

Year in Review  
Hot Topics in Special Education Law

**WINTER MAASE**

February 11, 2020  
Jordan M. Bullinger & Vickie L. Coe

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**MICHIGAN CASES**

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**DHH PROGRAMING**

- Parent requested due process against district of residence for alleged lack of appropriate DHH programming
- District did not have a DHH program and educated student in special education and general education with peers, supported by DHH consultation and sign language interpreters
- Parent request MSD placement and District agreed
- Student attended MSD for 2 years and graduated with regular diploma
- Parent alleged that district failed to provide FAPE for several years
- District moved to limit proofs based upon SOL
- ALJ allowed evidence back beyond SOL and awarded 3 full years of college tuition and expenses.

*In re Student with a Disability (SEA MI 2018)*

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**MSD**

- Guardians of Parents requested MSD as placement for DHH Student with significant behavior challenges;
- IEP Team proposed MSD – MDE / MSD refused to attend the IEP;
- District requested due process hearing, which the parties settled with Student being permitted to enroll at MSD;
- MSD agreed to implement IEP and agreed to implement the settlement agreement;
- Student attended from December 2017 to May 2018;
- MSD then attempted to remove student unilaterally based upon dangerousness and requested due process hearing.

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**MSD**

- ALJ Findings:
  - MSD did not want to accept the student;
  - MSD did not implement the IEP or the settlement agreement;
  - MSD did not have trained or qualified staff for behavior planning;
  - MSD did not follow the IEP Process when it changed the student's placement without an IEP or IAES;
  - MSD did not properly follow the discipline procedures;
  - Ordered MSD to return the student, hire and train staff and provide compensatory education.

*In re Student with a Disability (SEA MI 2018)*

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**WAR OF THE ROSES**

- 4-year-old student placed in ECSE program;
- Parents were divorced and continued to fight with each other and "behaved badly" in IEP and other meetings / interactions at or with school;
- Parent insisted that student be placed in particular session (AM vs PM) ECSE program;
- District placed some limitations on Parent's attendance and presence in the program.

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**WAR OF THE ROSES**

- ALJ confirmed that parent as party requesting hearing has burden of proof;
- ALJ confirmed that district is entitled to deference related to the session (AM vs PM) the student will attend;
- Not a placement decision;
- ALJ confirmed that parents do not have unrestricted right of access and found that district restrictions did not deny parental participation and did not deprive student of right to FAPE;
- ALJ admonished parents related to their lack of civility to one another and encouraged school staff to stay above the fray.
- *In re Student with a Disability* (SEA MI 2019).

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**IEE**

- District completed an evaluation of Student.
- Parent requested an IEE.
- District initiated a due process hearing to defend the appropriateness of the District's evaluation.
- Parent did not participate in the hearing process.

"Based on the evidence presented at the hearing, the Administrative Law Judge has no earthly idea what the Respondent believes might be deficient since the evaluations here were very thorough and appropriate. Unfortunately, despite being repeatedly given every opportunity to do so, the Respondent failed to participate in the hearing to describe what the alleged insufficiencies are."

- *In re Student with a Disability* (SEA MI 2019).

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**IEE**

- District granted an IEE and imposed \$1,000 cap.
- District agreed to raise the cap to \$2,500.
- Parent filed State Complaint alleging failure to raise cap further denied them the IEE.
- MDE found District responded appropriately to IEE request.

"The public agency may also establish criteria to ensure that the cost of a publicly-funded independent educational evaluation is reasonable. This has been the Department's position since the regulations for the Education for All Handicapped Child Act were first issued. The Analysis to the Final Regulation stated that: "Public agencies should not be asked to bear the costs of unreasonably expensive independent evaluations." Appendix A to 45 CFR Part 121a [the predecessor to 34 CFR Part 300], published at 42 FR 42511 (August 23, 1977)." Letter to Thorne, February 5, 1990 (OSEP)

Case No. 19-0146

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**SPECIALIZED TRANSPORTATION**

- Parent of DHH student in regional program requests special transportation to and from after school and weekend extracurricular activity;
- IEP includes special transportation to and from school due to location of special education program;
- IEP Team decides that student does not require extracurricular activities for FAPE;
- IEP Team decides that student can access extracurricular activities on equal basis without special transportation.

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**SPECIALIZED TRANSPORTATION**

- Parent files state complaint;
- MDE directs the District to provide special transportation as part of IEP for student to access extracurricular activities;
- District initiated hearing on whether District was and is required to provide door-to-door transportation for extracurricular activities – such as sport practices and events;
- ALJ found that because for student to have equal access then District must provide transportation for extracurricular activities to provide the Student with the same access and opportunity as his nondisabled peers.

"Because the Student is placed at a center-based program so far away from his home, transportation must be provided for nonacademic and extracurricular activities to provide the Student with the same access and opportunity as his nondisabled peers."

- *In re Student with a Disability* (SEA MI 2019).

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**LRE (?)**

- Parents of student with disability request due process hearing when District seeks to change student's placement to an SCI program.
- Parents did not disagree that the setting that the student was being educated in at the time of the hearing was inappropriate.
- Parents also did not disagree that it was appropriate for the student to spend 100% of his day in the special education setting.
- Parents, however, alleged that SCI program was too restrictive and that he should be placed instead in a program for students with ASD or some other program along the continuum short of the SCI program first.
- Student was eligible for special education and related services as a student with ASD. Student has other significant developmental and functional needs that were not explained by the student's eligibility label.
- 6:2 student-to-staff ratio in the ASD program, whereas in the SCI program there could be as many as 12 students with one teacher and two paraprofessionals.
- ALJ held in favor of parents.
- *In re Student with a Disability* (SEA MI 2019).

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**DISCIPLINE – NOT YET ELIGIBLE STUDENT**

- District expels student due to persistent disobedience.
- Expulsion occurs approximately one year after the District evaluates the student and determines that student is not IDEA eligible.
- At no point in time leading up to or during the expulsion process did the parent or staff refer the student for another IDEA evaluation.
- Record request from MPAS several months after the expulsion.
- MPAS subsequently filed state complaint alleging a child find violation and failure to provide student with discipline protections afforded to not-yet-eligible students.

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**WHO IS A NOT-YET-ELIGIBLE STUDENT?**

- **Before the behavior:**
  - Parent expressed written concern that child needs special education and/or related services to supervisory, administrative or teaching personnel; or
  - Parent requested an evaluation of child; or
  - Teacher or other district personnel expressed concern about a pattern of behavior to the director of special education or other supervisory personnel.
- **Exceptions:**
  - Parent refused evaluation; or
  - Parent refused or revoked consent for services; or
  - District evaluated and student not eligible.

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**DISCIPLINE – NOT YET ELIGIBLE STUDENT**

- Following investigation, MDE determines:
  1. Prior to the behavior, the Parent did not express a concern that child needs special education and/or related services to District staff.
  2. Prior to the behavior, the Parent did not request that the District evaluate the student.
  3. Prior to the behavior, no teacher or district staff expressed a concern about a pattern of behavior to the special education director or someone in a supervisory position.
- Yet, MDE found the District out of compliance because it failed to provide the student with disciplinary protections. Apparent rationale is because the MDE believed that the District had failed to meet its ongoing child find duty.

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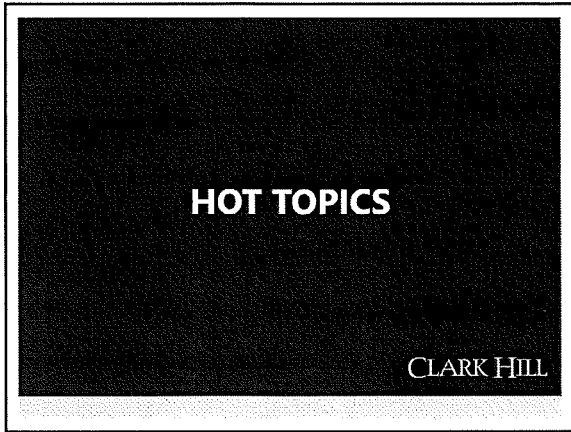
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**RESTRAINT AND SECLUSION**

- November 19, 2019 Letter from MDE reminding districts of obligation to report restraint and seclusion data in MSDS.
- OCR conducting district-level restraint and seclusion compliance reviews.
- Process began January 2019
- Based on compliance reviews, OCR opened 30 investigations of disability discrimination due to use of restraint and/or seclusion between January 15, 2019 and March 29, 2019.
- OCR and OSERS release technical assistance video about the use of restraint and seclusion.
- Among providing definitions and background information and the legal standards surrounding the use of restraint and seclusion, the video emphasizes that the repeated use of restraint and seclusion for students with disabilities may be seen as an indicator that the student's current plan of services is not sufficient to provide a FAPE.

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**DISCIPLINE GUIDANCE**

- MDE released guidance in May of 2019
- Guidance largely tracks federal regulations
- IAES language suggests that IAES must be documented by IEP or IEP Amendment
- Presuming can continue to use IAES form as long as IEP Team / process makes the decision
- Language suggests the parties can change placement by agreement of parent as part of BIP

Careful – Presume that MDE meant through IEP or IEP Amendment

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**DISCIPLINE GUIDANCE**

- MDE guidance suggests that MDR not conducted until after evaluations are completed.
- Best practice to complete evaluations before MDR, but timeline can be a problem.
- *Letter to Nathan, 73 IDELR 240 (January 29, 2019)* directs district to follow timelines in federal law related to MDRs even if evaluation is not complete.
- Under OSEP guidance, may result in need hold a new MDR after evaluations are complete.
- Don't forget about Section 504.

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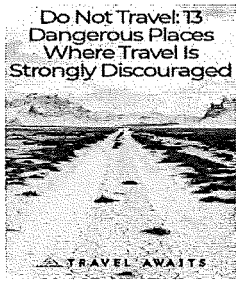
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**Shortened School Day**



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**Shortened School Day**

1. An explanation of why the student's disability-related needs require a shortened day. 34 CFR §300.320(a)(1)
2. A clear explanation of the unique need or skill gap prohibiting the student from attending a full day of school (e.g., the student is medically fragile and lacks stamina, the student is recovering from an injury, or the student is currently unable to demonstrate safe behavior). 34 CFR §§300.320(a)(4)(5)
3. A clear connection to the growth and progress expected to be achieved by shortening the student's school day (e.g., the student is expected to recover from the physical or medical condition with rest and medical treatment). 34 CFR §300.320(a)(2)
4. A plan for the student's return to school for a full day, which may include a plan to meet more frequently to review student data and determine whether the student is able to return to school full-time. 34 CFR §300.114

MDE, OSE Policy Guidance - September 2019

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**Shortened School Day**

May an IEP team implement a shortened school day for a student in order to manage student behavior or as a means of discipline?

No. Shortened school days may not be used to manage student behavior or as a means of discipline. Removing a student from school is NOT reasonably calculated to result in progress or educational benefit. The student may be lacking critical skills necessary to successfully participate in school. The IEP must address the skill deficits by providing supports and services necessary for the student to have a FAPE.

For students with disabilities whose behavior impedes his or her learning or the learning of others, the IEP team must develop an IEP that addresses the student's behavioral needs through annual goals, related services, and/or supplementary aides and services.

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**Shortened School Day**

The IEP should include positive behavioral interventions, supports, and strategies to enable the student to participate in the full school day. Removal from school is neither a service nor support for students with difficult behaviors and is not reasonably calculated to result in educational benefit.

A school district may not reduce a student's instructional time as a form of punishment or in lieu of a suspension or an expulsion. In addition, a school district may not require a student to "earn" back the return to a longer or full school day by demonstrating good behavior. Attendance may also not be conditioned upon the student's taking medication or receiving treatment, therapies, or other outside services.

MDE, OSE Policy Guidance - September 2019

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**Shortened School Day**

Must a school district shorten a student's school day upon request of the student's parent?

No. If a parent requests a change in the length of the student's school day, the school district must respond to the parent's request by providing written notice, consistent with 34 CFR §300.503(a)(b). However, any changes to the regular school schedule must be made by the student's IEP team, which includes the parent. The only time it is appropriate to shorten the school day for a student with a disability is when the student's IEP team determines a shortened school day is required to address the student's unique disability-related needs. This decision must be reflected in the student's IEP, including documenting the reasons for the shortened day and providing a plan for returning to a full school day.

MDE, OSE Policy Guidance - September 2019

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**TRANSITION ASSESSMENTS AND CONSENT**

- MDE rescinded August 23, 2018 memorandum that required consent for transition assessments.
- February 22, 2019 memo from USDOE confirms that IDEA does not require consent before conducting transition assessments unless the assessments are part of an initial evaluation or reevaluation.
- "[W]e believe that generally, 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."

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**REEVALUATION GUIDANCE**

- Dated April 30, 2019
- Mostly reiterated the IDEA and MARSE reevaluation standards and timelines
  - At least once every three years, unless parent and public agency agree assessments not necessary
  - Timeline not reset where evaluation is conducted to add or remove a service
  - No more than one per year unless the parent and public agency agree
  - When public agency determines conditions warrant
  - When parent or teacher request reevaluation
- Requires use of REED process to document the decisions and data
- Requires consideration of impact on student if IEP services and supports are removed

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**IEPS AND PARENTALLY PLACED PRIVATE SCHOOL STUDENTS**

- District develops an IEP for student with disability that provides a FAPE.
- Parents of student subsequently dis-enrolls the student in a private school. No evidence that the parents enrolled the student in the private school because they did not believe the district could provide the student with a FAPE.
- Parents have made clear that the student would continue to attend the private school for the foreseeable future.
- Is the district obligated to develop a new IEP for the student the following year and, annually thereafter, if the parent does not contact the LEA and request FAPE for the student?
- Under the circumstances described, no. However, child find obligation continues to exist.
- *Letter to Wayne, 73 IDELR 263 (OSEP 2019).*

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**INCARCERATED YOUTH**

- Absent a specific exception, all IDEA protections apply to incarcerated students and their parents.
- Must have policies in place to identify, locate and evaluate students who may have disabilities. This includes students who have never been identified prior to entry into the facility.
- Students must be evaluated even if the student will not be in the facility long enough to complete the evaluation. If a student transfers after the evaluation has begun, and the responsibility for FAPE transfers as well, both agencies must coordinate to ensure that a timely evaluation occurs.
- Unless there is a specific exception, all IEP content requirement apply to students in correctional facilities.
- Must implement existing IEP or hold an IEP Team meeting to modify the contents of the IEP.
- Students identified with a disability either before or during incarceration who did not transfer with an IEP or were not attending or enrolled in school at time of incarceration, must have a meeting to develop an IEP within 30 school days.

*Dear Colleague Letter, 64 IDELR 249 (OSEP and OSERS 2014)*

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**INCARCERATED YOUTH - LIMITATIONS WHERE PRESENT WITH A BONA FIDE SECURITY RISK**

- Where an incarcerated student presents with a "bona fide security or other compelling penological interest" that cannot be accommodated that stands in the way of him/her receiving a regular high school diploma, the IEP Team need not put him/her on a regular high school diploma track.
- Instead, may modify the student's IEP to incorporate the services student needs to earn a GED.
- Neither an unwillingness to spend money on special education nor administrative convenience rise to the level of a "compelling penological" interest.
- *Letter to Duncan, 73 IDELR 264 (OSEP 2019).*

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**ON THE HORIZON OR CURRENTLY IN PLAY**

- Potential changes to MARSE Rules.
- Care for Students Initiative to Expand Behavioral and Other Health Services.

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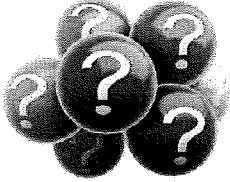
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QUESTIONS



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- School law issues are complex and fact specific; when in doubt, consult with your legal counsel!

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THANK YOU!

*The End*

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