

## Wisconsin Legal Updates

### State Superintendent's Conference on Special Education and Pupil Services Leadership Issues

November 14, 2019

Paul Sherman, School Administration Consultant, Special Education Team  
Patricia Williams, Assistant Director, Special Education Team

### Pupil Nondiscrimination

#### Annual Pupil Nondiscrimination Report is Due December 22, 2019

- Complaints received July 1, 2018, through June 30, 2019
- New reporting system this year uses WAMSid and password
- ASM to set-up role administrator and user
- Will allow access to prior year's reports
- More information: <https://dpi.wi.gov/sped/pupil-nondiscrimination/pi9-07>

#### School Year 2017-18 Results

Protected Class/Basis of Complaint	2017-2018 School Year
Ancestry	14
Disability	248
Pregnancy, Marital or Marital Status	13
National Origin	61
Race	690
Religion/Creed	57
Sex	1063
Sexual Orientation	349
<b>TOTAL</b>	<b>2,495</b>

#### Wisconsin Pupil Nondiscrimination Appeals Findings

- Four appeals resolved since October 2018
- In all four the district's final determination of the complaint affirmed
- In two instances the department found procedural deficiencies

PI 9.04(2) of the Wisconsin Administrative Code requires school districts to have written procedures for resolving complaints of discrimination arising under 118.13 of the statutes. The procedure, at a minimum, must provide for a written acknowledgment of the complaint within 45 days of receipt, and final resolution of the complaint within 90 days. The timeline may only be extended with the agreement of the district and the complainant.

A district's final determination must adequately inform the complainant of the basis for the decision. "A final determination must make at least some reference to the relevant facts considered, and the law applied to those facts so that the complainant is reasonably informed of the basis for the decision made. An adequate determination need not be an extensive, formal, judicial opinion or legal memo, but it cannot be merely conclusory."

### **OCR Issues Q & A on Racial Discrimination and School Discipline**

<https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-vi-201812.pdf>

- Withdraws Obama era guidance on school discipline first issued in 2014
- Based on the recommendation from the Federal Commission on School Safety (Betsy DeVos, Matthew Whitaker, Alex Azar, **Kirstjen Nielsen**), **December 18, 2018**
- Concern that previous guidance deprived districts of local control and enabled school violence
- New guidance reminds districts of obligation not to discriminate on the basis of race in school discipline.
- Mentions "disparate impact" but downplays its application in the school setting.
- Specifically identifies as inappropriate the use of quotas as a remedy for discrimination in discipline.

### **Title IX Regulations Revisions**

<https://www.ed.gov/news/press-releases/secretary-devos-proposed-title-ix-rule-provides-clarity-schools-support-survivors-and-due-process-rights-all>

- 60 day comment period closed
- Over 100,000 comments received
- Department of Education will now review and draft response to comments

### **7<sup>th</sup> Circuit Disability Discrimination Cases**

*H.P. v Naperville Community School District*, 910 F.3d 957 (2018)

*Ashby v. Warrick County School Corporation*, 908 F.3d 225 (2018)

*Vargas v. Madison Metropolitan School District*, 74 IDELR 165 (2019)

## Pupil Services

### School Districts' Responsibilities if Students are Excluded from School Due to Measles Outbreak

[https://dpi.wi.gov/sites/default/files/imce/sspw/pdf/School\\_District\\_Responsibilities\\_During\\_Measles\\_Outbreak\\_September\\_2019.pdf](https://dpi.wi.gov/sites/default/files/imce/sspw/pdf/School_District_Responsibilities_During_Measles_Outbreak_September_2019.pdf)

- Nondisabled students excluded for not having immunizations
  - Disabled students excluded for not having immunizations
  - Students unable to be vaccinated
  - Schools closed due to measles outbreak
- \*Virtual Learning Time <https://dpi.wi.gov/cal/innovation/virtual-learning-time>

### Permanency Plan Hearings for Children Placed in Out of Home Care

[https://dpi.wi.gov/sites/default/files/imce/foster-care/PermanencyPlan\\_Memo.pdf](https://dpi.wi.gov/sites/default/files/imce/foster-care/PermanencyPlan_Memo.pdf)

- Districts will receive notice of permanency plan hearings
- Districts may provide information
- Districts must comply with pupil records requirements in so doing

### 2019 Act 1

2019 Wisconsin Act 1 deletes any phrase similar to the phrase “mental retardation,” “mentally retarded,” and other similar phrases throughout the state’s administrative code. The act replaces these phrases with the term “intellectual disability.” Phrases replaced with the term “intellectual disability” are located in administrative code provisions promulgated by the Department of Health Services (DHS), the Department of Children and Families, the Public Service Commission, the Department of Safety and Professional Services, and the Department of Workforce Development.

## Special Education

### Due Process Decisions:

- **DPI Case No. LEA-18-0019:** The parent failed to establish by a preponderance of the evidence that the district failed to implement substantial portions of the student’s IEP, and that the student was denied FAPE as a result of the alleged implementation failures.
- **DPI Case No. LEA-19-0003:** The district did not provide FAPE to the student during the 2017-2018 school year when it developed an IEP that allowed the student to only make de minimus progress in most of the areas where he required special education services, particularly writing, organization, work completion, and advocacy. The district further failed to develop an IEP designed to provide FAPE for the 2018-2019 school year when the IEP team developed an IEP in May of 2018 that reduced the amount of services even though the student was not making sufficient progress, and the goals remained primarily

the same with zero as the baseline. In finding that the district failed to offer an IEP that was reasonably calculated to enable the student to make progress appropriate in light of the student's unique circumstances, the hearing officer ordered the district to pay for private school tuition and transportation costs. This decision is under appeal in the U.S. District Court, Eastern District of Wisconsin.

*Link to Due Process Decisions:* <https://dpi.wi.gov/sped/dispute-resolution/due-process>.

## **IDEA Complaint Decisions:**

### ***Least Restrictive Environment/Placement***

- **Case No. 19-043:** In determining where ESY services would be provided, the IEP team did not consider the least restrictive environment for the student.
- **Case No. 18-083:** When the student was placed by the county in a facility, the district remained responsible for providing the student FAPE, and failed to do so, when the student's IEP was not implemented.

### ***Shortened Days***

- **Case No. 18-081:** The district improperly shortened the student's day to one hour per day of instruction via the telephone due to the parent's intent to enroll the student in a treatment program.
- **Case No. 18-098:** The student's day was improperly shortened when no explanation was provided as to why it was required based on the student's individualized needs.
- **Case No. 19-012:** The district improperly shortened the student's day when the IEP failed to include a plan for the student's return to a full day, resulting in a shortened day that spanned across two school years.
- **Case No. 19-020:** The student's day was improperly shortened when it was used to manage student behavior, and the student was required to earn back instructional time by demonstrating good behavior.
- **Case No. 19-030:** The district improperly shortened the student's day when the student was required to follow directions 50% of the time in order for the day to be extended.

### ***Disciplinary Requirements***

- **Case No. 19-009:** Unless the "deemed to know" provisions apply, a district is not required to conduct a manifestation determination if the student had not been found eligible for special education prior to the incident that results in the disciplinary change of placement.
- **Case No. 19-048:** After the 10<sup>th</sup> cumulative day of disciplinary removal, the district must consider whether each subsequent removal constitutes a pattern. Factors to be considered include removals for behavior that is substantially similar, removals in close proximity to each other, the length of each removal, and the total amount of time removed.

### ***LEA Representative***

- **Case No. 18-090:** The IEP team was not properly constituted when the LEA representative at the meeting needed supervisor approval before providing for a one-on-one aide. The LEA representative at the IEP team meeting must be fully authorized to commit district resources.
- **Case No. 19-043:** The IEP team was not properly constituted when the LEA representative at the meeting was not authorized to commit district resources in regard to ESY.

### ***Implementation***

- **Case No. 19-045:** The student’s IEP was not implemented with regard to transportation when the parents rejected the district’s transportation contract, and there was no documentation showing that the district either attempted to negotiate a different reimbursement rate or offer a different mode of transportation that met the students’ needs.

### ***Prior Written Notice***

- **Case No. 19-030:** The district was required to provide the guardian with prior written notice when the guardian’s request for a one-on-one aide and an increase in instructional time was denied. The notice must contain certain requirements, including a description of the action refused, an explanation of why the district refuses to take the action, other options considered and why those options were rejected. *See Sample Form M-1 Notice of An Activity Requested by a Parent:* <https://dpi.wi.gov/sped/laws-procedures-bulletins/procedures/sample/forms>

### ***Seclusion and Restraint***

- **Case No. 19-014:** A seclusion room must be free of objects or fixtures that may injure the student, and parents must be notified of the incident and the availability of a written report within one business day. The written report must be available for review by the parent within three business days of the incident. Districts should have a process in place that clearly communicates to staff who is responsible for completing the report, and what information must be included.
- **Case No. 19-053:** A room cannot be used for seclusion when it contains such items as a desk, chair, and garbage can, and has a door that is capable of being locked, and a student may not be restrained or secluded for longer than what is required to resolve the safety risk.

### ***Evaluations***

- **Case No. 18-095:** Timeline extensions for initial evaluations for SLD may not be used to unnecessarily delay special education evaluations. The school district is responsible for ensuring scientific research-based interventions (SRBIs) are properly implemented, and progress monitoring data used by IEP teams are collected in a manner consistent with state SLD evaluation criteria. Any concerns about the implementation of SRBIs should be addressed well before an IEP team evaluation meeting is held to determine eligibility.

*Link to State Complaint Decisions:* <https://dpi.wi.gov/sped/dispute-resolution/complain/decisions>

### **DPI Bulletins:**

- **19.01 Supported Decision Making Agreements:** Section 115.807(4), Wis. Stats., which was created through 2017 Wisconsin Act 345, requires school districts to provide students and their parents with information on supported decision-making under Chapter 52 of the Wisconsin Statutes, other alternatives to guardianship, and strategies to remain engaged in the student’s secondary education. Supported decision-making agreements permit an adult student with a functional impairment to enter into a written agreement with a supporter of their choosing to help them gather information, understand their options, and communicate their decisions to others. Bulletin 19-01 provides information to families, adult students, and school districts about this option and how the agreement can be used in schools.

*Link to DPI Bulletins:* <https://dpi.wi.gov/sped/laws-procedures-bulletins/bulletins>

**7<sup>th</sup> Circuit Court of Appeals:**

- **P.F., et al, v. State Superintendent of Public Instruction, et al (No. 17-3266, Jan. 22, 2019):** Wisconsin’s open enrollment program does not discriminate under Title II of the Americans with Disabilities Act and section 504 of the Rehabilitation Act when it permits nonresident school districts to deny students with IEPs open enrollment due to lack of services or space.

*Link to 7<sup>th</sup> Circuit Decision:* <http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2019/D01-22/C:17-3266:J:Sykes:aut:T:fnOp:N:2281763:S:0>

**OSEP Guidance:**

- **Letter to Nathan, January 29, 2019:** If the student has not been found eligible for special education, the disciplinary protections under IDEA, including the manifestation determination requirements, still apply if the district is “deemed to have knowledge of the child’s disability” prior to the incident. Thus, the manifestation determination must be conducted with ten school days of any decision to change the student’s placement as a result of disciplinary action, and there is no exception under IDEA to allow additional time to complete an evaluation prior to conducting the manifestation determination review.
- **Letter to Olex, February 22, 2019:** Parental consent is not required prior to conducting an age appropriate transition assessment because the purpose of the assessment is to develop appropriate postsecondary IEP goals and not to determine whether a child has or continues to have a disability and the nature and extent of the special education and related services that the child needs.
- **Letter to Zirkel, May 2, 2019:** An independent educational evaluation (IEE) can be obtained after an initial evaluation regardless of whether the child was found eligible as a child with a disability.

*Link to OSEP Guidance:* <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/index.html>