



F3 Law

Here and Now:

**Revisiting Dyslexia
Eligibility, Goals
and Services**

What We'll Cover . . .



- Dyslexia: Background and Definition
- Law and Guidance
 - Definition of “Specific Learning Disability”
 - SLD Eligibility Criteria
 - California Statutes and Guidance Related to Dyslexia
 - U.S. Department of Education Guidance
- OAH and Other Cases Addressing Dyslexia Issues
 - Child Find and Eligibility
 - Assessments
 - Goals, Methodology and Services



Dyslexia: Background and Definition

The Numbers



- Nationwide, dyslexia likely affects 1 in 10 individuals
- One estimate indicates that over 1 million students in California's K-12 public schools have some signs of dyslexia
- And approximately 220,000 of those students are receiving special education as SLD

(International Dyslexia Association, "About Dyslexia" (updated 2021); Decoding Dyslexia CA, "Frequently Asked Questions" (updated 2021))

Characteristics



- Specific reading disorder
- Does not reflect low intelligence
- Hereditary
- Affects individuals from different cultural, ethnic and socioeconomic backgrounds nearly equally

(International Dyslexia Association, "About Dyslexia" (updated 2021))

Definition



- “Specific learning disability that is neurobiological in origin”
- “Characterized by difficulties with accurate and/or fluent word recognition and by poor spelling and decoding abilities”
- “Deficit in the phonological component of language that is often unexpected in relation to other cognitive abilities and the provision of effective classroom instruction”

Definition (cont'd)



- “Secondary consequences may include problems in reading comprehension and reduced reading experience that can impede growth of vocabulary and background knowledge”
- International Dyslexia Association’s definition has been cited verbatim by OAH and CDE on numerous occasions

(International Dyslexia Association, “About Dyslexia” (2021); California Dept. of Educ, California Dyslexia Guidelines (2017, as revised and modified, 2018 and 2019); see, e.g., Student v. Capistrano Unified School Dist. (OAH 2010) Case No. 2010050368, 111 LRP 63912)



Dyslexia: The Law and Guidance

Definition of Specific Learning Disability



Disorder in one or more of the basic psychological processes involved in understanding or using spoken or written language, which manifests itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations

(34 C.F.R. § 300.8(c)(10); Ed. Code, § 56337, subd. (a); Cal. Code Regs., tit. 5, § 3030, subd. (b)(10))

Definition of SLD (cont'd)



- SLD does not include learning problems that are primarily the result of visual, hearing, or motor disabilities, of intellectual disability, of emotional disturbance, or of environmental, cultural, or economic disadvantage
- SLD includes conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, **dyslexia**, and developmental aphasia

(34 C.F.R. § 300.8(c)(10); Ed. Code, § 56337, subd. (a); Cal. Code Regs., tit. 5, § 3030, subd. (b)(10))

Need for Special Education



- Don't forget! Even if student meets SLD definition, second step in determining eligibility is that student must require special education and related services as a result of his or her SLD
- Without such need, student cannot be found eligible

SLD Eligibility Criteria



- District may consider whether student has severe discrepancy between intellectual ability and achievement in:
 - Oral expression
 - Listening comprehension
 - Written expression
 - Basic reading skill
 - Reading comprehension
 - Mathematical calculation or mathematical reasoning
 - Note: IDEA includes reading fluency skills in above list
- (Cal. Code Regs., tit. 5, § 3030, subd. (b)(10)(B); 34 C.F.R. § 300.309(a)(1)(v))

SLD Eligibility Criteria



- District also may find SLD if student:
 - Does not achieve adequately for his or her age
 - and**
 - Does not make progress when using RTI process or exhibits a pattern of strengths and weaknesses in performance, achievement, or both

(Cal. Code Regs., tit. 5, § 3030, subd. (b)(10)(C))

SLD Eligibility Criteria



- Whichever method is used:
 - Underachievement may not be due to lack of appropriate instruction in reading or math and data must prove this
 - Observation must be done in student's learning environment

(Cal. Code Regs., tit. 5, § 3030, subd. (b)(10)(C))

California Statutes Addressing Dyslexia



- Education Code Section 56245 (2008)
 - Encourages districts to provide teachers with in-service training on recognition of – and teaching strategies for – SLDs, “including dyslexia and related disorders”

California Statutes Addressing Dyslexia



- Education Code Section 56337.5 (2015)
 - Clarifies that student with dyslexia who meets SLD eligibility criteria is entitled to special education
 - If student with dyslexia is found not eligible for special ed, his or her instruction “shall be provided in the regular education program”
 - Note: Amendment (SB 237) pending in legislature that would require screening for students in grades K-3

California Statutes Addressing Dyslexia



- Education Code Section 56335 (2015)
 - Required CDE to develop (nonbinding) program guidelines for dyslexia before 2017-2018 school year

California Statutes Addressing Dyslexia



- Education Code Section 44259 (2021)
 - Revised minimum requirements for preliminary multiple or single subject, or education specialist teaching credential to include
 - “[S]tudy of effective means of teaching literacy, including, but not limited to, the study of reading . . . , and evidence-based means of teaching foundational reading skills in print concepts, phonological awareness, phonics and word recognition, and fluency . . .”
 - Study to incorporate CDE’s program guidelines for dyslexia

CDE Guidance



- California Dyslexia Guidelines (CDE 2017)
 - Subsequently modified in 2018 and 2019
 - Provides educators, parents and other stakeholders with practical resources for identifying/educating students with dyslexia
 - Emphasizes evidence-based instruction
 - Not legally binding
 - Look in your materials for website address to download full-text PDF (now expanded to 125 pages)

- Dear Colleague Letter (OSERS 2015)
 - Emphasized that dyslexia can be an SLD
 - Encouraged districts to “consider situations where it would be appropriate to use the terms dyslexia, dyscalculia, or dysgraphia to describe and address the child's unique, identified needs through evaluation, eligibility, and IEP documents”

- Letter to Unnerstall (OSEP 2016)
 - Districts are only required to assess particular areas related to suspected disability
 - If evaluation process reveals that specific assessment for dyslexia is needed to ascertain disability and educational needs, then district must conduct such assessment



OAH and Other Cases Addressing Issues Related to Dyslexia

Child Find and Eligibility

Los Alamitos USD (2021)



■ Facts:

- After struggling in preschool, Student began kindergarten in Tier 1 RTI program used to identify and assist students with reading
- Student subsequently attended “Reading Lab,” which provided Tier 2 interventions, but made minimal progress
 - April progress report included significant areas of concern in reading skills
- District ultimately found Student eligible for special education during first grade
- Parents claimed that District should have assessed Student during kindergarten

Child Find and Eligibility

Los Alamitos USD (2021)



■ Ruling:

- ALJ ruled in Parents' favor
- If District had referred Student for assessment after his second trimester in kindergarten, it would have found Student had dyslexia and eligible for special education as SLD
 - Student exhibited (to some degree) all symptoms of dyslexia identified by CDE's Dyslexia Guidelines
- District should have been aware that Student was not making sufficient progress in RTI program

(Student v. Los Alamitos Unified School Dist. (OAH 2021) Case No. 2021050241, 121 LRP 32577)

Child Find and Eligibility

Huntington Beach City SD (2017)



■ Facts:

- Parent expressed concern about Student's struggles with letters and numbers
- First-grade teacher referred Student to reading intervention group
- Special ed teacher observed Student, did not believe he needed special ed, and wanted more time for interventions to work
- Parent obtained private reading tutor
- District ultimately assessed Student in January of first grade year and found Student eligible as SLD based on unique needs in reading
- Parent's private assessment indicated dyslexia

Child Find and Eligibility

Huntington Beach City SD (2017)



■ Ruling:

- ALJ ruled in favor of Parent and awarded reimbursement for private tutoring for child find violation
- Interventions were “noteworthy signs that created suspicion of disability”
- “Reliance on an outcome basis” to determine whether or not to assess was “faulty”
- Student’s average grades should not have been basis for decision not to assess

(Student v. Huntington Beach City School Dist. and Huntington Beach City School Dist. v. Student (OAH 2017) Case Nos. 2016040336 and 2016090420, 117 LRP 5711)

Child Find and Eligibility



- Practical Compliance Keys
 - Remember that threshold for suspecting that child has disability is relatively low
 - Information from parents or teachers and/or medical documentation or private assessment that student might have dyslexia should put districts on child find alert
 - For example, student's inability to decode at grade level, letter reversals, struggles with sight words and spelling, general difficulties with reading comprehension and difficulties writing can trigger suspicion of SLD, despite student's average grades

Child Find and Eligibility



- Practical Compliance Keys
 - Key challenge facing districts using RTI or other tiered intervention models is recognizing when child find obligation begins
 - Waiting “reasonable” time before special education referral is acceptable, but what is “reasonable” will vary depending on student’s circumstances
 - Districts risk violating their child find obligations if they do not refer students who are continuing to struggle until they have completed entire tiered intervention process

Assessments

Escondido Union SD (2019)



■ Facts:

- Parents requested early triennial assessment for 10-year-old with SLD, specifically for evaluating dyslexia based on concerns over Student's difficulties in reading, spelling and writing
- Assessment indicated overall reading skills below age/grade level, but report did not specify that Student exhibited dyslexia
- Based on Parents' continued concerns, District amended assessment report to note that orthographic and phonological processing deficits were consistent with mixed form of dyslexia
- Parents requested IEE; District defended assessment

Assessments

Escondido Union SD (2019)



■ Ruling:

- ALJ ruled District's assessment met all legal requirements
- Student continued to qualify as SLD and District sufficiently assessed Student in his areas of suspected deficits
- Parents unsuccessfully argued that assessment did not appropriately address Student's dyslexia because report did not specifically mention dyslexia until Parents raised topic during IEP team meeting
- ALJ also rejected argument that additional tests were required when District amended report

(Escondido Union School Dist. v. Student (OAH 2019) Case No. 2018120837, 119 LRP 18032)

Assessments

Los Angeles USD (2019)



■ Facts:

- After Student was assessed in 2017, IEP team met to discuss results of assessment, to determine and update her eligibility and to transition Student from kindergarten to first grade
- At meeting, Parents did not raise any concern that Student might have dyslexia or that assessments failed to properly evaluate Student's reading difficulties
- Nonetheless, in 2018, Parents filed for due process hearing, contending that District denied Student FAPE by failing to comprehensively assess Student in all areas of disability, specifically by not assessing her for dyslexia during 2017

Assessments

Los Angeles USD (2019)



■ Ruling:

- Assessment was appropriate considering what District knew at time
- Based on Student's average test scores, psychologist appropriately concluded that it did not appear dyslexia was affecting Student in school setting
- Tests indicated that Student had requisite skills to be able to read
- Parents presented no evidence, testimony, assessments reports or diagnosis to support their claim that District should have known Student had dyslexia

(Student v. Los Angeles Unified School Dist. and Los Angeles Unified School Dist. v. Student (OAH 2019) Case Nos. 2018060459 and 2018100624, 119 LRP 18030)

Assessments

Issaquah SD No. 411 (2022)



■ Facts:

- Parents requested evaluation, believing Student had dyslexia, based, in part, on independent assessment's conclusions
- District found Student eligible under SLD category, with assessment report also citing to Parents' assessor's findings
- Parents believed District should have formally evaluated Student for dyslexia and that failure to do so violated IDEA requirement to evaluate "in all areas of suspected disability"
- District refused Parents' IEE request and filed for due process
- ALJ and District Court ruled in District's favor

Assessments

Issaquah SD No. 411(2022)



■ Ruling:

- 9th Circuit upheld District's assessment, finding that it met all legal requirements (also finding that District's IEPs were appropriate)
 - District conducted battery of assessments to evaluate Student's reading and writing skills areas that dyslexia could impact
 - Parents' insistence that District should have evaluated Student for dyslexia rather than recognizing her difficulties with reading, writing, and spelling under the broader SLD category was "based on a distinction without a difference"
 - Evaluation was not deficient merely because it did not use the term "dyslexia" in manner Parents would have preferred

(Crofts v. Issaquah School Dist. No. 411 (9th Cir. 2022) 122 LRP 2043)

Assessments



- Practical Compliance Keys
 - Remember that districts are only required to assess student in particular areas related to suspected disability
 - Neither IDEA nor California law provides parents with right to dictate specific areas that district must assess as part of its comprehensive evaluation
 - Of course, if district determines that particular assessment for dyslexia is needed to determine whether student has disability (SLD), then it must conduct such assessment

Assessments



- Practical Compliance Keys
 - Ultimately, districts must consider medical diagnoses in their eligibility determinations, but diagnosis of dyslexia by independent assessor does not provide automatic IDEA eligibility and should not drive specific instructional methodologies or services, as those must be developed by IEP teams tailored to unique needs of each student

Goals, Methodology, Services Liberty Union HSD (2017)



■ Facts:

- District's IEP for high school Student with dyslexia contained two reading goals
 - "Oral reading" goal: "By August 19, 2017, [Student] will read grade level text orally with 80% accuracy, at a fluency rate of 100 words per minute, and expression on successive readings as measured with 80 percent accuracy in 4 out of 5 trials by student work samples/teacher charted records"
 - "Reading" goal: "By August 19, 2017, when given commonly used academic vocabulary words from core classes, [Student] will accurately read those words with 90 percent accuracy in 3 out of 4 trials."
- IEP also contained spelling goal

Goals, Methodology, Services

Liberty Union HSD (2017)



■ Ruling:

- ALJ: Goals proposed by District failed to meet required standards
- Oral reading goal overlooked fact that Student's inability to read fluently was result of his inability to decipher the words he encountered as he read
 - Goal was not measurable and failed to show direct relationship between present levels of performance and services to be provided
- Other reading goal was essentially based on memorization and did not meet Student's need to learn how to decode unfamiliar words
- Spelling goal failed to address fundamental spelling deficits

(Student v. Liberty Union High School Dist. (OAH 2017) Case No. 2017020873, 71 IDELR 49)

Goals, Methodology, Services

Laguna Beach USD (2016)



■ Facts:

- Parents funded private placement in Connecticut during third and fourth grades
- Rejected Connecticut district's proposed IEP and moved to California
- Parents placed Student at NPS that using Slingerland methodology to address dyslexia
- Parents sought IEP from District; interim IEP offered resource class for English and math, with gen ed placement for other classes
- Parents objected because District did not use Slingerland and IEP did not identify teaching method that would be used

Goals, Methodology, Services

Laguna Beach USD (2016)



■ Ruling:

- ALJ ruled in favor of District
- District was not required to use Slingerland methodology in order to offer FAPE
- Special ed teacher credibly testified that there were many effective reading programs that could address Student's dyslexia
- "[Methodology used to implement an IEP is left to the school district's discretion so long as it meets a child's needs and is reasonably calculated to provide some educational benefit to the child"

(Student v. Laguna Beach Unified School Dist. (OAH 2016) Case No. 2016030723, 116 LRP 39101)

Goals, Methodology, Services

Las Virgenes USD (2020)



■ Facts:

- IEE obtained by Parents indicated dyslexia and contained 48 recommendations, including use of Orton-Gillingham
- IEP team rejected many of IEE's recommendations
- District's "Read 180" program and assessment data showed Student's comprehension skills were age-appropriate
- Parents contended District did not offer appropriate SAI and other supports to address Student's dyslexia and that District teachers and personnel were not equipped to provide Student with his identified services because they did not follow CDE's Dyslexia Guidelines

Goals, Methodology, Services

Las Virgenes USD (2020)



■ Ruling:

- ALJ rejected Parents' claims
- Student made good progress in District's "Read 180" program
- District-provided home tutor persuasively testified that Student could read and write at grade level and that another intensive reading program (Orton-Gillingham) was unnecessary
- All teachers and personnel who worked with Student demonstrated they were qualified to provide accommodations and support to special education students with dyslexia

(Student v. Las Virgenes Unified School Dist. (OAH 2020) Case No. 2019100451, 120 LRP 8400)

Goals, Methodology, Services

Santa Monica-Malibu USD (2018)



■ Facts:

- Elementary school Student with visual processing disorder and severe dyslexia was below grade level in reading and writing
- Parents removed Student to private school, believing District failed to close reading gap
 - Parents focused on fact that one of Student's goals provided that, by end of third grade, Student was to achieve tasks in reading that were appropriate only for second grader
- Parents sought reimbursement for costs of private placement, challenging District's IEPs developed during 2016 and 2017

Goals, Methodology, Services

Santa Monica-Malibu USD (2018)



■ Ruling:

- ALJ rejected reimbursement claim
- Although Student was not reading at grade level, he had made sufficient progress over two years and met many goals faster than expected despite his severe dyslexia
- “IDEA did not require [District] to achieve any particular outcome” or to “catch up” Student to same levels of reading ability and performance as his same-aged peers.
- District’s IEPs satisfied Andrew F. FAPE standard

(Student v. Santa Monica-Malibu Unified School Dist. (OAH 2018) Case No. 2018020479, 118 LRP 31550)

Goals, Methodology, Services



- Practical Compliance Keys
 - Complete and accurate assessments are foundation for “connect the dots” approach
 - Defensible position on IEP goals depends on obtaining accurate information on student’s disability and current level of functioning

Goals, Methodology, Services



■ Practical Compliance Keys

- Courts have consistently reaffirmed that IEP teams have discretion to choose educational methodologies to address dyslexia (or any other educational need)
 - Provided that team considers student's individual needs and offers program that appropriately addresses those needs, methodology used to implement such program should not be subject to challenge
 - But because methodologies—particularly reading methodologies to address dyslexia—are often sources of contention between districts and parents, district should be prepared to explain why it selected particular methodology(ies)

Goals, Methodology, Services



■ Practical Compliance Keys

- When deciding whether to place student with dyslexia in general education classroom for academic subjects, districts should consider student's ability to focus, any learning deficits that could cause him to fall behind, as well availability of reading and other supports in general education setting
 - Remember ALJs will look to "Rachel H. test," which IEP teams should also apply when making placement decisions

Take Aways . . .



- Cases discussed in this session illustrate variety of disputes with parents that can arise in identifying, assessing and providing appropriate services to students with dyslexia
- It is essential to develop collaborative relationship with parents to help avoid costly litigation
- Develop and foster culture that places priority on students and their needs!

Information in this presentation, included but not limited to PowerPoint handouts and the presenters' comments, is summary only and not legal advice. We advise you to consult with legal counsel to determine how this information may apply to your specific facts and circumstances.



BUSINESS & FACILITIES
CHARTER SCHOOLS
eMATTERS
GOVERNANCE & LEADERSHIP
HIGHER EDUCATION
LABOR & EMPLOYMENT
LITIGATION
STUDENT SERVICES & SPECIAL EDUCATION

F3Law.com

Fresno

Los Angeles

Oakland

Inland Empire

Sacramento

San Diego



Spotlight on Practice:

The Doug C. Dilemma—
Meeting Legal Deadlines vs.
Ensuring Parental
Participation

Background and Introduction



- In 2013, 9th U.S. Circuit Court of Appeals decided Doug C. v. State of Hawaii, Department of Education, which held that parents' right to participate in IEP team meetings is generally more important than districts' need to meet legally imposed deadlines

Background and Introduction



- This session will:
 - Provide brief overview of important timelines and parental participation requirements
 - Examine Doug C. ruling in depth
 - Analyze recent decisions from OAH applying Doug C. rationale to variety of special education disputes involving parental participation in IEP process
 - Offer practical pointers on how these cases affect day-to-day duties of special educators



Background: Important Special Education Timelines and Parental Participation Requirements

Special Education Timelines: Initial Assessment and IEP Development



- Propose assessment for initial assessment plan within 15 calendar days from date of student's referral
 - Tolloed for school breaks in excess of five school days
 - If referral is received 10 days or fewer before end of school year, then proposed assessment is due within first 10 days of following school year

(Ed. Code, §§ 56043, 56321)

Special Education Timelines: Initial Assessment and IEP Development



- Convene IEP team meeting within 60 calendar days after receipt of consent to assessment plan to determine student's eligibility
 - Tolled for school breaks in excess of five school days
 - If referral is received 30 or fewer days before end of school year, meeting must be held within 30 calendar days of beginning of next school year
 - Timeline does not apply if the student enrolls in another district or if student is not made available for assessment
- Develop IEP within 30 calendar days after determination is made that student requires special education

(Ed. Code, §§ 56043, 56302.1, 56344)

Special Education Timelines: Timelines Applicable to all IEPs



- Notify parents of proposed IEP team meeting “early enough to ensure an opportunity to attend”
- Inform parents of their procedural safeguards at each IEP team meeting and provide copy of notice to parents at least once each school year
- Implement IEP “as soon as possible” after receipt of parental consent

(Ed. Code, §§ 56043, 56341.5, 56344, 56500.1)

Special Education Timelines: Reassessments



- Conduct triennial eligibility review at least once every three years, but no more than once per year (unless district and parents agree otherwise)
 - Parents and district may agree in writing that triennial assessment is not necessary or may agree to limit scope of assessment
- Provide assessment plan for any proposed reassessment within 15 calendar days from date of referral
 - Timeline tolled for school breaks in excess of five school days
 - If referral is received 10 days or fewer before end of school year, then proposed reassessment is due within first 10 days of following school year

(Ed. Code, §§ 56043, 56321, 56381)

Special Education Timelines: Reassessments



- Hold IEP team meeting to review reassessment (including triennial assessments) within 60 calendar days after receipt of parents' consent to reassessment plan
 - Timeline is tolled for school breaks in excess of five schooldays
 - If referral is received 30 days or fewer before end of school year, then meeting must be held within first 30 days of following school year

(Ed. Code, §§ 56043, 56343, 56343.5, 56344, 56380)

Special Education Timelines: Additional IEP Team Meeting



- Annual IEP review must take place not longer than 12 months from date of last IEP
- Hold IEP team meeting in response to parental request within 30 days after receipt of such written request
 - Timeline is tolled for school breaks in excess of five schooldays

(Ed. Code, §§ 56043, 56343, 56343.5, 56344, 56380)

Parental Participation: Notice of Meeting



■ Content

- Purpose, time and place of meeting
- Who will be attending
- Inform parents of right to bring individuals with knowledge or special expertise about student

■ Timing

- Early enough to ensure parents will have opportunity to attend
- OSEP suggests 10-day advance notice, but no formal requirement

(34 C.F.R. § 300.322; Ed. Code, § 56341.5; Letter to Constantian (OSEP 1990) 17 IDELR 118)

Parental Participation: Scheduling the Meeting



- “Mutually agreed time and place”
- Standard of reasonableness should apply
- Not unreasonable to schedule team meetings during regular business hours
 - But there might be circumstances where parents’ employment situation restricts availability; districts should be flexible in those instances

(34 C.F.R. § 300.322(a)(2); Letter to Thomas (OSEP 2008) 51 IDELR 224)

Parental Participation: Alternative Means of Participation



- Parents and district may agree to use alternative means of participation for IEP team meetings, including video conferencing and conference calls
- Both parties must consent
- If additional costs result, district is responsible
- USDOE encourages use of flexibility during COVID-19 in conducting meetings via alternative means of participation “when face-to-face meetings are not feasible or practicable”

(34 C.F.R. § 300.328; COVID-19 Q & A (IDEA Part B) (OSEP 2020) 77 IDELR 138)

Parental Participation: Conducting Meeting Without Parents



- Parents have absolute right to attend all IEP team meetings even when districts are certain they will reject proposed actions
- Meetings may be conducted without parents only if district “is unable to convince parents that they should attend”
- Must keep records of all attempts to arrange meeting
 - Log of phone calls
 - Copies of correspondence
 - Document visits to home/work

(34 C.F.R. § 300.322(d); Ed. Code, § 56341.5, subd.(h))



Analysis of Doug C. v. **State of Hawaii** **Department of** **Education**

Overview



- In June 2013, 9th Circuit ruled that Hawaii Department of Education violated IDEA's parental participation requirements by holding Student's annual IEP meeting without parent present in order to comply with deadline for annual IEP review
- By denying Parent opportunity to participate in IEP process, court ruled that Department denied Student FAPE

(Doug C. v. State of Hawaii, Dep't of Educ., (9th Cir. 2013) 720 F.3d 1038, 61 IDELR 91)

Facts



- School wanted to hold IEP team meeting for Student with autism before annual review deadline (November 13)
- Parent was unavailable for October 28 proposed meeting
- Parent and School agreed to meet on November 9
- Parent emailed School on day of meeting explaining he was sick and suggested rescheduling for November 16 or 17
- Parent could not commit to School's proposal to hold meeting earlier – on November 11 or 12

Facts (cont'd)



- Special education coordinator decided to proceed with meeting on November 9 as scheduled
- IEP team changed Student's placement from Horizons Academy private school to Workplace Readiness program at Maui High School
- After meeting, coordinator sent Parent new, completed IEP for his review
- Team held follow-up meeting on December 7 with Parent and staff member from Horizons
- Parent did not consent to IEP

Procedural History



- Prior to follow-up IEP meeting, Parent filed request for due process hearing, asserting that lack of parental participation in IEP meeting denied Student FAPE
- ALJ denied Parent's claim
- U.S. District Court affirmed, holding that Parent "failed to show that Department did not fulfill its statutory duty to ensure that [Parent] was afforded an opportunity to participate at the November 9, 2010 IEP meeting"
- Parent appealed to 9th Circuit

9th Circuit's Decision



- Court emphasized crucial role of parent participation in IEP process as affirmative duty under IDEA
- Department breached its obligation
 - Parent did not affirmatively refuse to attend meeting, nor could it be said that Department was unable to convince him to attend
 - Fact that it might have been frustrating to schedule meetings with Parent or difficult to work him did not excuse Department's failure to include him in Student's IEP meeting

9th Circuit's Decision (cont'd)



- Court rejected Department's argument that it could not accommodate Parent's request to reschedule because of impending annual IEP deadline on November 13
 - No legal support for theory that if annual deadline passed without new IEP, services would "lapse"
 - Coordinator improperly prioritized schedules of other team members over attendance of Parent when he did not wish to disrupt their schedules without firm commitment from Parent

9th Circuit's Decision (cont'd)



- “When confronted with the situation of complying with one procedural requirement of the IDEA or another, we hold that the agency must make a reasonable determination of which course of action promotes the purposes of the IDEA and is least likely to result in the denial of a FAPE”
 - Decision to prioritize strict deadline compliance over parental participation was “clearly not reasonable”
 - Court acknowledged circumstances in which accommodating parent’s schedule would do more harm to student’s interest than proceeding without parent’s presence, but said such circumstances would be “rare”



Subsequent Application of Doug C. by OAH in FAPE Disputes

Larchmont Charter School (2021)



■ Facts:

- Parents disenrolled Student from private school and placed him in Charter School
- Annual IEP was due 9/11 and triennial was due on 9/26
- Parents agreed to waive triennial reassessment but would not confirm annual IEP meeting date (as well as rescheduled date)
- Parents disenrolled Student from Charter School on 9/16, placing him in private school
- Subsequent due process claim alleged District violated IDEA by not holding annual meeting by due date of 9/11

Larchmont Charter School (2021)



■ Decision:

- ALJ found in favor of Charter School
- Parents failure to confirm meeting date placed Charter School in dilemma of meeting legal deadline vs. ensuring parents' participation in IEP process
- Decision not to hold meeting without Parents was reasonable
 - Charter School believed it could continue to provide services to Student even if annual IEP team meeting was not timely held
- Parents were contemplating disenrolling Student in early September, which was likely reason they failed to respond

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

Case Law Lesson



- Carefully consider whether or not to base decision to cancel IEP team meeting on parents' failure to confirm meeting date

Los Angeles USD (2019)



■ Facts:

- Student's annual IEP team meeting was due in August before school year began
- To meet statutory timeline, District sought to hold meeting in May before teachers went on summer break
- When Parents did not respond to notice of meeting, they were given choice of alternate dates (5/24 or 5/31)
 - Mother responded on 5/30 indicating she wished to be at meeting but had doctor's appointment; meeting proceeded without Parents
- District finalized IEP and offered to convene another meeting after new school year began to discuss it with Parents

Los Angeles USD (2019)



■ Decision:

- District violated IDEA by holding annual IEP team meeting without Parents
- ALJ: “[District] made clear that it was prioritizing its staff’s scheduling over parental participation in violation of ruling in Doug C.”
- Parents had never missed previous meeting and Mother indicated desire to attend
- Offering to convene another meeting when new school year began was “after-the-fact” parental involvement

(Student v. Los Angeles Unified School Dist. (OAH 2019) Case No. 2019071112, 76 IDELR 22)

Case Law Lesson



- District's desire to complete IEP team meeting before summer break (or otherwise accommodate staff schedules) does not generally justify holding IEP team meeting in parents' absence
- Plan IEP team meetings early enough so that scheduling is not affected by summer (or other) breaks

Los Alamitos USD (2019)



- Divorced Parents with joint custody of Student attended triennial IEP team meetings in March and May 2018
- Meeting resumed in July
 - District told Parents it needed to complete triennial IEP and offered three dates; Father could not attend; Mother indicated she was on vacation and wanted to hold meeting in fall
 - IEP team members met without Parents and developed IEP
- District held another meeting in August
 - Father attended; no indication that notice was sent to Mother
- District sought to implement IEP without parental consent

Los Alamitos USD (2019)



- ALJ found multiple procedural violations that significantly impeded Parents' participation rights; refused to allow District to implement its IEP developed in July 2018 without Parents
- At the time of July 2018 IEP team meeting, Student already had IEP in place and District "failed to prove that postponing the meeting would do more harm to Student's interest than proceeding without the presence of at least one Parent"
- Postponing IEP team meeting to fall semester would have promoted purposes of IDEA to facilitate parental participation
- No previous evidence of parental refusal to participate

(Los Alamitos Unified School Dist. v. Student (OAH 2019) Case No. 2018081156, 119 LRP 7804)

Case Law Lesson



- In circumstances that involve divorced parents, be sure to provide notice of IEP team meeting to both parents

Tehachapi USD (2018)



■ Facts:

- District held series of IEP team meetings over several months to complete IEP for Student with autism
- Staff had “very difficult” time developing IEP due to zealous parental participation, repeated review of information already presented and involvement of advocate and several independent assessors
- Annual and triennial were many months late
- Parents asserted IDEA violation for failure to comply with legal timelines

Tehachapi USD (2018)



- Decision:
- ALJ: District could not be faulted for meetings that were “involved, lengthy and sometimes contentious”
- No evidence that District sought to schedule unnecessary IEP team meetings to inconvenience Parents (or for any other reason)
 - Reasonable for District to set time limits on length of meetings
- Prioritizing Parents’ participation also was least likely to result in denial of FAPE to Student since previous IEP was in place
 - Doug C. requires ALJs to allow District “reasonable latitude” in decision-making

(Student v. Tehachapi Unified School Dist. (OAH 2018) Case No. 2018070708, 119 LRP 334)

Case Law Lesson



- Series of IEP team meetings may be necessary to gather information, including input from parents and independent assessors, to develop an informed offer of FAPE to student—even at risk of missing deadline for annual IEP
- Consider scheduling multiple meetings close together in time

Murrieta Valley USD (2016)



■ Facts:

- District conducted manifestation determination review following rock throwing incident involving 8-year-old, who exhibited severe physical aggression and verbal abuse
- Following MDR, District conducted FBA, the results of which recommended behavior support plan
- District attempted to hold IEP team meeting to modify behavior supports, but Parent expressed no desire to attend and did not respond to multiple attempts to set mutually convenient time
- District held meeting without Parent

Murrieta Valley USD (2016)



■ Decision:

- ALJ found District's action to be appropriate, distinguishing circumstances from Doug C. in which Parent had desired to attend meeting
- District made reasonable attempts to convince Parent to attend and properly documented those attempts
- Due to Student's escalating behaviors, it was imperative to hold meeting to get BSP in place as soon as possible and to modify behavioral content of Student's IEP

(Murrieta Valley Unified School Dist. v. Student (OAH 2016) Case No. 2016080027, 116 LRP 42282)

Case Law Lesson



- Court in *Doug C.* acknowledged that there may be circumstances in which accommodating parent's schedule would do more harm to student than proceeding without parent's presence at meeting
- Ultimately, district must engage in balancing act between ensuring participation and making sure that student is provided with FAPE

Los Angeles USD (2015)



■ Facts:

- Parents initially consented to 4/29 meeting date for Student's triennial IEP
- District convened meeting, but Parents had not arrived by 8:15 a.m. scheduled start time
- Father appeared at 8:45 a.m. after meeting was underway, but left shortly thereafter, stating that meeting was "adjourned"
- District team members continued meeting, offering same placement and services to Student, but did not finalize IEP due to incomplete assessments

Los Angeles USD (2015)



■ Decision:

- ALJ determined District acted appropriately by continuing meeting after Father departed
- In contrast to Doug C., Father was able to attend meeting, and did so, but arrived late with no notice and left voluntarily
- Father did not ask IEP team members wait for him to arrive, nor did he ask that meeting be restarted
- Team offered same placement and services to which Parents had previously consented, appropriately postponing discussion concerning Parents' request for placement change

(Student v. Los Angeles Unified School Dist. (OAH 2015) Case No. 2015050091, 115 LRP 39059)

Case Law Lesson



- It is generally advisable to finish IEP team meetings even if parents express disagreement or leave meeting



Practice Pointers: Doug C. and Parental Participation Compliance Tips

Tip #1: Overdue Meeting and Cessation of Services



- Misperception exists that if annual deadline passes without new IEP in place, services will “lapse”
- As 9th Circuit pointed out in Doug C., although IDEA mandates annual review of student’s IEP, there is no authority for proposition that district cannot provide any services to student whose annual review is overdue

Tip #2: “After-the-Fact” Meetings

- Doug C. decision advises that when district violates IDEA by not ensuring parent participation, “after-the-fact” parental involvement through subsequent IEP team meetings (at which IEP is simply presented to parents without substantive discussion) is not sufficient to cure FAPE violation

Tip #3: Adherence to Stated Meeting Times



- District members of IEP team should honor meeting times listed in meeting notice sent to parents
- If team believes meeting will extend beyond scheduled time, it should give parents option of rescheduling meeting for later date

Tip #4: Non-Responsive Parents



- Parents might not always remember to notify district about changes in their contact information
- So when parent does not respond to communications about scheduling IEP team meetings, search for updated information, attempt other methods of communication and keep detailed records of all such attempts

Tip #5: Holding Meeting Without Parents



- Only when necessary to ensure student receives FAPE
- Comply with legal requirements to document efforts to persuade parents to attend
 - Copies of all written communication (emails and letters, with responses)
 - Phone logs of calls and voice mails
 - Date and time of visits to home/work
- Send copy of any IEP developed without parents
- Reconvene IEP team when parents are available

Tip #6: Proper Notice



- When district convenes IEP team meeting to discuss possible changes to student's program, it must notify parents of reason for meeting
- Failure to provide proper (or timely) notice is IDEA procedural violation that could entitle parents to relief for denial of FAPE

Conclusion and Take Aways . . .



- Make reasonable determination of which course of action promotes purposes of IDEA and is least likely to result in denial of FAPE
- Keep in mind Doug C.'s strong emphasis on ensuring parental participation at expense of meeting legal deadlines
- Develop ongoing and collaborative relationship with parents
- Emphasize meaningful parental participation as standard for IEP team meetings and entire IEP development process

Information in this presentation, included but not limited to PowerPoint handouts and the presenters' comments, is summary only and not legal advice. We advise you to consult with legal counsel to determine how this information may apply to your specific facts and circumstances.



BUSINESS & FACILITIES
CHARTER SCHOOLS
eMATTERS
GOVERNANCE & LEADERSHIP
HIGHER EDUCATION
LABOR & EMPLOYMENT
LITIGATION
STUDENT SERVICES & SPECIAL EDUCATION

F3Law.com

Fresno

Los Angeles

Oakland

Inland Empire

Sacramento

San Diego



F3 Law

Legal Update

Legal Update Overview



- New OAH Decisions
- Noteworthy Decisions from Courts
- Latest Federal Guidance
- Breaking COVID-19 Legal News and Other Developments



New OAH Decisions

Assessments

Soledad Unified School District



Facts:

- 13-year-old Student with SLD and SLI was due for triennial in December 2019; Parents signed assessment plan
- District completed some parts of assessment, but Parent would not make Student available for social-emotional and cognitive assessments
- District believed these two assessment were essential after learning Student had been diagnosed with anxiety and PTSD
- Parent claimed she was waiving triennial assessments of Student because of COVID-19 pandemic and related public health emergency

Assessments

Soledad Unified School District



Decision:

- District was entitled to assess Student in areas of social-emotional and cognitive, according to its January 2020 assessment plan, without Parent's consent and without limitations or conditions
 - District met all procedural requirements; assessments were necessary; and Parent understood (and signed) assessment plan
 - School psychologist offered to conduct assessments outside and wear personal protective equipment
- Parent did not have legal right to waive Student's triennial assessments due to COVID-19 pandemic and perceived related health concerns

(Soledad Unified School Dist. v. Student (OAH 2021) Case No. 2021030990, 121 LRP 26260)

Assessments



Why Does This Case Matter to Us?

- USDOE has not waived requirements for districts, based on COVID-19, to conduct full and individual initial evaluations for student suspected of having a disability
- Nor has USDOE waived requirements relating to triennial assessments
- USDOE has encouraged districts to work with parents to reach mutually agreeable extensions of time, as appropriate, if district or parent believes additional time is needed

([COVID-19 Questions & Answers: Implementation of IDEA Part B Provision of Services](#) (OSEP 2020) 77 IDELR 138; California Department of Education, [Special Education Guidance for COVID-19](#), September 30, 2020)

Distance Learning

Pleasant Valley School District



Facts:

- 6-year-old Student eligible as OHI
- District's IEP offered 224 minutes daily SAI, and push-in OT for 100 minutes monthly
- IEP did not specify that services would be in-person
- District began 2020-2021 year in distance learning
- Distance learning plan offered Student 830 minutes per week of SAI, 40 minutes per week of OT, and 120 minutes per month of counseling
 - Shortfalls in instructional time were made up in asynchronous time through Google Classroom, SeeSaw online learning platform, or usage of material sent home by teacher

Distance Learning

Pleasant Valley School District



Decision:

- Parent was unable to demonstrate that District materially failed to implement Student's IEP
- District delivered distance learning SAI, educationally related social-emotional services, and OT services to Student that “closely approximated” Student’s in-person services
- No indication that District had reason to believe Student could not access his education through distance learning in order to make reasonable progress on his goals
- No evidence that Student regressed in any area

(Student v. Pleasant Valley School Dist. (OAH 2021) Case No. 2021040386, 121 LRP 32573)

Distance Learning



Why Does This Case Matter to Us?

- Although District prevailed in this case, distance learning litigation continues to yield mixed results
- For example, in Student v. Ventura Unified School District (OAH 2021), ALJ ruled that District denied FAPE by failing to provide in-person instruction during pandemic once it arguably knew (by end of Spring 2020) that Student could not access distance learning, as Parent was required to physically assist and prompt Student during SAI for Student to receive any benefit

IEP Content

Conejo Valley Unified School District



Facts:

- Student was found eligible for special education and related services in December 2020, with primary eligibility category of OHI based on ADHD and secondary eligibility category of ED based on anxiety
- Parents claimed that District denied FAPE by failing to include in December 2020 IEP, a description, individualized for Student, of means by which special education and related services would be provided during emergency conditions when instruction or services could not be provided to Student either at school or in-person for more than 10 school days

IEP Content



Conejo Valley Unified School District

Decision:

- ALJ: District complied with new IEP content requirement
- IEP stated that if instruction or services, or both, could not be provided to Student either at school or in person for more than 10 school days due to emergency conditions, IEP would be provided by means of distance learning to extent feasible, as determined by teachers, in light of emergency circumstances at that time
- No evidence that Student would not have been able to access curriculum using any methods of “distance learning” incorporated into Student’s Emergency Services Plan contained in December 2020 IEP

(Student v. Conejo Valley Unified School Dist. and Conejo Valley Unified School Dist. v. Student (OAH 2021) Case Nos. 2021020362 and 2021030817, 121 LRP 32565)

Why Does This Case Matter to Us?

- Description of means by which IEP services will be provided under emergency conditions pursuant to Education Code, section 56345, subdivision (a)(9)(A) is element of overall offer of FAPE
(California Department of Education, [Special Education Guidance for COVID-19](#) (September 30, 2020))
- Parents must be involved in the development of emergency plan, and local educational agencies must obtain parental consent to implement such plan (Id.)

IEP Team Members

Ventura Unified School District



Facts:

- Student was diagnosed with refractory epilepsy and had intractable seizures (i.e., not controlled by medication)
- Parent asked District to invite 1:1 nurse assigned by District to Student's IEP team meeting
- Instead, District decided that credentialed school nurse, who oversaw and directed 1:1 nurse, would attend
- Parent contended that 1:1 nurse was required IEP team member because she provided Student's "most important" related service, and because Parent requested her attendance

IEP Team Members

Ventura Unified School District



Decision:

- ALJ agreed with District's assertions that 1:1 nurse was not special education or related service provider; it was not required to compel her attendance; and it did not prohibit her attendance (rather, she had declined invitation to attend)
 - "[District] exercised its right to determine the specific personnel to fill the required roles on Student's IEP team"
 - "Parents have the right to invite district personnel with knowledge or expertise regarding the child, but they are not required to attend"

(Student v. Ventura Unified School Dist. (OAH 2021) Case No. 2021010613, 121 LRP 26245)

IEP Team Members



Why Does This Case Matter to Us?

- IDEA does not expressly require districts to make a specific employee available for IEP team meetings at parent's request
- OSEP has indicated that in absence of federal regulations, determination of whether districts must ensure attendance of one of its employees when invited by parent may be covered by state and local policy
- California has not regulated issue of whether district must ensure that a specific district employee, invited by parent, attend IEP team meetings

IEEs

Long Beach Unified School District



Facts:

- Parent of 9-year-old Student with autism, SLD and SLI requested independent vision therapy assessment after disagreeing with District's conclusions about Student's vision
- District agreed to fund IEE, consistent with SELPA criteria of \$300-\$500 for visual acuity and perception and \$300-\$500 for visual processing
 - District provided Parent with name of assessor and advised that Parent could choose another assessor provided such assessor met SELPA criteria
- Parent selected assessor who would charge between \$1400 and \$1800
- District did not fund assessment, nor did it file for due process hearing

IEEs

Long Beach Unified School District



Decision:

- District appropriately relied on SELPA cost criteria, which was reasonable and did not effectively prevent Parent from obtaining independent assessment
- But ALJ rejected District's argument that it was under no obligation to file for due process hearing to demonstrate appropriateness of its assessment because it had agreed to fund vision assessment consistent with SELPA criteria
 - ALJ ordered District to fund vision therapy assessment by assessor of Parent's choice who would meet District's established cost criteria

(Student v. Long Beach Unified School Dist. (OAH 2021) Case No. 2021020305, 121 LRP 26254)

Why Does This Case Matter to Us?

- ALJ specifically pointed to OSEP guidance in Letter to Parker (OSEP 2004), in which OSEP stated that if parent elects independent evaluator not on district's list of evaluators, and district believes evaluator does not meet its criteria (or if there is no justification for selecting evaluator not meeting such criteria), district may file for due process rather than pay for the independent evaluation
- ALJ: "The guidance did not recommend that a public agency merely offer an evaluation and do nothing more."

Parent Participation

San Diego Unified School District



Facts:

- District and Parents agreed that 21-year-old with autism required residential placement
- Student was scheduled to be released from current RTC on 22nd birthday (March 2021)
- Student was entitled to services through June 2021
- Parents proposed using their townhome as RTC, with District providing educational services
- District documented Parents' proposal but did not discuss it at IEP team meeting, instead offered to provide services at local school

Parent Participation

San Diego Unified School District



Decision:

- ALJ: District's conduct at IEP meeting violated IDEA
- Parents were entitled to information as to why District would not consider their RTC in-home proposal, even if it "may not ultimately have been workable, sustainable, or even legal"
- "Recording and ignoring Parents' proposals and questions does not meet the standard that parents are to meaningfully participate and have a significant role in an IEP team meeting"

(Student v. San Diego Unified School Dist. (OAH 2021) Case No. 2021030159, 121 LRP 26256)

Parent Participation



Why Does This Case Matter to Us?

- As ALJ in this case pointed out, parents, like districts, may approach IEP team meetings with ideas in mind—predetermination is not synonymous with preparation
- Parental participation guaranteed by IDEA requires districts to engage in open discussion of student’s educational program and show willingness to discuss options proffered by parents at team meeting



Noteworthy Decisions from the Courts

Compensatory Education

McLaughlan v. Torrance Unified School District



Facts:

- Student had neuro-genetic disorder (Angelman's syndrome), which caused severe intellectual disability, speech impediment and other impairments
- Student's IEP called for group setting, but because he would become overstimulated, he spent most of day in individual classroom
- Although individual classroom "was likely a better fit for Student," ALJ and District Court determined that District's failure to implement IEPs, as written, was substantive IDEA violation
- Parents sought comp ed for 1530 hours of SAI

Compensatory Education

McLaughlan v. Torrance Unified School District



Decision:

- District Court found no comp ed was required
- Although IEPs should have been revised to indicate use of individual classroom, it “remains unclear to the Court how exactly Student suffered educational harm by the District's failure to implement the IEPs as written”
- Student would not have been able to tolerate 314 minutes per day in group setting, and District worked with Student to include him in group learning to extent he could do so

(McLaughlan v. Torrance Unified School Dist. (C.D. Cal. 2021) 79 IDELR 75)

Compensatory Education



Why Does This Case Matter to Us?

- Compensatory education has gained more relevance with prospect of numerous claims arising from distance learning during COVID-19
- While compensatory education is not expressly identified in IDEA, courts have awarded it in appropriate circumstances as equitable remedy by exercising their authority to “grant such relief as the court determines appropriate”
- 9th Circuit has held that student with disabilities is entitled to only so much compensatory education time as is required to provide student with appropriate education (Parents of Student W. v. Puyallup Sch. Dist. No.3, (9th Cir. 1994) 31 F.3d 1489, 21 IDELR 723)

Discrimination/Bullying



Csutoras v. Paradise High School/Paradise Unified School District

Facts:

- Student with ADD received academic accommodations under Section 504, but plan did not contain any social interaction accommodations
- Student was assaulted at football game
- Assaulting student admitted that assault was motivated by Student's relationship with another student
- Student claimed ADA and Section 504 violation based on USDOE directives in Dear Colleague Letters related to peer-on-peer harassment/bullying on basis of disability

Discrimination/Bullying

Csutoras v. Paradise High School/Paradise Unified School District



Decision:

- District Court and 9th Circuit rejected Student's claim
- Court applied precedential "deliberate indifference" standard (where "the school's response to the harassment or lack thereof was clearly unreasonable in light of the known circumstances")
- District was not on notice of any "obvious" need for social-related accommodation, there had been no prior incidents of bullying/harassment directed at Student, and no allegations that District ignored any widespread bullying or harassment of disabled students

(Csutoras v. Paradise High School/Paradise Unified School Dist. (9th Cir. 2021) 121 LRP 30999)

Discrimination/Bullying



Why Does This Case Matter to Us?

- Courts generally do not accept guidance issued from USDOE as binding authority; instead, they are bound to apply prior judicial precedent
- Here, 9th Circuit found no evidence that Dear Colleague Letters addressing bullying were issued as authoritative or official position of USDOE for purposes of private damages actions
 - “And the Letters are chock-full of vague and aspirational words—encouraging schools to ‘consider’ some of the recommendations they ‘can’ implement--that confirm the non-binding nature of their suggestions and undercut [Student’s] argument that they were meant to provide any binding regulatory standard for private enforcement.”

Offer of FAPE



William S. Hart School District v. Antillon

Facts:

- 16-year-old Student with autism began exhibiting maladaptive behaviors after an alleged sexual assault at school, eventually leading to suicidal ideation and hospitalization
- Diagnostic Center recommended change in eligibility because Student's assessment demonstrated "intellectual functioning failing"
- District convened IEP team meeting to discuss recommendation and offered to work with Parents to locate appropriate NPS placement
- District offered two possible NPS placements, but Parents subsequently enrolled Student in parochial school

Offer of FAPE



William S. Hart School District v. Antillon

Decision:

- District Court upheld ALJ's ruling that District was required to make clear written offer of single identifiable NPS placement and that its failure to do so was denial of FAPE
 - "[E]ven where parents have made clear their intention to refuse the offer, a district is still required to make a clear written offer"
 - Court concluded that "one specific program or school" must be offered to constitute a clear written offer
- Court also rejected District's contention that reimbursement for "noncertified parochial school" was improper or unconstitutional

(William S. Hart School District v. Antillon (C.D. Cal. 2021) 79 IDELR 73)

Offer of FAPE



Why Does This Case Matter to Us?

- Although it is acceptable for district to initially suggest several placements for parents to discuss and consider, “the school district must take the final step and clearly identify an appropriate placement from the range of possibilities” and “use its expertise to decide which program was best suited for [student]’s unique needs.”
(Glendale Unified School Dist. v. Almasi (C.D. Cal. 2000) 122 F. Supp. 2d 1093)

Private School Students



Capistrano Unified School District v. S.W. and C.W.

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 the rest of first grade and for second grade
- They 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

Private School Students

Capistrano Unified School District v. S.W. and C.W.



Decision:

- 9th Circuit concluded District was not required to develop IEP while Student was in private school
- Court 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 District v. S.W. and C.W. (9th Cir. 2021) 121 LRP 42964)

Private School Students



Why Does This Case Matter to Us?

- 9th Circuit 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
- Nonetheless, court stated that district still needs to prepare IEP if parents ask, so districts should be on high alert to monitor correspondence from parents of private school students



Latest Federal Guidance

Child Find



Return to School Roadmap

- Districts may need to reconsider policies that rely heavily on teachers' personal observations of students and expand scope of child find activities to increase public awareness of pandemic's effect on student's academic, behavioral, social-emotional, and mental health needs
- If virtual instruction limits teacher contact/interaction, districts should reexamine effectiveness of existing child find policies
- Levels of student performance primarily attributable to limited instruction do not mean student requires special education and related services under IDEA

(Return to School Roadmap: Child Find under Part B of the IDEA (OSERS 2021) 121 LRP 29378)

COVID-19



Letter to Special Ed and Early Intervention Partners

- OSERS/OSEP expressed expectation that all LEAs will provide every student with opportunity for full-time, in-person learning for 2021-2022
- SEAs and LEAs should put in place layered prevention strategies including promoting vaccination and universal and correct mask-wearing in schools
- SEAs and LEAs should focus efforts on:
 - Mitigating and addressing impact of service disruptions on children's progress, with emphasis on children who have been most impacted by the pandemic
 - Ensure full implementation of IDEA during the 2021-2022 school year

(Letter to Special Education and Early Intervention Partners (OSERS/OSEP 2021) 121 LRP 29376)

English Learners



Letter to Boals

- IEP team must consider individualized needs of each EL student in determining appropriate services and whether IEP needs to include language development goals
- IEP team should include personnel with experience in student's language needs, such as speech language pathologists and individuals with expertise in speech language acquisition
- Districts and schools should provide teachers with continual, up-to-date training on the best way to serve ELs with disabilities, including cross-disciplinary professional development, team teaching, and/or collaboration on lesson development

(Letter to Boals (OSEP 2021) 121 LRP 38490)

IEPs



Return to School Roadmap

- IEP teams should develop “contingency plans” if circumstances again require change from in-person learning
- Districts may continue to hold IEP team meetings virtually after school buildings reopen if parent agrees or if continued COVID-19 prevention practices necessitate
- IEP teams must make individualized decisions concerning whether, and to what extent, compensatory services may be necessary to mitigate impact of pandemic on student’s receipt of FAPE
 - Involve student’s previous teachers and service providers

(Return to School Roadmap: Development and Implementation of IEPs in the LRE under the IDEA (OSERS/OSEP 2021) 121 LRP 33345)

IEP Distribution



Letter to Frumkin

- OSERS rejected request by parent to amend IDEA regulation so that it would require dissemination of IEPs to teachers and service providers before first day of school
- Current regulation requiring distribution of newly developed or revised IEPs within “reasonable time” is sufficient
 - IDEA provides sufficient protections and flexibility to account for variety of timeframes during which IEP may be developed or updated
 - IDEA regulations provide for basic floor of protections, but certain aspects of implementation are better addressed by state and local education authorities

(Letter to Frumkin (OSERS 2021) 121 LRP 32641)

Information in this presentation, included but not limited to PowerPoint handouts and the presenters' comments, is summary only and not legal advice. We advise you to consult with legal counsel to determine how this information may apply to your specific facts and circumstances.



Breaking COVID-19 Legal News and Other Developments

SB 328 – “Late Start” Law



- Effective for 2022-2023 school year
- Law requires middle schools to begin no earlier than 8 a.m. and high schools to start regular classes after 8:30 a.m.
- SB 328 exempts rural districts because of bus scheduling challenges
- Also excludes “zero periods,” which are optional courses offered by some schools before regular school day begins that do not generate ADA

SB 328 – “Late Start” Law



■ Practical Pointers for IEP Teams

- Make sure there is sufficient time to provide service hours described in IEP
- Convene meetings to discuss and head off any potential problem issues before they arise

E.E. v. State of California



■ November 2021:

- Based on evidence that several students with disabilities had been excluded from independent study, District Court held that parents were likely to prevail on Section 504 and ADA claims against state

■ February 2022:

- District Court granted preliminary injunction to ensure districts make virtual learning options available

■ March 2022:

- 9th Circuit granted stay of District Court's preliminary injunction pending appeal
- **Court placed appeal on calendar for June 2022**

Pending Legislation



■ SB 1016:

- Would require State Board of Education to include “fetal alcohol spectrum disorder” in the regulatory definition of “other health impairment” for the purpose of special education eligibility

■ AB 1868:

- Would require school districts, county offices of education and charter schools to include additional data in LCAP regarding English Language Learners at risk of becoming long-term ELs
- Requires Department of Education to annually post on its website data of English language acquisition status and disability

Pending Legislation



■ AB 2121:

- Would require CA Collaborative for Education Excellence (CCEE) to select partnership to provide technical assistance on family support for families of students with disabilities and conflict prevention and alternative dispute resolution in special education

■ AB 2427:

- Lowers the postsecondary transition planning for students with disabilities from 16 to 14 years of age

Information in this presentation, included but not limited to PowerPoint handouts and the presenters' comments, is summary only and not legal advice. We advise you to consult with legal counsel to determine how this information may apply to your specific facts and circumstances.



F3 Law

**Thank you for
attending!**

**And thank you
for all you do for
students!!**



BUSINESS & FACILITIES
CHARTER SCHOOLS
eMATTERS
GOVERNANCE & LEADERSHIP
HIGHER EDUCATION
LABOR & EMPLOYMENT
LITIGATION
STUDENT SERVICES & SPECIAL EDUCATION

F3Law.com

Fresno

Los Angeles

Oakland

Inland Empire

Sacramento

San Diego