What's the Word? Current Legal Issues in Caselaw and USDOE Guidance

Presented by
Jose L. Martín, Attorney
Richards Lindsay & Martín, L.L.P.—Austin, Texas
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Anxiety in Students with Disabilities

- Often appears together with other conditions and/or diagnoses
- Appears to be a growing problem, likely exacerbated by COVID pandemic (see OSERS' *Return to School Roadmap*, 79 IDELR 232 (September 30, 2021))
- Commonly creates legal issues in several areas

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Legal Areas of Interest

1. Child-Find
2. Eligibility
3. IEP/Services
4. Attendance/Truancy
5. Private Placement Cases
6. Homebound Placement
7. Disability Harassment/Bullying

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Child-Find

***Zamora v. Hays Cons. Ind. Sch. Dist.*, 79 IDELR 12 (W.D.Tex. 2021)**

Middle-schooler diagnosed with ADHD, depression and an anxiety disorder misses some school and goes to nurse a lot.

When parents asked about §504, a meeting was held, and a §504 Plan put into place with accommodations (extra time, breaks, reminders, notetaking assistance).

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Child-Find

***Zamora v. Hays Cons. Ind. Sch. Dist.*, 79 IDELR 12 (W.D.Tex. 2021)**

In high school parents ask for sp ed evaluation, but then refused to sign consent.

Parents submitted a letter indicating student also had generalized anxiety disorder (GAD) and requesting §504 Plan.

Before giving consent to evaluate, parents filed for due process.

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***Zamora v. Hays Cons. Ind. Sch. Dist.*, 79 IDELR 12 (W.D.Tex. 2021)**

Parents placed student in a charter school (where he had attendance problems).

HO had to order parents—twice—to submit the student for evaluation by the District.

Evaluation concluded student was not IDEA-eligible and HO ruled for the District.

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***Zamora v. Hays Cons. Ind. Sch. Dist.*, 79 IDELR 12 (W.D.Tex. 2021)**

On appeal, Court noted that parents had asked for §504 Plan, not sp ed, and that a district "does not commit a Child Find violation merely because it pursues §504 accommodations before pursuing a special education evaluation….There may be cases where intermediate measures are reasonably implemented before resorting to evaluation."

With his §504 Plan, student received all As and Bs, including in AP classes, and scored at "Masters" level on State tests.

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***Zamora v. Hays Cons. Ind. Sch. Dist.*, 79 IDELR 12 (W.D.Tex. 2021)**

Court found §504 Plan was addressing student's needs.

Moreover, Court also found that District did not delay in evaluating the student under IDEA after he was formally diagnosed with GAD, but the parents failed to consent.

Private Dr's letter, moreover, only recommended §504, not special education services.

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***Zamora v. Hays Cons. Ind. Sch. Dist.*, 79 IDELR 12 (W.D.Tex. 2021)**

Notes—Apparently, Court thought attendance problem not severe, as student continued to perform at a high level.

Note the recurring issue of students with anxiety that are taking high-stress advanced classes…

Tactically, it can't help a parents' child-find claim to refuse consent for evaluation when offered it… (And only private eval does not recommend sp ed).

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D.T. v. Cherry Creek Sch. Dist., 79 IDELR 74 (D.Co. 2021)

Florida high-schooler had difficulty transitioning into large high school in Colorado, with declining grades in 10th grade honors classes (he refused to consider switch to regular classes).

Parent reported he had a suicidal ideation, which led school to do a Suicide Risk Assessment and a referral to a crisis center (parent did not follow up, saying student would not cooperate).

In 11th grade, student reported family stress, was later hospitalized, was smoking pot, and parent requested a §504 plan.

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D.T. v. Cherry Creek Sch. Dist., 79 IDELR 74 (D.Co. 2021)

After he commented that he was going to "shoot up the school," he ran away, but was hospitalized again, diagnosed with depression and GAD.

He transitioned to a home program after being expelled, upon which the parent requested a sp ed evaluation.

IEP team concluded student qualified as ED, student transferred to another high school, where in 12th grade his grades dropped (he was doing drugs, lost focus on academics), although he was able to graduate with his class.

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D.T. v. Cherry Creek Sch. Dist., 79 IDELR 74 (D.Co. 2021)

Parent filed for due process claiming untimely child-find.

Court agreed with HO that IDEA child-find obligation was not triggered until the shooting threat, as prior problems appeared "situational" due to transfer to a different state and large school.

Court noted that student refused considering non-honors courses, and that parent had not followed up with crisis center referral.

Conclusion: no child-find violation.

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***D.T. v. Cherry Creek Sch. Dist.*, 79 IDELR 74 (D.Co. 2021)**

Note—Similar to the Maine law, Colorado regulations indicated that ED eligibility does not exist unless general education interventions have first been tried and found wanting. Also, see citations to a similar California law in *A.P. v. Pasadena USD*, 78 IDELR 139 (C.D.Cal. 2021). To what degree can schools rely on such provisions in a child-find dispute?...

Could not a claim had been made that *§504* child-find was violated even earlier, when schools learned of hospitalization and diagnoses?... Parent had actually asked for a §504 plan, but staff just provided some informal assistance with assignments.

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- ***A.W. v. Middletown Area SD*, 65 IDELR 16 (M.D.Pa. 2015)**

17-year-old with GAD, social phobia, separation anxiety disorder.

Diagnosed and received therapy since 3rd grade (school advised parents to have him evaluated due to absences).

After various parent inquiries, District developed a §504 plan after an IDEA evaluation concluded that his OK academic performance meant he was not eligible under IDEA.

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- ***A.W. v. Middletown Area SD*, 65 IDELR 16 (M.D.Pa. 2015)**

In 8th grade, the student's emotional status deteriorated significantly, absences began to accumulate, disruptive behaviors emerged, and failing grades began

Despite §504 plan, the absences continued, so District initiated a compulsory attendance action against the student.

District proposed a *psychiatric* evaluation; parent agreed, but also asked for an IDEA eval.

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- ***A.W. v. Middletown Area SD*, 65 IDELR 16 (M.D.Pa. 2015)**

  Psychiatric eval confirmed diagnoses of anxiety, but added ODD, recommended IDEA eligibility as ED, and half days at school..

  District did not revise §504 plan, but now initiated IDEA referral (psychiatric eval did not provide data to develop an IEP).

  After student was about to fail several classes, parents placed him in District's online program (no §504 plan at the program).

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- ***A.W. v. Middletown Area SD*, 65 IDELR 16 (M.D.Pa. 2015)**

  An agreed-to independent eval found the student to be eligible under IDEA as ED

  In his now 9th grade, the student received an IEP, but parents requested a hearing, alleging untimely child-find.

  HO found that District violated child-find, since there were ample reasons to suspect disability and need for services as early as 7th grade.

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- ***A.W. v. Middletown Area SD*, 65 IDELR 16 (M.D.Pa. 2015)**

  Court agreed there was a child-find violation, as school did not evaluate the student within a reasonable time after suspicion of eligibility.

  "Because the District engaged in 'an unnecessary two-step process in conducting its evaluation,' it deprived A.W. of 'needed educational supports and services.'"

  The Court remanded case to HO to determine award of compensatory services.

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- ***A.W. v. Middletown Area SD*, 65 IDELR 16 (M.D.Pa. 2015)**

  Notes—In a later decision, the Court affirmed an award of 949 hours of comp ed, more than an hour-for-hour award, including for many absences, which it found directly related to unaddressed anxiety—(see 65 IDELR 247)

  Why the psychiatric "pre-eval" rather than an IDEA-sufficient eval? What was its purpose? Why no school-based counseling or BIP in §504 plan?

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- ***A.W. v. Middletown Area SD*, 65 IDELR 16 (M.D.Pa. 2015)**

  Note factual ingredients present in the case quite a bit prior to IDEA referral: many absences, truancy action, behaviors, declining grades, outside services, concerned parents…

  Treating absences as a truancy matter, when there are indications of disability that may manifest with attendance problems, adds to the child-find risk.

  No §504 plan in online program? Likely a §504 violation.

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- **Child-Find Takeaways**

  Careful not to over-rely on academic performance in making the child-find decision

  Developing a solid §504 plan can help student's situation and assist in disputes involving timing of child-find, but its effectiveness must be monitored.

  If in doubt, offer parents sp ed evaluation

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- **Child-Find Takeaways**

  When worrisome factors start coming together, it's time to offer sp ed evaluation.

  General ed interventions have to be applied early in the chronology of problem, effectively, and with close monitoring and speedy follow-up.

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Eligibility

General Eligibility Legal Construct/Equation

Condition (meets fed and state criteria) +
Adverse impact on education (broad view) +
Need for sp ed services

= IDEA eligibility

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Eligibility

***Independent Sch. Dist. No 283 v. E.M.D.H.*, 74 IDELR 19 (E.D.Va. 2020), aff'd 76 IDELR 203 (8th Cir. 2020)**

High-schooler had depression and anxiety (and a number of other diagnoses over time), with an apparent capacity to comprehend and master class work, but with recurring attendance problems since elementary school.

In middle school, the student expressed she was afraid to go to school, stopped attending altogether, and was disenrolled.

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- ***Independent Sch. Dist. No 283 v. E.M.D.H.*, 74 IDELR 19 (E.D.Va. 2020), aff'd 76 IDELR 203 (8th Cir. 2020)**

  She began 9th grade, but attendance quickly became irregular, and she was admitted (again) to a day treatment program, and later, to an in-patient program in Wisconsin.

  At the beginning of 10th grade, the school placed her on a §504 plan (extra time, shortened work, check-ins with teachers, breaks from class, pass to counselor's office, fidget device), but she was again disenrolled due to mounting absences.

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- ***Independent Sch. Dist. No 283 v. E.M.D.H.*, 74 IDELR 19 (E.D.Va. 2020), aff'd 76 IDELR 203 (8th Cir. 2020)**

  She re-enrolled 11th grade, school agreed to evaluate for sp ed.

  Parents' attorney convinced school to rely on private evaluation upon reenrollment.

  Aside—While private evaluations must be considered by IEP team, they do not have to be followed. 34 C.F.R. §300.502(c)(1). Moreover, such evaluations might not be properly premised on IDEA eligibility standards…

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- ***Independent Sch. Dist. No 283 v. E.M.D.H.*, 74 IDELR 19 (E.D.Va. 2020), aff'd 76 IDELR 203 (8th Cir. 2020)**

  While District evaluation was pending, student was offered a self-paced online learning environment. She attended only three days.

  IEP team ultimately concluded student did not meet eligibility criteria under IDEA because her conditions did not adversely impact her educational performance, and because her impairments did not manifest in the classroom setting.

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- ***Independent Sch. Dist. No 283 v. E.M.D.H.*, 74 IDELR 19 (E.D.Va. 2020), aff'd 76 IDELR 203 (8th Cir. 2020)**

  District hired expert consultant to help clarify the nature of the student's difficulties, and he found her history of diagnoses and treatment was "complex, confusing, and at times, contradictory." He also stated that professionals treating her neither communicated with each other or referred to each other's files.

  The consultant also found that the student's "dysfunctional family dynamics" were "contributing factors" to her issues.

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- ***Independent Sch. Dist. No 283 v. E.M.D.H.*, 74 IDELR 19 (E.D.Va. 2020), aff'd 76 IDELR 203 (8th Cir. 2020)**

  With quick analysis, Court found that the student was both SED and OHI, as "her several diagnoses…appear to have directly impacted her attendance at school."

  "No one disputes that the Student excelled on standardized tests; neither can anyone dispute that her absenteeism inhibited her progress in the regular curriculum."

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- ***Independent Sch. Dist. No 283 v. E.M.D.H.*, 74 IDELR 19 (E.D.Va. 2020), aff'd 76 IDELR 203 (8th Cir. 2020)**

  On appeal, the 8th Circuit agreed that the student wasn't missing school as a result of bad choices, "but rather as a consequence of her compromised mental health, a situation to which the IDEA applies."

  It also noted that "[t]his Student may not present the paradigmatic case of a special education student," but the District failed to offer her a FAPE.

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- ***Independent Sch. Dist. No 283 v. E.M.D.H.*, 74 IDELR 19 (E.D.Va. 2020), aff'd 76 IDELR 203 (8th Cir. 2020)**

  Notes—OHI eligibility: does the student exhibit "limited strength, vitality, or alertness" (34 C.F.R. §300.8(c)(9))? An awkward fit.

  SED eligibility: "pervasive mood of unhappiness or depression," "fears associated with school problems," "inability to learn"? A better fit (see NDDPI ED Guidelines, at pgs. 12-14).

  Note that Court appears unworried about expert's conclusion that diagnoses seem contradictory, uncoordinated, and indicating family issues have played a part in attendance issues.

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- ***Independent Sch. Dist. No 283 v. E.M.D.H.*, 74 IDELR 19 (E.D.Va. 2020), aff'd 76 IDELR 203 (8th Cir. 2020)**

  It's hard to argue the §504 plan is addressing the disability-related problems when the student is not attending school, is in and out of programs, and clearly in distress—at least in part—from mental health conditions.

  On the point above, also see ***A.A. v. District of Columbia*, 70 IDELR 21 (D.D.C. 2017)**(K student with anxiety, who was frequently removed from the classroom despite her §504 plan needed sp ed); ***Pittsburgh Sch. Dist.*, 121 LRP 35219 (SEA PA 2021)**(frequent absences should have triggered evaluation, rather than §504 plan revision).

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- ***N.S. v. Randolph Bd. of Educ.*, 75 IDELR 103 (D.N.J. 2019)**

  Student excelled academically and had no attendance problems from 6th to 10th grade.

  He had a §504 plan based on a diagnosis of GAD, but was unwilling to attend school or work in home instruction.

  His teachers saw no signs of anxiety at school, and he only stopped attending when he reached the end of compulsory attendance age.

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- ***N.S. v. Randolph Bd. of Educ.*, 119 LRP 387700 (D.N.J. 2019)**

  Court found that his anxiety was not the cause of his failure to attend school.

  Thus, his anxiety did not require special ed, and there was no IDEA child-find violation.

  Parents' request for residential placement was denied ("there is evidence that plaintiffs decided to place him at Waypoint prior to the District's eligibility meeting to reduce stress and chaos in the home").

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- ***N.S. v. Randolph Bd. of Educ.*, 119 LRP 387700 (D.N.J. 2019)**

  Note—How is the court so confident that the student's anxiety is not at least a contributing factor to his attendance problems? Is there evidence of willful truancy?... Contrast to the previous case (*E.M.D.H.*), where the court was quite willing to attribute all absence issues to the anxiety and none to the family dysfunction.

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- ***D.L. v. Clear Creek Ind. Sch. Dist.*, 70 IDELR 32 (5th Cir. 2017)**

  In an unpublished decision, Court finds that high-schooler with anxiety, depression, and ADHD was not IDEA-eligible, as he excelled academically and socially before significant "truancy" in his last semester of high school.

  Litigation Note—Crucially, the parents only alleged that he was improperly dismissed from sp ed years before, and did not raise a child-find claim with respect to his senior year.

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- ***D.L.. v. Clear Creek Ind. Sch. Dist.*, 70 IDELR 32 (5th Cir. 2017)**

  Note—Court dismisses the student's attendance problems (he was apparently overwhelmed by makeup workload and gave up) as "truancy" despite acknowledging that he had depression, ADHD, and anxiety.

  Does this analysis not seem a bit "facile"?... Why exactly are the attendance issues mere "truancy"?

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- ***D.L.. v. Clear Creek Ind. Sch. Dist.*, 70 IDELR 32 (5th Cir. 2017)**

  Similarly see, ***Adams County Sch., Dist. #27J*, 76 IDELR 28 (SEA Colorado 2019)** where a high schooler with anxiety and other diagnoses who did well academically "when she did attend" was determined properly ineligible despite needing periodic homebound instruction and the after-effects of a sexual assault. HO found that "her dysfunction was a situational response to the assault." Does that matter?...

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- **Eligibility Takeaways**

  It should be well-established that adverse impact on education is comprehensive of non-academic effects (e.g., absences, socialization difficulties) (*See* NDDPI ED Guidelines, at p. 14, citing OSEP letter)

  Likewise, for students with anxiety, sp ed services may be needed for non-academic reasons.

  Careful with facile findings—without solid support—that students are engaging in willful refusal to attend or perform work.

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- **Eligibility Takeaways**

  Students with anxiety may present a "mixed bag," where part of the difficulties are due to disability and part are due to non-disability factors (e.g., family issues, willful behavior, attitudinal issues, etc) and it will be impossible to parcel out the respective causes.

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Attendance/Truancy

Perhaps the most vexing potential symptom of students' anxiety is difficulty attending school regularly.

At times, academic demands can exacerbate the anxiety, leading to problems completing schoolwork.

Obviously, failure to attend has immediate and alarming impact on both academic and non-academic progress.

Difficult Sub-Question—When is the behavior willful truancy and when is it a result of the student's anxiety?

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***A.P. v. Pasadena Unified Sch. Dist.*, 78 IDELR 139 (C.D.Cal. 2021)**

Parents of teenager with social anxiety disorder and depression provided the diagnoses to the school during a §504 meeting.

Student school avoidance and disengagement from schoolwork increased rapidly and significantly, but school did not evaluate until 4 months later, after a suicide attempt.

Court held that at the time of the §504 meeting, although student was doing quite well, school should have known student would deteriorate when under increased academic stress.

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***A.P. v. Pasadena Unified Sch. Dist.*, 78 IDELR 139 (C.D.Cal. 2021)**

Court found that "the fact that [Student] was able to achieve academically should have been measured in light of her considerable intellectual potential."

Certainly, she should have been evaluated when she "began to miss school with alarming frequency."

Note—Should a referral decision be based on the potential future problems? An "anticipatory child-find"? Mainstream caselaw lends no support to that proposition. But, failing to evaluate as absences quickly accrue was definitely problematic for the District.

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***Schaffer v. Fulton County Sch. Dist.*, 78 IDELR 250 (N.D.Ga. 2021)**

School filed a truancy petition against a student with severe anxiety and depression, claiming that the absences were unexcused, despite parents' submission of doctor's notes.

And, Court found that there were inconsistencies in the school's attendance recordkeeping (three days after a letter indicated 26 unexcused absences, another letter stated there were 40).

Court thus refused to grant summary judgment to school on the parents' §504/ADA retaliation claim.

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***Schaffer v. Fulton County Sch. Dist.*, 78 IDELR 250 (N.D.Ga. 2021)**

Note—Dangerously for the District, the timing of the truancy filing was right after the parents asked for emergency IEP team meetings.

§504/ADA retaliation claims, moreover, can lead to awards of money damages. See, e.g., *Whitehead v. School Bd. for Hillsborough County, Fla.*, 24 IDELR 21 (M.D.Fla. 1996).

See the following for §504 and ADA anti-retaliation provisions—42 U.S.C. §12203(a), 34 C.F.R. §104.61, 34 C.F.R. §100.7, 29 C.F.R. §33.13.

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Attendance/Truancy Takeaways

Attendance problems in students with anxiety should be treated as a first priority issue for IEP teams

IEP team tools: counseling, psych consults, BIP strategies, accommodations, parent counseling/training, explicit instruction in stress and anxiety management,

Question simplistic determinations that absences are willful.

Attendance difficulties can trigger child-find, particularly in cases where there is indication of diagnoses, or student is in §504.

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Attendance/Truancy Takeaways

Schools should avoid truancy legal actions in these situations, as they can trigger litigation and/or retaliation claims (and effectiveness is very variable).

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Homebound Placement

Frequently sought by parents who are having trouble getting their children to school due to anxiety.

But, it is a double-edged sword that can entrench school avoidance, perpetuate problems with peer interaction, and lead to academic regression (which can itself cause more anxiety).

Homebound services focus on instruction, and student is expected to do work independently…

As a short-term measure with solid planning for transition back to school, it can be appropriate. The longer it goes, the more difficult the return to school.

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Homebound Placement

Notes—For an example of an appropriate short-term homebound placement with a planned school re-entry, see ***Gwinnett County Sch. Dist.*, 115 LRP 17688 (SEA GA 2015)**(homebound services for last 3 weeks of school year for student who stopped attending due to anxiety were appropriate and enabled him to pass his classes, did not violate LRE).

Aside—It can be problematic to deny homebound students with anxiety participation in graduation ceremonies and other student events. See ***School Dist. of Philadelphia*, 111 LRP 51028 (SEA PA 2011)**(failure to consider supports to facilitate student's participation).

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Homebound Placement

***School Dist. of Pittsburgh v. C.M.C.*, 68 IDELR 102 (W.D.Pa. 2016)**

Following an altercation with a peer, a teen with Asperger's and anxiety disorder was fearful about returning to school, which led to weeks of homebound instruction.

District proposed a mostly online placement, but parent placed the student privately and sought reimbursement.

Court noted that school psychologist testified student would be unable to learn with virtual instruction

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Homebound Placement

***School Dist. of Pittsburgh v. C.M.C.*, 68 IDELR 102 (W.D.Pa. 2016)**

Moreover, student was obsessed with computers and had difficulties staying on task while online.

Lastly, the Court found that the online component would not allow student to practice social skills or peer interaction (other than a weekly social skills group).

Note—Where does online instruction fall in the LRE continuum?

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Comments on a Couple of Wisconsin Cases

- ***Grafton Sch. Dist. v. J.L.*, 76 IDELR 281 (E.D.Wis. 2020)**

  High-schooler eligible as OHI (ADHD, Anxiety) was unilaterally placed in a private school after he appeared to struggle academically in his 10th and 11th grades.

  After a hearing request, an ALJ found that the District had failed to implement the student's IEP, which was also deficient, and that he had been denied a FAPE.

  On appeal, the Court noted that material or significant failures to implement an IEP can rise to the level of a denial of FAPE.

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Comments on a Couple of Wisconsin Cases

- ***Grafton Sch. Dist. v. J.L.*, 76 IDELR 281 (E.D.Wis. 2020)**

  Note—Holding in agreement, see *Neosho R-V Sch. Dist. v. Clark*, 38 IDELR 61 (8th Cir. 2003); *Van Duyn v. Baker Sch. Dist.*, 47 IDELR 182 (9th Cir. 2007); *A. P. v. Woodstock Bd. of Educ.*, 55 IDELR 61 (2nd Cir. 2010); *Sumter County Sch. Dist. 17 v. Heffernan*, 56 IDELR 186 (4th Cir. 2011); *Houston Independent Sch. Dist. v. Bobby R.*, 31 IDELR 185 (5th Cir. 2000).

  Court found teacher failed to check the assignment notebook (related to an IEP goal), failed to provide quarterly progress reports, and failed to include writing assignments toward his English grade (suggesting not providing the required help in writing per IEP).

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Comments on a Couple of Wisconsin Cases

- ***Grafton Sch. Dist. v. J.L.*, 76 IDELR 281 (E.D.Wis. 2020)**

  Court held that "the student's lack of progress on his writing goal is evidence that this failure to implement was material and deprived him of a FAPE."

  Student also had quite low baselines on IEP goals, although they were similar from the year prior, and he received some F's and D's on writing assignments.

  Court awarded reimbursement for the private placement, which it found appropriate to meet the student's needs

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Comments on a Couple of Wisconsin Cases

- ***Grafton Sch. Dist. v. J.L.*, 76 IDELR 281 (E.D.Wis. 2020)**

  Comments—Normally, a failure to implement might lead to an award of some compensatory service, but if the parent places the student unilaterally, and the implementation failure rises to the level of a denial of FAPE, reimbursement can happen (as long as the private program is appropriate).

  And, of course, the District will have to either appeal or negotiate/fight over the parents' attorneys' fees.

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- ***J.K. v. Mueller-Owens, Madison Metro. Sch. Dist.*, 78 IDELR 32 (W.D.Wis. 2021)**

  IDEA 6th grader (disability not disclosed) was causing a disturbance in a classroom, and a "Positive Behavior Coach" was called to help.

  He calmly tried to get her out of the classroom for a bit, then she appeared to agree to leave, but a scuffle broke out near the door.

  His version was that she immediately came at him punching, and he tried to place her in a "bear hug."

  Her version was that he punched her first, she punched him back, and she was slammed to the ground.

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- ***J.K. v. Mueller-Owens, Madison Metro. Sch. Dist.*, 78 IDELR 32 (W.D.Wis. 2021)**

  The hall videotape was blurry and unclear.

  Parent raised a 4th Amendment (search/seizure) claim, which the Court found could be maintained with a showing that the seizure was accomplished with unreasonable force.

  The factual dispute between the student and behavior coach was unresolved and central to the unreasonable force claim.

  Thus, the Court did not grant the District's Motion for Summary Judgment (requires no disputed issue of material fact), meaning the case heads to a jury trial.

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- ***J.K. v. Mueller-Owens, Madison Metro. Sch. Dist.*, 78 IDELR 32 (W.D.Wis. 2021)**

  Comment—If a parent in federal court makes it past Summary Judgment on a money damages claim, the case will be unlikely to get to a jury, as insurance companies will tend to settle the case at that point…

  Note how quickly a situation can escalate. It would have been better for the Behavior Coach to have waited until backup arrived (a school security officer was on the way), so a witness could have been present.

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Retaliation Claims

- ADA contains an anti-retaliation provision for opposing actions made unlawful by the Act.

  42 U.S.C. §12203(a)

- A §504 regulation incorporates the anti-retaliation provision of Title VI of the Civil Rights Act of 1964.

  34 C.F.R. §104.61, 34 C.F.R. §100.7

- Another §504 regulation also prohibits retaliation for assisting in securing compliance with the law.

  29 C.F.R. §33.13

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Retaliation Claims

- Courts tend to apply the *McDonnell Douglas* burden-shifting analysis to §504/ADA retaliation claims:

  1. Protected activity known to defendant,
  2. Adverse action by defendant against plaintiff,
  3. Causal link between protected activity and adverse action.

  If this prima facie case is made, defendant must articulate a legitimate non-discriminatory reason for its actions.

  Plaintiff may show reasons offered were pretext for discrimination.

  McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)

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Retaliation Claims

- Money damages may be available for ADA/§504 retaliation claims, as with other forms of intentional discrimination.

  See, e.g., *Whitehead v. School Bd. for Hillsborough County, Fla.*, 24 IDELR 21 (M.D.Fla. 1996).

- Parents may not have to pursue disability discrimination claims under ADA/§504 to seek relief for retaliation.

  Davis v. Clark County Sch. Dist., 60 IDELR 152 (D.Nev. 2013).

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Retaliation Claims

- With respect to students with disabilities, the retaliation claim can arise in several recurring contexts, as can be seen by some recent cases…

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- ***H.C. v. Fleming County Ky. Bd. of Educ.*, 72 IDELR 144 (6th Cir. 2018)**

  Parent of a child with disabilities claimed she was banned for entering the school without prior approval in retaliation for requesting a 504 hearing and complaining about her son's disciplinary actions

  Court found that student had been properly suspended fort hitting another student and threatening to shoot another

  School produced evidence that parent was banned due to "contentious and unpleasant interactions with [school] personnel," and that she had to be issued a criminal trespass warning after she disregarded the ban

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- ***H.C. v. Fleming County Ky. Bd. of Educ.*, 72 IDELR 144 (6th Cir. 2018)**

  Parent, now proceeding *pro se*, since her attorney withdrew from the case citing "irreconcilable differences," failed to present evidence that the school's proffered reasons were pretextual, dooming her case.

  See also, ***Camfield v. Board of Trustees of Redondo Beach Unified Sch. Dist.*, 70 IDELR 126 (C.D.Cal. 2017), *aff'd*, 75 IDELR 59 (9th Cir. 2019)** for another case of a parents required to seek permission before entering school; there, due to profanity with staff (calling Principal a "fucking bitch"), raised voices, and appearing unannounced. Circuit Court noted that prior permission process did not interfere with parents' advocacy

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- ***Molloy v. Acero Charter Schs, Inc.*, 75 IDELR 91 (N.D.Ill. 2019)**

  Reading Specialist claimed she was terminated for raising concerns that school was not using MTSS, believing that use of MTSS to identify SLDs was required by federal law.

  School argued that teacher was not opposing an action unlawful under ADA or §504 because she was incorrect that the laws require use of MTSS.

  Court disagreed, finding that the "antiretaliation provisions apply so long as the plaintiff acted 'in good faith and with a reasonable and sincere belief that he or she is opposing unlawful discrimination.'"

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- ***Molloy v. Acero Charter Schs, Inc.*, 75 IDELR 91 (N.D.Ill. 2019)**

  Court thus denied school's motion to dismiss

  Note—School was in a difficult situation….The Reading Specialist was refusing to implement interventions and arguing in an IEP meeting that the students was improperly qualified as having SLDs because MTSS data was not used as part of the evaluation.

  Court does not address the issue directly, but it is clear that use of MTSS/RtI data can, but does not necessarily have to, be used in an SLD evaluation. See, e.g., 34 C.F.R. §300.309(a)(2); *Memorandum to State Directors of Special Education*, 56 IDELR 50 (OSEP 2011).

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- ***Herron v. Trenton Special Sch. Dist.*, 76 IDELR 246 (W.D. Tenn. 2019)**

  One-to-one aide's contract was not renewed days after she contacted child protective services (CPS) with concerns about the school's implementation of a preschool student's IEP.

  Moreover, there was evidence that the school knew she had filed the anonymous report.

  School argued that she was non-renewed for creating a negative environment and complaining about the job, but neither issue came up in a performance review that took place days before the CPS report.

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- ***Herron v. Trenton Special Sch. Dist.*, 76 IDELR 246 (W.D. Tenn. 2019)**

  Court held that a jury could find that the school's reasons were in fact a pretext, and denied its motion for judgment.

  Aide's report involved failure to follow IEPs and improper staff-to-student ratio for proper supervision.

  See ***Hicks v. Benton County Bd. of Educ.*, 69 IDELR 32 (W.D. Tenn. 2016)** for a similar case, where a principal conceded that an aide was "stirring up" trouble before she was non-renewed after responding to parents' questions about why a teacher was rarely present in the classroom.

68

- ***Kirilenko-Ison v. Board of Educ. of Danville Ind. Schs.*, 77 IDELR 91 (6th Cir. 2020)**

  School nurses suffered adverse employment actions after raising concerns over the diabetes care provided to two §504 students

  Disagreements centered on the students needing to eat breakfast 4 hours before lunch to avoid "insulin stacking" and participating in activities and riding on bus with very low glucose levels, which could lead to hypoglycemic episodes

  The parents disagreed, wanting the students to eat breakfast at school even if they were late, and to ride the bus no matter their blood sugar levels.

  The school was inclined to go along with the parents.

69

- ***Kirilenko-Ison v. Board of Educ. of Danville Ind. Schs.*, 77 IDELR 91 (6th Cir. 2020)**

  Superintendent told nurses that their conduct jeopardized the students' right to FAPE by recommending different treatment with respect to their meals, activities, and transportation.

  Court found little merit in school's proffered reasoning, and noted all elements of retaliation claim were properly raised and that the school was not entitled to judgment

  Court reversed the lower court and remanded the §504/ADA claim for further proceedings

70

- ***Kirilenko-Ison v. Board of Educ. of Danville Ind. Schs.*, 77 IDELR 91 (6th Cir. 2020)**

  Note—It is certainly not discriminatory to want a student to eat breakfast early to avoid diabetes complications later in the day, even if the parent opposes the effort. As to the bus ride, training a bus aide on administration of glucogen would have addressed the low-blood-sugar issue on rides home, but that would have required the school to provide the resources…

  Generally, the concerns of licensed nurses with respect to health and safety *should* be in line with those of the school.

  What could the school have done? If students are late, they get light snack. Diabetes-trained aide available on bus ride home.

71

- **Notice the recurring contexts for retaliation claims**:
  1. School actions restricting parent access to school,
  2. Adverse employment actions against employees advocating for their students with disabilities, and
  3. School staff reports to child welfare agencies (against parents).

  Practical Thoughts—Speak up about the risk of retaliation claims as appropriate. Adverse employment action against a staffmember who has advocated must be solidly based on separate job deficiencies that can be well documented. CPS reports on parents must be independently based (and parents should be warned about situations that may give rise to such reports before resorting to reporting).

72

Recent OCR Decisions of Interest

- Some COVID-related Letters of Findings (dodgy COVID-comp schemes, remote instruction for vulnerable students)
- A service dog case with the classic misconceptions/resistance

73

- ***Los Angeles (CA) Sch. Dist.*, 122 LRP 14379 (OCR 2022)**

  OCR opened a directed investigation into the District's handling of services for students with disabilities during COVID, as well as the resulting COVID comp decisions.

  During the period of COVID closure, the District trained staff that the expectation would not be to "deliver every minute of FAPE…." There was no requirement that amount of online services match the IEP amounts.

  With respect to the need to provide COVID comp for any service shortfalls and their resulting impact on students, the District created a training webinar.

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- ***Los Angeles (CA) Sch. Dist.*, 122 LRP 14379 (OCR 2022)**

  The webinar distinguished "compensatory services" from "recoupment services," and indicated comp was "not intended for situations outside of a district's control or where the district is not at fault."

  Webinar also took the position that "all students likely suffered some learning loss."

  Training recommended that staff not use the term "compensatory services," and did not require review of pre-pandemic IEP goals and levels of performance.

  It also stated that "recoupment services" would only be provided if there was "significant loss of learning/skills" and the student "demonstrates a need for additional services (i.e., recoupment).

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- ***Los Angeles (CA) Sch. Dist.*, 122 LRP 14379 (OCR 2022)**

  There were, however, no definitions of "significant learning loss" or "need for additional services."

  In interviews, Directors took the position that the District reserved compensatory services for only those situations where it was at fault for the failure to provide services.

  §504-only students, moreover, were without a plan for §504 teams to consider recoupment or COVID comp, except for the site-based processes available to reg ed students.

  Also, need for "recoupment services" was to be decided outside of IEP team meetings, with IEP meetings held after the decision, to add the services to the IEP if they were decided necessary.

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- ***Los Angeles (CA) Sch. Dist.*, 122 LRP 14379 (OCR 2022)**

  First, OCR concluded that decisions to limit services during COVID closure were not based on individual considerations of student need. No IEP meetings were initiated to discuss remote learning services during COVID closure.

  Next, OCR found that "the District created a legally unsupported heightened standard for the assessment of compensatory services, limiting the provision of compensatory services to circumstances where the District was at 'fault.'"

  It was a violation, moreover, for the District to consider that recoupment services were not part of FAPE.

77

- ***Los Angeles (CA) Sch. Dist.*, 122 LRP 14379 (OCR 2022)**

  The District was obligated to provide FAPE during COVID closure. "This remains true even if the circumstances that resulted in the denial of FAPE to students with disabilities are not due to direct action or inaction by the District, such as the need to change to remote learning due to the COVID-19 pandemic."

  OCR ruled that the decision on whether a student needs COVID comp "must be individually determined."

  It was a violation, moreover, for the District to determine need for COVID comp outside the IEP team process.

78

- ***Los Angeles (CA) Sch. Dist.*, 122 LRP 14379 (OCR 2022)**

  "Parents/guardians, meanwhile, despite knowing best how their children have fared during remove learning, were not involved in the recoupment service determination…."

  OCR also found that the recoupment services were really services offered to all students regardless of disability status.

  OCR thus imposed a far-reaching Resolution, with a requirement to appoint an administrator to oversee implementation, outreach to parents, thousands of individualized COVID-comp decisions, massive planning (and great expense).

79

- ***Los Angeles (CA) Sch. Dist.*, 122 LRP 14379 (OCR 2022)**

  Notes—The District gambled on a set of assumptions and apprehensions not based on any legal guidance, but rather quite opposite to USDOE guidance.

  The initial March 2020 OSEP guidance specifically used the term "compensatory services" as a FAPE-based requirement, anticipating that schools might have problems meeting all the service requirements of IEPs. *Q & A on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak*, 76 IDELR 77 (USDOE March 12, 2020), at Questions A-1, A-2, A-3.

  Using a different term for comp caused due to COVID (e.g., COVID comp) is OK; divorcing it from FAPE or IDEA safeguards is not.

80

- ***Los Angeles (CA) Sch. Dist.*, 122 LRP 14379 (OCR 2022)**

  Notes—Does it matter that all student might have suffered some COVID-related learning loss?

  It is quite surprising that the District would commit some of these mis-practices to a training webinar, and openly make claims disavowing any COVID comp liability to OCR.

  OSEP and OSERS have clarified that it is incorrect to assert that compensatory services are only appropriate when a hearing officer or court orders such a remedy for a denial of FAPE. *Letter to Wolfram and Mandlawitz*, 80 IDELR 196 (OSEP 2022).

  Generally, it appears that OCR will require consideration of COVID comp even for modest non-compliance with IEP services during closure (see, e.g., *Hamburg (NY) Cent. Sch. Dist.*, 122 LRP 2701 (OCR 2021)(comp determination needed when student received 3 rather than 4.5 hrs/day sp ed instruction)).

81

In-School Suspension

- In-school suspension (ISS) can be a removal that is not counted in the short-term removal limitation.

  "It has been the Department's long term policy that an in-school suspension would not be considered a part of the days of suspension addressed in §300.530 as long as the child is afforded the opportunity to continue to appropriately participate in the general curriculum, continue to receive the services specified in the child's IEP, and continue to participate with nondisabled children to the extent they would have in their current placement." 71 Fed. Reg. 46715 (August 14, 2006); see also *Dear Colleague Letter*, 68 IDELR 76 fn. 29 (OSEP 2016).

82

ISS

- In-school suspension (ISS) can be a removal that is not counted in the short-term removal limitation.

  Almost identically-worded commentary was included with the 1999 version of the IDEA regulations. *See* 64 Fed. Reg. 12619 (March 12, 1999). Thus, USDOE's 2006 comment that its position on ISS was "longstanding."

83

ISS

- The recent OSEP discipline guidance document reiterates this long-standing doctrine

  The Q & A recites the 2006 commentary to the regulations, with the criteria to be met for an ISS removal to not "count" as a true short-term removal under the rules.

  Q & A: Addressing the Needs of Children with Disabilities and IDEA's Discipline Provisions, 81 IDELR 138 (OSEP July 19, 2022), at Question C-1, C-7, fn. 20.

84

ISS

- The Q & A also adds the following:

"It is important to recognize that even if all three of these factors are met, an in-school suspension still removes the child from the educational placement determined to be appropriate by the child's placement team, and additional actions may need to be taken by the child's IEP Team. For example, the **repeated use of in-school suspension may indicate that a child's IEP, or the implementation of the IEP, does not appropriately address their behavioral needs.** Therefore, the child's IEP Team should consider whether additional positive behavioral interventions and supports or other strategies would assist the child in the current placement."

Q & A: Addressing the Needs of Children with Disabilities and IDEA's Discipline Provisions, 81 IDELR 138 (OSEP July 19, 2022), at Question C-7.

85

ISS

- Thus, schools using ISS must heed the warning that repeated need to remove the student to ISS may be indicative that either:

1. The IEP might not be meeting the student's behavioral needs, and/or
2. The IEP might not be implemented properly, and/or
3. The student may need other or additional behavioral supports, interventions, or other strategies.

Q & A: Addressing the Needs of Children with Disabilities and IDEA's Discipline Provisions, 81 IDELR 138 (OSEP July 19, 2022), at Question C-7.

86

ISS

- ***Policy underpinning***—Use of ISS with participation in curriculum avoids the disconnection to education that concerns USDOE with home suspensions.

In fact, court cases have held that short-term ISS with participation in education does not implicate substantive due process concerns. See, e.g. *Wise v. Pea Ridge Sch. Dist.*, 107 LRP 64097 (8th Cir. 1988); *Laney v. Farley*, 107 LRP 50017 (6th Cir. 2007)("An ISS could, but does not necessarily, deprive a student of educational opportunities in the same way that an out-of-school suspension would.")

87

ISS

- Given that several factors are involved, the guidance also states that whether an ISS counts as a day of suspension "depends on the unique circumstances of each case."

  But, there has been no follow-up guidance on how the individual ISS factors should be interpreted or applied…

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ISS

- **Factors in ISS guidance**:

  Opportunity to continue to:

  1. appropriately participate in the general curriculum;
  2. receive IEP services; and
  3. participate with nondisabled students to the same extent as in current placement.

89

ISS

- To what degree must the IEP services be continued in the ISS setting for this policy to apply?

  Must the IEP services be duplicated in ISS? That is not required even if the student is placed long-term in an IAES. "The LEA is not required to provide all services in the child's IEP when a child has been removed to an IAES." *Q & A on Discipline Procedures*, 52 IDELR 231, at Question C-3 (OSERS 2009).

  The USDOE commentary to the 2006 regulations addressed this point several times:

90

ISS

"We caution that we do not interpret 'participate' to mean that a school or district must replicate every aspect of the services that a child would receive if in his or her normal classroom." 71 Fed. Reg. 46716.

"We read the Act of modifying the concept of FAPE in circumstances where a child is removed from his or her current placement for disciplinary reasons." Id.

"An LEA is not required to provide children suspended for more than 10 school days in a school year for disciplinary reasons, exactly the same services…" Id.

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ISS

- Caselaw (the little there is) has tended to analyze the ISS services requirement in a generalized fashion.

Student who punched teacher and was placed in ISS for a few days accessed his coursework and made good grades. The ISS days did not count as short-term removals under §300.530. ***Jefferson Cty. BOE,* 75 IDELR 178 (SEA Alabama 2019)**(noting that Alabama regulations incorporated the USDOE commentary on ISS).

92

ISS

Without detail, an Ohio HO found that a child "continued his services and education during any in-school suspension." ***In re: Student with a Disability,* 115 LRP 14973 (SEA Ohio 2015).** Thus, he determined that the ISS was not a removal from his educational placement.

Student with ED, SLD, and OHI was placed in an ISS. Setting was staffed by a paraprofessional, and he received assignments from his teachers, so the services in ISS were appropriate. ***China Spring Ind. Sch. Dist.,* 110 LRP 36343 (SEA Texas 2010)**.

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ISS

Middle-school student with SLDs was placed in ISS where he "was in school, attending classes in the ISS room" and "received services." The court agreed with the HO that the time in ISS was not a "suspension" or a failure to implement the IEP. ***Garmany v. District of Columbia*, 61 IDELR 15 (D.D.C. 2013).**

94

ISS

Student with unspecified disability was placed in an ISS for portions of days, and "staff reported that in ISS, the Student continued to receive special education and related services." ***In re Student with a Disability.*, 75 IDELR 206 (SEA Minnesota 2019).** Although the HO did not specify the services, the student apparently had an opportunity to "catch up on coursework" while in ISS. Taking the time in ISS out of the equation, there were fewer than 10 days of removal, so MDR was not required.

95

ISS

OCR held that a school violated §504 when it failed to implement the §504 plan of a student with ADHD while assigned to ISS. ***Norwalk (VA) Pub. Schs.*, 46 IDELR 21 (OCR 2005).** Indeed, the ISS teacher was unaware the student even had a §504 plan. See also *Westerville (OH) City Dist.*, 112 LRP 37564 (OCR 2012)(failure to provide any services in ISS to student with ADHD).

Note—OCR has generally applied an analysis for ISS placements consistent with that under IDEA, going back nearly 30 years. See e.g., *Chester Cty. (TN) Sch. Dist.*, 17 IDELR 301 (OCR 1990); *Greenville Cty. (SC) Sch. Dist.*, 17 IDELR 1120 (OCR 1991).

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ISS

Author's position on ISS services:

- Exact duplication of IEP services likely not required
- Related services likely required per IEP
- Degree of need for sp ed instructional support proportionate to intensity of such services in IEP and available assistance in ISS setting
- School must have method to get assigned work and needed additional services to the ISS setting without delay
- *Key indicator*: whether student is able to complete the assigned daily work in ISS

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ISS

- What is the precise meaning of the **LRE** portion of the ISS guidance?

  One interpretation is that the LRE-related ISS guidance is intended to prevent LEAs from creating segregated ISS settings for students with disabilities (or from using other sp ed settings as informal ISS units)

  Another interpretation could be that a school cannot take advantage of the ISS guidance if the ISS setting does not have the exact proportion of disabled and nondisabled students

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ISS

- What is the precise meaning of the LRE portion of the ISS guidance?

  There is no caselaw on this point, but the first interpretation seems to make most sense, as USDOE would undoubtedly oppose segregated ISS placements.

  Author's position—Use of regular ISS setting likely satisfies the LRE component of the ISS guidance

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- **Overall Practical Thoughts?**
  - ISS can be a valuable alternative to potentially ineffective and limited home suspensions
  - Schools wishing to take advantage of guidance must have system in place to get assignments and needed additional services to the ISS setting quickly
  - System must ensure ISS services decision is individualized
  - Documenting provision of sp ed assistance in ISS important in case of disputes over tally of short-term removals (e.g., sign in sheets).
  - Repeated or excessive use of ISS can signal a problem with the IEP, its implementation, or a need to revise behavior interventions or supports.

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