

## Parting is Such Sweet Sorrow: Dismissing a Student from Speech or a Related Service

Presented by

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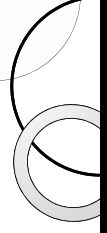
## Basic Legal Framework

- **What are “related services” under IDEA?**

*Services required* to assist a child in benefiting from their special education (34 C.F.R. § 300.34(a))

- IDEA regulations contain a non-exclusive listing of related services (34 C.F.R. § 300.34(c))

Note that the list includes medical services (only for evaluative and diagnostic purposes), parent counseling, school health services, and rehabilitation counseling services (career development)

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- A related service that would merely be *beneficial*, but not necessarily *required*, does not have to be provided to students under IDEA. 34 C.F.R. § 300.24(a)

A key distinction, since most related services could be beneficial in some way to a student... Or add to benefit

- **Tie-in to IEP instructional goals**—related services must be needed in order for child to meet the annual goals targeted by the sp ed services



## Common Problematic Legal Issues

- **Appropriate type and level of related services**

Foundation data: evaluation

Secondary: IEP annual goals & objectives

Additional Data: Private evals, parent input

Why is service required to meet goals?

Are findings traceable to eval data?

Are eval findings educationally premised?



## Common Problematic Legal Issues

- **Appropriate type and level of related services**

Can provider assert with confidence that level of related services will enable student to meet related services IEP goals?

Schools must not use standardized formulas for arriving at service amounts, which should vary in any given caseload



- **Decreases/Dismissals from Related Services—Overall Points**

A litigation trigger

Closely scrutinized by hearing officers

Supported by formal eval data?

Supported by informal data?

Is reason lack of student cooperation?

Is reason completion of IEP goals?

Is student progress at a plateau?

Is reason administrative issues?

Is reason a resources issue?



- ***Dawn G. v. Mabank ISD, 114 LRP 16859 (N.D.Tex. 2013)***

Student with Autism, ADHD, and Dyslexia

Among various other issues, parent challenged proposed dismissal from OT

Therapist indicated student was performing very well, teachers noted he was independently asking for his “sensory diet” as needed

Therapist’s opinion was that data indicated student no longer needed OT



- ***Dawn G. v. Mabank ISD, 114 LRP 16859 (N.D.Tex. 2013)***

Student had met OT goal of “independence with initiating sensory strategies to modulate behavior”

Court disagreed with HO’s finding that an OT evaluation was required, as it was based only on HO’s informal finding that the student’s handwriting was “difficult to read”



- ***Dawn G. v. Mabank ISD, 114 LRP 16859 (N.D.Tex. 2013)***

Court held that HO's "observation" was insufficient to overcome the testimony and evaluation of OT who had worked with the student for 2 yrs

(Court viewed student's handwriting and actually found it "quite legible")

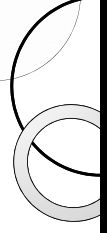
Court agreed that student had met his main OT goal



- ***Dawn G. v. Mabank ISD, 114 LRP 16859 (N.D.Tex. 2013)***

*Notes*—The meeting of key IEP goals can be a basis for dismissal from related services, if the goals represent the only areas of related services need, as here.

*Aside*—HO findings based on personal observations are always questionable...




- ***Kern County Supt. of Schs., 103 LRP 39913***  
**(SEA California 2003)**

Student with severe Autism engaged in dangerous head-banging behavior

OT proposed reducing direct services from 120 mins/wk to 15 mins/wk, with a decrease in consult services (from 30 to 15 mins/wk)

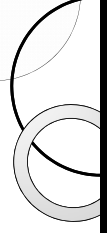
OT noted that previous amount of services was not based on data, but rather a settlement agreement



- ***Kern County Supt. of Schs., 103 LRP 39913***  
**(SEA California 2003)**

HO found that reduction in OT was inconsistent with needs for sensory input and “recent displays of severe self-injurious behavior”

Reduction also inconsistent with BIP target behavior of reducing head-banging, which was for sensory stimulation




- ***Kern County Supt. of Schs., 103 LRP 39913***  
**(SEA California 2003)**

Proposed reduction in speech was also inappropriate (from 30 mins/day to 90 mins/wk)

“Minimal advancement observed in March 2003 was an insufficient justification to reduce direct speech and language services.”

Reduction also inconsistent with need to reduce head-banging



- ***Kern County Supt. of Schs., 103 LRP 39913***  
**(SEA California 2003)**

*Notes*—Reducing services to a student when there is a major ongoing problem that is not under control is never going to work for the school

Admittedly, the amount of services provided is large, but may be necessary

Is this a case of therapist fatigue?...



- ***Robert F. v. North Syracuse Cent. Sch. Dist.*, 79 IDELR 96 (N.D.N.Y. 2021)**

School proposed reducing the speech services of a student with Autism, even though the original amount was less than what state regulations required

IEP called for 4 30-min sessions per week, and school proposed reducing to 3 sessions per week (while state regs actually required daily sessions)

And, student had not met his speech goals

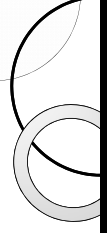


- ***Robert F. v. North Syracuse Cent. Sch. Dist.*, 79 IDELR 96 (N.D.N.Y. 2021)**

Court found that the reduction not only denied the student a FAPE, but that it constituted *deliberate indifference*, in light of the fact that it was made even as the student had failed to meet his speech goals

”No reasonable juror could conclude that reducing services to the child after he failed to make progress does not constitute deliberate indifference.”






- ***Robert F. v. North Syracuse Cent. Sch. Dist.*, 79 IDELR 96 (N.D.N.Y. 2021)**

*Notes*—Deliberate indifference is a standard that substitutes for intentional discrimination under § 504, which can give rise to money damages. But does not the deliberate indifference analysis, borrowed from *Davis v. Monroe* (workplace sexual harassment), better apply in disability harassment contexts?

See, e.g., *S.S. v. Eastern Kentucky Univ.*, 50 IDELR 91 (6<sup>th</sup> Cir. 2008); *Estate of Lance v. Lewisville Ind. Sch. Dist.*, 62 IDELR 282 (5<sup>th</sup> Cir. 2014); *Long v. Murray County Sch. Dist.*, 61 IDELR 122 (11<sup>th</sup> Cir. 2013); *S.B. v. Board of Educ. of Harford County*, 67 IDELR 165 (4<sup>th</sup> Cir. 2016).



- ***Robert F. v. North Syracuse Cent. Sch. Dist.*, 79 IDELR 96 (N.D.N.Y. 2021)**

*Notes*—The bad faith/gross misjudgment standard for intentional discrimination based on FAPE/services issues is probably better suited.

See, e.g., *Monahan v. Nebraska*, 554 IDELR 140 (8<sup>th</sup> Cir. 1982); *Sellers v. School Bd. of the City of Manassas, Va.*, 27 IDELR 1060 (4<sup>th</sup> Cir. 1998), *cert. denied*, 525 U.S. 871 (1998); *D.A. v. Houston Ind. Sch. Dist.*, 55 IDELR 243 (5<sup>th</sup> Cir. 2010).

But, it likely would have also been met here (gross departure from accepted professional standards), so it's a purely analytical point.



- ***Caldwell ISD, 111 LRP 56462 (SEA Texas 2011)***

Student with Cerebral Palsy, ADD, and ID

ARDC proposed reducing direct speech services from 900 mins/sem to 360 mins/semester)

Therapist explained that the proposal was due to the student's resistance to therapy and him wanting to stay in class with his peers



- ***Caldwell ISD, 111 LRP 56462 (SEA Texas 2011)***

HO noted, however, that the student's recent evaluation showed his speech impairment was as severe as ever

No data indicated speech had improved, and no behavioral interventions had been attempted to address his resistance to therapy

“Such a change in services needs to be supported by assessment data, even if informal data.”



- ***Caldwell ISD, 111 LRP 56462 (SEA Texas 2011)***

*Notes*—Reducing services due to student resistance, when staff know they are needed, is usually a losing proposition

The correct course of action for the ARDC would have been to study the resistance behavior thru an FBA, develop a BIP, and implement behavioral interventions

Or, an aide could be sent with the student to implement BIP strategies in speech




- ***Caldwell ISD, 111 LRP 56462 (SEA Texas 2011)***

*Notes*—Case was upheld on appeal to federal court (*Caldwell ISD v. L.P.*, 114 LRP 2869 (W.D.Tex. 2012)), and parents sought more than \$140,000 in attorneys' fees.



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- ***Department of Educ., State of Hawaii, 109 LRP 43676 (SEA Hawaii 2006)***

6-year-old boy has ID, VI, and cerebral palsy.

IEP team proposed a reduction in OT and PT, which parents challenged

HO noted data that indicated that in 60-min sessions, the student tired quickly, and the last half of sessions were not productive




- ***Department of Educ., State of Hawaii, 109 LRP 43676 (SEA Hawaii 2006)***

HO held this was a case where more was not really better, in terms of OT and PT service time

He found that, at a future time, when the student's attention span improves, increases in services may be appropriate

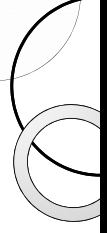
*Note*—This situation may call for shorter but more frequent sessions.



- ***Chris N. v. Corpus Christi ISD, 41 IDELR 255 (SEA Texas 2004)***

Parents of a high-schooler with AU/ED (?) sought residential placement


In granting residential placement, HO noted that counseling services were discontinued after student repeatedly and on a long-term basis refused to participate (counselor even agreed to drive him to school to see if he would talk during the trips)



- ***Chris N. v. Corpus Christi ISD*, 41 IDELR 255 (SEA Texas 2004)**

HO's position was that "he refused required counseling and he was obliged by his ARD Committee."

*Notes*—The case was reversed on appeal (see *Corpus Christi ISD v. Chris N.*, 45 IDELR 221 (S.D.Tex. 2006), but the HO's point was that the counseling should not have been removed from the IEP, as it continued to be necessary. Rather, counselor should have continued trying to provide the service, while documenting the student's continued refusal.



- ***Chris N. v. Corpus Christi ISD*, 41 IDELR 255 (SEA Texas 2004)**

*Note*—See also *Fort Bend ISD v. Z.A.*, 62 IDELR 231 (S.D.Tex. 2014), where a school psychologist unilaterally determined that counseling services in the student's IEP were not necessary, as he concluded the problem was the student's drug use in his first session with the student.



- ***Muscogee County Sch. Dist., 22 IDELR 204 (SEA Georgia 1995)***

IEP team proposed reduction in OT and PT for 17-year-old with profound disabilities

Staff testified that the student had attained as much as possible in terms of fine and gross motor function

After a year of maintaining the services at parent insistence, the IEP team reduced the services



- ***Muscogee County Sch. Dist., 22 IDELR 204 (SEA Georgia 1995)***

HO noted that therapists testified that all possible progress had been made, and only minimal services were required to maintain function

*Notes*—Therapists should take this position with care. Does data support the contention that the student has “maxed out” in progress? Is the decision supported by a real reevaluation?



- ***Muscogee County Sch. Dist., 22 IDELR 204 (SEA Georgia 1995)***

*Notes*—On “maxing out” of progress, also see *District of Columbia Pub. Schs.*, 112 LRP 14462 (SEA DC 2011), where a reduction of OT and PT for a child with multiple disabilities was upheld, as teacher and therapists testified that student had reached a “plateau” and “more services would not translate to more progress.”

HO noted that IDEA does not require formal assessments prior to reductions in related services. But, they can sure help if the reduction is challenged...



- ***Brady ISD, 110 LRP 17628 (SEA Texas 2009)***

After conducting OT and PT reevaluations, the ARDC reviewed the evals and proposed a change from direct OT and PT to consult services only

The parent asked for IEEs, which were also reviewed by the ARDC, although not followed (*see* 34 C.F.R. § 300.502(c)(1))

HO found that the change was appropriately supported by the available data





- ***In re: Student with a Disability, 109 LRP 77032 (SEA Virginia 2009)***

IEP team proposed a reduction in PT for a 19-year-old with severe ID

Therapist indicated that student had reached a point where she was able to physically participate in all classroom activities, which she was unable to previously

The classroom teacher indicated she would prefer for the student to not be pulled out of class so much for related services, if possible



- ***In re: Student with a Disability, 109 LRP 77032 (SEA Virginia 2009)***

HO agreed with the reduction in PT, as the parent had no evidence other than her opinion that her daughter would do better with more services

HO also noted that the IDEA does not require school to provide for physical progress beyond that necessary for participation in the school activities

*Note*—Here, a variation on the “max out” position, as the student had achieved the gross motor skills necessary to access the school setting and participate fully



- **Glendora USD, 46 IDELR 300 (SEA CA 2006)**

District reduced OT for 6-year-old with AU and language disorder (from 2 60-min sessions per week to one 50-min session per week)

OT goals included functional grasps, writing name, participation in arts/crafts, wet tactile tasks, coloring



- **Glendora USD, 46 IDELR 300 (SEA CA 2006)**

HO held that school failed to consider student's needs in reducing OT by more than 50%

“Student has poor handwriting, scissor skills, self-care skills, and tactile defensiveness, and vestibular/occulomotor control that affect his fine motor and academic performance”



- ***Glendora USD, 46 IDELR 300 (SEA CA 2006)***

HO found that evidence indicated student could not make progress toward goals with the reduced OT

Although OT based reduction on a three-page letter of findings, there was no testing of the student

Parent's expert conducted testing and stated student needed 2 hrs/wk OT



- ***Glendora USD, 46 IDELR 300 (SEA CA 2006)***

HO found a denial of FAPE


*Notes*—Service reductions are best supported by new reevaluations with new testing data (here, a “letter of findings” was based on no hard test data).



- ***In re: Child with Disabilities, 21 IDELR 594 (SEA Connecticut 1994)***

HO found reduction in PT services to student with severe multiple disabilities was inappropriate and based on “administrative expediency”

*Note*—If a HO gets a “whiff” that the reduction decision is a resources-based or administrative decision, the school will lose the case.

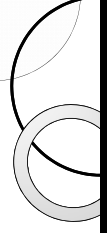


- ***Georgetown ISD, 121 LRP 3995 (SEA TX 2020)***

District closed due to COVID on 3/23/2020

Although the District initially offered the parent the option of teletherapy speech, only one session was provided

Thereafter, teletherapy speech was discontinued for “ethical and equity reasons”




- **Georgetown ISD, 121 LRP 3995 (SEA TX 2020)**

Speech was delivered only through online activities, and progress could not be measured

Initially, inclusion, social skills, and “behavior communication support” were provided through synchronous online services

In April, District proposed an IEP Amendment offering reduced online social skills services, 60 mins/wk online dyslexia services, 7 *indirect* speech consult sessions per 9-wk grading period, 30 mins/week inclusion support through Google Hangout

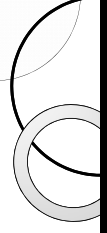


- **Georgetown ISD, 121 LRP 3995 (SEA TX 2020)**

HO noted that “the District prepared the Amendment without input from student’s mother,” who disagreed with Amendment

HO found that in March, the District “modified Student’s IEP and special education services without Student’s mother’s consent.”

HO also noted that “the District has yet to meet to determine whether the student needs compensatory services...”




- ***Georgetown ISD, 121 LRP 3995 (SEA TX 2020)***

He noted that the District was waiting on a full grading period after return to school before deciding on comp services

At the start of 2020-21, the District provided direct online speech

HO held that the District had the ability to provide direct speech teletherapy, but chose not to do so, and thus did not make every effort to provide the IEP services

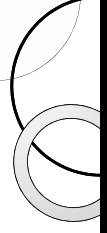


- ***Georgetown ISD, 121 LRP 3995 (SEA TX 2020)***

Lastly, the fact that the District could not measure the student's progress in reading and speech was indicative that he did not make progress during the period of closure

HO stated that the proposed IEP amendment "was a unilateral proposal made without parental input."

HO grants compensatory education



- **Georgetown ISD, 121 LRP 3995 (SEA TX 2020)**

*Speech Note*—Discontinuation and then drastic reduction in speech services (to only indirect services) was undertaken not due to change in student need, but rather pandemic-related administrative circumstances... Did the District promise COVID comp services for missing direct services?

*Procedure Note*—Where in the IEP amendment regulation is parental input required *prior* to the LEA proposing the amendment? Isn't the procedure one where the District may unilaterally propose an amendment and the parent may agree or disagree? See 34 C.F.R. §300.324(a)(4)



- **Georgetown ISD (SEA TX HO 2020)**

Here, the district proposed an amendment, the parent disagreed, so an IEP meeting was held—all within a month of closure

Despite the SEA's qualitative comp guidance, the HO offers hour-for-hour comp

*Note*—Is it inappropriate for Districts to wait until some time after students return to make an appropriate qualitative comp determination? The HO here seems to fault the District for following that method... (despite OSEP guidance that comp determinations should take place after schools reopen). Doesn't the HO's approach force use of the disfavored quantitative approach to comp determinations?



- **Dealing with private evaluations**

The dynamic of recommendations from physicians

***Christopher M. v Corpus Christi ISD, 17 IDELR 990 (5<sup>th</sup> Cir.1991)*** (no presumption favoring Drs' opinions over those of school staff—school entitled to rely on its related service providers)

***Alvin ISD v. A.D., 48 IDELR 240 (5<sup>th</sup> Cir. 2007)***(Drs' info faulty, based on parent's inaccurate representations and omissions, based on maximization of potential)



- **Dealing with private evaluations**

IEP team must *consider* private eval (see 34 CFR § 300.502)—What does that mean?...

To consider an IEE means that it is reviewed by IEP team, discussed, and, to the extent not adopted, team explains basis for disagreement. *Letter to Anonymous, 23 IDELR 563 (OSEP 1995)*.

**Caveat**—Private evals might not be educationally based (i.e., a clinical, non-IDEA perspective)

**Does eval provide info relevant to educational need and IEP?** USDOE emphasized importance of educational relevance in determining whether IEE meets agency criteria and merits consideration (see 71 Fed. Reg. 46,690 (August 2006))





- **Dealing with private evaluations**

If the parent asks for a related services IEE, must the ARDC maintain the prior level of services while the IEE is finished and reviewed?

No. See ***Letter to Anonymous, 72 IDELR 163 (OSEP 2018)***. “It is important to note that the parent’s request for an IEE alone would not require the school district to continue the child’s current educational placement...”



- **Ideas in considering private evaluations**

Have school evaluators reviewed IEE?

Is it based on maximum benefit or potential?

Are data sources suspect?

Is evaluator properly qualified?

Are findings well-supported?

Does eval intrude in educational methods?

Will evaluator answer follow-up questions?