

From Evaluation to Dismissal: Appropriate Programming and Implementation of Related Services

Presented by

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1

Basic Legal Framework

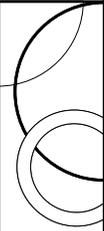
- **What are “related services” under IDEA?**

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)

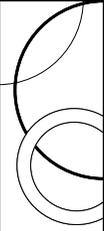
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- A related service that would merely be *beneficial*, but not necessarily *required*, does not have to be provided to students under IDEA. 34 C.F.R. § 300.24(a)

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 special services

3



Evaluation Issues

- **Related services evaluations are the foundation data to determine:**
 1. need for services, and, if needed,
 2. amount, duration, and modality of services.

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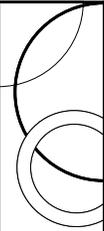
Evaluation Issues

- **Educational vs. Medical Model Perspectives**

1. **Medical**—What services are needed to regain full function?
2. **Educational**—What services are needed in school setting to enable student to benefit from sp ed and make educational progress? (A more limited role).

Needs to be explained to parents...

5



- **Orangeville Comm. Unit Sch., I 12 LRP 12090 (SEA ILL 2012)**

14-year-old with juvenile idiopathic arthritis did not receive an OT eval

School was aware that she had problems climbing stairs, holding a pen

Teachers provided informal accommodations, such as laptop use and staying on first floor

6



- **Orangeville Comm. Unit Sch., I 12 LRP I2090 (SEA ILL 2012)**

Documentation from a hospital recommended PT and OT evals

HO found it was inappropriate for school to attempt to address the needs without first identifying them through formal assessments

School failed to formally assess the effectiveness of accommodations

7



- **Orangeville Comm. Unit Sch., I 12 LRP I2090 (SEA ILL 2012)**

Lesson—Legally, threshold for needing to conduct a related services eval is fairly *low* (suspicion of potential area of need), but standard for services is fairly *high* (necessary for student to benefit from sp ed).

If in doubt, evaluate formally (parent input must be considered as well).

8



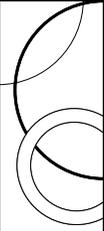
- **Dealing with private evaluations**

The dynamic of recommendations from physicians

Christopher M. v Corpus Christi ISD, 17 IDELR 990 (5th 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 (5th Cir. 2007)(Drs' info faulty, based on parent's inaccurate representations and omissions, based on maximization of potential)

9



- **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))

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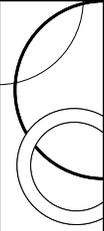


- **Dealing with private evaluations**

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....”

11



- **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?

12



Other Common 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?

13



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

14



- **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 goals?

Is reason administrative issues?

Is reason a resources issue?

15



- **Prince George's County PS, 59 IDELR 22 (SEA MD 2012)**

District reduced OT for 15-year-old with ID/OHI

Goal for handwriting remained on IEP, eval data revealed need for handwriting improvement remained unchanged

OT had stated writing might not improve because student was “so engrained in his approach to printing”

16



- **Prince George’s County PS, 59 IDELR 22 (SEA MD 2012)**

OT recommended student receive keyboard training, discontinuation of direct OT services (indirect only to work with aide)

SEA found insufficient documentation to support the reduction in services (only an OT observation)

17



- **Prince George’s County PS, 59 IDELR 22 (SEA MD 2012)**

Lesson—Reductions in OT without reevaluation are difficult to defend in DP hearings or SEA complaints

Student resistance to OT approaches are a part of the need that OTs must address (IEP team can meet to address the problem)

If student is moving to keyboard, IEP goals should change

18



- ***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 indicates student no longer needed OT

19



- ***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 on HO’s informal finding that the student’s handwriting was “difficult to read”

20



- ***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 found it "quite legible")

Court agreed that student had met his main OT goal

21

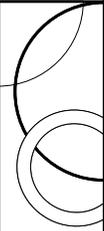


- ***Dawn G. v. Mabank ISD, 114 LRP 16859 (N.D.Tex. 2013)***

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.

HO findings based on personal observations are always questionable...

22



- ***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

23

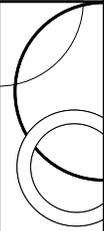


- ***Kern County Supt. of Schs., 103 LRP 39913 (SEA California 2003)***

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

24



- ***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

25



- ***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?...

26



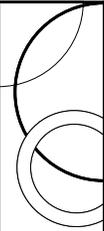
- ***Robert F. v. North Syracuse Cent. Sch. Dist., 79 IDELR 96 (N.D.N.Y. 2021)***

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 (state required daily sessions)

And, student had not met his speech goals

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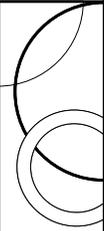


- ***Robert F. v. North Syracuse Cent. Sch. Dist., 79 IDELR 96 (N.D.N.Y. 2021)***

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 (implicating money damages)

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

28



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

Notes—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 (6th Cir. 2008); *Estate of Lance v. Lewisville Ind. Sch. Dist.*, 62 IDELR 282 (5th Cir. 2014); *Long v. Murray County Sch. Dist.*, 61 IDELR 122 (11th Cir. 2013); *S.B. v. Board of Educ. of Harford County*, 67 IDELR 165 (4th Cir. 2016).

29



- ***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 (8th Cir. 1982); *Sellers v. School Bd. of the City of Manassas, Va.*, 27 IDELR 1060 (4th Cir. 1998), *cert. denied*, 525 U.S. 871 (1998); *D.A. v. Houston Ind. Sch. Dist.*, 55 IDELR 243 (5th Cir. 2010).

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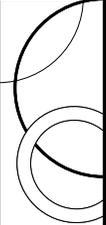
- ***Caldwell ISD, 111 LRP 56462 (SEA Texas 2011)***

Student with Cerebral Palsy, ADD, and ID

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

Therapist explained that the proposal was due to the student’s resistance to therapy and wanted to stay in class with his peers

31



- ***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.”

32



- ***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

33



- ***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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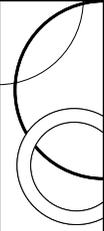


- ***Chris N. v. Corpus Christi ISD, 41 IDELR 255 (SEA Texas 2004)***

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)

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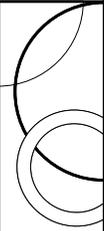


- ***Chris N. v. Corpus Christi ISD, 41 IDELR 255 (SEA Texas 2004)***

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 had to continue trying to provide the service and document the student's continued refusal.

36



- ***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.

37



- ***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

38



- ***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?

39



- ***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...

40



- ***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

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

41



- ***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 was a problem in the past

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

42



- ***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

43



- ***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

44

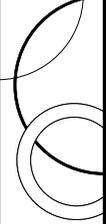


- **Glendora USD, 46 IDELR 300 (SEA CA 2006)**

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”

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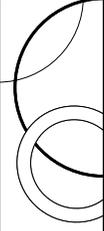
- **Glendora USD, 46 IDELR 300 (SEA CA 2006)**

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

46

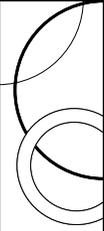


- ***Glendora USD, 46 IDELR 300 (SEA CA 2006)***

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).

47



- ***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.

48



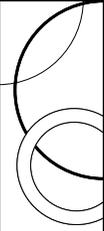
- **Methodology Issues**

- ***Carlson v. San Diego USD, 54 IDELR 213 (9th Cir. 2010)***

- Parents of a student with OT needs asserted that District denied her a FAPE by refusing to offer a specific methodology to address sensory deficits

- Court held that dispute was one of OT methodology, but questions of methodology are left up to the schools (*Rowley*), and do not have to be set forth in IEP

49



- ***Corpus Christi ISD v. Cole K., Civil Action No. C-03-112 (S.D. Tex. 2004)***

- Parents of a child with physical impairments wanted school to provide aquatic OT provided by a private provider

- School proposed regular OT direct, and integrated with classroom activities

- District agreed to try aquatic OT on a trial basis, but determined its OT services were better integrated with education

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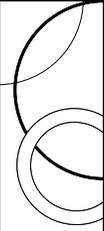


- ***Corpus Christi ISD v. Cole K., Civil Action No. C-03-112 (S.D. Tex. 2004)***

Court reversed HO and ruled for the district, finding dispute was really one of methodology—parents preferred aquatic method for OT, while district chose land-based direct OT services in coordination with classroom activities

Parents failed to show school's OT was inappropriate for FAPE

51



- **IEP Issues**

Generally, related services in the IEP must be supported by IEP goals

Related service that teach or improve on a skill must be reflected in IEP goals.

Letter to Hayden, 22 IDELR 501 (OSEP 1994).

Meaning, sp ed transportation would not require IEP goals, as student is not taught a skill (unless using public transportation is taught as a vocational skill).

52



- **IEP Issues**

- Schedule of services**

- Make sure the schedule of services is specific and clear as to frequency, amount, duration, location, and modality

- Modality**—Consult or direct? Direct 1:1 or group? Combination of consult direct? Is each set forth specifically?

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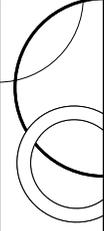


- **Implementation Issues**

- Federal courts' analysis of IEP implementation failures under IDEA:

- Rule*—Only a material failure to implement IEP, or a failure to implement a significant or essential component of the IEP, will amount to an actual denial of FAPE (see, e.g., *Houston ISD v. Bobby R.*, 31 IDELR 185 (5th Cir. 2000), and cases from 2nd, 4th, 8th, and 9th Circuits)

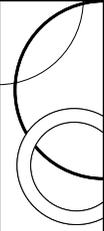
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- **Implementation Issues**

Thus, significant failures to implement a related service, particularly if the related service is key to the student benefitting from the sp ed services, will mean a denial of FAPE.

55



- **Implementation Issues**

Letter to Balkman, 23 IDELR 646 (OSEP 1995)

“General rule is that if the district makes IEP services available to the student at the normally scheduled time, the district is not obligated to make other arrangements to provide services if the disabled student is absent from school at that time for reasons other than his or her participation in school-sponsored activities.”

56



- **Implementation Issues**

Letter to Balkman, 23 IDELR 646 (OSEP 1995)

Schools must make up sessions missed due to school activities (e.g., field trips)

Schools must make up sessions missed due to staff issues

But no legal requirement to make up sessions due to student absences

57



- **Implementation Issues**

Overall Implementation Guidance

- Maintain accurate logs of service times
- Make up sessions missed due to staff issues
- Implement full session times
- Note how much consult vs. direct time
- Explain delivery modality to parents

58