

349 Ed. Law Rep. 7

West's Education Law Reporter

December 14, 2017

Education Law into Practice

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THE COURTS' USE OF OCR POLICY INTERPRETATIONS IN SECTION 504/ADA STUDENT K-12 EDUCATION CASES ^{a1}

This brief analysis is a sequel to the recent article examining the extent of judicial use of Office of Special Education Programs (OSEP) policy interpretations in Individuals with Disabilities Education Act (IDEA) cases.¹ The shifted coverage here is the extent of judicial use of the related U.S. Department of Education Office for Civil Rights (OCR)² policy interpretations³ in corresponding cases concerning students with disabilities in the K-12 context under Section 504 and the Americans with Disabilities Act (ADA).⁴ The related differences attributable respectively to OCR's enforcement jurisdiction and the intertwined framework of Section 504 and the ADA⁵ from the IDEA context are that (1) the civil rights coverage of OCR extends to Title VI (race and national origin) and Title IX (gender),⁶ and (2) the definitional coverage of disability is broader than under the IDEA.⁷

*8 The previous article's introductory attention to the significant role of U.S. Department of Education interpretations was the up-and-down course of the major transgender student case.⁸ Yet, the focal point of this decision was an OCR (jointly with DOJ), not OSEP, policy interpretation, because the legislative context was Title IX, not the IDEA.⁹

In any event, for the OSEP and, to a lesser extent, OSERS policy interpretations of the IDEA for the 17.5-year period from January 1, 2000 through June 30, 2017, the previous article found that (1) courts cited these agency interpretations in 73 cases, representing an estimated 5% of the K-12 student disability adjudications during this period; (2) the effect in the vast majority of the cases was supporting; and (3) for the 27 of the 73 cases that specifically addressed the weight of the agency interpretation, only five rejected judicial deference.¹⁰

Focus of the Analysis

The purpose of this follow-up analysis is to determine the frequency and role of OCR policy interpretations in court decisions concerning K-12 students under Section 504 and the ADA.¹¹ In addition to the commentary accompanying the Section 504 regulations¹² and the much more recent ADA regulations,¹³ the guidance appears in three other written forms: (1) general "policy support documents," such as Dear Colleague Letters (DCLs) and frequently asked questions (FAQ) or question-and-answer (Q/A) documents; *9 ¹⁴ (2) individual policy letters in response to inquiries from interested parties;¹⁵ and (3) letters of findings (LOFs) resulting from complaint investigations.¹⁶ The multi-step analysis that courts use in determining whether to defer to agency interpretations, which is primarily attributable to the Supreme

Court's decision in *Auer v. Robbins*,¹⁷ includes, for example, whether the agency interpretation is (1) inconsistent with its own regulations, and (2) a fair and considered judgment on the matter.¹⁸

Method for the Analysis

The overlapping sources were the Westlaw and SpecialEdConnection legal databases. The Boolean search used various terms, including "Office for Civil Rights," "OCR," and "U.S. Department of Education," in combination with "school" and either "Section 504" or "Americans with Disabilities Act,"¹⁹ for the 17.5-year period from Jan. 1, 2000 through June 30, 2017.²⁰ For relevant cases, the selection was limited to the final decision.²¹

The exclusions, in three successive categories, further clarify the scope of the coverage. The first category consists of the obvious but nevertheless notable exclusions that are directly obverse to the aforementioned²² boundaries: (1) decisions citing OCR policy interpretations for other statutory frameworks in the agency's jurisdiction, such as Title IX;²³ and (2) the infrequent decisions concerning relevant OCR policy interpretation but prior to Jan. 1, 2000²⁴ or after June 30, 2017.²⁵ The second category of exclusions were specific to OCR's complaint investigation role without a resulting relevant policy interpretation: (1) the several decisions that cited complaints to OCR in the factual background of the case;²⁶ (2) those decisions in which *11 the OCR complaint was the basis for a retaliation claim;²⁷ (3) those decisions where the claim was based on a settlement agreement resulting from an OCR complaint;²⁸ and (4) those in which OCR was the defendant.²⁹ The final category was more of a judgment call, excluding those cases where the mention of the OCR policy interpretation appeared to be merely marginal.³⁰

Results of the Analysis

The systematic search and selection yielded thirty final³¹ court decisions that cited OCR or, to the limited applicable extent,³² DOJ policy interpretations as either supportive or not supportive.³³ However, the court directly addressed the deference issue in only five (17%) of the cases. In three of these five cases, the court found the agency interpretation to be persuasive.³⁴ *12 Conversely, in the other two of these five cases, the court rejected according any persuasive weight to the OCR agency interpretation at issue.³⁵

Finally, among the remaining twenty-five cases, the court used the OCR policy document as either sole support (n=4)³⁶ or in combination with other sources of support (n=13).³⁷ The remainder consisted of the aforementioned³⁸ marginally included decisions (n=8).

Discussion of the Findings

Like OSEP (and OSERS) policy interpretations under the IDEA, OCR (and DOJ) policy interpretations have served to resolve ambiguities and fill gaps in the applicable regulations for a limited but notable number of court decisions under the Section 504 and the ADA. The overall total of 30 decisions for OCR/DOJ,³⁹ as compared 73 decisions for OSEP/OSERS⁴⁰ is not unexpected due to the substantially lower frequency of claims under Section 504/ADA, as compared to those under the IDEA, that courts have *13 specifically addressed in the K-12 student context.⁴¹ Although the scope of the Section 504/ADA definition of disability is broader than that under the IDEA,⁴² the lower frequency of specific judicial analyses of Section/504 claims is largely attributable to two factors: (1) for the predominant, "double-covered"⁴³ group of students, the courts often do not reach the merits due to the rather robust exhaustion provision

of the IDEA;⁴⁴ (2) for those cases that reach the merits under either the double-covered or the 504-alone category, the prevailing requirement to show intentional discrimination often causes dismissal or summary disposition without addressing the issues associated with the OCR (and DOJ) guidance.⁴⁵ On the other hand, OCR's cessation or at least suspension in the use of policy letters in response to individual or organizational inquiries,⁴⁶ does not seem to be a differentiating factor because, although OSEP continues their use, OCR's other sources of policy interpretations would seem to provide a counterbalancing effect.⁴⁷

Within the expected lower frequency, the courts' use of OCR (and DOJ) policy interpretations is similar to that of the corresponding OSEP (and OSERS) policy interpretations.⁴⁸ Their general supportive use and relatively infrequent testing in terms of the *Auer* factors⁴⁹ may reflect a results-oriented, *14 legal realism approach, where the courts selectively cite the agency interpretations where they add support to the conclusions without generally examining their specific legal force.⁵⁰ Alternatively or additionally, the relatively selective and supportive use may be attributable to the parties' attorneys to the extent that they lack sufficient specialization to be familiar with these sources. In any event, the relatively low and cursory usage fits with the judicial preference for statutes⁵¹ and judicial precedents.⁵²

The numbers in the successive exploratory studies of the courts' use of OSEP and OCR policy interpretations within the K-12 context⁵³ warrant follow-up research including more thorough searching of not only the applicable case law but also the parties' briefs, extensions to other contexts, such as the intersecting OCR areas of (1) the Title VI and Title IX frameworks, (2) the adjoining context of postsecondary education, and (3) the corresponding cases specific to employees.

Footnotes

^{a1} *Education Law Into Practice* is a special section of the EDUCATION LAW REPORTER sponsored by the Education Law Association. The views expressed are those of the author and do not necessarily reflect the views of the publisher or the Education Law Association. Cite as 349 Ed.Law Rep. [7] (December 28, 2017).

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¹ Perry A. Zirkel, *The Courts' Use of OSEP Policy Interpretations in IDEA Cases*, 344 Ed. Law Rep. 671 (2017).

² Both OSEP and OCR are parts of the U.S. Department of Education, with OSEP being within a larger Office of Special Education and Rehabilitation Services (OSERS). For the Department's organizational structure showing the respective positions of OCR and OSERS, see <https://www2.ed.gov/about/offices/or/index.html>.

³ For OCR, due to its investigative and compliance arm, the policy interpretations include not only Dear Colleague Letters and other general memoranda but also letters of findings in response to complaints on behalf of K-12 students with disabilities. OSEP lacks such an organizational component, with the parallel for complaint investigations under the IDEA being at the state education agency level. See, e.g., Perry A. Zirkel, *Legal Boundaries for the IDEA Complaint Resolution Process: An Update*, 313 Ed. Law Rep. 1 (2015).

⁴ As explained *infra* note 11, the coverage also extends to a limited extent to the policy interpretations of the Department of Justice (DOJ).

⁵ For a detailed canvassing of the close relationship between Section 504 and the ADA and their differences from the IDEA, see Perry A. Zirkel, *An Updated Comprehensive Comparison of the IDEA and Section 504/ADA*, 342 Ed. Law Rep. 886 (2017).

⁶ For an overview of the official enforcement responsibility of OCR, see, e.g., <https://www2.ed.gov/about/offices/list/ocr/aboutocr.html>.

- 7 First, in addition to the students covered solely by the wider definition of disability under Section 504 and the ADA, almost all students with individualized education programs (IEPs) under the IDEA are covered by Section 504/ADA. For the demographic extent of “504-only students,” see, e.g., Perry A. Zirkel & John M. Weathers, *K-12 Students Eligible Solely under Section 504: Updated National Incidence Data*, 27 J. DISABILITY POLY STUD. 67 (2016). For the possible exceptions for students with IDEA IEPs, see, e.g., *B.C. v. Mount Vernon Sch. Dist.*, 837 F.3d 152, 336 Ed.Law Rep. 141 (2d Cir. 2016). Second, unlike the IDEA, Section 504 and the ADA extend to students in higher education, employees, and other individuals in applicable entities. See, e.g., Margaret McMenamain & Perry A. Zirkel, *Section 504, the Americans with Disabilities Act, and Public School Employment*, 11 J. PERSONNEL EVALUATION IN EDUC. 243 (1997).
- 8 See Zirkel, *supra* note 1, at 671.
- 9 *Gloucester Cty. Sch. Bd. v. G.G.*, 822 F.3d 709, 723, 331 Ed.Law Rep. 54 (4th Cir. 2016), *vacated and remanded*, 137 S.Ct. 1239 (2017). For related trial court decisions, which differed from each other in relation to the agency interpretation, see *Bd. of Educ. of Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, 208 F.Supp.3d 850, 341 Ed. Law Rep. 236 (S.D. Ohio 2016), *aff'd mem. sub nom. Dodds v. U.S.*, 845 F.3d 217, 338 Ed. Law Rep. 675 (6th Cir. 2017); *State of Tex. v. U.S.*, 201 F.Supp.3d 810, 340 Ed.Law Rep. 200 (N.D. Tex. 2016). The intervening change was the joint OCR/DOJ rescission of the prior OCR policy interpretations. See Zirkel, *supra* note 1, at 671 n.3.
- 10 Zirkel, *supra* note 1, at 675-76.
- 11 The scope also extends to the limited role of the DOJ policy interpretations in K-12 student cases based on its residual authority, particularly under the ADA. See, e.g., 28 C.F.R. § 35.171 (2014). However, within the boundaries of this analysis, the only applicable agency interpretations thus far have concerned the specialized issue of service animals in public schools. See, e.g., *United States v. Chili-Cent. Sch. Dist.*, 198 F.Supp.3d 228, 234, 339 Ed.Law Rep. 789 (W.D.N.Y. 2016); *Alboniga v. Sch. Bd. of Broward Cty.*, 87 F.Supp.3d 1319, 321 Ed. Law Rep. 331 (S.D. Fla. 2015).
- 12 These regulations, which are attributable to OCR, have remained largely unchanged since their issuance and reissuance more than 35 years ago. The commentary for these regulations, which has the heading Appendix A, starts at 45 Fed. Reg. 30,945 (May 9, 1980); 45 Fed. Reg. 22,685 (May 4, 1977).
- 13 E.g., for the aforementioned (*supra* note 11) use of the ADA commentary regarding service animals, see 75 Fed. Reg. 56,197 (Sept. 15, 2010).
- 14 For these guidance documents in the OCR website archive, which extends back to 1997, see <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/disability.html>.
- 15 These letters are not available via the OCR website. However, based on a cursory search in LRP's SpecialEdConnectionb, it appears that OCR ceased this practice approximately 15 years ago. See, e.g., Letter to Bowen, 35 IDELR ¶ 129 (OCR 2001); Letter to Durham, 27 IDELR 380 (OCR 1997); Letter to Zirkel, 22 IDELR 667 (OCR 1995).
- 16 In recent years most of the OCR complaint investigations have ended with “voluntary” resolution agreements. See, e.g., <https://www2.ed.gov/about/offices/list/ocr/frontpage/casesolutions/disability-cr.html>. In any event, they do not represent a generalizable policy position of the agency, as some of the LOFs explicitly warn. E.g., *Harrison (CO) Sch. Dist. Two*, 57 IDELR ¶ 295 (OCR2011); *Polk Cty. (FL) Pub. Sch.*, 56 IDELR ¶ 179 (OCR 2010) (“[LOFs] are not formal statements of OCR policy, and they should not be relied upon, cited, or construed as such”).
- 17 519 U.S. 452 (1997). For a long line of related Supreme Court decisions, see, e.g., *Decker v. Nw. Envtl. Def. Ctr.*, 133 S.Ct. 1326, 1337 (2013) (“It is well established that an agency's interpretation need not be the only possible reading of a regulation--or even the best one--to prevail.”); *Christopher v. SmithKline Beecham Co.*, 567 U.S. 142, 158 (2012) (not in the absence of fair warning, such as where “an agency's announcement of its interpretation is preceded by a very lengthy period of conspicuous inaction”); *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 702 (1991) (“[I]t is axiomatic that the [agency's] interpretation need not be the best or most natural one by grammatical or other standards. Rather, [its] view need be only reasonable to warrant deference.”); *Honig v. Doe*, 484 U.S. 305, 325 n.8, 43 Ed.Law Rep. 857 (1988) (“Given this ambiguity [in the statutory language and legislative history], we defer to the construction adopted by the agency charged with monitoring and enforcing the statute. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 ... (1987); *Skidmore v. Swift & Co.*, 323 U.S. 144 (1944) (according deference in proportion to the “thoroughness evident in its consideration, the validity of its reasoning, its consistency with

earlier and later pronouncements, and all those factors which give it power to persuade.”). Moreover, the agency's position comports fully with the purposes of the statute.”). For an elaboration of judicial deference, including an evaluation of the pertinent Supreme Court jurisprudence, see Anuradha Vaitheswaran & Thomas Mayes, *The Role of Deference in Judicial Review of Agency Action*, 27 J. NAT'L ASS'N OF ADMIN. L. JUDICIARY 402, 407-418 (2007).

18 *Auer v. Robbins*, 519 U.S. at 461-462. For a checklist of these factors in the K-12 context, see Perry A. Zirkel, *Do OSEP Policy Letters Have Legal Weight?* 171 Ed. Law Rep. 391 (2003). This *Auer* deference is separate from and lower than that accorded to agency regulations under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). For an example in the IDEA context, see *Ariz. State Bd. of Charter Sch. v. U.S. Dep't of Educ.*, 464 F.3d 1003, 1006-07, 213 Ed. Law Rep. 114 (9th Cir. 2006).

19 The search terms also extended to “Fed. Reg.” variations for the regulations' commentary. See *supra* notes 12-13.

20 This period was in parallel to the predecessor, OSEP analysis. See *supra* note 10 and accompanying text.

21 “Final decision” in this limited context of relevance refers to the selection in a case with more than one decision. If only one decision contained a relevant reference to OCR, it was the choice even if it was not the most recent or the highest ruling. However, if more than one decision contained a relevant reference to OCR, the choice was the most recent. *E.g.*, *T.K. v. N.Y.C. Dep't of Educ.*, 779 F.Supp.2d 289, 270 Ed. Law Rep. 593 (S.D.N.Y. 2011), *further proceedings*, 32 F.Supp.3d 405, 312 Ed. Law Rep. 603 (S.D.N.Y. 2015), *aff'd on other grounds*, 810 F.3d 869, 326 Ed. Law Rep. 609 (2d Cir. 2016).

22 See *supra* text accompanying notes 11 and 20.

23 *E.g.*, *Doe v. Bd. of Educ. of Prince George's Cty.*, 605 Fed.Appx. 159, 318 Ed. Law Rep. 696 (5th Cir. 2015); *Hawkins v. Sarasota Sch. Bd.*, 322 F.3d 1279, 174 Ed. Law Rep. 678 (11th Cir. 2003); *Smith v. Metro. Sch. Dist. Perry Twp.*, 128 F.3d 1014, 122 Ed. Law Rep. 48 (7th Cir. 2000); *Lockhart v. Willingboro High Sch.*, 70 IDELR ¶ 258 (D.N.J. 2017).

24 *E.g.*, *Honig v. Doe*, 484 U.S. 305, 325 n.8, 43 Ed. Law Rep. 857 (1988) (“Given this ambiguity, we defer to the construction adopted by the agency charged with monitoring and enforcing the statute.”); *T.J.W. v. Dothan City Bd. of Educ.*, 26 IDELR ¶ 999 (M.D. Ala. 1999) (“While determinations by the OCR are not binding on this court, when relevant, the court looks to the OCR's interpretation of § 504 Regulations as persuasive authority”).

25 *E.g.*, *A.H. v. Illinois High Sch. Ass'n*, 70 IDELR ¶ 92 (N.D. Ill. 2017) (citing an OCR DCL in note 17).

26 *E.g.*, *Fry v. Napoleon Cmty. Sch.*, 137 S.Ct. 743, 340 Ed. Law Rep. 19 (2017); *S.D. v. Haddon Heights Bd. of Educ.*, 833 F.3d 389, 335 Ed. Law Rep. 123 (3d Cir. 2016); *CTL v. Ashland Sch. Dist.*, 743 F.3d 524, 302 Ed. Law Rep. 31 (7th Cir. 2014); *B.M. v. S. Callaway R-II Sch. Dist.*, 732 F.3d 882, 297 Ed. Law Rep. 712 (8th Cir. 2013); *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 196 Ed. Law Rep. 791 (11th Cir. 2005); *Reed v. Kerens Indep. Sch. Dist.*, 70 IDELR ¶ 40 (N.D. Tex. 2017); *Swanson v. Yuba City Unified Sch. Dist.*, 65 IDELR ¶ 197 (E.D. Cal. 2015); *J.A. v. Wentzville R-IV Sch. Dist.*, 65 IDELR ¶ 133 (E.D. Mo. 2015); *Donus v. Garden City Union Free Sch. Dist.*, 987 F.Supp.2d 218, 306 Ed. Law Rep. 99 (S.D.N.Y. 2013); *R.B. v. Mastery Charter Sch.*, 762 F.Supp.2d 745, 267 Ed. Law Rep. 158 (E.D. Pa. 2010); *J.D.P. v. Cherokee Cty. Sch. Dist.*, 735 F.Supp.2d 1348, 263 Ed. Law Rep. 576 (N.D. Ga. 2010); *A.M. v. N.Y.C. Dep't of Educ.*, 840 F.Supp.2d 660, 281 Ed. Law Rep. 854 (E.D.N.Y. 2012); *H.W. v. Long Beach Unified Sch. Dist.*, 56 IDELR ¶ 101 (C.D. Cal. 2011); *Sch. Bd. of Manatee Cty. v. L.H.*, 666 F.Supp.2d 1285, 253 Ed. Law Rep. 189 (M.D. Fla. 2009); *S.L.-M v. Dierringer Sch. Dist. No. 343*, 614 F.Supp.2d 1152, 245 Ed. Law Rep. 83 (W.D. Wash. 2008); *Curry v. Shaw Sch. Dist.*, 47 IDELR ¶ 163 (N.D. Miss. 2007); *A.S. v. Trumbull Cty. Bd. of Educ.*, 414 F.Supp.2d 152 (D. Conn. 2006); *Sutton v. W. Chester Area Sch. Dist.*, 41 IDELR ¶ 61 (E.D. Pa. 2004); *Minor B. v. Stockton Unified Sch. Dist.*, 65 IDELR ¶ 110 (Cal. Ct. App. 2015)

27 *E.g.*, *A.C. v. Shelby Cty. Bd. of Educ.*, 711 F.3d 687, 290 Ed. Law Rep. 542 (6th Cir. 2013); *Jenkins v. Rock Hill Sch. Dist.*, 513 F.3d 580, 229 Ed. Law Rep. 40 (6th Cir. 2008); *Vives v. Fajardo*, 472 F.3d 19, 215 Ed. Law Rep. 247 (1st Cir. 2007); *Hamilton v. Hite*, 70 IDELR ¶ 175 (E.D. Pa. 2017); *R.K. v. Y.A.L.E. Sch., Inc.*, 621 F.Supp.2d 188, 246 Ed. Law Rep. 147 (D.N.J. 2009).

28 *E.g.*, *A.R. v. Sch. Admin. Unit #23*, 71 IDELR ¶ 12 (D.N.H. 2017); *C.M. v. Pemberton Twp. High Sch.*, 70 IDELR ¶ 101 (D.N.J. 2017); *cf. K.F. v. Francis Howell R-III Sch. Dist.*, 49 IDELR ¶ 244 (E.D. Mo. 2008) (resolution agreement).

- 29 *E.g.*, *Cunningham v. Riley*, 98 F.Supp.2d 554, 146 Ed.Law Rep. 118 (D. Del. 2000); *McKnight v. U.S. Dep't of Educ. OCR*, 69 IDELR ¶ 234 (D. Nev. 2016).
- 30 *Seth B. v. Orleans Parish Sch. Bd.*, 810 F.3d 861, 876 n.36 (5th Cir. 2016); *Horne v. Potomac Preparatory P.C.S.*, 209 F.Supp.3d 146, 149 n.2, 341 Ed.Law Rep. 273 (D.D.C. 2016); *K.D. v. Starr*, 55 F.Supp.3d 782, 792 n.8, 316 Ed.Law Rep. 124 (D. Md. 2014); *MC v. Arlington Cent. Sch. Dist.*, 59 IDELR ¶ 134 (S.D.N.Y. 2012); *Chavez v. Bd. of Educ. of Tularosa Mun. Sch.*, 2008 WL 4816992 (D.N.M. July 25, 2008); *Joseph M. v. Se. Delco Sch. Dist.*, 34 IDELR ¶ 117 (E.D. Pa. 2001); *Baisden v. W. Va. Secondary Sch. Activities Comm'n*, 568 S.E.2d 32, 42 n.10, 168 Ed.Law Rep. 950 (W. Va. 2002).
An additional, rather odd but clear-cut exclusion was a case in which the court cited an IDEA hearing officer decision for support but mistakenly characterized it as an OCR decision. *Rene v. Reed*, 751 N.E.2d 736, 746, 155 Ed.Law Rep. 815 (Ind. Ct. App. 2001).
- 31 *See supra* note 21 and accompanying text.
- 32 *See supra* note 11.
- 33 The second category here broadly extended to eight cases where the court declined to address the weight of the OCR policy interpretation, often by distinguishing it from the issue in the case. *D.F. v. Leon Cty. Sch. Bd.*, 65 IDELR ¶ 134 (N.D. Fla. 2015); *Kimble v. Douglas Cty. Sch. Dist. RE-1*, 925 F.Supp.2d 1176, 1183-84, 295 Ed.Law Rep. 637 (D. Colo. 2013); *J.B. v. Avilla R-XIII Sch. Dist.*, 58 IDELR ¶ 33 (W.D. Mo. 2011); *M.W. v. Avilla R-XIII Sch. Dist.*, 57 IDELR ¶ 68 (W.D. Mo. 2011); *Bantum v. Sch. Dist. of Phila.*, 56 IDELR ¶ 199 (E.D. Pa. 2011); *Joshua S. v. Sch. Bd. of Indian River Cty.*, 37 IDELR ¶ 218 (S.D. Fla. 2002); *Chapman v. Cal. Dep't of Educ.*, 36 IDELR ¶ 91 (C.D. Cal. 2002); *Bradshaw v. Cherry Creek Sch. Dist. No. 5*, 98 P.3d 886, 892, 192 Ed.Law Rep. 576 (Colo. Ct. App. 2003).
- 34 *D.L. v. Baltimore City Bd. of Sch. Comm'rs*, 706 F.3d 256, 259-60, 289 Ed.Law Rep. 493 (4th Cir. 2012) (“Where a regulation is ambiguous we must grant deference to an agency’s interpretation of its own regulation.” *Auer v. Robbins*, 519 U.S. 452 (1997) [other citations omitted]. We grant *Auer* deference even when the agency interpreting its regulation issues its interpretation through an informal process, such as an opinion letter. [citations omitted]. Where an agency has made an interpretation of its own regulation, as the Department of Education has done in *Letter to Veir*, that interpretation is controlling unless it is “plainly erroneous or inconsistent with the regulation.” *See Auer*, 519 U.S. at 461); *Lamkin v. Lone Jack C-6 Sch. Dist.*, 58 IDELR ¶ 197 (W.D. Mo. 2012) (“The Plaintiffs argue that *Letter of McKethan* should not be followed, but have failed to cite any judicial or administrative decision that calls it into doubt. In contrast, the Defendants note that administrative decisions have cited and relied upon it The Court finds *Letter of McKethan* persuasive, and finds that the Plaintiffs’ revocation of services under IDEA was tantamount to revocation under § 504 and the ADA.”); *Hornstine v. Twp. of Moorestown*, 263 F.Supp.2d 887, 908, 178 Ed.Law Rep. 244 (D.N.J. 2003) (“This [OCR] letter ... is entitled to deference as an opinion expressed by the administrative agency in charge of ADA enforcement in school settings, see *Chevron v. Nat'l Res. Def. Council*, 467 U.S. 837, 843 (1984).”).
- 35 *J.M. v. Dep't of Educ., State of Haw.*, 224 F.Supp.3d 1071, 1086, 343 Ed.Law Rep. 839 (D. Haw. 2016) (“This Court is not aware of any Ninth Circuit case addressing what, if any, weight courts should give to the OCR’s Dear Colleague letters. This Court therefore concludes that the OCR’s 10/21/14 Dear Colleague Letter is merely aspirational.”); *Long v. Murray Cty. Sch. Dist.*, 59 IDELR ¶ 76 (N.D. Ga. 2012) (“The Court does not consider the Office of [sic] Civil Rights (‘OCR’) administrative enforcement actions cited by Plaintiffs [as persuasive]. OCR applies a different and less exacting legal standard in enforcement actions than courts apply in actions for monetary damages.”). Alternatively, this second case may be read as fitting in the aforementioned (*supra* note 30) broad category.
- 36 *K.L. v. Mo. State High Sch. Athletic Ass'n*, 178 F.Supp.3d 792, 805, 336 Ed.Law Rep. 820 (E.D. Mo. 2016); *N.M. v. Cent. Bucks Sch. Dist.*, 62 IDELR ¶ 208 (E.D. Pa. 2013); *Mason v. Bd. of Educ.-Howard Cty. Pub. Sch. Sys.*, 56 IDELR ¶ 14 (D. Md. 2011); *C.D. v. N.Y.C. Dep't of Educ.*, 52 IDELR ¶ 8 (S.D.N.Y. 2009).
- 37 *Gohl v. Livonia Pub. Sch.*, 836 F.3d 672, 692, 336 Ed.Law Rep. 114 (6th Cir. 2016); *T.K. v. N.Y.C. Dep't of Educ.*, 810 F.3d 869, 876, 326 Ed.Law Rep. 609 (2d Cir. 2016); *Christopher S. v. Stanislaus Cty. Office of Educ.*, 384 F.3d 1205, 1211-12, 192 Ed.Law Rep. 303 (9th Cir. 2011); *Todd v. Carstarphen*, 236 F.Supp.3d 1311 (N.D. Ga. 2017); *Pollack v. Reg'l Sch. Unit 75*, 69 IDELR ¶ 271 (D. Me. Apr. 28, 2017); *United States v. Chili-Cent. Sch. Dist.*, 198 F.Supp.3d 228, 234, 339 Ed.Law Rep. 789 (W.D.N.Y. 2016); *Meares v. Rim of the World Unified Sch. Dist.*, 69 IDELR ¶ 30 (C.D. Cal. 2016); *Sch. Bd. of Lee Cty. v.*

M.P., 68 IDELR ¶ 242 (M.D. Fla. 2016); *AP v. Pennsbury Sch. Dist.*, 68 IDELR ¶ 132 (E.D. Pa. 2016); *Alboniga v. Sch. Bd. of Broward Cty.*, 87 F.Supp.3d 1319, 1343-44, 321 Ed.Law Rep. 331 (S.D. Fla. 2015). *Garcia v. Northside Indep. Sch. Dist.*, 47 IDELR ¶ 6 (W.D. Tex. 2007); *Smith v. Tangipahoa Parish Sch. Bd.*, 46 IDELR ¶ 282 (E.D. La. 2006); *D.E.R. v. Bd. of Educ. of Borough of Ramsey*, 2005 WL 1177944 (D.N.J. May 5, 2005).

38 *See supra* note 33.

39 *See supra* text accompanying notes 31. Although the boundary is not a bright one, the inclusion of cases on one margin is counterbalanced by the exclusion of what amounts to approximately on equal number on the opposite margin. *See supra* notes 30 and 33.

40 *See supra* text accompanying note 10.

41 *See, e.g.*, Perry A. Zirkel, *A National Update of Case Law from 1998 to the Present under the IDEA and Section 504/ADA* (June 2015), <http://nasdse.org/Publications/tabid/577/Default.aspx> (showing a much higher predominance of court cases decided on the merits under the IDEA than under Section 504/ADA in the K-12 context). Alternatively, although only approximate, the estimated total for IDEA decisions in the predecessor article was 2300 (Zirkel, *supra* note 1, at 677), whereas the estimated total for Section 504 decisions is 1236. E-mail from Leigh Dalton, attorney with Stock & Leader (after consulting with Westlaw reference attorney Michael Suarez), to Professor Perry A. Zirkel (Nov. 13, 2017, 04:13 EST) (on file with the author).

42 The difference is largely due to the Section 504/ADA extension to various major life activities rather than just learning, as compared with the IDEA focus on educational impact (in terms of adverse effect on educational performance necessitating special education). *See, e.g.*, Zirkel, *supra* note 5, at 890 and nn.49-50.

43 The category of “double-covered” students refers to those with IEPs, whereas “504-alone” students are those with 504 plans because they are eligible only under Section 504 (and the ADA), not under the IDEA. The double-covered designation accounts for approximately 12.5% of the K-12 student population, whereas the 504-alone designation accounts for approximately 1.5% of this overall population. Zirkel & Weather, *supra* note 7, at 68 and 70.

44 *E.g.*, Louis Wasserman, *Delineating Administrative Exhaustion Requirements and Establishing Federal Courts' Jurisdiction under the Individuals with Disabilities Education Act*, 29 J. NAT'L ADMIN. L. JUDICIARY 349 (2009) (canvassing the extensive case law applying the provision in the IDEA requiring utilization of the hearing officer system prior to initiating suit in court). For the most recent iteration of the applicable test, see *Fry v. Napoleon Community Schools*, 137 S.Ct. 743, 340 Ed.Law Rep. 19 (2017) (requiring exhaustion where the gravamen of the case is denial of FAPE).

45 *E.g.*, Perry A. Zirkel, *Do Courts Require a Heightened, Intent Standard for Students' Section 504 and ADA Claims Against School Districts?*, 46 J.L. & EDUC. 559 (2017) (finding a predominant trend for requiring an intent-type standard to K-12 student Section 504/ADA claims).

46 *See supra* note 15.

47 *See supra* notes 14, 16 and accompanying text. The issuance of general policy memoranda, such as DCLs and FAQs, seems to have increased when the individual letters ceased, likely suggesting a decision to integrate selected inquiries into such more general and focused pronouncements.

48 *See supra* text accompanying notes 10 and 32-34.

49 *See supra* note 17-18 and accompanying text.

50 For example, in the only one of the thirty cases to cite an OCR LOF, despite the aforementioned (*supra* note 1) caveat, the court used it as sole support in reaching a relative unusual disparate impact conclusion. *C.D. v. N.Y.C. Dep't of Educ.*, 52 IDELR ¶ 8 (S.D.N.Y. 2009)

51 For a reflection of the hierarchal successively lower weighting of regulations and agency interpretations, *see supra* note 18.

52 *See, e.g.*, Jeffrey C. Dobbins, *Structure and Precedent*, 108 MICH. L. REV. 1453, 1460-63 (2010) (tracing the vertical and horizontal binding dimension and the separable persuasive dimension).

53 The findings are likely underestimates, particularly for the OCR/DOJ analysis due to the limitations of the Boolean search process, which are more pronounced for the more broader and more heterogeneous activity of these agencies as compared with that of OSEP.

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