

Wrightslaw Special Education During a Pandemic Quarantine

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The Crisis

- My thoughts
- Hope for the best, but prepare for the worst.
- If it all goes South and gets bad, what do you do?

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Options

- Administrative Complaint with SEA
- Request Mediation
- Complaint with the feds OCR or DOJ
- Due Process

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Due Process

- What is the process?
- You have to have evidence to prove FAPE not provided
- If successful with the evidence, the facts, the proof, what is the law re your remedy.
- Remedy is comp ed

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Due Process

- But before we talk about the law of comp ed – let's talk about the process of due process
- Due process hearing
 - Single tier state v.
 - two tier state
- Losing party – right to appeal

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Appeal

- Usually federal court because of an automatic right to remove if a "Federal Question" and case was filed in state court.
- District Court rarely hears new evidence.

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Appeal

- What controls outcome at Due Process
- Or at the U. S. District Court
- Is it the law?
- The facts?
- Or something else
- Parents lose more cases than school districts win. ???

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Outcome?

- The HO / ALJ / District Court Judge all have life experiences that impact their emotions and beliefs.
- Do they feel your pain?
- Did your letters blame and finger point and turn people away.

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First Impressions

- You want that person with the power to control outcome to have a favorable first impression about you, and to keep it.
- Your letters have to be polite.
- See our "Letter to the Stranger" on our website.

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Appeal – prepare in advance

- Appeal – I told my clients that if we won at DP, we should assume that the school board would appeal to federal court.
- If we won at that level, we should assume that the school will appeal to the U.S. Court of Appeals.

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Appeal

- I told my clients that if we lost at DP and I thought the case was strong, I would expect them to permit me to appeal to federal court.
- And, if we lost there, we should be prepared to appeal to the U.S. Court of Appeals.
- In other words, regardless of outcome, the case is going up, so prepare.

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The Appellate Process

- Due process
- U. S. District Court
- U. S. Court of Appeals
- Supreme Court of the United States
SCOTUS

Now the law of Comp Ed

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Compensatory Education

- The spec ed law was passed in 1975.
- There is nothing in the statute or the regulations about comp ed.
- *Miener* sued Missouri seeking comp ed. Judge said no legal right to it, not authorized in the law.
- Upheld by the Eighth Circuit in 1982.
- In 1985, SCOTUS had the *Burlington* case and the school failed to provide FAPE.

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Burlington

- "The statute directs the court to grant such relief as it determines is appropriate. The ordinary meaning of these words confers broad discretion on the court."
- The remedy? - "equitable considerations are relevant in fashioning relief."

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Miener

- That next year, 1986, *Miener* went back to the Eighth Circuit and asserted that the language in *Burlington* - "equitable considerations are relevant in fashioning relief" meant that they should receive comp ed.
- The Eighth Circuit reversed themselves and said that if *Miener* can prove a denial of FAPE, she is entitled to comp ed.

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1986 Miener Eighth Circuit

- That became the first case that awarded compensatory education.
- On Wrightslaw, in preparation for this Webinar, I created a webpage with the legal history and development of the comp ed concept.
- URL is www.wrightslaw.com/info/comp.ed.law.htm

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comp.ed.law.htm

- Review of the cases, dependent upon available time.
- Initially the parent had to show egregious fault by the school district.
- Then a shift away from that.
- Then issue about whether it was available beyond 21st birthday. Eventually courts said it was.

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Comp Ed

- Then the developing legal issue became calculation / determination of amount of comp ed.
- Then who makes that determination.
- Over time, the case law held that the determination must be made by the District Court Judge or a remand to the HO / ALJ to determine.
- The IEP Team could not control the determination about comp ed.

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Courts of Appeal

- Special ed case law evolves through the opinions of the U. S. Courts of Appeal.
- In comp ed, the 2005 *Reid* case and the 2008 *Draper* case, a/k/a – “**The Poor Man’s Burlington**” set the stage for many more comp ed cases over the years.
- *Reid* and *Draper* are still impacting spec ed case law today.

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Finding Comp Ed Cases

- Demo of Google Scholar
- URL is: <https://scholar.google.com/>
- Click on "Case law," then select the Courts you wish to search, state and federal.
- Enter as your search term the following, with the quotation marks:
"individuals with disabilities education act" "compensatory education"

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WWW.COPAA.ORG

- Council of Parent Attorneys and Advocates
- <https://www.copaa.org>
- Top spec ed litigator and friend of many years – [Andy Feinstein wrote a thought provoking article.](#)

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Andy Feinstein - 4/24/2020

Let's not rely on compensatory education to remedy the damage done to our kids during the period of COVID-19 school closure. "Comp Ed" are fighting words.

By talking that language, we are creating a confrontational posture with school districts and we are misleading our clients. Compensatory education is not the right analytic framework for this situation.

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Feinstein / COPAA

Only in extreme cases, such as where the district refuses to provide any education to students with a disability while providing distance learning to all other students, would a strong claim for compensatory education likely be successful.

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Feinstein cont'd

Parents, who have been carefully tracking performance during the period of distance learning, should have a significant voice in setting the current level of performance.

If the student's performance is below where it was on the day schools closed for the COVID-19 pandemic, the IEP Team will be obliged to provide more intense services than those provided in the prior IEP.

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Contradictory? Wrapping Up

Don't **overtly** push comp ed, or even mention it. However, prepare for the worst, prepare for the appeal, have your facts and data organized, in order, become familiar with the law of comp ed, and . . .

Visualize that nameless, faceless stranger who controls outcome, so always present nice and polite. You then increase the odds that all will work out fine.

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The End

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