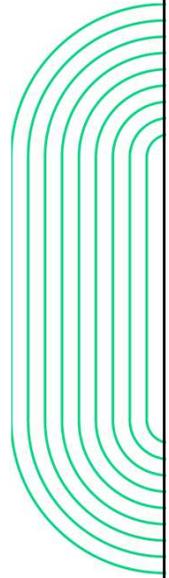


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BACK TO THE *SCHOOL* PART *I*

Retainer Workshop
August 24, 2021
Jordan M. Bullinger



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This presentation contains general recommendations and specific information and should not be relied upon for any specific purpose without consultation with legal counsel and in the context of specific facts and circumstances.





WHAT'S ON TAP



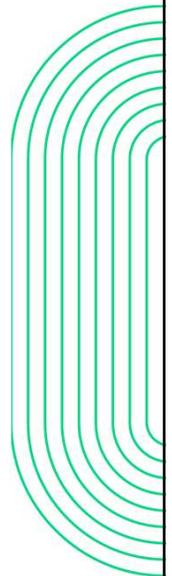
- Michigan State & Federal Decisions
- Noteworthy Decisions from Abroad
- OCR & Michigan
- MIOSHA



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PART ONE

Michigan State & Federal Decisions



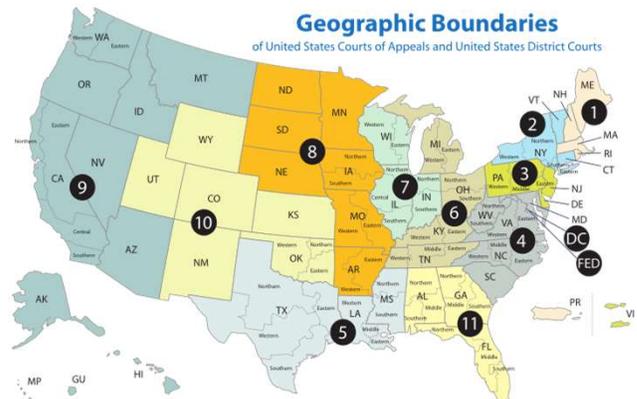
Shefke v Macomb ISD, 77 IDELR 72 (ED MI 8-19-20)

- Parent alleged refusal to implement protective restraint techniques to ensure the safety of a non-verbal 4th grade student with ASD and who presents with SIB resulted in a seizure and brain injury.
- Parent alleged gross negligence and claims under the 4th and 14th amendment and MPWDCRA.
- School argued complaint should be dismissed for failure to exhaust.
- Court found that simply alleging money damages was insufficient to escape obligation to exhaust administrative remedies under IDEA.
- Court dismissed Parent's complaint without prejudice.



Perez v Sturgis, 121 LRP 23144 (6th Cir. 6-21-21)

- 23-year-old DHH student settled DPH with LEA.
- Court held that because he settled the DPH, he could not sue the LEA for emotional distress he allegedly suffered as a result of a failure to meet his communication needs.
- Court joined 8th and 10th COA in holding that settlement of FAPE claims does not satisfy IDEA's exhaustion requirements. Settlement of IDEA DPH can bar separate claims under 504 and the ADA.



Davis v Flint Community Schools, 77 IDELR 227 (MI COA 10-29-20)

- 6 yr old Student with ASD suffered injuries when he dropped the lid of a bench on his hand during school hours.
- Court found that LEA's are generally immune from tort liability arising from school operations; however, they have a duty to repair and maintain buildings under their control if those buildings are open to the public.
- Court opined the injury did not arise from a failure to repair a dangerous or defective condition. Rather, Student lifted and dropped the lid against the teacher's direction.
- Parent alleged failure to have a safety device for the lid constituted a hazard that the school should have addressed. Court found no evidence that the bench ever came with such a device and the District's responsibility was only to repair and maintain.
- Court ultimately held Flint was immune from the parent's negligence claims under state law.



Boykins v Trinity, Inc., 78 IDELR 278 (ED MI 5-27-21)

- 20-year-old with ASD died hours after suffering a seizure on a bus in July 2018.
- Generally, LEAs are not liable for constitutional violations committed by employees or third-party contractors. However, Court noted that an exception exists when the alleged violation stems from an official district policy.
- LEA had a policy of transporting all SWDs on gen. ed. transportation regardless of individual needs.
- LEA also required SWDs to remain on the bus until the school was "ready to receive them."
- Court found that policies which required the SWD to remain on a hot bus in July with poor ventilation could have been a factor in the Student's death.
- LEA's motion to dismiss constitutional claims denied.



PART TWO

Noteworthy Decisions From Abroad

Rocklin Unified Sch. Dist., 121 LRP 12194 (SEA CA 3/24/21)

- LEA offered both in-person and virtual instructional models to a medically fragile 3rd-grader.
- IEP described in-person placement while the notes described virtual.
- LEA announced return to in-person learning at the start of the 20-21 school year.
- Parent elected to continue virtual. Because the Parent was placed on a waiting list, Parent filed a due process hearing.
- IHO held that IDEA requires that LEAs offer a single, specific program in the form of a clear, coherent offer which the parent can reasonably evaluate and decide whether to accept or reject.
- IHO held describing two contradictory placement offers in two different sections made the IEP offer ambiguous and confusing.

Charles H. v District of Columbia (DDC 2021)

- Group of 40 incarcerated adult students (ages 18-22) filed an action alleging that, at least for a year, only received sporadic instructional work packets without any feedback or related services.
- Court granted class certification.
- Sought a preliminary injunction -
 - Likelihood of success on the merits – Court held that provision of work packets without any teacher feedback did not amount to SDI within SWDs IEPs.
 - Irreparable harm – Court held that denial of FAPE was prolonged and pronounced and efforts to correct still created a shortfall of 50% of SDI.
 - Balance of the equities – Court found interest in compliance with IDEA, including increased resources as a result of coronavirus rescue legislation, and flexibility of modalities weighted against governmental interest in controlling expenditure of limited resources.



Wong v Board of Educ., 120 LRP 23481 (D Conn. 8-7-20)

- Parents appealed a IHO decision that the LEA provided FAPE and a dismissal of 504/ADA claims for lack of jurisdiction.
- Parents alleged LEA took adverse action by limiting efforts to communicate with school staff and took adverse action by removing their son from NHS following their advocacy related to a disciplinary incident.
- Court held that to establish retaliation under the ADA/504, parents must show that they were engaged in a protected activity of which the LEA was aware and that they were subject to adverse action soon thereafter.
- If established, the LEA must establish a legitimate, nondiscriminatory reason for the action.
- IHO held that removal from NHS was related to a violation of the code of conduct. IHO further held that removal did not adversely impact the teen's education.
- IHO held that the alleged interference was due to inadvertent identification of emails as spam. The IHO also noted that the LEA has two alternative email addresses to communicate.
- Court found parents had no viable retaliation claims.



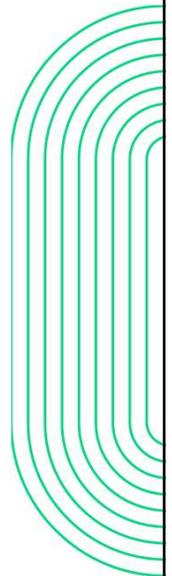
Schaeffer v Fulton Co. Sch. Dist., 78 IDELR 250 (ND GA 5-10-21)

- Parent alleged a SSW retaliated against a SWD by filing a truancy petition with juvenile court based on excess absences.
- Court held that to establish a viable cause of action the Parents must establish:
 - 1. They engaged in a protected action;**
 - 2. The LEA acted adversely against them; and,**
 - 3. There was a causal connection between the protected activity and the adverse action.**
- Court held that Parents established all 3 by showing that SSW initiated truancy proceedings soon after the Parents requested an IEP meeting.
- Court was unpersuaded that SSW filed because the absences were unexcused. Parents presented evidence that they almost always informed LEA of the reason for the Student's absences and that the nature of the Student's disability preventing him from attending school.
- Court noted inconsistencies with LEA's attendance supported SSW acted with retaliatory intent.
- Court denied LEA's motion to dismiss the case.



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PART THREE
OCR



Holland (MI) Public Schools, 79 IDELR 77 (OCR 4-26-21)

- Parent alleged that the LEA retaliated against her by threatening to place SWD in a virtual school.
- Parent alleged in response to a request to pick SWD up due to refusal to wear a mask that the Principal allegedly stated SWD needed to attend an online school if he persisted in refusing to wear a mask and appropriately social distance.
- Discussions regarding a potential change to the student's placement should be discussed in the context of an IEP meeting.
- OCR found insufficient evidence that the LEA engaged in an adverse action.



Flint (MI) Community Schools, 121 LRP 15248 (OCR 1-28-21)

- Parent alleged that the LEA retaliated against her by issuance of a truancy letter.
- Flint established that the truancy agent was not aware of Parent's placement concerns. Rather, "the attendance agent responsible for the decision to send the Parent the letter was neither involved with nor aware of the Parent's complaints."
- OCR found that the agent followed district policies and practices further undercut any suggestion that the letter was issued in retaliation for Parent's advocacy.
- OCR found insufficient evidence that Flint retaliated against the Parent.



PART FOUR

MIOSHA

MIOSHA

- MIOSHA health and safety activities include:
 - Setting and enforcing occupational safety and health standards;
 - Providing extensive safety and health training and education; and,
 - Working with partners to develop innovative programs to prevent workplace hazards.



General Duty Clause - 408.1011(a) – Furnish to each employee, employment and a place of employment that is **free from recognized hazards** that are causing, or are likely to cause, death or serious physical harm to the employee.

What if the Student is the workplace hazard?

- Jurisdiction - collateral Attack on IEP / 504 Plan
- Privacy rights under FERPA & IDEA - Student vs System
- Procedural Safeguards under IDEA and Section 504



Workplace Violence

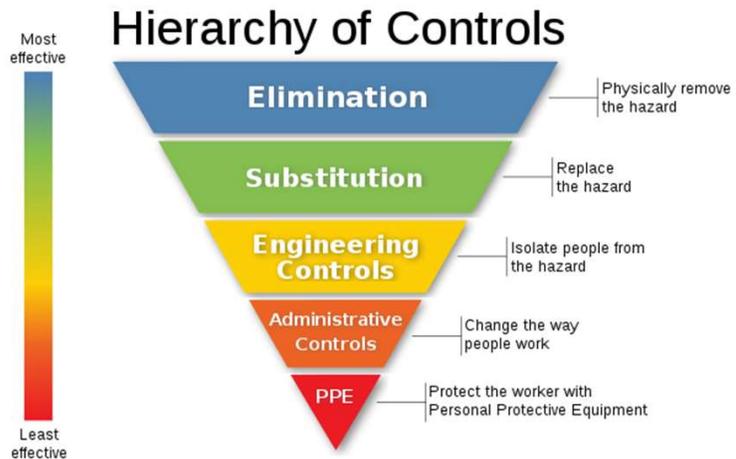
- Criminal Acts – Violent acts by people, employees or former employees who enter the workplace with the intention to commit a crime;
- Customers/Clients/Patients – Violent acts directed at employees by individuals who enter the employer’s premises to obtain some type of service;
- Co-Worker Conflict – Violence directed at co-workers, supervisors, or managers by a current or former employee, supervisor, or manager; and,
- Personal – Violence in the workplace by someone who does not work there, but who is known to, or has a personal relationship with, an employee.

MIOSHA has not promulgated specific standards for protecting employees from workplace violence; however, MIOSHA has cited employers for exposing their employees to workplace violence hazards under the “General Duty” clause following incidents of assaults committed by customers and visitors.



Workplace Violence Training Programs

- Identify workplace violence hazards;
- Determine methods of controlling or eliminating these hazards;
- Train employees and supervisors; and,
- Prepare to respond to a violent incident.



MIOSHA Investigation

- Inspection
 - Administrative Subpoenas
 - Warrant / Court Order
- Opening Conference
 - Administration
 - Union
- Interviews
- Walkaround Inspection
- Closing Conference
 - Discuss proposed citations and/or any recommendations
 - Establish time frame to correct any hazards.
 - Review MIOSHA's posting requirements and settlement options.
 - Provide information on hazard abatement and answer questions.



MIOSHA Citations

- Willful - a violation committed with an intentional disregard or plain indifference to the requirements of MIOSHA regulations or employee safety and health.
- Serious – A hazard exists that has a likelihood of causing serious physical harm or death.
- Repeat Serious – A violation of the same rule within three years (construction) or five years (general industry).
- Other-than-serious – A hazard exists and could cause an injury, but most likely would not result in death or serious physical harm.

Serious violations must contain a monetary penalty, with the maximum penalty being \$7,000. Any violation classified as Willful must have a minimum penalty of \$5,000, with the maximum penalty being \$70,000.



MIOSHA Appeal Process

- Penalty Reduction Agreement
 - Within 5 days and complete within 15
- Appeal within 15 working days from receipt of citation.
- If not appealed, then becomes a final order.
- First Appeal – Petition to MIOSHA.
- Second Appeal – Appeal to the Board of Health and Safety Compliance and Appeals.
 - Mandatory settlement conference.
 - If unable to reach a settlement, then a hearing will be scheduled before an ALJ.
 - If Board does not request a review of decision, then decision becomes final order.
 - Decision may be appealed to Circuit Court.



QUESTIONS



Jordan M. Bullinger
616.608.1146
jbullinger@clarkhill.com



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Thank You!



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PART 2

BACK TO SCHOOL WEBINAR
August 24, 2021
Vickie L. Coe



1

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This presentation contains general recommendations and specific information and should not be relied upon for any specific purpose without consultation with legal counsel and in the context of specific facts and circumstances.



2

WHAT'S ON TAP



- Contingency Learning Plans
- Homebound/Hospitalized Services
- Child Find and Reevaluations
- Masks

3



PART ONE
CONTINGENCY LEARNING PLANS

4

HOW DID WE GET HERE?

- June 30, 2020, Governor Whitmer issued Executive Order (EO) 2020-142 that required school districts to develop and adopt a COVID-19 preparedness and response plan that was aligned with the Return to School Roadmap and MI Safe State Plan.
- Michigan Department of Education issued Guidance to Address Return to Learn for Students with IEPs dated August 24, 2020 which outlined the Department's top priorities for the 2020-2021 school year.
- Acknowledgement by MDE that, while neither the IDEA nor MARSE require the use of a contingency learning plan ("CLP"), the Department strongly recommended that districts use CLPs as part of its top priorities for the 2020-2021 school year.
- The CLP guidance developed by MDE was designed based on the guidance issued by the USDOE.

5

OSEP GUIDANCE

- Questions and Answers on Providing Services to Children with Disabilities during the Coronavirus Disease 2019 Outbreak issued March 2020.
- If a child with a disability is absent for an extended period of time because of a COVID-19 infection and the school remains open, the IEP Team must determine whether the child is available for instruction and could benefit from homebound services such as online or virtual instruction, instructional telephone calls, and other curriculum-based instructional activities, to the extent available.
- If a child does not receive services after an **extended period of time**, a school must make an individualized determination whether and to what extent compensatory services may be needed.
- Unclear what "extended period of time" means but guidance seems to suggest that is generally **more than 10** consecutive days.

6

OSEP GUIDANCE

•Question A-1: Is an LEA required to continue to provide a free appropriate public education to students with disabilities during a school closure caused by a COVID-19 outbreak?

(H) _____

7

OSEP GUIDANCE

- “The IDEA, Section 504, and Title II of the ADA do not specially address a situation in which elementary and secondary schools are closed for an extended period of time (generally more than 10 consecutive days) because of exceptional circumstances, such as an outbreak of a particular disease.”
- “If an LEA closes its schools to slow or stop the spread of COVID-19, and does not provide any educational services to the general student population, then the LEA would not be required to provide services to students with disabilities during that same period of time.”
- “If an LEA continues to provide educational opportunities to the general student population during a school closure, the school must ensure that students with disabilities also have equal access to the same opportunities, including the provision of FAPE.”

(H) _____

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OSEP GUIDANCE

•Question A-2: Must an LEA provide special education and related services to a child with a disability who is absent for an extended period of time because the child is infected with COVID-19, while the schools remain open?

(H) _____

9

OSEP GUIDANCE

- "Yes. It has long been the Department's position that when a child with a disability is classified as needing homebound instruction because of a medical problem, as ordered by a physician, and is home for an extended period of time (generally more than 10 consecutive school days), an individualized education program (IEP) meeting is necessary to change the child's placement and the contents of the IEP, if warranted. ... "If a child with a disability is absent for an extended period of time because of a COVID-19 infection and the school remains open, then the IEP Team must determine whether the child is available for instruction and could benefit from homebound services such as online or virtual instruction, instructional telephone calls, and other curriculum-based instructional activities, to the extent available."
- "If a child does not receive services after an extended period of time, a school must make an individualized determination whether and to what extent compensatory services may be needed, consistent with applicable requirements, including to make up for any skills that may have been lost."

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OSEP GUIDANCE

- Question A-4: If a child with a disability at high risk of severe medical complications is excluded from school during an outbreak of COVID-19 and the child's school remains open, is the exclusion considered a change in placement subject to the IDEA's protections?

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OSEP GUIDANCE

- "If the exclusion is a temporary emergency measure (generally 10 consecutive school days or less), the provision of services such as online or virtual instruction, instructional telephone calls, and other curriculum-based instructional activities, to the extent available, is not considered a change in placement. During this time period, a child's parent or other IEP team member may request an IEP meeting to discuss the potential need for services if the exclusion is likely to be a of a long duration (generally more than 10 consecutive school days). For long-term exclusions, an LEA must consider placement decisions under the IDEA's procedural protections of 34 CFR 300.115-300.116 regarding the continuum of alternative placements and the determination of placements."

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OSEP GUIDANCE

• Question A-5: May an IEP Team consider a distance learning plan in a child’s IEP as a contingency plan in the event of a COVID-19 outbreak that requires the school’s closure?

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OSEP GUIDANCE

- “Yes. IEP teams may, but are not required to, include distance learning plans in a child’s IEP that could be triggered and implemented during a selective closure due to a COVID-19 outbreak. Such contingent provisions may include the provision of special education and related services at an alternate location or the provision of online or virtual instruction, instructional telephone calls, and other curriculum-based instructional activities, and may identify which special education and related services, if any, could be provided at the child’s home.
- Creating a contingency plan before a COVID-19 outbreak occurs gives the child’s service providers and the child’s parents an opportunity to reach an agreement as to what circumstances would trigger the use of the child’s distance learning plan and the services that would be provided during the dismissal.”

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14

RIGHT TO FAPE AND ALTERNATIVE LEARNING

- No one-size fits all approach to addressing student needs during the pandemic.
- Must provide students with disabilities the same opportunities that provide to nondisabled students.
- Federal law mandates that all eligible students have a right to a free appropriate public education even in times of crisis.
- IDEA and Section 504 should not be used as a per se rule to deny virtual and/or online/remote learning.
- As stated in USDOE March 21, 2020 guidance, the provision of FAPE may include, as appropriate, special education and related services provided through specially designed instruction that is provided in person, virtually, online, telephonically, and/or in a combination.

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IEP TEAM CONSIDERATIONS

- COVID-19 has not changed or altered the IEP Team’s obligation to put FAPE on the table.
- Decisions about the nature and extent of IEP services must be made on individualized basis and is based on the needs of that student.
- IEP Teams must keep the needs of the student front and center and work creatively to consider the student’s present level, the effects of his/her disability, his/her disability-related needs and develop an IEP that meets those needs in an appropriate placement regardless of how the services will be delivered.
- MDE has endorsed the continued use of CLPs but need updated guidance as to how districts should implement for the 2021-2022 school year.

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PART TWO
HOMEBOUND/HOSPITALIZED
SERVICES/SUPPORTS



17

PURPOSE

- Provide continuity of educational services for pupils with medical conditions that prevent them from physically attending school.
- Certification must be made by a M.D., D.O. or a licensed physician’s assistant.
- Are designed to be a self-study program that allows pupils to maintain their coursework and studies while they are unable to attend school.
- The services provided during homebound/hospitalized allow the classroom teacher to work through the homebound/hospitalized teacher to help distribute course materials, deliver instruction, and monitor pupil progress in the course.

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FAILURE TO PROVIDE SERVICES

- Required to provide as a condition of receiving state aid.
- Failure to provide may result in withholding funding until such time the district comes into compliance with the act.
- Willful failure to implement is also subject to penalty for school officials or board members under the SSA and RSC.
- Failure to provide services does not relieve the district of the liability to pay for service if initiated by a third party.
- Failure to meet program or pupil accounting requirements may result in the loss of foundational allowance for the pupil in question.
- Level of services provided can be a subject of due process hearing complaints – More on that later.

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LEGAL REQUIREMENTS

- Provide continuity of educational services for pupils with medical conditions that prevent them from physically attending school, is confined to the home or hospitalized during regular school hours for a period of longer than five (5) school days..
- Certification must be made by a M.D., D.O. or a licensed physician's assistant.
- Are designed to be a **self-study program** that allows pupils to maintain their coursework and studies while they are unable to attend school.
- The services provided during homebound/hospitalized allow the classroom teacher to work through the homebound/hospitalized teacher to help distribute course materials, deliver instruction, and monitor pupil progress in the course.

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LEGAL REQUIREMENTS

- District or ISD may provide the services itself or may contract with an ISD, hospital, treatment center, or another district to provide the services.
- The school is responsible for delivery of all content of the homebound/hospitalized instruction, the textbooks required for the course and related materials, as well as course assignments and grading.
- **Minimum** of two (2) 45-minute instructional periods per week for general education pupils; or two (2) nonconsecutive 60-minute instructional periods per week for pupils with an IEP. The two (2) one-hour sessions may be on the same day; however, there must be an adequate break between the two sessions.

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TIMELINES

- When the school learns that a pupil with a medical condition that could result in more than five (5) consecutive days of absence, the school must first determine if the pupil is eligible for homebound/hospitalized services.
- If eligible, must have service begin as soon as possible but not later than three (3) school days after being notified for general education students.
- MARSE rules state that homebound services must be initiated within 15 school days after verification by a M.D. or D.O. or a licensed physician assistant of a medical condition which requires the pupil with a disability to be confined to the home during regular school hours. Hospitalized services shall be initiated when determined to be medically feasible.
- When a district determines the amount of time for homebound/hospitalized services for a pupil with an IEP, the district must consider the pupil's entitlement to a FAPE.

(i) _____

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DELIVERY OF SERVICE

- To provide the services, a district may
 - Assign the pupil's teacher(s) or other teacher(s) employed by the district to provide the service.
 - Employ a substitute teacher to provide the services.
 - Contract with another district or an ISD.
 - Contract with a hospital, treatment center, or other health care facility that employs a certified teacher.
 - Use a telecommunication link with the school, or computer programming.
 - Use electronic equipment such as video recording equipment, talking books and equipment from the Library of Michigan or voice activated tape recorders.

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In re Student with a Disability, SEA MI 2021

- Former student of district files a due process hearing request alleging that the district deprived him of a free appropriate public education.
- District provided services that consistently exceeded the minimum two, nonconsecutive hours on instruction. Related services provided on a consultative basis.
- Instructional services provided by a retired certified teacher who was employed by the district.
- Student alleged that deprived of a FAPE during homebound instruction on various points, including the qualifications of the homebound teacher.
- ALJ rejected student's claims.

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**PART THREE
CHILD FIND AND REEVALUATIONS**



25

CHILD FIND BASICS

- IDEA and Section 504 require "child find."
- It is the **District's** duty.
- Districts cannot take a passive approach and rely on parents or others to refer.
- Requires knowledge of red flags.
- Timely referral is critical.
- Child find duty is ongoing; does not stop once a student become eligible under the IDEA or Section 504.



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FAILURE TO TIMELY REFER/FIND

- Can be costly for the district if student is later determined to be eligible.
- There is a lot of litigation over alleged "child find" failures. The litigation is generally based on one of two premises: (1) Student who has never received special education services and parent claims that the student should have been "found." or (2) Student is receiving special education services and parent claims the student should have been found earlier.
- In a complaint situation, you can lose on child find but win on eligibility because evaluation reveals that the student does not meet the eligibility criteria.
- Most important to keep in mind that there is a difference between suspecting a disability and identification.

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EVALUATION BASICS

- Two purposes of an evaluation:
 - Determine whether the student has a disability as defined under the IDEA/MARSE (or Section 504) and **because** of that disability, the student **needs** special education and related services.
 - Provide information/data to help the IEP Team identify the specially designed instruction and supports that the student needs to receive a free appropriate public education ("FAPE").

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REEVALUATIONS

- Don't get caught up in the "no further assessments needed" cycle.
- Don't simply waive a reevaluation out of convenience or to meet a deadline.
- Before you take the "no further assessments" route, ensure:
 - That the parent (or staff) have not stated or implied that the student may have a different eligibility.
 - The student is making the expected progress and there is *actual* data to support this.
 - Everyone has a clear understanding of the student's present needs and how they may have changed over time.

(i) _____

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In re Student with a Disability, SEA MI 2021 cont.

- Student also alleged that the district failed to properly identify him as a student with a specific learning disability.
- With parents' agreement, the district had not reevaluated the student in a number of years.
- Outside evaluation report provided to the district that student alleged was proof that the district had a reason to suspect that he had a specific learning disability and should have been evaluated by the district.
- Based on that outside evaluation, as well as some updated evaluations that had been completed by a different district and some outside "providers," the student challenged the appropriateness of the services and supports in the district's IEPs.
- ALJ rejected the student's claims.

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In re Student with a Disability, SEA MI 2020

- Parent of already eligible student filed due process hearing against the district alleging in part that it had failed to meet its child find duty when it did not identify student as having a specific learning disability.
- Student had been previously evaluated and found not eligible for special education and related services as a student with a specific learning disability.
- Parent failed to present any evidence or support that the district had a reason to suspect the student should have been referred for an evaluation to consider eligibility for a specific learning disability.
- Parent failed to present any evidence or support that the district failed to provide the student with a free appropriate public education.
- ALJ finds in district's favor.

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PART FOUR
MASKS: Where are we now?



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Current state of the guidance

- CDC and state government Recommends return to full-time in person learning in the fall with layered prevention strategies in place.
- With the exception of school busing, CDC does not mandate a universal mask mandate in k-12 schools.
- Instead, CDC recommends universal indoor masking for all teachers, staff, students (age 2 and older), and visitors to k-12 schools, regardless of vaccination status.
- State government strongly recommends/encourages masking but leaves decision whether to mandate to local health departments and individual school districts.
- Some local health departments have instituted mandates.
- Some school districts have adopted policies in the absence of mandates at the federal, state or local level.
- Issue of masks continue to be controversial.

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•How do we address exemption requests due to religious reasons?

(i) _____

34

•What about medical exemptions?

(i) _____

35

Unable to medically tolerate?

- Treat it similar to a request for reasonable accommodation under the ADA.
- Onus on individual asking for accommodation to present medical documentation
- Engage in interactive process
 - Fundamental alteration to the program, service or activity;
 - Undue financial or administrative burden;
 - Direct threat to the health or safety of others.

WARNING - Information gained through this process may trigger Child Find obligations.

(i) _____

36

•What about requests due to belief that masks constitute impermissible restraint that restricts breathing under the Restraint and Seclusion Statute?

Ⓜ _____

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QUESTIONS



Ⓜ _____

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Vickie L. Coe
517.318.3013
vcoe@clarkhill.com

Ⓜ _____

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