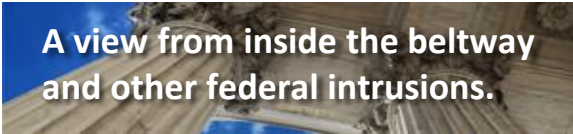




2014 SCSBA School Law Conference
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1



ON THE DOCKET TODAY...

- 1. **Background.**
 - Friend or Foe? Why fighting federal overreach matters.
 - NSBA Bill
- 2. **Legislation by Executive Fiat.**
 - DCL's, Proposed Rules
- 3. **How Administration Uses Guidance in Federal Court.**
 - Long v. Murray County Sch. Dist.* (11th Cir.)
 - C.L. v. Scarsdale Union Free School District* (2nd Cir.)
 - K.M. v. Tustin Unified School District* (9th Cir.)
 - Easton Area Sch. Dist. v. B.H.*(3d Cir.)

2

FRIEND OR FOE? WHY FIGHTING FEDERAL OVERREACH MATTERS.

- Federal: ED's use of federal funding to wield enforcement standards. Carrot & Stick.
- Change from categorical assistance to driving state and local policies.
- Increasing responsibilities without commensurate funding.
- ED's public education agenda threatens local governance.
- Legislation by executive fiat erodes checks and balances inherent in 3-branch federal government.
- Unchallenged, unauthorized administrative decrees create precedence for future administrations.

3

NSBA'S H.R. 1386 - LOCAL SCHOOL BOARD GOVERNANCE AND FLEXIBILITY ACT

- Bi-partisan bill introduced by Rep. Schock (R-IL). Responsibility of education resides with states and local school boards.
- School boards are accountable to taxpayers and voters.
- US ED should support local decision by limiting regulations to implementation of federal legislation.

4

Legislation by Executive Fiat: DCL's, Proposed Rules

- US ED and DOJ utilize administrative guidance to:
 - Drive agenda/affect change locally.
 - Validate their interpretation of federal law in the courts through agency deference.

5

EXAMPLES OF LEGISLATION BY EXECUTIVE FIAT...

- 2010 "Dear Colleague" Letter (DCL) on Bullying.
- 2013 DCL on Student in Extra Curricular Athletics.
- 2013 Proposed Expansion of Data Collection.
- 2014 Joint US ED and DOJ Guidance on Discipline and Race.

6

NSBA has filed five responses to federal administrative actions this year alone.

- 1. NSBA Comments on the DOJ Proposed Rule for Amendments to the Americans with Disabilities Act, Titles II and III.
- 2. NSBA Comments on the ED Notice re Request for an Information Collection on the Impact of Professional Development in Fractions for Fourth Grade.
- 3. NSBA Comments on the USDA's Proposed Rule on Expanded Local School Wellness Policy Requirements.
- 4. 2013 DCL on Student in Extra Curricular Athletics.
- 5. 2013 Proposed Expansion of Data Collection.

7

2010 "DEAR COLLEAGUE" LETTER (DCL) ON BULLYING.

- What did it do?
 - Articulated administrative enforcement and court standards.
- Reflects US ED's and OCR's:
 - Strong enforcement position
 - Broad standard for school district responsibility
 - Many factual scenarios based on actual OCR investigations
 - Requires myriad remedial measures school district could/should have taken in each case
- NSBA responded and asked for clarification.

8

2010 "DEAR COLLEAGUE" LETTER (DCL) ON BULLYING.

- | | |
|--|---|
| <p>OCR standards:</p> <ul style="list-style-type: none"> ▪ Knows or reasonably should have known ▪ Severe, pervasive or persistent ▪ Interferes with or limits participation | <p>Title IX/Monroe Standards:</p> <ul style="list-style-type: none"> ▪ Actual knowledge ▪ Severe, pervasive and objectively offensive ▪ Effectively bars access |
|--|---|

9

2013 DCL ON STUDENT IN EXTRA CURRICULAR ATHLETICS

- OCR issued DCL on January 25, 2013, regarding the participation of students with disabilities in extracurricular athletics.
- NSBA :
 - Questioned OCR’s expansive view of the requirements of Section 504, and the possible exposure of school districts to liability.
 - Warns guidance may encourage litigation by plaintiffs’ attorneys.
 - Cautioned against the use of informal guidance to expand federal law.

10

IN DECEMBER 2013, JOHN K. DIPAOLO, DEPUTY ASSISTANT SECRETARY FOR POLICY, OFFICE FOR CIVIL RIGHTS SPOKE TO NSBA COSA TO CLARIFY ISSUES WE RAISED:

- No need to for a meeting of IEP team to inquire about accommodation in an extracurricular athletic program.
- FAPE team may address extracurricular participation.
- No regulatory requirement for a specific process.

11

DIPAOLO, DEP. ASST. SEC’Y FOR POLICY, OCR (CONT.):

- School districts are encouraged but not required to create additional opportunities for SWD.
- Existing alternative programs are fine, but not required.
- Not a Title IX standard to evaluate when needs of SWD cannot be as “fully and effectively” met by the existing program.
- Benchmark is whether the separate activity is comparable to the existing program.
 - Example: if school creates wheelchair basketball, and the existing basketball team has uniforms, the wheelchair basketball team should also have uniforms.
- Recommends documenting individualized inquiry even though not required: who participated, what discussed, what outcome?

12

2013 PROPOSED EXPANSION OF MANDATORY CIVIL RIGHTS DATA COLLECTION

-In August 2013, OCR issued a Notice seeking public comment to its proposal to expand the scope of its CRDC.

- NSBA identified the following issues:
 - (1) questionable legal jurisdiction to support, or be the basis for, OCR's inquiries;
 - (2) the types of data being proposed for collection;
 - (3) the burden and expense to already financially-strapped public school districts and over-worked staff; and
 - (4) the confusion resulting from differences between OCR's characterization and obligations under state law.

13

2014 JOINT US ED AND DOJ GUIDANCE ON DISCIPLINE AND RACE.

US ED and DOJ on January 8, 2104 issued a Dear Colleague Letter" (DCL) to school districts nationwide on subject of zero tolerance student disciplinary policies.

Guidance recommends public school officials use law enforcement only as a last resort for disciplining students and targets schools for discipline based on race.

14

IS OCR AT IT AGAIN?

- NSBA is largely in agreement with the DCL, but parts of it appear to create potential liability for schools.
- Disparate Impact analysis could place districts at legal risk if not applied correctly.
- OCR's analysis requires an inquiry into "comparable, effective alternative [disciplinary]... practices" to lessen burden on a disproportionately affected racial group.
- Devil is in the details... or in this case, consistency in implementation.

15

3.How US ED and DOJ Uses Guidance in Federal Court...



16

Long v. Murray County Sch. Dist., (11th Cir. 2013)

Facts:

- Murray County junior Tyler Long committed suicide at home on Oct. 17, 2009.
- Tyler, was diagnosed with Asperger's Syndrome in 2005.
- Tyler was the subject of many instances of teasing and bullying which were reported to school officials
- IEP addressed social needs and bullying.

17

What was in place (or not) at the school...

- Policies prohibited all verbal and physical harassment.
- No specific mention disability-based harassment.
- School used STEP discipline process, Teachers as Advisors program, offered character education in 9th grade year.
- No assemblies address the school's anti-taunting, -bullying or-harassment policies.
- No specific charge from the school leadership on anti-bullying processes.
- Online complaint form; no confidential drop box.

18

The lawsuit...

- Parents claiming deliberate indifference under 504/ADA.
- Three Expert Witnesses testified:
 - School failed to use diligence in recognizing and responding to the bullying
 - School failed to prevent harassment, by **failing to meet generally accepted standards for schools and administrators.**
 - Psychological autopsy analysis concluded suicide caused by bullying.

19



Parents appealed to the 11th Circuit challenging propriety of SJ.

US DOJ/ED filed briefs in support of the parents, arguing deliberate indifference existed when school is ineffective in preventing sustained disability discrimination.

- Determination of DI should include use of “known” prevention strategies by school.

20

More Issues tracking OCR's expansive standard...

- Were known acts of peer mistreatment severe, pervasive **or** objectively offensive sufficient to create a “hostile environment” ?
- Was student deprived of **any** educational opportunity?
- Did expert testimony support inference of deliberate indifference to alleged peer mistreatment based on disability?

21

NSBA asked the court:

- Not to expand *Davis* standard.
- Not to conflate *Davis* standard with OCR enforcement standards.
- Not to expand *Davis*' actual notice requirement by triggering school upon any report of peer "bullying."

22

11th Circuit rules for school district...

- School district was not deliberately indifferent to peer harassment.
- Deliberate indifference standard in *Davis* applies to § 504 and (ADA) claims.
- Upheld district court ruling that the school district was not liable for student-on-student harassment under either federal anti-discrimination disability statute.
- **Importance of case: failure of remediation is not a per se indicator of deliberate indifference.**

23

***K.M. v. Tustin Unified School District*, Nos. 11-562259/12-56224 (9th Cir. Aug. 6, 2013), cert. denied, Nos. 13-770, 13-777 (U.S. Sup. Ct. Mar. 4, 2014)**

Issue: Does providing FAPE under IDEA satisfy access requirements under the ADA?

24

Background...

- A high school student with hearing disabilities asked school for a word-for-word translation service called Communication Access Realtime Translation (CART) in the classroom.
- School district denied request, but offered other accommodations.
- Parents argued ADA's effective communications regulation provides additional relief and is not preempted by IDEA.

25

Hearing Officer and Fed. Ct. rule for school...

- School district complied with IDEA; and
- ADA claims were foreclosed by the failure of the IDEA claims.
- Plaintiffs appeal to 9th Circuit:
 - ADA's effective communications regulation creates obligations in addition to IDEA requirements.

26

At the 9th Cir...

- Ruled in favor of students...
- Parents entitled to "Primary consideration" regarding specific services...
- Regardless of appropriateness of IEP team determinations.

27

NSBA joined CSBA's brief on certiorari...

- Need to clarify IDEA is the governing statute re: educational services students with disabilities.
- ADA's effective communications regulation provides some rights, but must be interpreted in *pari materia* IDEA's collaborative framework.
- Such interpretation should not alter the IEP process, causing undue financial and administrative burdens on schools.

28

DOJ involvement...

- 9th Cir. Deferred to U.S. Department of Justice;
- DOJ argued that because it enforces the ADA, it has authority to opine on the IDEA as it relates to the ADA.
- NSBA argued DOJ's interpretation of IDEA is outside its legal purview and should not be entitled to deference.
- The U.S. Supreme Court denied review on March 4, 2014.

29

***C.L. v. Scarsdale Union Free School District*, No. 12-1610 (2d Cir. Mar. 11, 2014).**

Issue: May a court deny tuition reimbursement under IDEA for unilateral private school placement that is not the LRE? that enrolled only children with disabilities.

30

Background...

- CL attended Greenacres Elementary School from kindergarten through third grade.
- School provided services under a Section 504 plan for some LD, but found him ineligible for special education services under IDEA.
- Parents placed CL in private school and sought tuition reimbursement.

31

H.O. and Dist. Ct. rule for school district... sort of...

- H.O. found school district denied FAPE.
- But denied reimbursement because placement was inappropriate: not the LRE.
- Federal district court upheld this determination.
- Parents appealed to the U.S. Court of Appeals for the Second Circuit.

32

And, the federal camel sticks its nose under the tent... again.

- DOJ joined by ED filed an *amicus* brief supporting parents.
- Argued:
 - Courts may not consider LRE in denying tuition reimbursement for a private placement.
 - Schools must show other LRE *private* placements are available.
 - Upon finding of FAPE denial, court cannot consider a public school as a viable educational option.

33

Pushing back...

- NSBA joined NYSSBA's *amicus* brief as a counter-attack on this position.
- Goal was to support argument that feds are pursuing course unsupported by congressional intent, statutory text, or case law precedent.

34

2nd Circuit rules for parents...

- Unilateral private placement not inappropriate under IDEA even if in a LRE where school failed to provide FAPE.
- FAPE denial allows parents to “turn to an appropriate specialized private school designed to meet special needs, even if the school is more restrictive.”
- **Causal connection?** FAPE denial causes parents to seek out private schools that only educate disabled students.

35

2nd Circuit's rationale:

- “Inflexibly requiring that the parents secure a private school that is nonrestrictive, or at least as nonrestrictive as the FAPE-denying public school, would undermine the right of unilateral withdrawal the Supreme Court recognized in” a previous case.
- LRE is a factor in appropriateness of private placement, but **“by no means is it dispositive.”**

36

Doe v. Prince George's County Board of Education, (4th Cir.)

- **Issue.** Is a school district liable under Title IX for alleged harassment and sexual assault by a classmate when school officials respond to alleged harassment, but have no knowledge of alleged assaults until after close of school year?

37

Doe v. Prince George's County Board of Education, (4th Cir.)

- **Facts:**
- Student alleged that during 4th and 5th grade he was repeatedly sexual harassed another student.
- The district responded to each incident of which it received notice.
- For instance alleged perpetrator was given ISS, and was not allowed to use restroom at same time as alleged victim.
- Alleged victim continued to participate in school activities with no decline in academic performance.
- However, alleged victim's parents withdrew him from the school at the end of the fifth grade year.

38

Facts...

- Alleged victim then reported to police that classmate had sexually assaulted him at school on several occasions.
- Police closed case as "unfounded" after investigation.
- The parents subsequently sued the district, asserting a Title IX sexual harassment claim along with a state law claim for negligence.
- Parents claimed school "should have known" of alleged sexual assault. (**Negligence standard NOT Davis v. Monroe Standard**).

39

What did the federal court do?

- The district court ruled in favor of the school district on the Title IX claim, finding that :
 1. School District response to reported incidents could not be deemed deliberately indifferent; and
 2. School District had no actual notice of the other alleged assaults.
- The parents appealed to the U.S. Court of Appeals for the Fourth Circuit.

40

NSBA Legal Strategy:

- The deliberate indifference standard established in *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999), should NOT be relaxed to incorporate common law negligence principles.
- 4th Circuit should reject the plaintiff plea to expand *Davis* using the U.S. Department of Education's (ED) Office for Civil Rights (OCR) enforcement guidance and expert opinions on proper investigations or interventions.
- Local school officials are in the best position to respond to known incidents of harassment or bullying, therefore retain long-standing judicial precedent deferring to school officials around climate & discipline even if claims involve federal civil rights statutes.

41

Resources

- 1. NSBA Comments on the DOJ Proposed Rule for Amendments to the Americans with Disabilities Act, Titles II and III. <http://www.regulations.gov/#documentDetailD=DOJ-CRT-2014-0001-0042>
- 2. NSBA Comments on the ED Notice re Request for an Information Collection on the Impact of Professional Development in Fractions for Fourth Grade: <http://www.nsba.org/sites/default/files/reports/NSBA%20Comments%20on%20ED%20Fractions%20Notice%20%284-7-14%29.pdf>.
- 3. NSBA Comments on the USDA's Proposed Rule on Expanded Local School Wellness Policy Requirements: <http://www.nsba.org/sites/default/files/reports/4-28-2014%20Comments%20onLocal%20School%20Wellness%20Policy%20Implementation%20under%20the%20Healthy%2C%20Hungry%20Kids%20Act%20of%202010.pdf>
- 4. 2013 DCL on Student in Extra Curricular Athletics: <http://www.nsba.org/sites/default/files/reports/Letter%20to%20Hon%20Seth%20Galanter%20%28Re-DCL-1-125-13%29Mar%202013.pdf>
- 5. 2013 Proposed Expansion of Data Collection: <http://www.nsba.org/sites/default/files/reports/NSBA%20Comments%20on%20ED%20Fractions%20Notice%20%284-7-14%29.pdf>

42



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43
