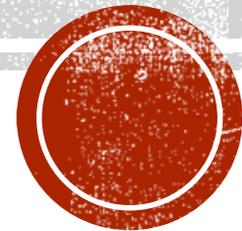


# **BREAKING NEWS: FALL UPDATES 2018**

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# TOPICS

- **OSEP and New Rules for the BSEA**
- **OCR Statistics Fall 2018, Resolutions and Agreements**
- **Recent Cases for Removal of Dangerous Special Ed Students**

# OSEP – NEW RULES FOR BSEA

- **The proposed amendments are open to public comment through November 17, 2018 and it is anticipated the amended rules will be adopted in December 2018.**

The proposed amended regulations are available in both clean and redlined formats at:

[https://www.mass.gov/service-details/proposed-amendments-to-hearing-rules-for-special-education-appeals.](https://www.mass.gov/service-details/proposed-amendments-to-hearing-rules-for-special-education-appeals)

## **RULE II C: EXPEDITED HEARINGS**

- a. when a parent disagrees with a school district's determination that the behavior leading to discipline was not a manifestation of the student's disability; or
  
- b. when a parent disagrees with a school district's decision regarding a student's placement in the discipline context; or
  
- c. when a school district asserts that maintaining the current placement of the student during the pendency of due process proceedings is substantially likely to result in injury to the student or others.

# CONCERNS ABOUT PROPOSED RULE

- Requiring parties to exchange documents and witness lists and to provide same to the Hearing Officer within five business days prior to the hearing date.
- Adding a provision prohibiting postponements for expedited hearings.
- Proposed Rule II.C remains inconsistent with federal regulations. Under the current BSEA Rule and continuing under the Proposed Rule, the timeline for expedited hearing is substantially compressed compared to the timeline required under federal regulation in that it requires a hearing on an expedited request be held no later than **fifteen (15) calendar days** after the request is received by the opposing party. By contrast, the federal rule, 34 CFR §300.532(c)(2), requires that the expedited due process hearing occur within **twenty (20) school days** of the date on which the hearing request is filed.

## **RULE II D: ACCELERATED HEARINGS**

- a. When the health or safety of the student or others would be endangered by the delay; or
- b. When the special education services the student is currently receiving are sufficiently inadequate such that harm to the student is likely; or
- c. When the student is currently without an available educational program or the student's program will be terminated or interrupted immediately

# OCR STATISTICS FALL 2018

75 Pending Cases Currently Under Investigation by Office for Civil Rights for Disability Discrimination Claims in Massachusetts - most involving claims alleging denial of FAPE

## **Resolution Methods in Case Processing Manual:**

Rule 109 - Rapid Resolution Process

Rule 201 - Facilitated Resolution Between Parties Process

Rule 302 - Resolution During Investigation Process

# SAN BERNARDINO COUNTY

## RESOLUTION AGREEMENT 8/2016

*OCR found, among other things, that the district violated 504 because it:*

- provided a fixed predetermined amount of specialized instructional time that a student would receive, automatically reducing any higher service levels provided for in individual student special education plan;
- it did not have a system in place to track service provision or provide make-up services to students when services were not provided.

*Resolution in part – District must document that:*

1. placement and services decisions regarding a student with a disability must be based upon the individual needs of the student.
2. each special education instructor and service provider documents: the date, duration, and method of service delivery for each special education and related service actually provided to the student

# WHAT OCR LOOKS AT:

In investigating a denial of a FAPE under Section 504, OCR first looks at the services to be provided in the student's IEP or 504 plan or IEP.

If OCR finds that a district has not implemented the IEP or 504 plan by failing to provide some or all of the services listed, OCR examines the **extent and nature** of the missed services.

Under some circumstances, a failure to implement a service from a student's IEP or Section 504 Plan **may not be sufficient to constitute a denial of FAPE.**

OCR relies on the **totality of circumstances**, such as any efforts by the district to compensate for the missed services, to determine whether this failure resulted in a denial of a FAPE.

# COMPLAINT NO. 01-15-1227 LYNN PUBLIC SCHOOLS (JULY 2018)

## CLAIMS:

1. District failed to appropriately evaluate the Student when she began experiencing escalating difficulty accessing the District's education program due to her disability.
2. District failed to reconvene the Student's education team to determine an appropriate placement for her after a disciplinary incident at the School, which resulted in several months of missed education services
3. Retaliation by filing criminal charges.

**FINDING OF NOTE:** When the team reconvened after disciplinary incident to determine next steps for the Student, the primary team member who made these decisions was the special education administrator, who was knowledgeable about placement options but not the Student or evaluative data.

# OPTIONS FOR REMOVING A SPECIAL ED STUDENT WHO IS DANGEROUS

**The district may unilaterally place the student in an IAES regardless of whether the conduct is a manifestation of the student's disability**

1. The student carries or possesses a weapon;
2. The student commits serious bodily injury upon another person.;
3. The student possess drugs (controlled substances);

**OR when Maintaining the student's current placement is substantially likely to result in injury:**

- to
1. The district can file an expedited hearing to place the student in an IAES for up to 45 school days; OR
  2. The district can file an injunction in Superior Court.

# RECENT CASES ADDRESSING CLAIMS THAT STUDENT IS DANGEROUS

## *Vilonia School District 72 IDELR 136 (SEA AK 2018)*

- **FACTS:** Online behaviors caused district to determine that he was dangerous: The student with traumatic brain injury held a gun for a photo and used a hashtag that said, "I love it when they run"; the next day, the student stated on social media, "I fight to kill, I don't fight to hurt people" and student posted a picture of him hanging himself with a belt.
- **HELD:** For a student's behavior to justify an IAES the behavior must be determined "dangerous" to self or others.
- While there is no bright-line rule for determining whether a behavior is dangerous, a court, like the one in this case, will look to see if the student made direct threats to any one person or audience. Here, the district erred when it removed student to IAES without consent of the parents.

# OAKLAND UNIFIED SCH. DIST., 71 IDELR 205 (SEA CA 08/23/17)

- **FACTS:** 8-year-old student with ADHD engaged in self-injurious behaviors: elopement, climbing, and mouthing. The student frequently removed her shoes and socks, which contributed to a risk of injury during her elopements. Because of the physical layout of the school campus, the student's climbing and elopement behaviors caused major concerns. The student ran out of the school and climbed the outdoor railings adjacent to steep drop-offs approximately 100 times. The student frequently placed inedible items in her mouth and would push, hit, kick, climb on, and bite her aides. The student would also throw school supplies at others.
- **HELD:** The Hearing Officer ruled that the student should be placed in an IAES: The hearing officer considered the nature, extent, and frequency of the student's conduct.
- To support its argument, the district pointed at student's disciplinary history and other school records for past violent or dangerous conduct.

# TERMINATION BY OOD PLACEMENT DUE TO DANGEROUS CONDUCT

- ***In re: Steve***, BSEA #1808823 Amy Reichback (May 21, 2018) (adopts standard for emergency termination: student must present a “clear and present threat to the health and safety of him/herself or others” AND school district must assume responsibility by identifying another placement.
- ***Framingham Public Schools and Student v. Guild for Human Services, Inc. and the Department of Developmental Services***, BSEA # 1808824 Catherine M. Putney-Yaceshyn, May 7, 2018 (deciding that student has stay put rights to placement at private sped school even when school followed 603 CMR 28.09(12) and its own termination policy)

# QUESTIONS AND ANSWERS

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