



F3 Law

Here and Now:

**Key OSEP Letters
and Their Impact
on Special Education**

Background and Introduction



- What is OSEP?
 - OSEP = Office of Special Education Programs
 - Part of executive branch of U.S. Government (U.S. Department of Education) that provides leadership and support for professionals working with children with disabilities through administration of IDEA

Background and Introduction



- What is OSEP? (cont'd)
 - OSEP is supervised by Office of Deputy Secretary of Education through Office of Special Education and Rehabilitative Services (“OSERS”)
 - OSERS and OSEP often issue combined guidance
 - OSERS plays critical role in developing federal regulations and obtaining public comment

Background and Introduction



- OSEP Policy Documents
 - Provide information, guidance and clarification regarding implementation of IDEA through two types of issuances:
 - Policy Letters
 - Provide written guidance on specific IDEA issues, typically in response to questions raised by stakeholders
 - Policy Support Documents
 - Broader written guidance in form of Memoranda, Dear Colleague Letters or Frequently Asked Questions (“FAQ”) documents

Background and Introduction



- Today's session . . .
 - Overview of important and/or controversial OSEP policy letters and documents
 - Organized by topic
 - Illustrated by case examples and practical pointers, where applicable

Behavior and FBAs



- Dear Colleague Letter (OSERS/OSEP 2016)
 - Failure to consider and provide for needed behavioral supports through IEP process is likely denial of FAPE
 - Short-term suspension characterization of “10 free days” is erroneous because supports may be needed to address or improve patterns of behavior that impede learning before, during or after short-term removals
 - OSEP cautioned against overuse of exclusionary discipline

Behavior and FBAs



- Letter to Christiansen (OSEP 2007)
 - FBA qualifies as evaluation or reevaluation (with all accompanying procedural safeguards, including obligation to seek parental consent) if it focuses on educational and behavioral needs of specific student
 - FBA is not evaluation (and parental consent is not required) if it is employed as widespread intervention tool to improve behavior of all students

Behavior and FBAs



- Cases Addressing Letter to Christiansen
 - D.S. v. Trumbull Board of Education (2d Cir. 2020)
 - FBA is “targeted examination” not “comprehensive assessment”
 - Not an “evaluation” for which parent can seek IEE
 - Expressly rejected reasoning in OSEP’s Letter to Christiansen
 - San Jose Unified School Dist. (OAH 2021)
 - ALJ disagreed with 2d Circuit’s rationale
 - Case is discussed in greater detail in Legal Update session

Bullying



- Dear Colleague Letter (OSERS/OSEP 2013)
 - Characterized by aggression where aggressor has more real or perceived power than target, and aggression is repeated (or has potential to be repeated)
 - Physical, verbal or psychological actions inflicting or attempting to inflict discomfort upon another through real or perceived imbalance of power
 - Bullying of student with disability that results in student not receiving “meaningful educational benefit” is denial of FAPE

Bullying: Case Example #1



- Colton Joint Unified School Dist. (OAH 2017)
 - District denied FAPE to kindergartner with autism when IEP team failed to address peer bullying
 - Team was aware of multiple reports and parental concerns
 - Treated complaints as disciplinary matter
 - As result of bullying, Student lost desire to attend school and went from average student to one performing significantly below grade level

Bullying: Case Example #2



- San Diego Unified School Dist. (OAH 2018)
 - Alleged incidents of bullying on water polo team in which Student was slapped and punched
 - ALJ found no need for IEP team to raise issue of bullying under guidelines of Dear Colleague Letter
 - Although there might have been power imbalances among team members, investigation revealed Student was not singled out, that there was no ongoing pattern, or that Student lost educational benefit

Bullying



- Practical Pointers Related to Dear Colleague Letter
 - Follow anti-bullying (and anti-discrimination) policy
 - IEP team should consider taking following steps if student with disability is possible victim of bullying
 - Convene meeting to determine impact of bullying on student's ability to receive FAPE
 - Determine whether additional (or different) services, such as more supervision, are necessary
 - Revisit student's placement to determine if it remains appropriate
 - Ensure that all staff members are aware of any changes to IEP

IEEs



- Letter to Baus (OSEP 2015)
 - If parent disagrees with district assessment because student was not assessed in a particular area, parent has right to request IEE to assess student in that area
 - As with all IEEs, district then must either fund or file
 - Letter to Carroll (OSEP 2016): IDEA does not condition right of parent to request IEE on district's ability to cure defects in its evaluation prior to granting IEE

IEEs



- OAH Cases Addressing Letter to Baus
 - Torrance Unified School Dist. (OAH 2016)
 - Letter to Baus did not expand obligation of districts to fund IEEs in one or more fields beyond those assessed by district
 - Lake Elsinore Unified School Dist. (OAH 2016)
 - “The right to an IEE is not triggered until there is an evaluation by District with which Parents disagree”
 - Note: Case involved request for FBA

IEEs



- OAH Cases Addressing Letter to Baus (cont'd)
 - Capistrano School Dist. (OAH 2017)
 - “[T]he purpose of a publicly funded independent evaluation is to provide the parent with a second opinion that may be weighed against that of the school district's assessor. An evaluation in a different professional field, by assessors with different credentials and licenses and looking at different information, is not a second opinion.”

IEE Criteria



- Letter to Petska (OSEP 2001)
 - Cannot Prohibit Membership in Groups and Associations: Criteria prohibiting IEE examiners from associating with private schools or advocacy groups are unrelated to the examiners' ability to conduct educational evaluation
 - Experience in the Public Schools Unnecessary: Criteria that examiners must have "recent and extensive experience in the public schools" is too narrow

IEE Criteria



- Letter to Petska (OSEP 2001) (cont'd)
 - Licensing Requirements Permitted: District may establish criteria that requires IEE examiner either to hold or be eligible to hold particular license, provided it requires same licensure for their own staff who conduct evaluations
 - Cost Limitations Permitted: If total cost of IEE exceeds district's "maximum allowable costs" criteria and district believes that there is no justification for excess cost, it cannot, in its sole judgment, "determine that it will pay only the maximum allowable cost and no further"

IEE Criteria



- OAH Case Addressing Letter to Petska
 - Alameda Unified School Dist. (OAH 2020)
 - District's assessment of 8-year-old resulted in IEP team's conclusion that she was not eligible for special education
 - Parents sought IEE conducted by licensed clinical psychologist
 - SELPA's criteria required psychoeducational evaluators be either credentialed school psychologists or licensed educational psychologists
 - District rejected IEE request; filed for due process

IEE Criteria



- OAH Case Addressing Letter to Petska (cont'd)
 - Alameda Unified School Dist. (OAH 2020)
 - ALJ found for District
 - District's (SELPA's) criteria was appropriate
 - School/educational psychologist were qualified personnel
 - Policy did not limit Parents' ability to obtain IEE
 - Numerous assessors were available
 - Parents did not demonstrate unique circumstances justifying use of clinical psychologist

IEE Criteria



- Practical Pointers Related to Letter to Petska
 - Ensure all staff assigned responsibility of responding to IEE requests know information they need to provide to parents
 - When responding to IEE requests, provide copy of procedural safeguards and complete IEE policy
 - IEE criteria should be reviewed periodically to ensure that they are still current
 - If no geographic and/or cost criteria are in place, district is limited in its ability to prevent parents from seeking distant and possibly very expensive IEE

IEP Team Composition and Meeting Attendees

- Letter to Clinton (OSEP 2001)
 - Attorneys can attend IEP team meetings as part of team if they “possess knowledge or special expertise”
 - But “[a]n attorney's presence would have the potential for creating an adversarial atmosphere that would not necessarily be in the best interests of the child. Therefore, the attendance of attorneys at IEP team meetings should be strongly discouraged”

Placement and LRE



- Letter to Fisher (OSEP 1994)
 - PWN and IEP meeting required before change in placement
 - Change in location does not always equal change in placement
 - Placement is point along continuum of placement options, while location is physical site where student receives related services, such as classroom
 - However, change in location can result in change in placement if it substantially alters student's educational program

Placement and LRE



- 9th Circuit Case Addressing Letter to Fisher
 - R.M. v. Gilbert Unified School Dist. (9th Cir. 2019, unpublished)
 - Reassigning student with Down syndrome to different school because new school had more intensive special education program that would best meet his educational needs without altering amount of time he spent in general education did not amount to change in placement
 - Change in physical location of student's instruction will not qualify as change in placement if there is no substantial or material change to composition of student's educational program and services

Placement and LRE



- Practical Pointers Related to Letter to Fisher
 - To help better ensure that IEP team decision will be considered change of location and not change of placement, consider following pointers:
 - Be specific when explaining to parents how new location matches up with old one and be ready to provide details about how two classrooms compare should parents challenge reassignment

Placement and LRE



- Practical Pointers Related to Letter to Fisher (cont'd)
 - To help better ensure that IEP team decision will be considered change of location and not change of placement, consider following pointers:
 - Ensure that new location will expose student to typically developing peers to same extent and that he or she will have same opportunities to interact with nondisabled students in terms of quality and amount of time

Placement and LRE



- Practical Pointers Related to Letter to Fisher (cont'd)
 - To help better ensure that IEP team decision will be considered change of location and not change of placement, consider following pointers:
 - Do not rely solely on fact that student will be receiving same amount and type of specialized instruction and related services at new location, but also provide student with same opportunities to participate in nonacademic and extracurricular activities

Placement and LRE



- Letter to Trigg (OSEP 2007)
 - District can place student in particular classroom or school based on availability of special education services
 - “If a child's IEP requires services that are not available at the school closest to the child's home, the child may be placed in another school that can offer the services that are included in the IEP”
 - But district cannot allow such concerns to dictate student’s placement on LRE continuum

Postsecondary Transition



- Letter to Pugh (OSEP 2017)
 - IDEA regulations do not identify postsecondary goals as area in which districts must report progress
 - But OSEP equates academic/functional goals with postsecondary goals
 - Therefore, student's progress in meeting postsecondary goals must be reported

Postsecondary Transition



- Letter to Olex (OSEP 2019)
 - Parental consent under IDEA is not required prior to conducting age-appropriate transition assessment because purpose of such assessment is only to develop appropriate postsecondary IEP goals
 - But consent is required when such assessment will be used to determine whether student has (or continues to have) disability, or nature and extent of special education and related services that student needs
 - Issue remains unsettled in California

Preschool Students



- Dear Colleague Letter (OSEP 2017)
 - Districts must ensure eligible preschoolers receive FAPE in LRE even if they do not operate public preschool programs
 - In these situations, districts must explore alternative methods to ensure that LRE requirements are met for each preschool child with a disability
 - May look to other public agencies; enroll student in private preschool; locate other public preschool programs; or provide home-based services

Revocation of Consent



- Letter to Cox (OSEP 2009)
 - Disagreements between parents who both have right to make educational decisions for student do not affect district's obligation to discontinue services upon receiving written revocation of consent
 - Provided that parent revoking consent has right to do so, district must provide PWN, discontinue services within reasonable time, and treat subsequent evaluation request by either parent as request for an initial evaluation

Revocation of Consent



- Additional Guidance Related to Letter to Cox
 - In Letter to Ward (OSEP 2010), OSEP, while acknowledging that challenges may arise when parents disagree, refused to amend its guidance in Letter to Cox that it only takes one parent to revoke consent -- even if it was other parent who provided original consent
 - There is no limit to number of times parent may revoke consent and then subsequently request reinstatement of special education services (73 Fed. Reg. 73014 (Dec. 1, 2008))

Revocation of Consent



- OAH Case Addressing Letter to Cox
 - Roseville Joint Union High School Dist. (OAH 2017)
 - Divorced Parents agreed that Student needed later start time and independent study to address hypersomnia
 - Believed IEP could not be implemented at school
 - Father revoked consent to special ed; District mailed PWN to Father (but not Mother) and immediately terminated services

Revocation of Consent



- OAH Case Addressing Letter to Cox (cont'd)
 - Roseville Joint Union High School Dist. (OAH 2017)
 - Failure to provide both Parents with legally compliant PWN denied FAPE
 - Immediately ending services did not allow time to resolve confusion about available options
 - Mother testified she would have attempted to reverse revocation had she received PWN

Revocation of Consent



- Practical Pointers Related to Letter to Cox
 - Language and circumstances surrounding any revocation must be examined carefully before determining that revocation applies to all of student's special education rights and protections
 - Provide PWN "promptly" after receipt of written revocation

Revocation of Consent



- Practical Pointers Related to Letter to Cox (cont'd)
 - Provide PWN within “reasonable” time before discontinuing special education services
 - What is “reasonable” depends on various factors, including time needed to respond to parent inquiries about effect of revocation
 - Provide detail in PWN concerning consequences of revocation, specifically that student will no longer receive special education services of any kind and no longer has protections available under special education disciplinary procedures

Virtual Schools



- Dear Colleague Letter (OSERS/OSEP2016)
 - Child find for children in virtual schools presents unique challenges due to minimal face-to-face interaction
 - LRE mandate applies to students with disabilities in virtual schools
 - “The educational rights and protections afforded to children with disabilities and their parents under IDEA must not be diminished or compromised when children with disabilities attend virtual schools...”

Virtual Schools



- Practical Pointers Related to Dear Colleague Letter
 - At time of enrollment in virtual school, be sure to ask parents if student has IEP or Section 504 plan from previous school
 - When student enrolls, staff should request student's records from previous school, and review records carefully to look for diagnoses, previous behavior issues, or attendance problems
 - Explain child find and referral process to virtual school staff so they are aware of their obligations

Virtual Schools



- Practical Pointers Related to Dear Colleague Letter
 - Be proactive and communicate promptly with parents when there are concerns about student and, if necessary, offer to conduct assessment
 - Develop procedures and mechanisms for identifying patterns that indicate student is struggling with specific area of virtual school curriculum
 - Recognize that sudden drop in participation or attendance in online course(s) can be red flag for possible referral

Take Aways . . .



- OSEP's guidance and policy letters have been keystone of special education law for many decades
- All stakeholders in education of students with disabilities can obtain insight into USDOE's official position on particular issues
- In some guidance, OSEP also imparts important practical compliance strategies for educators and IEP teams
- We hope that this session has served to better inform you about OSEP and its pronouncements on various issues of importance

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.



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