with Disabilities
 - Students with disabilities are subjected to restraint and seclusion at rates far exceeding those of other students
 - Restraint and seclusion of students with disabilities can violate Section 504 and the ADA

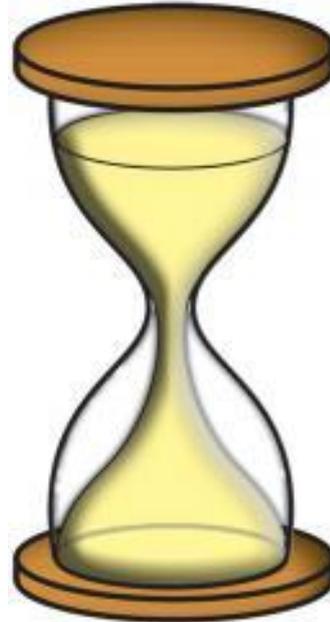
Dear Colleague Letters

- FAQ About the Rights of Students with Disabilities in Public Charter Schools Under Section 504
 - Charter school students with disabilities have the same Section 504 rights as other public school students with disabilities
 - Federal requirements for disability nondiscrimination apply to recruitment, application, and admission of students to public charter schools

Dear Colleague Letters

- FAQ About the Rights of Students with Disabilities in Public Charter Schools Under IDEA
 - “children with disabilities who attend charter schools and their parents retain all rights and protections under Part B of IDEA just as they would at other public schools”

ADA Amended Regulations



- Update to align ADA regulations with the ADA Amendments Act of 2008

ADA Amended Regulations

- **Major Life Activities** include the “operation of major bodily functions”
 - Neurological
 - Digestive
 - Respiratory systems

ADA Amended Regulations

- Examples provided for physical and mental impairments
 - Dyslexia
 - Attention-Deficit/Hyperactivity Disorder (ADHD)

ADA Amended Regulations

- “Substantially Limits” only requires a “degree of functional limitation”
- Lower standard for “substantially limits” than was applied prior to 2008 Amendments

Supreme Court Cases

- *Andrew F. v. Douglas County School District* (10th Cir.)
- *Fry v. Napoleon Community Schools* (6th Cir.)

■ Facts

- Student with autism attended public school preK through 4th grade.
- Parents placed unilaterally for 5th grade
- Student made “some academic progress” in the district program.

■ History

- Hearing officer found in favor of the school district because the IEP was “reasonably calculated to enable the child to receive educational benefit,” citing *Rowley*
- District court affirmed
- 6th Circuit affirmed

Andrew F. Douglas County SD

- Question
 - Level of educational benefit required by FAPE
- Positions
 - Parents: meaningful educational benefit and educational opportunities substantially equal to those provided to nondisabled students
 - SD: some or more than *de minimus* educational benefit
 - US: an opportunity to make significant educational progress in light of the child's particular needs and capabilities

■ Supreme Court

- Roberts: “maybe you have a lot of different adjectives to describe the standard,” but “there’s really nothing concrete there” for courts to review.
- Alito: “What is frustrating about this case and about this statute is that we have a blizzard of words.”
- Breyer: “If we suddenly adopt a new standard, all over the country we’ll have judges and lawyers and people interpreting it differently... I foresee taking the money that ought to go to the children and spending it on lawsuits and lawyers and all kinds of things that are extraneous.”
- Kagan said she had “some feeling that the word ‘equality’ is a poor fit for this statute.”
- Justices seemed unhappy with the “more than *de minimus*” standard.

Fry v. Napoleon Community Schools

■ Facts:

- Elementary school student with cerebral palsy
- Parents wanted her to be accompanied by her service dog to increase her independence
- IEP team considered but denied. IEP provided for a 1:1 aide
- FAPE provided
- Student no longer attends the district

Fry v. Napoleon Community Schools

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Wonder and E.F. (Photo by Stacy Fry via SCOTUSblog)

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Fry v. Napoleon Community Schools

■ History

- Parents filed suit in district court under ADA and Section 504 seeking monetary damages for emotional harm
- District court dismissed. Parents did not exhaust their administrative remedies
- Circuit court affirmed

Fry v. Napoleon Community Schools

- Question
 - Whether parents must exhaust IDEA procedures before bringing ADA or Section 504 suit when seeking monetary damages
- Positions
 - Parents: No, relief not available under IDEA
 - SD: Yes, this is ultimately a FAPE question
 - US: No, question is whether relief requested is available under the IDEA

Fry v. Napoleon Community Schools

■ Supreme Court

- Seemed to be agreement among justices that this was a classic case where parents should not have to exhaust administrative remedies
- But also concern that strategic pleading (requesting damages) could allow parents to go straight to court with a true IDEA case
- Possible alternative rules
 - Exhaustion not required in requesting monetary damages and not alleging a denial of FAPE
 - Exhaustion not required if it would be futile
 - Exhaustion not required if the heart of the complaint focuses on the IEP

IDEA Reauthorization

- Timeline
- Current Political Climate
 - Impact on “white paper”
- Preliminary Concepts

Department of Education

- New role?
 - Guidance letters
- Secretary of Education
 - School choice
 - Charter schools
 - Vouchers
 - IDEA
- State autonomy

Asthma Update

- *In re: Estate of Stewart v. Oswego Comm. Unit Sch. Dist. No. 308*, 2016 IL App (2d) 151117 (Ill. App. Ct. 2016)
 - Facts: High school student dies in English class from asthma
 - Holding: Failing to call 911 was *willful and wanton conduct*

Asthma Update

- Asthma Episode Emergency Response Protocol is required by 105 ILCS 5/22-30
- ISBE Model available:
www.isbe.net/Documents/asthma_response_protocol.pdf

Asthma Update

- When in doubt, in this order:
 - CALL 911 IMMEDIATELY
 - CALL SCHOOL NURSE IF NOT ALREADY PRESENT
 - CALL PARENT/GUARDIAN

