



F3 Law

Legal Update

Legal Update Overview



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



New OAH Decisions

Assessments

Chino Valley Unified School District



Facts:

- In July 2020, District developed assessment plan for Student with autism
 - District found reassessments were warranted due to Student's absence from school during 2019-2020 and reports by Parents that Student's pica and elopement behaviors jeopardized her safety
- Parents refused to make Student available for in-person assessments due to concerns over Student's safety and requested virtual assessment
 - Parents later agreed to in-person assessment, but imposed various conditions
- District filed for due process hearing to allow assessment under its terms

Assessments

Chino Valley Unified School District



Decision:

- District demonstrated that Student could be safely assessed in person during pandemic with current safety measures and protocols in place
- District witnesses credibly explained that in-person assessments of Student were necessary and that conducting certain parts of assessments virtually would invalidate them
- Conditions imposed by Parents raised “insurmountable barriers”

(Student v. Chino Valley School Dist. and Chino Valley Unified School Dist. v. Student (OAH 2021) Case Nos. 2020060369, 2020100601)

Assessments



Why Does This Case Matter to Us?

- In many instances, including in this case, many types of assessment can only be performed accurately if student is present in person
- Provided statutory requirements for assessments and reassessments are satisfied, parents may not put conditions on those assessments, such as objecting to manner of testing and location at which tests are performed
- Decisions have held that a parent who insists on placing conditions on assessments may be regarded as having refused consent

Distance Learning

Long Beach Unified School District



Facts:

- Beginning in March 2020, seventh-grader with autism received virtual instruction in his SDC and virtual instruction in two general education classes
- Student did not receive 1:1 aide as called for by his IEP from March until May 2020
- Parents claimed Student had connectivity issues with Chromebook
- Parents also contended Student did not have access to AT (C-Pen Reader and Bookshare program) until September 2020

Distance Learning

Long Beach Unified School District



Decision:

- ALJ determined:
 - District denied Student FAPE for 39 days when he was without aide
 - Overall, Student made progress during distance learning
 - Teacher provided credible testimony that Chromebook connectivity issues were minor
 - Lack of C-Pen did not impede Student's access to his education
 - Lack of access to Bookshare was not material failure

(Student v. Long Beach Unified School Dist. (OAH 2021) Case No. 2020090441)

Distance Learning



Why Does This Case Matter to Us?

- This is only one example of numerous FAPE disputes over distance learning during COVID-19 that are being decided at due process hearings—with mixed results for districts
 - Orcutt Union School Dist. (OAH 2021) [District failed to tailor Student's program to his unique needs during distance learning and expected Parent to provide one-on-one behavioral supports]
 - Corona-Norco Unified School Dist. (OAH 2021) [District was required only to do its best to implement Student's IEP remotely and did not have to match one-on-one services in-person, but denied FAPE by failing to make up services that were missed as result of initial shutdown]

Eligibility

Lompoc Unified School District



Facts:

- High school student had numerous suspensions for tardiness, truancy, fighting and smoking marijuana
- Grades plummeted and Student became a runaway
 - Told school resource officer that she ran away due to home conflicts
- Occasionally returned to school but was described as “known wanderer” who did not like going to class
- Parent and private psychologist believed Student met ED criteria and required residential placement

Eligibility

Lompoc Unified School District



Decision:

- Parents did not prove Student's reported behaviors met criteria for ED
- ALJ found numerous deficiencies in private psychologist's assessment
 - Assessment did not focus on relationship between diagnoses and educational needs
 - Recommendation for therapeutic residential placement was based largely on Student's homelessness, drug use and need for safe place to live
- District staff credibly testified that Student's attendance, behavior and personal relationships while at school did not raise concerns; bad grades were result of poor attendance and drug use

(Student v. Lompoc Unified School Dist. (OAH 2021) Case No. 2021030255)

Eligibility



Why Does This Case Matter to Us?

- This case illustrates several classic mistakes that often undermine credibility of independent assessments in eligibility disputes that may, combined with credible testimony from district staff, result in successful outcome for district in due process hearing
 - Failure to administer multiple comprehensive educationally related assessment tools
 - Failure to obtain input from school staff
 - Failure to observe student in classroom setting
 - Failure to apply IDEA eligibility criteria in assessment report
 - Improper reliance on DSM-V

FBA and IEEs

San Jose Unified School District



Facts:

- Parent requested District to 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
- Parent disagreed with draft FBA, which identified only one area of concern
- After revisions to FBA did not address Parent's concerns, Parent requested independent FBA; District denied request and filed for due process hearing

FBA's and IEEs

San Jose Unified School District



Decision:

- ALJ: 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"
- ALJ ordered District to fund independent FBA
- But no denial of FAPE

(Student v. San Jose Unified School Dist. and San Jose Unified School Dist. v. Student (OAH 2021) Case Nos. 2020090906, 2020060078)

FBA and IEEs



Why Does This Case Matter to Us?

- Prior to reaching decision concerning adequacy of District's FBA, ALJ explicitly rejected District's contention that FBAs are not "evaluations" under IDEA for which parents may seek IEEs at public expense
- ALJ found District's reliance on D.S. v. Trumbull Board of Education (2d Cir. 2020) was "misplaced" and stated that D.S. conflicted with numerous OSEP guidance letters and text of IDEA statute

Interim IEPs/Preschoolers

Charter Oak Unified School District



Facts:

- Child with autism received services, including ABA, pursuant to IFSP
- District received written notice from regional center that Student was potentially eligible for preschool special education services
- District determined it could not complete assessments by time of Student's third birthday in June due to COVID-19 restrictions
- Despite offering to develop interim IEP, District did not do so and Student received no services from June until September, when Student began distance learning

Interim IEPs/Preschoolers

Charter Oak Unified School District



Decision:

- Failure to develop interim IEP denied FAPE
- ALJ rejected District's argument that it was not required to develop IEP by Student's third birthday because COVID-19 prevented assessment
- "[F]rom June 24, 2020, through September 11, 2020, Student did not receive any offer of services, much less one comparable to that contained in his IFSP. An offer to make an offer is insufficient."
- ALJ awarded compensatory ABA services

(Student v. Charter Oak Unified School Dist. (OAH 2021) Case No. 2020100198)

Interim IEPs/Preschoolers



Why Does This Case Matter to Us?

- Districts have legal obligation to ensure that an IEP is developed for each eligible child by their third birthday
 - Here, COVID-19 barriers to in-person assessment did not excuse obligation to complete initial assessment and have an IEP in place by the third birthday
- ALJ's finding that District should have offered Student interim IEP comparable to IFSP is likely limited to these specific circumstances
 - Pandemic
 - Failure to complete initial assessment on time
 - Failure to develop IEP by Student's third birthday
 - Failure to follow through with statement that it would develop interim offer

Offer of FAPE

Rocklin Unified School District



Facts:

- Medically fragile and immunocompromised 10-year-old Student had been participating in distance learning
- In June 2020, District announced “Virtual Campus,” which would operate through 2020-2021 school year regardless of school reopening
- District reopened schools for in-person instruction in September 2020
- October IEP team meeting resulted in IEP that offered Student FAPE in “Regular Classroom/Public Day School,” but meeting notes described “Virtual Campus” as option for students with medical issues or at-risk status

Offer of FAPE

Rocklin Unified School District



Decision:

- ALJ: Evidence established that District offered two contradictory placements
 - IEP offered two different placements in separate sections of document
- Parent reasonably believed Student would be placed in Virtual Campus after expressing concern about in-person learning due to medical issues
- Evidence showed that District made verbal offer of Virtual Campus, which was consistent with IEP notes; staff provided varying opinions, which indicated lack of understanding of placement offer
- Parent was not able to view IEP document during on-line meeting

(Rocklin Unified School Dist. v. Student (OAH 2021) Case No. 2020120137)

Offer of FAPE



Why Does This Case Matter to Us?

- As this case demonstrates, despite unique circumstances imposed on districts due to COVID-19, every IEP must continue to set forth one formal, specific written offer of placement
- ALJ cited Union v. Smith (9th Cir. 1994)
 - Requirement of clear, written offer “should be enforced rigorously” as it creates record to help eliminate factual disputes



Noteworthy Decisions from the Courts

Child Find

A.P. v. Pasadena Unified School District



Facts:

- Shortly after Student with anxiety and depression enrolled in District, private psychologists shared diagnosis with Section 504 team
- During following three months (September through December 2017), Student was absent 28 times, resulting in warnings (truancy, tardiness)
- Student attempted suicide in January 2018, after which District proposed initial assessment
- After agreeing to assessment, Parents privately placed Student
- District found Student eligible for special education in April 2018

Child Find

A.P. v. Pasadena Unified School District

Decision:

- District Court reversed ALJ, determining District violated child find by failing to assess Student between September and December 2018
- District had knowledge of possible ED following Section 504 meeting, despite Student's initially good grades and attendance
- Disability had "severe and profound" impact on ability to attend school
- ALJ erred by ruling that District was entitled to wait for reasonable period after implementing Section 504 plan to see whether it worked

(A.P. v. Pasadena Unified School Dist. (C.D. Cal. 2021) 78 IDELR 139)

Child Find



Why Does This Case Matter to Us?

- This case instructs that, when deciding not to refer student for eligibility assessment, districts cannot rely solely on excellent grades, especially when “gifted” students have disabilities
- Districts must apply child find principles of identifying, locating and evaluating students for special education or related services to high-performing students just as they would for any other student
- Also, it is important to remember that Section 504 accommodations cannot supplant district’s obligations under IDEA

Exiting Students

J.D. v. East Union High School District



Facts:

- Student was eligible at age 4 under SLD category due to speech impairment
- When Student returned to District at age 16, he received all A's
- Speech support reduced to 30 minutes per month, with no specialized academic instruction (although he still received some accommodations)
- District triennial assessments indicated he was not eligible and District sought to exit Student from special education
- ALJ agreed with District and Parent appealed

Exiting Students

J.D. v. East Union High School District



Decision:

- District Court affirmed ALJ's decision, rejecting Parent's claim that IEP team did not consider that the IEP accommodations allowed Student to succeed in class
- Evidence indicated IEP team took all such accommodations into account when making its decision to recommend exiting Student
- Teachers testified that accommodation Parent mentioned specifically—ability to retake tests—was offered to all students

(J.D. v. East Side Union High School Dist. (N.D. Cal. 2021) 78 IDELR 35)

Exiting Students



Why Does This Case Matter to Us?

- When deciding whether student no longer requires special education and related services, IEP teams should consider beneficial effect of student's current services on classroom performance
- Teams should collect data in all settings and subject areas where accommodations are provided
- Ask: "Does data support speculation that student is capable of making educational progress without accommodations?"

IEEs

L.C. v. Alta Loma School District

Facts:

- August 10, 2017: District agreed to fund vision therapy IEE for Student
- District informed Parents that assessor did not meet cost criteria identified in its IEE policy, and repeatedly provided Parents with opportunity to petition District to allow exception
- December 5, 2017: District filed for due process hearing after being informed by advocate that parties were at impasse
- ALJ found no unnecessary delay, but District Court reversed, finding that District should have advised Parents as to amount of excess cost

IEEs

L.C. v. Alta Loma School District



Decision:

- 9th Circuit: No legal basis for District Court's decision
- Ongoing communication existed between parties from August until December
- Longest delay in communication was during Thanksgiving break
- Impasse reached on November 30; District filed only 5 days later
- No legal authority obligating District to identify any particular information concerning amount of excess cost

(L.C. v. Alta Loma School Dist. (9th Cir. 2021, unpublished) 78 IDELR 271)

IEEs



Why Does This Case Matter to Us?

- When parent requests IEE at public expense, district must—without unnecessary delay—either file due process complaint or fund IEE
- Here, 9th Circuit noted that what constitutes “unnecessary delay” is fact-specific inquiry
 - “For example, when parties ‘continued to discuss provision of an IEE,’ there was no unnecessary delay in the school district waiting to file for a due process hearing until the parties reached ‘a final impasse.’ When a school district’s delay is ‘unexplained,’ however, that weighs in favor of finding unnecessary delay.”

Manifestation Determinations

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

Manifestation Determinations

N.F. v. Antioch Unified School District

Decision:

- ALJ and District Court both rejected Parents' claim that District improperly held MD meeting 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)

Manifestation Determinations

Why Does This Case Matter to Us?

- Districts should always try to secure parental presence and participation at manifestation determination meeting; but they also have IDEA responsibility to hold meeting within 10 days of student's removal from his or her educational placement for disciplinary reasons
- What about 9th Circuit's decision in Doug C. (parent participation trumps meeting deadlines)? Will other courts/ALJs apply Doug C. principles to MD reviews?
- 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



Latest Federal Guidance

Adaptive Physical Education



Letter to Tymeson

- IEP team must determine extent to which student can access general PE program available to nondisabled peers, in addition to extent to which physical education is required as specially designed instruction
- IEP team cannot base its determination of amount of specially designed instruction in physical education on availability of qualified staff
- Depending on circumstances, removal of APE from student's IEP might constitute change of placement (i.e., if it substantially or materially alters student's educational program)

(Letter to Tymeson (OSEP 2021) 78 IDELR 260)

COVID-19



Q & A on Civil Rights and School Reopening

- Guidance on Title VI, Title IX, ADA Title II, and Section 504 requirements as they relate to safe reopening of schools
- Districts may prioritize students with disabilities in returning to in-person learning
- Districts must take individualized approach to determine how physical distancing at school might affect provision of services
- OCR plans to provide guidance on compensatory Section 504 services at later time

(Questions and Answers on Civil Rights and School Reopening in the COVID-19 Environment (OCR 2021) 78 IDELR 261)

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



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attending!**

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



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