Part IV: Addressing Mental Health Needs That Manifest Outside the Regular School Environment

Residential Treatment Center Placements

Presented by:
Marcy Gutierrez

ACSA Every Child Counts Symposium
Friday, February 7, 2020
OVERVIEW

Marcy Gutierrez is a Partner in Lozano Smith’s Sacramento office and co-chair of the firm’s Special Education Practice Group. She began her career in education as a public school teacher, and has been advising and representing school districts and other education entities for over fifteen years. Her areas of expertise include special education, student discipline, Title IX, the Brown Act, and litigation.

Ms. Gutierrez has effectively represented school districts in many venues, including cases successfully litigated at the administrative agency level as well as in the federal courts. In addition to special education, she also advises and represents school districts and other education entities with regard to student discipline, public records requests, and the broad spectrum of anti-discrimination and anti-harassment requirements that apply to public education agencies.

PRESENTER EXPERIENCE

Ms. Gutierrez is a frequently requested guest speaker who has presented on many topics, such as Transition Planning, Autism, IEP Facilitation, and other topics related to special education as well as Section 504. She finds her expertise is best used by providing training to staff, where she emphasizes hands-on tools to provide educationally and legally appropriate programs for students with special needs.

EDUCATION

Ms. Gutierrez earned her J.D. from University of the Pacific, McGeorge School of Law, and her B.A. from the University of California, Davis.

PROFESSIONAL AFFILIATIONS

California Council of School Attorneys
California Women Lead
Law and Public Policy Advisory Committee
Sacramento County Bar
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- Charter School
- Community College
- Facilities & Business
- Governance
- Investigations
- Labor & Employment
- Litigation
- Municipal
- Public Finance
- Public Safety
- Special Education
- Student
- Technology & Innovation
- Title IX

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mgutierrez@lozanosmith.com
916.329.7433

Presenter
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Today's Roadmap

• Difficult Residential Placement Scenarios and the Law
• Due Process Hearings
• Action Plan for Residential Placement Requests
Difficult Residential Placement Scenarios and the Law

How Many Students in Residential?

Special Education/Placements, California (2016 OSEP)

- Homebound/Hospital
- Inside regular class 40% through 79% of the day
- Inside regular class 80% or more of the day
- Inside regular class less than 40% of the day
- Parentally Placed in Private Schools
- Residential Facility, Age 6-21
- Separate School, Age 6-21

Examples of Difficult MH Issues

**Drugs**
- “Troubled Teen” behavior
- Aggression towards siblings/parents
- Social/emotional issues at home, incl. suicidal ideation/attempts
- School avoidance
Drug use does not qualify a student for special ed. by itself. **ALWAYS CONSIDER:** Is the student self-medicating for an underlying issue which is a disability?

**Drug Use – Educationally Related?**

**Drug Use & Educational Disabilities – N.S. v. Oakland USD**

- Diagnosed with PTSD, depression, reactive attachment disorder
- Struggled with work completion, attendance, motivation, chemical dependency
- Withdrawn and depressed behavior in class
- District did not assess mental health needs or offer mental health services

**FACTS**

- 5150 hold due to suicidal statements, severe intoxication, aggressive behavior
- Following 5150 hold, parents unilaterally enrolled the student in wilderness program, then a residential treatment center
- District offered placement in general education setting with no mental health supports
- District offered ERMHS assessment
Did the District deny FAPE by failing to assess him in the area of mental health and failing to offer appropriate mental health services?

- **Yes.** Due to Student's change in presentation and orientation towards schooling, and academic struggles, the District was on notice that Student likely had mental health needs. That Student was using marijuana did not relieve the District of its duty to assess.

### N.S. v. Oakland Takeaways

- District may be responsible for addressing areas of educational need *causing* drug use, and problems *caused* by drug use. This is different from addressing chemical dependency issues.

- These issues could create a actual/suspected disability, i.e. duty to assess.

- Don’t forget school discipline processes!

### Examples of Difficult MH Issues

- Drugs
- **“Troubled Teen” behavior**
- Aggression towards siblings/parents
- Social/emotional issues at home, incl. suicidal ideation/attempts
- School avoidance
The “Troubled Teen” Issues

- Antisocial/illegal behavior
- Poor peer influences
- Risky sexual behaviors

Troubled Teen – Social Maladjustment

Expressly NOT part of ED eligibility

Term is undefined

Courts have suggested ability to express remorse, “on/off switch” suggests social maladjustment, not ED

Troubled Teen – Ashland School District v. R.J.

Facts

- Eligible for special education due to ADHD
- Self-harm due to negative relationships, defiant, sneaking out of house, etc.
- Not disruptive in class, well regarded by her teachers, good grades, able to learn
- Parent placed in residential facility
Was the District obligated to reimburse parents for Student’s residential placement?

- No. Placement in a residential facility was not necessary to meet Student’s educational needs. Her placement at the residential facility stemmed from issues apart from the learning process.

**Troubled Teen – Ashland School District v. R.J.**

A student with needs in the areas of speech and academics is getting into fights. Parents claim that social-emotional/behavior is now an area of educational need.

What facts would need to be present in order for the school to show that this is a maladjustment?

**Examples of Difficult MH Issues**

- Drugs
- “Troubled Teen” behavior
- **Aggression towards siblings/parents**
- Social/emotional issues at home, incl. suicidal ideation/attempts
- School avoidance
Aggression at Home (but not school)

- Typically, not educationally-related
- Consider: Is the aggression due to homework or other schoolwork?
- ALWAYS CONSIDER: Does this affect attendance?

Examples of Difficult MH Issues

- Drugs
- “Troubled Teen” behavior
- Aggression towards siblings/parents
- Social/emotional issues at home, incl. suicidal ideation/Attempts
- School avoidance

Suicidal Ideation/Attempts: Parent v. Capistrano USD

- Student displays a “façade” of social emotional well-being at school
- Confides thoughts of suicide to teacher October 6, 2015
- Parent claimed Student should have been assessed sooner — not the first instance of social-emotional issues
Capistrano Takeaways

- Suggests schools should offer assessment when a student expresses suicidal thoughts at school, but not necessarily when those thoughts are expressed at home
- Suicide risk assessment is also a possibility
- Most importantly: build trust with adults
- Build tiered interventions to support students

Examples of Difficult MH Issues

Drugs
“Troubled Teen” behavior
Aggression towards siblings/parents
Social/emotional issues at home, incl. suicidal ideation/Attempts

School avoidance

Anxiety & School Avoidance – Parent v. San Dieguito HSD

- Diagnosed with major depression, anxiety, other ailments
- Primary problem was school attendance
- Anxiety and depression increased when placed on large middle school campus
- School refusal continued after transfer to smaller campus
- District placed student at large high school, with supports
**FACTS**

- Diagnosed with major depression, anxiety, other ailments
- Primary problem was school attendance
- Anxiety and depression increased when placed on large middle school campus
- School refusal continued after transfer to smaller campus
- District placed student at large high school, with supports

**Anxiety & School Avoidance – Parent v. San Dieguito HSD**

Did District deny FAPE by offering NPS placement when residential treatment center placement was needed?

- Yes. Overwhelming evidence of inability to access education and services in another setting due to disability.

**San Dieguito Takeaways**

- Typically educationally-related when a disability causes significant absences
- Key is to change or progressively increase interventions
- Home instruction is more restrictive than residential
- If attendance is not prosecuted, OAH takes this as a sign that school officials believe absences are disability-related
School Avoidance – Hypothetical

- Student is eligible, has anxiety, accommodations for breaks, quiet testing environment to help with this at school.
- Student says, “School is just stress, I want to stay home and play video games. I don’t care to continue my education or work somewhere that needs education, so I don’t need school.” School attendance drops to 50% overall.
- Parents report problems at home, Student is aggressive when parents confront him to go to school, so they let him stay home.
- Parents requests RTC so student will be forced to attend school.

What to do? What additional facts would you want to know?

The Process of Due Process

- 4,761 cases closed
- 106 decisions (2.2%)
- 3,742 settlements (78.6%)
  - 1,546 at mediation (32.5%)
  - 205 at resolution session (4.3%)
  - 1,991 outside mediation or resolution session (41.8%)
- 746 withdrawn (15.7%)
Number of Filings: 2008, 2013, 2017

What Issues Are Raised?

Over/Underrepresented Eligibility Categories

- Autism
- Other Health Impaired Specific Learning Disability
- Intellectual Disability
- Emotional Disturbance
What Goes Into a Hearing?
- Witness Preparation
- Case Analysis and Outlines
- Exchange Evidence
- Last-Minute Surprises

Pre-Hearing Impacts on Staff
- Disturbs the IEP Process
- Disruption of Schedules/Preparation
- Stress on Staff/Availability Issues
- Morale

Hearing Logistics

<table>
<thead>
<tr>
<th>Due Process Hearing Logistcs</th>
<th>Year to Date Totals</th>
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<tbody>
<tr>
<td>Average length of hearing in days</td>
<td>4 days</td>
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<tr>
<td>Average hearing time used by students</td>
<td>53%</td>
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<tr>
<td>Average hearing time used by districts</td>
<td>47%</td>
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<td>Number of hearing requests filed by parents that resulted in decision</td>
<td>57</td>
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<tr>
<td>Number of hearing requests filed by districts resulting in decision</td>
<td>28</td>
</tr>
<tr>
<td>Average number of witnesses students called</td>
<td>6</td>
</tr>
<tr>
<td>Average number of witnesses districts called</td>
<td>6</td>
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</tbody>
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Hearing Logistics

Direct Examination
- Questions from “friendly” side
- Non-leading questions

Cross Examination
- “Hostile” questions

Duration
- Key Witnesses: 4-8 hours of testimony
- Secondary Witnesses: 2-3 hours of testimony
- Side Witnesses: ~1 hour testimony
- Expert Witnesses: Very case-specific

Due Process and Defense Costs – Case 1

Costs and Time - Case 1

Due Process Hearing
Mediation
IEPs, settlement talks, and case analysis
Witness Prep/Hearing Prep

Due Process and Defense Costs – Case 2

Costs and Time - Case 2

Due Process Hearing
Mediation
IEPs, settlement talks, and case analysis
Witness Prep/Hearing Prep
Due Process and Defense Costs – Case 3/4

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<th>Costs and Time - Case 3/4</th>
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Second Due Process Hearing

First Due Process Hearing

Witness/hearing preparation


Post-Hearing Considerations

- The IEP process continues
- Changes in parent relationship
- Decisions
  - Potentially positive or negative judicial opinions of staff
  - Positive or negative opinions on District programs
  - Decisions issued 1-2 months after conclusion of hearing

Post-Decision

- Potential changes to a student’s IEP
- Follow-up litigation on fees and appeal
- If parents feel wronged, you may be back in hearing
“I want residential” – What Now?

Categories of Residential Placement Requests

Unilateral placements vs. placement requests
Eligible vs. non-eligible students

Unilateral Placements

Most difficult to settle: the money is already spent
If eligible, convene IEP meeting
Consider assessment plan
Investigate circumstances, releases of information
Prior Written Notice
### Requests for Placement

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<tr>
<td>Prior Written Notice</td>
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<tr>
<td>IEP meeting</td>
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<tr>
<td>Consider assessing non-eligible students (don’t forget SST/504 resources)</td>
</tr>
<tr>
<td>Review supports and student’s needs/parent concerns</td>
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<tr>
<td>If no consent to IEP offer, consider duty to file for IEP implementation</td>
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Marcy Gutierrez  
Partner  
Tel: 916.329.7433  
mgutierrez@lozanosmith.com  
Or any of the attorneys in one of our 8 offices.

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