

Legal Landscape, Post-COVID

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WASA

FAPE during COVID

- On March 21, 2020, the United States Department of Education (“USDOE”) issued guidance addressing the risk of COVID-19 in schools while serving students with disabilities.
 - The USDOE explained that, “during this national emergency, schools may not be able to provide all services in the same manner they are typically provided” and that it may be unfeasible or unsafe to provide in-person or hands-on educational services.
 - It went on to note that “FAPE may include, as appropriate, special education and related services provided through distance instruction provided virtually, online, or telephonically.”

FAPE during COVID

- On April 13, 2020, OSPI updated its “Questions and Answers: Provision of Services to Students with Disabilities During School Facility Closures for COVID-19.”
 - OSPI reiterated that, “[t]here is not an expectation that Individualized Education Program (IEP) services [will] be delivered exactly as the IEP states” and that “[t]here is no one right way to provide services.”
 - Similar to USDOE, OSPI reiterated that, “the provision of FAPE may include, as appropriate, special education and related services provided through instruction that is provided virtually, online, or telephonically.”

Recovery Services due to COVID

- On May 7, 2021, OSPI issued “Washington’s Roadmap for Special Education Recovery Services: 2021 & Beyond.” This guidance document addressed OSPI’s expectations for how school districts could begin to respond to any learning loss experienced by students with IEPs due to COVID-19.
 - OSPI framed such responses under the rubric of “recovery services,” rather than compensatory education. OSPI advised that such recovery service determinations would be made on a student-by-student basis by individual IEP teams.
 - “The IEP team must make an individualized determination as to whether a student needs recovery services, through a review of progress on IEP goals before COVID, during COVID facility closures, and since resuming in-person instruction.”

Implementation of IEPs

- ***Van Duyn v. Baker Sch. Dist.***, (9th Cir., 2007)
 - Parents alleged that the District denied Student a FAPE when it failed to implement IEP after transition from elementary to middle school.
 - The Court ruled that only a **material failure** to implement an IEP violates the IDEA.
 - “A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child’s IEP.”
 - Not providing math SDI, as listed in IEP, was a material failure; adapting program to reflect middle school structure, was not (but could have been)

Parent Participation

Doug C. v. Hawaii Dep't of Educ., (9th Cir. 2013)

- Parent asked for **annual** IEP review meeting to be rescheduled repeatedly
- Team ultimately met without parent due to annual review deadline and agreed to change Student from private placement to public placement; team offered to meet with Parent after team meeting
- 9th Circuit found team meeting without parent a denial of FAPE
 - Court found annual review deadline less important than parent's right to participate in placement decision

Child Find

Timothy O. v. Paso Robles Unified Sch. Dist., (9th Cir. 2016)

- Psychologist observed student for 30-40 minutes without any assessment tools and concluded that he could not diagnose the student with autism “off the top of his head.”
- The Court concluded that the school district denied FAPE by relying on informal observations in considering suspected autism and designing an education plan for the student.

Conflict Resolution

Avila v. Spokane Sch. Dist., (9th Cir. 2017)

- Court held that IDEA's two-year statute of limitations period applies from time when parents knew or should have known of the alleged violations.
 - Strict application of two-year limitation by District Court was reversed by Ninth Circuit.
- Application of limitations period may focus on when parents knew or had reason to know of an alleged denial of FAPE, not necessarily when parents become aware that the district acted or failed to act.
 - Child Find procedures and PWN are important in deciding when parents should know about alleged violations.

Conflict Resolution (cont'd)

- Citizen Complaint process
 - 60 day process run by OSPI
 - Focus is on whether district followed the IDEA's applicable procedures, based upon OSPI's identification of the issue(s) in the complaint
 - E.g., Did the District follow procedural requirements regarding implementation of the child's IEP?
 - Complaint must address issues within the prior one year time-period
 - District generally has 20 days to respond, with supporting documentation, to the Complaint
 - District's can admit or deny any violations, and if appropriate, propose appropriate student/district remedy

Questions?