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Here and Now:

Meeting District Obligations to Parentally Placed Private School Students

What We'll Cover . . .

- Child Find and Assessment Obligations
- Responsibility for the Provision of FAPE
- Obligations to Students Unilaterally Enrolled by Their Parents in Private Schools
  - Consultation
  - Equitable Participation
  - Individualized Services Plans ("ISPs")
- Private School Tuition Reimbursement Claims
  - Case Examples

But First . . . Some Terms

- Private School vs. Nonpublic School ("NPS")
  - Private school = private business or nonprofit entity that functions outside jurisdiction CDE and most state education regulations
  - Nonpublic school = specialized private school that provides services to public school students with disabilities, who are placed in the NPS by a district in order to provide FAPE

("Private Schools Frequently Asked Questions," (CDE, April 2015))

But First . . . Some Terms

- District of Residence ("DOR") vs. District of Location ("DOL")
  - DOR = District in which student maintains permanent residence
  - DOL = District in which private school is located
- Important distinction for purposes of child find, assessment, FAPE and equitable services responsibilities

Child Find and Assessment Obligations

General Responsibility for Child Find Activities

- Child find rules apply equally for public school students and for students placed by their parents in private schools
  - General child find activities must be similar and completed in comparable time period
  - Child find generally includes, but is not limited to, activities such as:
    - Widely distributing informational brochures
    - Providing regular public service announcements
    - Staffing exhibits at health fairs and other community events
    - Creating direct liaisons with private schools

(71 Fed. Reg. 46593 (Aug. 14, 2006); 34 C.F.R. § 300.131; Ed. Code, § 56301)

General Responsibility for Child Find Activities: Examples

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- Los Angeles Unified School District (OAH 2018)
  - On annual basis, District verified private school addresses through CDE, mailed out child find posters to all private schools within its boundaries, conducted meaningful consultation meetings with private school representatives and community organizations
- Pasadena Unified School District (OAH 2015)
  - District provided evidence of effective child find program by contacting every private school within its boundaries (twice) at beginning of each school year, providing contact information for referral, and listing of classes and seminars to which private school staff were invited

(Student v. Los Angeles Unified School Dist. (OAH 2018) Case No. 2017070535; Student v. Pasadena Unified School Dist. (OAH 2015) Case No. 2015060450, 115 LRP 47542)

Responsibility for Child Find Activities

- Remember: All districts have general IDEA responsibility to "identify, locate and evaluate" children with disabilities in their jurisdictions
- Purpose of child find for private school students is to ensure accurate count of students with disabilities attending private schools in order to determine IDEA equitable services obligation
  - Therefore, specific IDEA responsibility for child find for this group of students lies with district where private school is located ("DOL")

(Letter to Eig (OSEP 2009) 52 IDELR 136; 34 C.F.R.§300.131; Ed. Code, § 56171)

Responsibility for Assessment

- Once student is identified, DOL also is responsible for assessment to determine eligibility
- Parents theoretically can request assessments from both DOL (for purposes of the provision of equitable services) and from DOR (for the purpose of having a program of FAPE made available)
  - If that occurs, both districts are legally responsible for conducting assessments
  - If parents consent, DOL and DOR should exchange information
  - MOUs may exist between DOL and DOR to designate assessment responsibilities

(71 Fed. Reg. 46,593 (Aug. 14, 2006); Letter to Eig (OSEP 2009) 52 IDELR 136)

Practice Pointer: Assessments

- Remember to instruct all relevant personnel that in cases where the student resides within district boundaries, they cannot refuse parental request for assessment on grounds that student is currently attending private school in another district
- Also remember that parental consent is prerequisite for DOR and DOL to communicate assessment information

Responsibility for the Provision of FAPE

Responsibility for Provision of FAPE

- DOR is responsible for offering and providing FAPE
- If student is found eligible by DOL, DOL must provide parents with notice of procedural safeguards advising them of student's right to FAPE from DOR if he or she enrolls in public school
- DOL may send results of its evaluation and eligibility determination to student's DOR after receiving parental consent

(34 C.F.R. § 300.504; 34 C.F.R. § 300.622; 71 Fed. Reg. 46592-46593 (Aug. 14, 2006))

Responsibility for Provision of FAPE

- DOR is not required to make offer of FAPE to privately placed student if parent "makes clear his or her intention to keep the student enrolled in [private school]"
- No explanation in any USDOE guidance as to what parents must do to "make clear" their intention

(34 C.F.R. § 300.504; 34 C.F.R. § 300.622; 71 Fed. Reg. 46592-46593 (Aug. 14, 2006); Letter to Wayne (OSEP 2019) 73 IDELR 263; Questions and Answers on Serving Children with Disabilities Placed by Their Parents in Private Schools (OSERS 2022) 80 IDELR 197)

Case Example #1

Capistrano USD v. S.W. and C.W. (9th Cir. 2021)

Facts:

- Parents unilaterally withdrew Student from public school and enrolled her in private school
- Parents told District that Student would stay in private school for remainder of first grade and for second grade
- Parents sought reimbursement for private school tuition, programs, and related services for both school years
- One of several issues that ultimately reached 9th Circuit was whether District was obligated to develop second grade IEP for Student

Case Example #1

Capistrano USD v. S.W. and C.W. (9th Cir. 2021)

Decision:

- 9th Circuit concluded District was not required to develop IEP while Student was in private school
- Court noted that IDEA at 20 U.S.C. § 1412(a)(10)(A) is entitled "[c]hildren enrolled in private schools by their parents," and provides that such children need not be given IEPs
  - 9th Circuit recognized that there are not three classes of private school students – student is either placed in private school by IEP team or student is not, regardless of any parental claim for reimbursement

Case Example #1

Capistrano USD v. S.W. and C.W. (9th Cir. 2021)

Decision (cont'd):

- Court emphasized that it did not differentiate between whether or not claim for reimbursement is pending
- "[R]egardless of reimbursement, when a child has been enrolled in private school by her parents, the district only needs to prepare an IEP if the parents ask for one. There is no freestanding requirement that IEPs be conducted when there is a claim for reimbursement."

(Capistrano Unified School Dist. v. S.W. and C.W. (9th Cir. 2021) 80 IDELR 31, cert. denied, (2022) 122 LRP 39209)

Case Example #2

Bellflower USD v. Lua (9th Cir. 2021, unpublished)

Facts:

- Student attended District's elementary school until September 2014
- Parents removed Student to private parochial school, advising District that they feared for Student's safety and did not believe Student was making sufficient academic progress
- Parents subsequently contacted District on several occasions stating they remained interested in offer of FAPE from District
- District refused each request; instead, it offered to hold IEP team meeting within 30 days of Student's reenrollment in District

Case Example #2

Bellflower USD v. Lua (9th Cir. 2021, unpublished)

Decision:

- 9th Circuit affirmed District Court and ALJ decisions that District violated IDEA when it refused to develop new IEP for Student unless she left her parochial school and reenrolled in public school system
  - Fact that Student's private school was located in another LEA did not nullify District's obligation to convene IEP team meeting after Parents expressed interest in public school program
- Referring to Parents' several requests to convene IEP team meeting, court rejected District's claim that Parents had no interest in public school program

(Bellflower Unified School District v. Lua (9th Cir. 2020, unpublished) 77 IDELR 181, cert. denied, (U.S. 2021) 121 LRP 18240)

Case Example #3

Sequoia Union High School District (OAH 2015)

Facts:

- Parents completed enrollment form for Student in 2011, but then delivered "We Will Not Be Attending" letter stating Student would be enrolling in private school
- Parents did not state that they were withdrawing student from special education
- District did not follow up or send PWN to Parents
- District had no direct contact with Student until she subsequently reenrolled in District in June 2013

Case Example #3

Sequoia Union High School District (OAH 2015)

Decision:

- ALJ: District violated IDEA for its inaction between 2011 and 2013
- Because District had no contact with Parents, they did not have opportunity to "make clear" their intention to keep Student in private school
- ALJ: "[A]lthough the term 'make clear' is not defined, it must require a more definite act than the mere continuance of enrollment in private school"
- District had obligation to let Parents know FAPE was available

(Student v. Sequoia Union High School Dist. (OAH 2015) Case No. 2015020856, 115 LRP 51301)

Revocation of Consent

- Parents of student placed in private school with existing IEP, or found eligible for special education while in private school, may choose to revoke consent for provision of special education
- If parents do this – and if student's DOR gives PWN that it will not provide services – DOR will not be considered to be in violation of requirement to make FAPE available to student

(34 C.F.R. § 300.300(b)(4); Ed. Code, § 56346, subd. (d))

Continuing Obligation

- Even where parents have made clear their intention to keep their child enrolled in private school (or have revoked their consent to special education), DOR must be prepared to provide services should parents decide to reenroll student in public school
- If parents request assessment before deciding whether to return student to public school, district cannot condition assessment on reenrollment

(64 Fed. Reg. 12601 (Mar. 12, 1999); Letter to Goldman (OSEP 2009) 53 IDELR 97; Moorestown Twp. Bd. of Educ. v. S.D. and C.D. (D.N.J. 2011) 57 IDELR 158)

Continuing Obligation

- But DORs are not required to continue developing IEPs or holding IEP meetings for student who is no longer attending district schools and whose parents do not respond to IEP team meeting requests
  - Unless prior year's IEP is under administrative or judicial review at time it normally would be due

(Questions and Answers on Serving Children with Disabilities Placed by Their Parents in Private Schools (OSERS 2022) 80 IDELR 197; Student v. Cabrillo Unified School Dist. (OAH 2009) Case No. 2008120207, 109 LRP 44896)

Practice Pointer: Offer of FAPE

- Guidance and case law is clear that districts are not obligated to create IEPs for students with disabilities whose parents decide to keep them in private school
- Nevertheless, districts must be prepared to offer FAPE to such students in case parent decides to return student to public school
- For that reason, districts should maintain any assessment data they have for student and should have system for flagging student's reenrollment so that, if necessary, staff members know to convene IEP team and begin the process of assessing student

Obligations to Students Unilaterally Enrolled by Their Parents in Private Schools

Consultation

- Consultation is mandatory process that involves "timely and meaningful" discussions between DOL, private school representatives and representatives of parents on key issues relating to equitable participation of private school students in special education and related services
- Parties discuss how, where and by whom special education and related services will be provided

(34 C.F.R. § 300.134; Questions and Answers on Serving Children with Disabilities Placed by Their Parents in Private Schools (OSERS 2022) 80 IDELR 197; Ed. Code, § 56174.5))

Consultation

- Private schools have right under IDEA to file state (CDE) compliance complaint alleging:
  - That DOL did not engage in consultation that was meaningful and timely; and/or
  - That DOL did not give due consideration to views of private school officials

(34 C.F.R. § 300.136)

Practice Pointer: Consultation

- Through consultation process, parents should be reminded that parentally placed private school students have no individual right to receive some or all of the special education and related services that they would receive if enrolled in public school
- Parents should be made aware of program or services under IDEA's proportionate share requirements so they have a realistic idea of what services to expect

"Equitable Participation"

- "Equitable participation" is term used by USDOE to refer to provision of services by DOL to parentally placed private school students with disabilities
- Although IDEA requires consultation, DOL makes final decision as to:
  - Amount of IDEA funds to be allocated toward its parentally placed private school students (based on proportionate share formula)
  - How, when, where and by whom special education will be provided to some or all students, including types of services and service delivery mechanisms

(34 C.F.R. § 300.137)

"Equitable Participation"

- DOLs can decide how to distribute their proportionate share of federal IDEA funding by developing individualized service plan ("ISP") policy after meeting their consulting obligation
  - If student is eligible for services under ISP policy, DOL provides equitable services to student through ISP, rather than IEP
  - DOLs need to develop ISPs only for those parentally placed private school students whom they choose to serve pursuant to their policies

(34 C.F.R. §§ 300.132, 300.134, 300.138; Letter to Mendelson (OSEP 2007) 49 IDELR 198)

"Equitable Participation"

- IDEA does not require district to use, or prohibit district from using, memorandum of understanding ("MOU") concerning provision of equitable services (i.e., ISP services) at either the private school or another location
- "However, a private school's declining to sign an MOU cannot be a basis for an LEA's denying the provision of equitable services to parentally placed private school children with disabilities enrolled at that school who are otherwise eligible to receive such services"

(Letter to Flanigan (OSEP 2022) 122 LRP 44910)

Equitable Participation and Virtual Instruction

- If DOL closes its physical buildings as result of social distancing measures and/or other limitations that occur as result of pandemic or health emergency, but is providing virtual instruction or other remote learning opportunities for general student population, then DOL is required to provide equitable services to private school children with disabilities as determined through consultation process

(Questions and Answers on Serving Children with Disabilities Placed by Their Parents in Private Schools (OSERS 2022) 80 IDELR 197)

Individualized Services Plans ("ISPs")

- Each parentally placed private school student with a disability who is designated to receive services is entitled to ISP detailing specific services that district will provide
- Private school students with disabilities who are not designated to receive services under DOL's policy would not receive ISP

(34 C.F.R. § 300.138 (b); 34 C.F.R. § 300.132 (b); Questions and Answers on Serving Children with Disabilities Placed by Their Parents in Private Schools (OSERS 2022) 80 IDELR 197; Letter to Chapman (OSEP 2007) 49 IDELR 163)

Development of ISPs

- Districts must "initiate and conduct meetings to develop, review, and revise" ISP if student has been designated to receive services
  - Must occur in manner consistent with IDEA's IEP team meeting requirements
  - Same membership requirements as IEP teams but districts also must ensure that representative of private school attends and, "if the representative cannot attend, use other methods to ensure participation"
  - ISP must be reviewed periodically—and not less frequently than annually

(34 C.F.R. § 300.137; 34 C.F.R. § 300.138)

Practice Pointer: ISP Team Meeting vs. IEP Team Meeting

- Although many of the procedural requirements are the same, remember that it is the DOL that will hold the ISP meeting to design equitable services; IEP meetings are held by the DOR when making an offer of FAPE

Content of ISPs

- Although DOLs must develop ISPs in same manner that they develop IEPs, content of ISPs likely will differ from content of IEPs
- IEPs generally will be more comprehensive than ISPs "because parentally placed children do not have an individual entitlement to any or all of the services that the children would receive if enrolled in a public school"
- IDEA does not explicitly prohibit districts from using IEPs in lieu of ISPs, although the USDOE has stated that such practice may not be appropriate

(Questions and Answers on Serving Children with Disabilities Placed by Their Parents in Private Schools (OSERS 2022) 80 IDELR 197)

Personnel Standards

- IDEA requires that personnel providing services to parentally placed private school children meet same standards as personnel providing services in public school
  - This rule applies when public school teachers provide equitable services
- Districts may employ private school teachers to provide equitable services to parentally placed private school children with disabilities
  - Those teachers do not have to meet IDEA's teacher qualifications requirements

(34 C.F.R. § 300.138(a); 34 C.F.R. § 300.156(b); Questions and Answers on Serving Children with Disabilities Placed by Their Parents in Private Schools (OSERS 2022) 80 IDELR 197)

Challenges to ISP

- Parents cannot use IDEA due process to allege DOL did not follow IDEA's ISP procedures, including allegations of not providing services in manner stipulated by ISP
- Exception: Parents may file for due process for allegations that DOL failed to meet its child find requirements
- But parents may file state compliance complaint for alleged failures to properly implement an ISP

(34 C.F.R. § 300.140(a))

Provision of Transportation

- If student requires transportation in order to take part in equitable services under ISP, DOL must provide transportation:
  - From private school or home to service site other than private school; and
  - From service site to private school, or to home, depending on the timing of the services
- No requirement to provide transportation from home to private school
- Cost is included in proportionate share calculation

(34 C.F.R. § 300.139)

Services for Preschool Children

- DOL's obligation to serve children aged 3 through 5 under equitable services provisions depends on whether child is enrolled in private school that meets the IDEA's definition of "elementary school" (nonprofit school that provides elementary education)
  - If yes, equitable participation provisions apply
- DOR still has obligation to make FAPE available to this group of children

(34 C.F.R. § 300.13; 34 C.F.R. § 300.101)

Private School Tuition Reimbursement Claims

Legal Standard for Reimbursement

- Court or ALJ may require DOR to reimburse parents for cost of private school enrollment if:
  - District had not made FAPE available to the student in timely manner prior to enrollment; and
  - Private placement is appropriate
- If both criteria are satisfied, court or ALJ must weigh "equitable considerations" to determine how much reimbursement is appropriate
  - Reimbursement still may be appropriate even if private school does not meet all state's educational standards or furnish every service that student needs

(34 C.F.R. § 300.148(c); Ed. Code, § 56175)

Legal Standard for Reimbursement

- Reimbursement claim can be reduced or denied:
  - If, at most recent IEP meeting prior to removal, parents did not inform team that they were rejecting district's proposed placement (or at least 10 business days prior to removal, parents did not give notice of rejection);
  - If parents did not make their child available for proposed assessment by district; or
  - Upon a finding of unreasonableness with respect to actions taken by parents

(34 C.F.R. § 300.148(d))

Legal Standard for Reimbursement

- Even if parents failed to give notice, court or ALJ cannot deny/reduce reimbursement if:
  - District prevented parents from providing notice;
  - Parents were not informed of the notice requirement; or
  - Compliance with the notice requirement would likely result in physical harm to the child
- Even if parents failed to give notice, court or ALJ may use discretion to deny/reduce reimbursement if:
  - Parents are not literate or cannot write in English; or
  - Compliance with notice requirement would likely result in serious emotional harm to student

(34 C.F.R. § 300.148(e))

Case Example #1

C.B. v. Garden Grove USD (9th Cir. 2011)

Facts:

- Guardian of Student with autism and ADD was dissatisfied with District's IEP and obtained supplemental private services from NPA during 2006-2007
- Student attended NPA exclusively during 2007-2008
- ALJ determined District denied FAPE and ordered full reimbursement for 2006-2007, but only partial reimbursement for 2007-2008 because NPA could not provide comprehensive program to meet all of Student's needs (could not provide certain educational services)
- District Court awarded full reimbursement for both school years

Case Example #1

C.B. v. Garden Grove USD (9th Cir. 2011)

Decision:

- 9th Circuit affirmed District Court's decision in Guardian's favor, rejecting District's argument that, because NPA could not meet some of Student's additional needs (such as instruction in arithmetic), placement was not "proper" within meaning of IDEA
  - Student received significant benefits in important areas of his special educational needs
- District Court did not abuse its discretion by not reducing Guardian's reimbursement commensurate with missing elements of Student's special educational needs

(C.B. v. Garden Grove Unified School Dist. (9th Cir. 2011) 56 IDELR 121, cert. denied, (U.S. 2011) 111 LRP 68912)

Case Example #2

Larchmont Charter School (OAH 2021)

Facts:

- Parents did not respond to annual IEP team meeting request for Student with OHI; instead, they sent letter to Charter School advising the Student would be enrolling in private school (Bridges Academy)
- Letter was sent on day Student enrolled at Bridges and Parents expressed gratitude to Charter School staff
- Parent later filed for due process hearing challenging provision of FAPE
- Sought reimbursement for Bridges tuition for 2019-2020 school year in amount of $47,085

Case Example #2

Larchmont Charter School (OAH 2021)

Decision:

- ALJ: Charter School denied FAPE based on predetermination, failure to provide PWN and failure to offer sufficient goals, services and supports
  - Private school was appropriate placement
- But ALJ reduced tuition reimbursement from $47,085 to $23,542.50
  - Parents failed to provide 10-day notice, which prevented Charter School from revising offer of services
  - Parents did not reject Charter School's program or state that they would seek reimbursement for cost of Bridges
  - Parents acted unreasonably by failing to share private assessment report with Charter School after agreeing to do so

(Student v. Larchmont Charter School (OAH 2021) Case No. 2021030156, 121 LRP 33783)

Case Example #3

Corona-Norco Unified School District (OAH 2010)

Facts:

- Parents of 12-year-old Student with autism accepted portion of District's proposed IEP that offered services by private providers, but rejected proposed public school placement component
- Also conditioned acceptance by restricting District's ability to choose different private providers at later time
- Sought reimbursement for cost of private school where Student had been attending prior to District's proposed IEP

Case Example #3

Corona-Norco Unified School District (OAH 2010)

Decision:

- ALJ: Case involved Parents' statutory right to accept some IEP services but not others vs. no entitlement to FAPE when Parents choose private school placement when there is appropriate public school placement
- ALJ denied reimbursement claim
  - "Ability of a parent to agree only to portions of an IEP was never intended to circumvent the separation between public and private schools in special education law"
  - Offer of related services was tied to public school placement; Parents could not accept the services at different location

(Student v. Corona-Norco Unified School Dist. (OAH 2010) Case No. 2010020194, 110 LRP 34450)

Take Aways . . .

- Laws regarding responsibility for providing services directly or for benefit of students with disabilities enrolled by their parents in private schools are complex
- Summary of allocation of responsibilities between the DOL and DOR:
  - Child find and assessment: **DOL**
    - But **DOR** has general child find responsibilities
  - Provision of FAPE: **DOR**
  - Consultation: **DOL**
  - ISP: **DOL**

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Spotlight on Practice:

Managing the Manifestation Determination

What We'll Cover . . .

- Removals that Do and Do Not Trigger Obligation to Conduct MD: A Brief Overview
- MDs: Procedural Compliance
- MDs for Students Who Are Not Yet Eligible for Special Education
- MDs: At the Meeting
- MDs: After the Meeting

Removals that Do and Do Not Trigger MDs

Removals: A Quick Refresher

- MDs must be undertaken when district's proposed removal of student who violates code of student conduct amounts to change in placement
- "Removal" occurs when student cannot continue to:
  - Appropriately progress in general curriculum
  - Receive services specified in IEP; and/or
  - Participate with nondisabled students to extent he or she would have in his or her current placement
- <u>When does removal = change in placement?</u>

(71 Fed. Reg. 46715 (Aug. 14, 2016))

Removals: A Quick Refresher

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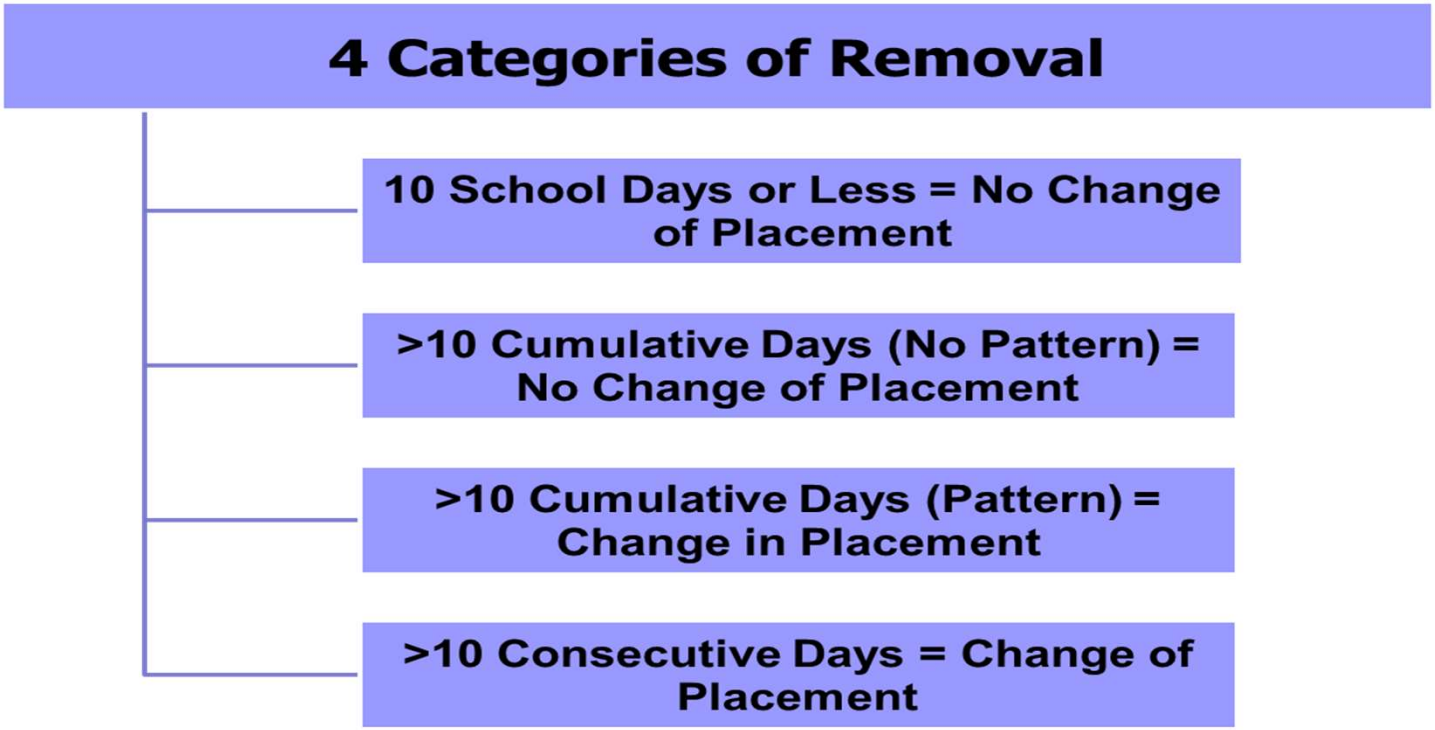

Removals: A Quick Refresher

- Beginning on 11th day of removal during term of "Type 3" and "Type 4" removals, district must provide:
  - Services to enable student to continue to participate in general education curriculum, although in another setting
  - Services to enable student to progress toward meeting IEP goals; and
  - Functional behavioral assessment ("FBA") and behavioral intervention services, as appropriate, designed to address behavior violation so that it does not recur

(34 C.F.R. § 300.530(d)(1)-(2); 34 C.F.R. § 300.530(d)(5))

Removals: A Quick Refresher

- Districts must hold MD review each time that student's removal constitutes change of placement, even in cases where the removal is made for violation of 34 C.F.R. § 300.530(g) (unilateral removals to IAES for up to 45 days for weapons, drugs or serious bodily injury)

(Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA's Discipline Provisions (OSEP 2022) 81 IDELR 138)

Practice Pointer: Counting Days

- While it is important to keep an accurate count of days that student is removed from school for disciplinary reasons, it is also important to recognize that some removals are not "disciplinary actions" and, therefore, do not count toward the 10-day threshold that might trigger a change of placement
  - Example: Removals of 11-year-old Student from his classroom for counseling, a threat assessment, de-escalation of his behavior and participation in statewide assessments were not "disciplinary actions"

(Student v. Capistrano Unified School Dist. and Journey Charter School (OAH 2014) Case No. 2014060007, 114 LRP 38670)

Practice Pointer: Nondisciplinary Removals

- On the other hand, change of placement resulting from a violation of student code of conduct does not have to be disciplinary in nature to trigger requirement to conduct MD
  - Example: Referral of middle school Student with ED to alternative school through SARB process after he missed 33 of 42 school days constituted a change of placement based on the student failing to adhere to the code of conduct, thereby triggering obligation to conduct MD

(Student v. Rialto Unified School Dist. (OAH 2014) Case No. 2014040982, 114 LRP 38497)

Procedural Compliance

Who Conducts the MD?

- District, parent and "relevant members of the child's IEP team"
- Technically, law creates a separate "MD team," since it does not require all members of IEP team to be present
- But limited case law interpreting IDEA treats meetings to conduct MDs as essentially IEP team meetings

(34 C.F.R. § 300.530(e)(1); Fitzgerald v. Fairfax County School Bd. (E.D. Va. 2008) 556 F. Supp. 2d 543, 50 IDELR 165)

Who Conducts the MD?

- Remember that all subsequent action following MD review is to be taken by IEP team as a whole
  - If behavior is manifestation of disability, IEP team must make decisions about any program revisions, FBAs or BIPs
  - If behavior is not manifestation of disability, IEP team may have to select appropriate IAES and services during suspension
- Practically, then, districts should consider conducting MD review in connection with IEP team meeting

Practice Pointer: Essential MD Team Members

- As is the case with IEP meetings, if an essential member of MD team does not participate in MD review, an IDEA procedural violation occurs; accordingly, districts should take all necessary steps to secure the attendance of all relevant staff
  - Example: District denied FAPE by convening MD with general education teacher who was not Student's teacher; although teacher selected by district to participate had some knowledge of Student, she was not an appropriate teacher to attend meeting because she never implemented any portion of Student's IEP, nor was she aware of any information in the IEP, except for what she was told about Student's disability

(Student v. Fresno Unified School Dist. (OAH 2012) Case No. 2012020842, 112 LRP 24578)

When Must MD Meetings Be Held?

- MD must be accomplished no later than 10 school days of decision to change student's placement
- OSEP: IDEA does not require that MD meeting occur when disciplinary removal is being considered; rather, requirement to conduct MD is triggered on date that decision is made to implement removal constituting change of placement

(34 C.F.R. § 300.530(e)(1); Letter to Anonymous (OSEP 2005) 43 IDELR 249)

When Must MD Meetings Be Held?

- Districts often must balance between holding MD meeting on time and making sure parents fully participate
- Doug C. v. Hawaii Department of Education (9th Cir. 2013) stands for proposition that there may be circumstances in which ensuring parental attendance at required IEP team meetings takes precedent over compliance with legal timelines when analyzing the procedural aspects of FAPE
  - Does Doug C. apply to MD reviews as well?

Case Example #1

N.F. v. Antioch Unified School District

Facts:

- Student with ADHD, anxiety and XYY syndrome was initially suspended prior to winter break, with suspension lasting through holidays
- After break, Student was removed for three more days, triggering requirement to hold MD review on January 18 (10 school days from initial removal in December)
- District allegedly provided one day notice to Parents of MD review
- District held MD review without Parents, found Student's conduct to be manifestation of disability and returned Student to prior placement

Case Example #1

N.F. v. Antioch Unified School District

Decision:

- ALJ and District Court both rejected Parents' claim that District improperly held MD review without them
- Parents' "lack of presence in the same room as [District] staff . . . did not deprive Parents of any meaningful opportunity to participate in the determination of the basis for Student's behavior"
- Even if procedural violation occurred, no denial of FAPE because results of meeting permitted Student to return to classroom

(N.F. v. Antioch Unified School Dist. (N.D. Cal. 2021) 78 IDELR 257, aff'd, (9th Cir. 2022), 81 IDELR 7)

Case Example #2

Parlier Unified School District

Facts:

- Fifth grade Student with OHI was suspended for a total of 19 days—eight separate suspensions—between October 2015 and May 2016
- District attempted to hold MD review on two separate occasions prior to Student's 11th day of suspension, but, because Parent was not available or did not respond, meetings did not take place
- Ultimately, MD review was held on May 5, 2016, 15 school days after Student's 11th day of suspension

Case Example #2

Parlier Unified School District

Decision:

- ALJ found that District committed procedural violation by holding May 5, 2016 meeting five days late
- However, ALJ excused the violation, noting that Parent did not provide any evidence that the delay was prejudicial
- Citing to Doug C., ALJ stated that "[i]f [District] had to choose between proceeding with the meeting without Parent but meeting the procedural deadline, or including Parent in the meeting and missing the deadline by five days, [District] made the correct choice . . . ."

(Student v. Parlier Unified School Dist. (OAH 2016) Case No. 2016080347, 116 LRP 42284)

Practice Pointer: Decision to Hold Meeting Without Parents

- Districts should <u>always</u> try to secure parental presence and participation at MD meeting; but they also have IDEA responsibility to hold meeting within 10 school days of student's removal from educational placement for disciplinary reasons
- When parents do not attend meeting, districts must document every attempt to ensure their attendance and also document fully all team conclusions and rationale for subsequent discussion with parents
- Balance the following:
  - Obligation to ensure opportunity for parent participation
  - Provision of FAPE to student

Parental Notice

- For IEP meetings, IDEA requires that district notify parents early enough to ensure that they will have an opportunity to attend, and must schedule meeting at mutually agreed upon time and place
- While IEP notice rules are not expressly applicable to MD meetings, they "provide guidance in evaluating reasonableness of notice of MD reviews to support meaningful parental participation in the process"
- MD meeting notice must inform parent of decision to change student's placement and must be accompanied by copy of procedural safeguards

(34 C.F.R. § 300.322(a)(1), (2); Ed. Code, § 56341.5, subds. (a)-(c); Student v. Fresno Unified School Dist. (OAH 2012) Case No. 2012020842)

Practice Pointer: MD Meeting Notice

- How much advance notice is enough?
- There is no definitive answer to that question in the law, but districts must provide adequate notice (time and content) to allow parents to be able to attend—and to prepare for—the meeting
  - Example: Because District "wanted to hold the MD team meeting within three school days of the changed placement, instead of within 10 school days as the law allows, District failed to ensure that Parents got the appropriate notice in a timely fashion"

(Student v. Fresno Unified School Dist. (OAH 2012) Case No. 2012020842, 112 LRP 24578)

MDs for Students Not Yet Eligible for Special Education

MDs for Students Not Yet Eligible for Special Education

- Parent of student who has not been determined to be eligible may assert any IDEA protections—including the requirement to conduct MD review for disciplinary removal resulting in change of placement—in circumstances when district had "knowledge" that student was with a disability before occurrence of behavior that precipitated disciplinary action

(34 C.F.R. § 300.534)

What Constitutes "Knowledge"?

- District deemed to have "knowledge" if:
  - Parent has expressed concern in writing to district supervisory or administrative personnel, or to one of student's teachers, that student needs special education and related services
  - Parent has requested evaluation; or
  - Student's teacher, or other district personnel, has expressed specific concerns about pattern of behavior demonstrated by student, directly to director of special education or to other supervisory personnel

(34 C.F.R. § 300.534)

What Constitutes "Knowledge"?

- Districts are not considered to have "knowledge" if parent has not allowed evaluation or has refused services, or if student has been evaluated but determined not to be eligible
- If district is not deemed to have "knowledge," student may be subjected to disciplinary measures applied to students without disabilities who engage in comparable behaviors

(34 C.F.R. § 300.534)

Case Example

Vista Unified School District

Facts:

- Student placed in group home by juvenile court
- Numerous instances of misconduct (inappropriate touching, profanity, cutting classes, fighting)
- Disruptive incidents culminated in an assault on another student
- District recommended expulsion
- Parents claimed District had basis of knowledge of disability due to Student's pattern of behavior and that District should have conducted MD

Case Example

Vista Unified School District

Decision:

- ALJ found for District
- No evidence that any staff expressed concern about specific "pattern of behavior"
- Although Student engaged in several different behaviors, there was no consistent behavior or tendencies that amounted to a "pattern"
- Referral to general ed intervention program did not indicate basis of knowledge
- No evidence of any request for assessment

(Student v. Vista Unified School Dist. (OAH 2018) Case No. 2017111058, 118 LRP 7001)

MDs: At the Meeting

Information to Consider

- MD team must consider all "relevant information," including:
  - Information in student's file such as evaluations and diagnostics
  - Student's IEP and placement
  - Teacher observations
  - Relevant information provided by parent
- For students who have transferred from other districts (either intrastate or interstate), it is essential for MD team to obtain records, particularly concerning behavioral history
  - IDEA requires districts to promptly request student records from student's former district and requires former district to promptly respond to request

(34 C.F.R. § 300.534; 34 C.F.R. § 300.323(g))

Practice Pointer: Information About Other Disabilities

- Based on the available information, MD team should consider possible existence of other disabilities that might have been the cause of conduct at issue
  - Example: ALJ overturned MD team's conclusion that Student's conduct (assaulting his girlfriend) was not manifestation of his hearing impairment or his ADHD because team failed to consider all relevant information in finding that Student's conduct was not manifestation of his disabilities, including Student's recent bipolar diagnosis and suicidal ideations

(Student v. Roseville Joint Union High School Dist. (OAH 2013) Case No. 2013080664, 113 LRP 44610)

Practice Pointer: Accuracy of Information

- It is essential to making correct MD decision that all information presented to team for consideration is accurate; relying on statement of only one witness about incident at issue, without corroboration, can sometimes be problematic
  - Example: Reliance on witness's statement that Student was involved in multiple drug sales proved to be inaccurate and led to ALJ's decision overturning MD team's determination that Student's conduct was not manifestation of his ADHD

(Student v. San Diego Unified School Dist. (OAH 2009) Case No. 2009060881, 52 IDELR 301)

Questions to Answer

- MD team is required to find that student's conduct giving rise to change in placement is manifestation of his or her disability if conduct at issue either:
  - Was caused by, or had a direct and substantial relationship to, student's disability; or
  - Was direct result of district's failure to implement IEP

(34 C.F.R. § 300.530(e)(1))

1. Was Conduct Caused By—Or Did Conduct Have Direct and Substantial Relationship to—Student's Disability?

- Ask:
  - What is the disability?
  - How does disability affect the student?
  - What are facts of disciplinary incident?

1. Was Conduct Caused By—Or Did Conduct Have Direct and Substantial Relationship to—Student's Disability?

- Remember:
  - Consider how severe disability is for that student
  - Blanket decisions based on characteristics generally exhibited by other students with same disability are prohibited
  - MDs are not simple analysis of right or wrong
  - Direct causal relationship between behavior and disability must be established
  - When several factors contribute to misconduct, but disability is contributing factor, relationship between disability and misconduct is established

Case Example #1

Sequoia Union High School District

F3 Law

Facts:

- 15-year-old Student with Moyamoya disease took Keppra antiseizure medication
- Student assaulted another student after dispute on social media
- Parent claimed Keppra was primary cause of outburst, but MD team found no relation between disability and misconduct
- District's school psychologist had sought opinion of Student's neurologist, who had advised that it was quite unlikely that there was any relationship between Student's disability and attack

Case Example #1

Sequoia Union High School District

Decision:

- ALJ upheld MD team's findings
- Expert testimony indicated Keppra could not contribute to Student's planned assault
  - Student had been taking Keppra for four years without engaging in any similar conduct
- Evidence established that mood/behavior dysregulation is side effect of Keppra, not disability in itself, and that mood and behavior dysregulation are addressed in eligibility category of ED, requirements for which Student did not meet

(Student v. Sequoia Union High School Dist. (OAH 2017) Case No. 2017020648, 117 LRP 11723)

Case Example #2

Fortuna Union High School District

Facts:

- High-school Student with autism experienced sudden deterioration of mental state
- Student attacked classmate and was subsequently placed on "5150 hold"; later Student allegedly sent text messages planning school shooting
- MD team concluded that Student's conduct was not related to autism
- Psychologist opined that his threats to other students and school, as well as fight incident, were not related to his impairment in social interaction as identified by IEP

Case Example #2

Fortuna Union High School District

Decision:

- ALJ ordered District to conduct FBA and return Student to high school
- Not reasonable for MD team to narrow its analysis by defining Student's disability to only autism or to narrow manifestation of Student's autism, based only on express language of IEP
- MD team ignored evidence that Student was experiencing abrupt decline in his mental state and that he was being medicated for depression

(Student v. Fortuna Union High School Dist. (OAH 2020) Case No. 2019120123)

Practice Pointer: "Snapshot" Rule

- ALJ will review the determinations of IEP team in light of what was objectively reasonable given information possessed by team at time of meeting
- OAH has stated "it makes sense to apply the [Adams snapshot] rule" to MDs
- Therefore, MD team's findings should not be called into question based on subsequent events or new information that may come to light

(Adams v. State of Oregon (9th Cir. 1999) 195 F.3d 1141; Student v. High Tech Middle North County (OAH 2014) Case No. 2014080899, 114 LRP 53441)

2. Was Conduct Direct Result of District's Failure to Implement Student's IEP?

- Ask:
  - What is the disability?
  - How does the disability affect student?
  - Was IEP being fully implemented?
  - If not, what portions were not being implemented?
  - What are facts of disciplinary incident?

2. Was Conduct Direct Result of District's Failure to Implement Student's IEP?

- Remember:
  - Examine any portions of IEP that were not implemented with fidelity
  - Analyze facts and effects of not implementing IEP to determine whether there was direct causal relationship between behavior and failure to implement

Case Example #1

Santa Paula Unified School District

Facts:

- Student with SLD had history of aggressive behaviors
- IEP team developed social-emotional goal and offered 30 minutes of weekly counseling
- Student was suspended for participating in physical altercations, vaping, and assaulting/injuring another student
- District proposed expulsion
- MD team determined Student's conduct was not caused by, and did not have direct and substantial relationship to, her disability

Case Example #1

Santa Paula Unified School District

Decision:

- ALJ overturned MD team's finding
- No evidence that team ever considered question of whether Student's conduct was direct result of failure to implement Student's IEP
  - No reference to any such discussions in MD findings report
- Evidence that individual counseling services were not being implemented between time Student enrolled in District and incident
- Note: ALJ also found Student's disability included diagnosed social emotional dysfunction that manifested in altercations with classmates

(Student v. Santa Paula Unified School Dist. (OAH 2020) Case No. 2020050048, 77 IDELR 85)

Case Example #2

Atascadero Unified School District

Facts:

- 16-year-old Student eligible as SLI and OHI had needed support of BCBA since middle school and had BIP that addressed physical and verbal aggression, off-task behavior, and elopement.
- In May 2022, Student would not return to class after lunch because he was watching construction workers
- Despite aide's attempt to use calming strategies, Student allegedly twice pushed case manager against wall and cursed at principal
- MD team decided that Student's conduct was not manifestation of Student's disabilities and that District did not fail to implement IEP

Case Example #2

Atascadero Unified School District

Decision:

- ALJ determined that Student's conduct was not direct result of any failures by District to implement Student's IEP
  - Parent failed to directly connect any alleged failure to implement all BCBA consultation hours to Student's specifically charged conduct
  - District staff credibly testified that, due to unsafe environment, they instituted nonviolent crisis intervention strategies in conformance with Student's BIP
- Note: ALJ also upheld finding that Student's conduct of pushing case manager was not impulsive and that Student understood situation

(Student v. Atascadero Unified School Dist. (OAH 2022) Case No. 2022060319, 122 LRP 36136)

Practice Pointer: IEP Implementation

- When several factors contribute to student's misconduct, even if only one factor is a failure to implement IEP, relationship between the student's disability and the misconduct is established
- Importance of fully implementing student's IEP and providing all services determined necessary for FAPE cannot be understated

Documenting the Meeting

- At minimum, it is essential to document the following items in any MD review
  - When team convened
  - Who was present and whether parents attended
  - What conduct was at issue
  - What decision was made
  - What information team relied upon in making decision
- Failure to document these items can lead to due process order requiring MD be repeated

MDs: After the Meeting

If Behavior Is Manifestation of Disability

- If MD team concludes that conduct is manifestation of student's disability, IEP team must:
  - Conduct FBA (unless FBA already conducted), and implement BIP (or if BIP has already been developed, review it and modify it, as necessary)
  - Return student to placement from which student was removed, unless IEP team agrees to change of placement as part of modification of BIP
  - Take immediate steps to remedy IEP implementation deficiencies, if needed

(34 C.F.R. § 300.530(e),(f))

Practice Pointer: How Soon Is Now?

- Law provides no instruction on how soon district must return student to placement from which student was removed, but IEP teams should be aware that failure to do so as quickly as possible (usually the following school day) can possibly result in denial of FAPE
  - Example: District committed procedural violation by not returning Student to his placement until five days after it had found that Student's conduct was manifestation of his disability; however, such violation did not rise to level of denial of FAPE because Student continued to receive benefit of his ABA home program and did not lose significant instructional time

(Student v. Bellflower Unified School Dist. (OAH 2013) Nos. 2012060009 and 2012060628, 113 LRP 13663, aff'd, (C.D. Cal. 2014) 63 IDELR 4)

If Behavior Is Not Manifestation of Disability

- If MD concludes that conduct is not manifestation of student's disability:
  - Student is subject to same sanctions for misconduct as nondisabled students
  - Student must continue to receive FAPE
  - IEP team should take steps to address student's behavior

(34 C.F.R. § 300.530(e),(f); 71 Fed. Reg. 46721 (Aug. 14, 2006))

Right to Appeal

- Parents who disagree with any decision regarding MD may request due process hearing
- OAH will schedule hearing within 20 school days of date complaint was filed
- ALJ must make finding within 10 school days of hearing
- Resolution meeting must occur within seven days of receiving notice of due process complaint unless parents agree otherwise
- Time limit does not apply if parties agreed to mediation

(34 C.F.R. § 300.532)

Take Aways

- To reach sound decisions and avoid unnecessary conflicts, it is essential that relevant staff be trained and aware of important fundamentals of the MD process
- Districts need to ensure that MD review is meaningful, which will require that MD team have comprehensive understanding of student and student's disabilities
- Communication with parents throughout MD process is vital, but if parents object to team's findings, team should remind them of their options to challenge decision

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Legal Update

Recent OAH Decisions

Application of Disciplinary Protections

Miller Creek School District

Facts:

- 11-year-old Student with autism was placed by District at NPS (Anova Center for Education)
- Student's behavior escalated during virtual learning
- Anova's director concluded that, due to Student's lack of progress and aging-out, Anova could no longer meet Student's special education needs at its campus and sent contract termination notice to District
- Parent filed for expedited due process hearing, contending that Anova's termination violated disciplinary protection provisions of IDEA because termination was due to Student's behavior and constituted expulsion or suspension from Anova's program

Application of Disciplinary Protections

Miller Creek School District

Decision:

- ALJ rejected Parent's claim, finding that Anova's decision to terminate agreement was not related to Student's outbursts
- Master Contract between Anova and District provided that agreement could be terminated with or without cause by either party
- "Neither [District] nor Anova removed Student from his placement because of disciplinary reasons, which may have otherwise triggered the [disciplinary protection] mandates of [IDEA] section 1415(k)"
- As soon as District received termination notice, it secured placement for Student at another nonpublic school

(Student v. Miller Creek School Dist. (OAH 2022) Case No. 2022060347, 122 LRP 26556)

Application of Disciplinary Protections

Why Does This Case Matter to Us?

- Only specific disciplinary occurrences trigger district's duty to conduct manifestation determination under IDEA
  - Notably, law provides that when district seeks to change special education student's educational placement for more than 10 days as a result of a violation of a student code of conduct, district must convene IEP meeting to determine whether student's violation was manifestation of student's disability
- Here, despite Student's significant behavior issues, there was no evidence that Student's removal from NPS was result of violation of student code of conduct

Assessments and Eligibility

Berkeley Unified School District

Facts:

- Parent privately placed Student at Bayhill, which was both private school and NPS
  - Student did not require NPS for FAPE and attended Bayhill as private school student
  - Under SELPA agreement, District was responsible to assess Student because Bayhill was located within District's geographic boundaries
- Following District's assessment, IEP team concluded that Student was not eligible for special education under SLD, OHI or SLI categories
- Parent then requested psychoeducational and academic IEEs
- District denied request and filed for due process hearing to defend its assessments

Assessments and Eligibility

Berkeley Unified School District

Decision:

- ALJ found District's assessments were appropriately conducted and denied publicly-funded IEE
  - Rejected claim that District would have found Student eligible if assessors had considered that Student attended an NPS, had tutoring, and was enrolled in academic support class
- District initiated due process hearing to defend its assessments without any unnecessary delay
  - Parent had also filed CDE complaint and District's communications with CDE constituted attempt to resolve matter
  - Filing with OAH 37 days after denying IEE request was not unreasonable in this case

(Berkeley Unified School Dist. v. Student (OAH 2022) Case No. 2022060239, 122 LRP 36134)

Assessments and Eligibility

Why Does This Case Matter to Us?

- When parent requests IEE at public expense, district must, "without unnecessary delay," either initiate due process hearing to show that its evaluation was appropriate, or fund IEE (unless it demonstrates at due process hearing that independent evaluation already obtained by parent does not meet its criteria)
- Whether length of time that has passed before district initiates due process hearing or provides IEE at public expense constitutes "unnecessary delay" is a question of fact, based upon the circumstances of particular case

Hearing Impairments

San Diego Unified School District

Facts:

- Student received DHH services from District's Infant and Toddler School Based Program
- Parents then privately placed Student in series of preschools, ultimately placing him at Echo Horizon School, an NPS
- Parents expressed interest in returning Student to District
- District proposed IEP that placed Student in general education kindergarten, with 15 hours per week of push-in DHH services and other supports and accommodations
- Parents rejected IEP, believing Student required DHH services in class throughout entire day as they asserted he received at Echo Horizon

Hearing Impairments

San Diego Unified School District

Decision:

- ALJ: Parents did not prove that District's proposed IEP would have provided insufficient DHH support in class
- District's elementary school had long history with serving DHH students
- Only significant difference between District's proposed classroom and Student's class at Echo Horizon was difference between physical presence of DHH teacher three hours per day, and one for the full day
- Student did not require full-time presence of DHH teacher to receive FAPE, and, in fact, District witnesses believed that it might lead to learned helplessness

(Student v. San Diego Unified School Dist. (OAH 2022) Case No. 2022050318, 122 LRP 47808)

Hearing Impairments

Why Does This Case Matter to Us?

- As this case confirms, in determining validity of IEP, ALJ must focus on placement offered by district, not on alternative preferred by parents
- Appropriateness of district's program must be upheld if it was reasonably calculated to provide student with educational benefit under Endew F. FAPE standard
- Program offered by district need not be as beneficial to student as parents' preferred program, as long as it provides FAPE

IEP Development

Hanford Elementary School District

Facts:

- 8-year-old was eligible under autism and ID categories
- District's proposed IEP called for 40 additional mainstreaming minutes per day
- Parent refused to consent to IEP, claiming that District did not offer sufficient level of supplemental aids or services, specifically one-to-one aide, to reasonably permit Student to receive academic benefit from proposed additional mainstreaming
- District filed for due process hearing seeking to implement proposed IEP absent parental consent

IEP Development

Hanford Elementary School District

Decision:

- ALJ examined IEP development process and found District committed procedural violation based on staff's contact with family's Regional Center advocate
  - Evidence supported inference that "[the Assistant Superintendent's] purpose in calling [the advocate] at her workplace was to discourage her participation in the development of the IEP . . ."
- ALJ also agreed with Parent that District's IEP did not offer FAPE
  - Based on Student's behaviors (distracted, off task, vocalizing, fidgeting and not focused) additional mainstreaming likely would be too challenging; offered accommodations were insufficient; goals were too vague

(Hanford Elementary School Dist. v. Student (OAH 2022) Case No. 2022050318, 122 LRP 36132)

IEP Development

Why Does This Case Matter to Us?

- When districts file for due process hearing seeking to demonstrate that their proposed IEP offered FAPE, ALJs increasingly examine not only specific offer of FAPE at issue but also district's compliance with all procedural requirements of IDEA and California law when developing IEP at issue
- In this case, disputed substance of telephone call between District staff and Regional Center advocate was sufficient for ALJ to find that District violated IDEA by interfering with Parents' ability to express their opinions and participate meaningfully at IEP team meeting

IAES

Sacramento City Unified School District

Facts:

- 15-year-old Student, exited from special education by Parent, attended large District high school
- Student exhibited extremely troubling behavior that included:
  - Viewing inappropriate content on school computer
  - Targeting minority students online and in-person at school and targeting peers who identified as members of LGBTQ community
  - Physically assaulting numerous other students and staff
  - Making threats to rape and murder classmate
- District subsequently found Student eligible (SLD and OHI) and sought expedited hearing to authorize proposed IAES placement

IAES

Sacramento City Unified School District

Decision:

- ALJ upheld District's contention that IAES was appropriate
- Staff and police expressed "authentic belief" that Student was danger to others at his current placement
- "Student's behavior problems rose above what could adequately be addressed at a large, comprehensive school like [Student's] high school"
- ALJ authorized removal to small, structured IAES that would allow Student to participate in general education curriculum and to receive his IEP services

(Sacramento City Unified School Dist. v. Student (OAH 2022) Case No. 2022080223, 122 LRP 40101)

IAES

Why Does This Case Matter to Us?

- If ALJ determines that maintaining student's current placement is substantially likely to result in injury to student or to others, ALJ may order change in placement to appropriate IAES for not more than 45 school days
- IAES that is selected must enable student to continue to participate in general education curriculum and to progress toward meeting goals set out in student's IEP
- IAES must also enable student to receive, as appropriate, FBA, behavioral intervention services, and modifications that are designed to address behavior violation so that it does not recur

LRE

Riverbank Unified School District

Facts:

- 16-year-old Student with cerebral palsy was wheelchair bound, fed through a tube and communicated nonverbally
- IEP team determined Student could not access education in general education setting or in mild to moderate SDC
- At May 2022 IEP team meeting, District offered placement in moderate to severe SDC focused on functional academics and daily living skills
- Parent believed Student needed more academic instruction and did not want Student placed in SDC focusing on functional life skills
- District filed for due process hearing to defend proposed IEP

LRE

Riverbank Unified School District

Decision:

- ALJ upheld District's IEP, both procedurally and substantively
- Application of Rachel H. factors concluded that Student could not be educated satisfactorily in general education environment
  - Student could not access education in general education class, as assignments bore little relation to work of his typically developing peers
  - Student rarely engaged with peers in class
- ALJ then concluded that District's placement was LRE along continuum of placements
  - Moderate to severe special day class, in location closest to Student's home, was LRE

(Riverbank Unified School Dist. v. Student (OAH 2022) Case No. 2022020209, 122 LRP 47816)

LRE

Why Does This Case Matter to Us?

- If it is determined that, as in this case, student cannot be educated in general education environment by applying Rachel H. test, then LRE analysis requires determining whether student has been mainstreamed to maximum extent appropriate in light of continuum of program options set forth in Education Code
  - Continuum of program options includes but is not limited to general education, resource specialist programs, designated instruction and services, special classes, nonpublic and nonsectarian schools, state special schools, specially designed instruction in settings other than classrooms, itinerant instruction in settings other than classrooms, and instruction using telecommunication instruction in the home or instructions in hospitals or institutions (Ed. Code, § 56361)

Predetermination

San Dieguito Union High School District

Facts:

- Student with anxiety, communication delays, ADHD, and epilepsy had received services at very small NPS (four classrooms)
- Parents believed Student was ready to move to NPS with larger campus
- At IEP team meeting, Student's case manager/special ed program supervisor stated Student required NPS with therapeutic program, which NPS preferred by Parents did not provide
  - Other team members did not believe Student required therapeutic setting
- Parents privately placed Student and claimed District made "take it or leave it" offer of placement at San Diego Center for Children ("SDCC") over objections of all other members of IEP team

Predetermination

San Dieguito Union High School District

Decision:

- ALJ determined that District engaged in predetermination resulting in denial of FAPE and awarded Parents reimbursement
- District's "implacable position on its placement offer" of SDCC was contrary to IEP team collaborative process central to IDEA
- Case manager/program supervisor "failed to cogently respond" to specific information and reasons expressed by Parents and other IEP members that SDCC was inappropriate NPS placement
- ALJ rejected District's position that it had sole authority to choose which NPS to be offered as Student's placement

(Student v. San Dieguito Union High School Dist. (OAH 2022) Case No. 2022020209, 122 LRP 36128)

Predetermination

Why Does This Case Matter to Us?

- For IEP team meetings, predetermination occurs when district has decided on its offer prior to meeting and is unwilling to consider other alternatives
- Although district is not required to accede to parents' desired placement, it must maintain open mind about placement decisions and be willing to consider placement proposed by parents, as well as its own proposed placement
- District must make it clear to parents at outset of IEP team meeting that its proposals are only recommendations for review and discussion

Noteworthy Decisions from the Courts

Assessments and Eligibility

Guevara v. Chaffey Joint Union School District

Facts:

- 17-year-old Student moved to District from Honduras and resided with legal Guardians
- Guardians filed multi-count due process complaint alleging:
  - Child find violation based on failure to assess upon enrollment in 2018
  - Failure to assess after Student exhibited poor academic performance
  - Denial of meaningful participation in IEP process at October 2019 team meeting
  - Conducting improper assessments resulting in finding of ineligibility in October 2019

Assessments and Eligibility

Guevara v. Chaffey Joint Union School District

Decision:

- District Court affirmed ALJ decision in District's favor on all points
  - "Piecemeal and cryptic nature" of communications from advocate to District failed to put District on notice of possible disability upon enrollment
  - Student received poor grades because he spoke less English than others in the class, was uninterested in doing classwork and preferred to socialize
  - District made several attempts to contact attorney who hung up phone during team meeting and waited reasonable time before deciding Guardians had intentionally left meeting
  - District conducted appropriate assessments in all areas of suspected disabilities
    - Determination of ineligibility (SLD, ID, OHI, ED and SLI) was supported by assessment results and reports

(Guevara v. Chaffey Joint Union School Dist. (C.D. Cal. 2022) 81 IDELR 277)

Assessments and Eligibility

Why Does This Case Matter to Us?

- Disability is "suspected," and student must be assessed, when district is on notice that student has displayed symptoms of particular disability or disorder
- Determination of what assessments are required is made based on information known at the time
- Here, Parents could not demonstrate what additional tests might have been conducted in making eligibility determination, nor could they demonstrate that Student had vision difficulties that warranted assessment in that area

FBAs

San Jose Unified School District v. H.T.

Facts:

- Parent requested District conduct FBA for Student based on list of behavioral issues that included lack of social skills and difficulty focusing
- District's behavior specialist conducted FBA, but was not provided with information from Parent and was told not to communicate with Parent after Parent did not respond to initial contact
- After revisions to FBA did not address Parent's concerns, Parent requested independent FBA; District denied request and filed for due process hearing
- ALJ found faulty assessment but no denial of FAPE; ordered District to fund IEE

FBAs

San Jose Unified School District v. H.T.

Decision:

- Court upheld ALJ's finding that District did not conduct its FBA appropriately because it unreasonably failed to obtain Parent's input in conducting assessment
- District "was responsible for using reasonable efforts to secure Parent's participation in the assessment process"
- Court also upheld ALJ's order for District to fund independent FBA
- But no denial of FAPE because BCBA credibly testified that recommendations she included in FBA would not have changed even if she had been provided with Parent's input

(San Jose Unified School Dist. v. H.T. (N.D. Cal. 2022) 82 IDELR 37)

FBAs

Why Does This Case Matter to Us?

- Court pointed out that it "by no means intends to suggest that a district's failure to obtain a parent's input in an assessment can never deny the student a FAPE"
  - Court concluded that, on particular facts of this case, Parent did not show that ALJ erred in finding that inappropriate FBA did not deny FAPE
- Also worthy of note is court's conclusion that if district fails to prove its assessment was appropriate, it must provide IEE at public expense
  - This is "consistent with a plain reading of the applicable statutes" regardless of whether faulty assessment results in denial of FAPE

LRE

D.R. v. Redondo Beach Unified School District

Facts:

- Student with autism spent 75 percent of school day in general classroom with supplementary aides and services
- District believed that, although Student made good progress on goals, he required more direct special education instruction
- District proposed SDC placement for 56 percent of school day
- Parents rejected IEP proposals and removed Student to private placement
- ALJ and District Court upheld District's proposed placement as LRE

LRE

D.R. v. Redondo Beach Unified School District

Decision:

- 9th Circuit overturned District Court decision
- Case hinged on first factor of Rachel H. test—academic benefits of general classroom placement
  - Proper benchmark for assessing whether Student received academic benefits from placement in general classroom is not grade-level performance, but rather is whether Student made substantial progress toward meeting academic goals established in IEP
  - Fact that student receives academic benefits in general classroom as result of supplementary aids and services is irrelevant to analysis required under Rachel H.
- 9th Circuit, however, denied reimbursement claim because Parents privately placed Student in even more restrictive setting

(D.R. v. Redondo Beach Unified School Dist. (9th Cir. 2022) 122 LRP 48314)

LRE

Why Does This Case Matter to Us?

- Ninth Circuit noted that even if Student might have received greater academic benefits in District's SDC than in general classroom, IDEA's "strong preference" for educating disabled children alongside their nondisabled peers is not overcome by showing that special education placement may be academically superior to placement in general classroom
  - "If a child is making substantial progress toward meeting his IEP's academic goals, the fact that he might receive a marginal increase in academic benefits from a more restrictive placement will seldom justify sacrificing the substantial non-academic benefits he derives from being educated in the regular classroom."

Parent Participation

G.G. v. Conejo Valley Unified School District

Facts:

- Parents asked District to assess privately placed Student
- During assessment process, school psychologist requested names of outside providers to obtain additional information
  - Parents delayed providing names until day before IEP team meeting
- IEP team found Student eligible under ED and OHI categories and developed IEP
- Parents did not consent to proposed services and placement
- Parents sought reimbursement for private school placement, alleging, among other claims, denial of meaningful participation

Parent Participation

G.G. v. Conejo Valley Unified School District

Decision:

- District Court affirmed ALJ decision in District's favor
- District did not deny meaningful participation by not reconvening an IEP team meeting after school psychologist ultimately spoke with Student's outside providers
  - Parents' delay in providing release for psychologist to speak with outside providers "caused this issue"
- District was not obligated to discuss private school placement options at IEP team meeting
  - Private school where Student attended was not certified

(G.G. v. Conejo Valley Unified School Dist. (C.D. Cal. 2022) 122 LRP 43161)

Parent Participation

Why Does This Case Matter to Us?

- To fulfill goal of parental participation in IEP process, districts are required to conduct "meaningful" IEP team meetings
- Courts have stated that parents meaningfully participate in development of IEP when they are informed of student's problems, attend IEP team meeting, express opinions regarding IEP team's conclusions, and request revisions in IEP
- Nothing in IDEA, however, requires IEP team to consider every possible placement along continuum, including private placements

Latest Federal Guidance

Child Find

Letter to Sharpless

- For states that require written requests from parents for assessment of their child, districts need to properly address parents' verbal request that can be reasonably understood as request for an initial evaluation under IDEA, but where additional actions are required under state law
  - Examples of reasonable responses include: providing parents with information and assistance such as copy procedural safeguards notice; further explaining right to, and procedures for, initiating an assessment; and providing assistance that parents may require to submit such request
- Failure to provide additional information or assistance could potentially violate IDEA's child find obligations

(Letter to Sharpless (OSEP 2022) 122 LRP 42874)

Early Childhood Education

Dear Colleague Letter on IDEA Services in Head Start

- OSEP expressed concern about delays in identification of children with possible disabilities, as well as untimely IEP and placement decisions
- OSEP emphasized importance of ongoing collaboration between SEAs, LEAs and their Head Start program partners to effectively meet IDEA requirements and ensure provision of FAPE
- OSEP reminded districts that Head Start programs have screening/child find/referral requirements
- IEP teams should consider various ways, including virtual coaching and consultation, to deliver services while child is in Head Start program

(Letter to State Directors of Special Education (OSEP 2022) 82 IDELR 12)

Highly Mobile Students

Letter to State Directors of Special Education

- OSERS/OSEP noted that highly mobile students are more likely to experience recurring educational disruptions and challenges
- Special education and related services available under IDEA are critical to helping eligible students meet such educational challenges
- Districts should complete their assessments for these children within expedited time frame (within 30 days if possible)
- District should not delay completing initial assessment because student has not completed MTSS process
- Highly mobile students with IEPs transferring to district may need ESY as comparable service

(Letter to State Directors of Special Education (OSERS/OSEP 2022) 122 LRP 44252)

Personnel Qualifications

Memo to State Directors of Special Education

- OSEP clarified states' obligations regarding IDEA Part B requirements related to personnel qualifications and alternate certifications
  - Note: See printed materials for complete summary of IDEA rules in this area
- OSEP recognized that states continue to face many challenges stemming from COVID-19 pandemic, including impact on exacerbating shortage of special education teachers and related services providers, and noted that some states currently have policies and procedures that may not be consistent with IDEA requirements
- But OSEP reminded SEAs that they may not waive IDEA personnel qualification requirements on emergency, temporary or provisional basis

(Memorandum to State Directors of Special Education (OSEP 2022) 81 IDELR 287)

New Developments Affecting Special Education

New Legislation

SB 291 (Education Code Section 33590)

Advisory Commission on Special Education

- Existing law established Advisory Commission on Special Education as entity in state government consisting of 17 members to, among other things, study and provide assistance and advice to State Board of Education, Superintendent of Public Instruction, Legislature, and Governor in new or continuing areas of research, program development, and evaluation in special education
- New law increases number of members on Commission from 17 to 19 and requires Commission to appoint 2 students with exceptional needs, 16 to 22 years of age, inclusive, for term of one year

New Legislation

SB 692 (Education Code Sections 56049-56049.1)

Least Restrictive Environment

- "Data transparency and analysis are essential to understanding the needs of pupils. Local educational agencies should use all available data sources on pupils with disabilities, with a particular focus on least restrictive environment data, to inform continuous improvement efforts."
- SB 692 requires State Department of Education (on or before November 30, 2023) to publish data related to federal measures of LRE for students with disabilities on its internet website and include it as resource on California School Dashboard
- Such data must be disaggregated by race or ethnicity and district

New Legislation

SB 1016 (Education Code Section 56332)

Fetal Alcohol Spectrum Disorder

- State special education regulations define "other health impairment" as having "limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the environment that is due to a chronic or acute health problem and adversely affects the child's educational performance"
- SB 1016 requires State Board of Education to include "fetal alcohol spectrum disorder" in such definition of "other health impairment" contained in Section 3030 of Title 5 of California Code of Regulations

Thank you for attending!

And thank you for all you do for students!

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