



# Dyslexia Updated: Eligibility, Goals and Services

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## 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
- Judicial and OAH Decisions Addressing Issues Related to Dyslexia
  - Child Find and Eligibility
  - Assessments
  - Goals, Methodology and Services

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# Dyslexia: Background and Definition

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## 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))

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## 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))

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## 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"

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## 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 subsequently revised and modified); 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))

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## Definition of Specific Learning Disability (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))

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## 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 student's SLD
- Without such need, student cannot be found eligible

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## 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
  - 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))

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## SLD Eligibility Criteria

- District may also determine SLD eligibility if student:
  - Does not achieve adequately for student's age or to meet State-approved grade-level standards in one or more of several areas that include basic reading skills, reading fluency skills and reading comprehension
  - and**
  - Does not make progress when using RTI process or exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, state-approved grade-level standards, or intellectual development

(Cal. Code Regs., tit. 5, § 3030, subd. (b)(10)(C)(1)-(2))

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## SLD Eligibility Criteria

- Findings must not be primarily result of:
  - Visual, hearing or motor disability
  - Intellectual disability;
  - Emotional disturbance;
  - Cultural factors;
  - Environmental or economic disadvantage; or
  - Limited English proficiency

(Cal. Code Regs., tit. 5, § 3030, subd. (b)(10)(C)(3))

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## 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)(4)-(5))

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## 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”

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## **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 and related services
- If student with dyslexia is found not eligible for special ed, student's instruction "shall be provided in the regular education program"

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## **California Statutes Addressing Dyslexia**

### **Education Code Section 56335 (2015)**

- Required CDE to develop (nonbinding) program guidelines for dyslexia before 2017-2018 school year to be used to "assist regular education teachers, special education teachers, and parents to identify and assess pupils with dyslexia, and to plan, provide, evaluate, and improve educational services to pupils with dyslexia"

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# 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

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# California Statutes Addressing Dyslexia

## Education Code Section 53008 (2023)

- On or before June 30, 2025, LEAs serving students in kindergarten or grades 1 or 2 must adopt one or more screening instruments from list adopted by the State Board of Education to assess students for risk of reading difficulties
- Beginning no later than 2025–26 school year, and annually thereafter, LEA serving students in kindergarten or grades 1 or 2 must assess each student in those grades for risk of reading difficulties using the screening instrument(s) adopted by LEA, unless student’s parent/guardian opts out of screening in writing
- Law does not restrict LEAs from providing additional student screenings or diagnostic evaluations, as appropriate
- Employees administering screening instruments must be appropriately trained

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# California Statutes Addressing Dyslexia

## Education Code Section 53008 (2023) (cont'd)

- Student may be exempted from requirements with the prior written consent of parent/guardian if any of the following criteria are satisfied:
  - Student has current identification or diagnosis of reading difficulty, reading disorder, or other disability
  - Student is eligible for special education and related services pursuant to IDEA or Section 504; or
  - Student is in process of being assessed for eligibility for special education and related services pursuant to IDEA or Section 504, and student is being evaluated with diagnostic assessments that make screening redundant

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# California Statutes Addressing Dyslexia

## Education Code Section 53008 (2023) (cont'd)

- LEA must provide parents/guardians of students eligible for screening with information about screening, including date or dates of screening and instructions for how parents/guardians can opt out of screening on behalf of their child, no later than 15 calendar days before administration of screening
- LEAs are encouraged to provide information about screening pursuant with other back-to-school materials at beginning of school year

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# **California Statutes Addressing Dyslexia**

## **Education Code Section 53008 (2023) (cont'd)**

- Results of screening must be made available to parent/guardian in “a timely manner,” but no more than 45 calendar days from date assessment was administered
- Results must include information about how to interpret results, as well as any applicable next steps
- Results are to be used as flag for potential risk of reading difficulties, not as a diagnosis of a disability
- If student is identified as being at risk of having reading difficulties after being screened, LEA must provide student with supports and services that are appropriate to specific challenges identified by screening instrument and other pertinent information about student

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# **CDE Guidance**

## **California Dyslexia Guidelines (CDE 2017)**

- Created per requirement of Education Code section 56335
- 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 (although often cited by ALJs in due process decisions)
- Look in your materials for website address to download full-text PDF (now expanded to 125 pages)

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## **U.S. Dep't of Educ. Guidance**

### **Dear Colleague Letter (OSEP 2015)**

- OSERS: “[R]egardless of whether a child has dyslexia or any other condition explicitly included in [ ] definition of ‘specific learning disability,’ or has a condition such as dyscalculia or dysgraphia not listed expressly in the definition, the LEA must conduct an evaluation in accordance with 34 C.F.R. §§ 300.304-300.311 to determine whether that child meets the criteria for specific learning disability or any of the other disabilities listed in [the IDEA].”
- Encouraged districts to “consider situations where it would be appropriate to use terms dyslexia, dyscalculia, or dysgraphia to describe and address student’s unique, identified needs through evaluation, eligibility, and IEP documents”

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## **U.S. Dep't of Educ. Guidance**

### **Letter to Unnerstall (OSEP 2016)**

- There is no provision in IDEA granting parent the right to dictate specific areas that district must assess as part of its comprehensive evaluation
- District is only required to assess student in particular areas related to the student’s suspected disability, as it determines appropriate
- If evaluation process reveals that specific assessment for dyslexia is needed to ascertain disability and educational needs, then district must conduct such assessment

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## Judicial and OAH Decisions Addressing Issues Related to Dyslexia

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### **Child Find and Eligibility**

Piedmont Unified School District (OAH 2023)

#### **Facts:**

- District originally found Student eligible for special education under category of SLI in January 2018 due to articulation deficits
- Subsequently, District determined Student no longer required speech services and, with Parent consent, Student exited special education in March 2021
- In September 2022, District found Student eligible for special education under category of SLD
- Parent claimed District should have suspected Student had dyslexia and assessed him for SLD during time he was eligible with “speech only” IEP
- Parent also claimed District violated child find by not assessing Student for SLD while Student was general education student

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## **Child Find and Eligibility**

Piedmont Unified School District (OAH 2023)

### **Decision:**

- ALJ rejected Parent's claims
- While Student was eligible as SLI, neither Parent nor teachers requested SLD assessment; District responded to Parent's concerns by conducting speech and language assessment to determine if any deficits were impacting Student's academic functioning
- After Student was exited from special education, Student's failure to meet two writing standards was not sufficient to trigger District's obligation to assess
- Referral to Tier 2 services did not constitute unreasonable delay in referring Student for special education assessment
- Student Study Team meeting in January 2022 triggered child find, after which District provided Parent with assessment plan

(Student v. Piedmont Unified School Dist. (OAH 2023) Case No. 2023010391, 123 LRP 23769)

## **Child Find and Eligibility**

Huntington Beach City School District (OAH 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 School District (OAH 2017)

### Decision:

- ALJ ruled in favor of Parent and awarded reimbursement for private tutoring for child find violation
- District was aware of Parent's concerns regarding Student's lack of progress during 2013-2014 kindergarten school year
- 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 grade



## Child Find and Eligibility

### Practical Compliance Keys (cont'd)

- 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

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## Assessments

Crofts v. Issaquah School District No. 411 (9th Cir. 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

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## Assessments

Crofts v. Issaquah School District No. 411 (9th Cir. 2022)

### Decision:

- 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)

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## Assessments

Escondido Union School District (OAH 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

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## Assessments

### Escondido Union School District (OAH 2019)

#### Decision:

- 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

### 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 (cont'd)

- 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

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# Goals, Methodology, Services

Las Virgenes Unified School District (OAH 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

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## **Goals, Methodology, Services**

Las Virgenes Unified School District (OAH 2020)

### **Decision:**

- 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**

Los Alamitos Unified School District (OAH 2022)

### **Facts:**

- Settlement agreement between District and Parent of Student with SLD required District to fund NPS placement during 2021-2022 and for District to develop IEP offer for 2022-2023 school year
- District developed proposed IEP in May 2022
- Parents claimed IEP failed to offer Student FAPE because it:
  - Failed to specify type and intensity of instruction by not indicating what subjects would be targeted or size of groups for group instruction
  - Did not provide structured literacy approach
  - Did not identify any specific reading methodology

## Goals, Methodology, Services

Los Alamitos Unified School District (OAH 2022)

### Decision:

- ALJ found for District
  - IEP is not required to include such details as description of size of group, unless required to offer FAPE
  - IEP offered a sufficient amount and frequency of specially designed instruction reasonably calculated to meet Student's literacy needs
  - District followed structured literacy approach consistent with California Dyslexia Guidelines
  - "Specific academic instruction at Student's required level of remediation could only be delivered in a structured, systematic, multisensory manner, which is structured literacy"
  - District did not specify particular methodology on Student's IEP because Student's needs would drive method, and approaches could change based on Student's response

(Student v. Los Alamitos Unified School Dist. (OAH 2022) Case No. 2022070072, 122 LRP 47810)

## Goals, Methodology, Services

Twin Rivers Unified School District (OAH 2024)

### Facts:

- Parent's concerns about lack of effective reading program for Student with dyslexia led Parent to withdraw Student from District, and privately place her at READ Academy, private school students with dyslexia and related learning disorders
- District funded placement for 2022-2023 pursuant to settlement agreement
- District assessed Student in December 2023 and developed IEP in January 2024
- Parent claimed proposed IEP denied FAPE, disputing goals, clarity of FAPE offer and appropriateness of District's offer of specialized reading instruction using READ 180 reading intervention program

## Goals, Methodology, Services

Twin Rivers Unified School District (OAH 2024)

### Decision:

- ALJ rejected Parent's claim that reading comprehension goal was not "appropriately ambitious" because it called for Student to increase only slightly the grade level of her independent reading
  - Comparison of Student's March 2023 and December 2023 assessment results showed Student making little or no progress in her independent reading level, suggesting slight increase in reading level stated in goal was in line with her existing rate of progress
- But ALJ found District's offer of specialized reading instruction using the READ 180 reading intervention program was unclear
  - READ 180 reading intervention program, as described in Student's IEP, was divided equally between that program and math intervention program called MATH 180
  - District was required to include specific description of amount of reading intervention services to be provided

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## Goals, Methodology, Services

Twin Rivers Unified School District (OAH 2024)

### Decision (cont'd):

- ALJ also concluded that READ 180 reading intervention program offered by District was not structured literacy program appropriate for student
  - Parent's expert witness testified that READ 180 can be effective for students with more moderate reading needs; however, for high-risk children like Student, with more severe reading needs, there was no evidence to support its efficacy
  - Parent's expert witness reviewed study of READ 180 and found it was not peer reviewed, tested both gifted and disabled students, and used questionable statistical analysis that measured only positive outcomes, but not negative outcomes
  - District did not rebut Parent's expert witness's opinion that peer-reviewed studies did not support effectiveness of READ 180 to teach high-risk readers like Student

(Student v. Twin Rivers Unified School Dist. and Twin Rivers Unified School Dist. v. Student (OAH 2024)  
Case Nos. 2024040199 and 2024030829, 124 LRP 31100)

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## Goals, Methodology, Services

### Practical Compliance Keys

- Complete and accurate assessments are foundation for “connect the dots” approach, a shorthand phrase often used to refer to the concept that the IEP process is logical and sequential—with each step resting on the adequacy of the prior step.
- Defensible position on IEP goals depends on obtaining accurate information on student’s disability and current level of functioning

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## Goals, Methodology, Services

### Practical Compliance Keys (cont’d)

- Courts have consistently reaffirmed that IEP teams have discretion to choose educational methodologies to address dyslexia (or any other educational need)
  - Such discretion, however, is provided that IEP team considers student’s individual needs and offers program that appropriately addresses those needs (provides FAPE)
  - 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)

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## Conclusion

- 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
- Appropriate and legally compliant child find, assessment and IEP development/implementation processes that recognize what dyslexia is and how it can impact student's educational progress and success are essential
- It is also essential to develop collaborative relationship with parents to help avoid costly litigation

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# The Evolving LRE Standard

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## What We'll Cover . . .

- LRE: Background and Overview
- LRE Legal Standards
- LRE and Ninth Circuit Precedent
- Recent LRE Decisions from Other Circuits
- Case Examples: Recent OAH LRE Decisions

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## LRE: Background and Overview

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### **Some Background . . .**

- Since original 1975 enactment of Public Law 94-142 (predecessor to today's IDEA), the concept of LRE has been one of guiding principles of special education legislation, remains one of the most contentious and litigated sections of IDEA, and has seen numerous interpretations by various courts over past five decades
- In the preamble to IDEA reauthorization in 2004 (Public Law 108-446), Congress noted that “[a]lmost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by having high expectations for such children and ensuring their access to the general education curriculum in the regular classroom, to the maximum extent possible”

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## More Background . . .

- Of course, LRE mandate does not override IDEA's FAPE obligation – often requiring balancing between the two requirements
- Ninth Circuit: “In each case, the apparent tension between the IDEA's clear preference for mainstreaming and its requirements that schools provide individualized programs tailored to the specific needs of each disabled child must be balanced”
- “The IDEA's broad mandate to provide [disabled] children with a free appropriate public education designed to meet the unique needs of each [disabled] child is fairly imprecise in its mechanics. This vagueness reflects Congress' clear intent to leave educational policy making to state and local education officials.”

(Poolaw v. Bishop (9th Cir. 1995) 67 F.3d 830, 23 IDELR 406)

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## LRE Legal Standards

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## FAPE in the LRE

- All students have the right to FAPE
- FAPE for IDEA eligible students with disabilities means:  
Special education and related services that are available to the child at no charge to the parent, meet state standards, include an appropriate school placement, and conform to the student's IEP

(34 C.F.R. § 300.114(a))

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## FAPE in the LRE

- Students eligible for special education must be provided access to specialized instruction and related services which are individually designed to provide educational benefit through an IEP reasonably calculated to enable the student to make progress appropriate in light of the student's circumstances
- Adequacy of the IEP turns on the unique circumstances of the student for whom it was created

(Board of Educ. of Hendrick Hudson Central School Dist. v. Rowley (1982) 458 U.S. 176, 201-204, 553 IDELR 656; Endrew F. v. Douglas County School Dist. RE-1 (2017) 580 U.S. 386, 69 IDELR 174)

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## The LRE Mandate

- Appropriate placement under IDEA's FAPE standard means that “[t]o the **maximum extent appropriate**, students with disabilities should be educated with nondisabled students; and
- . . . special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the **nature or severity of the disability** is such that education in regular classes with the use of supplementary aids and services cannot be achieved **satisfactorily**”

(34 C.F.R. § 300.114(a))

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## Supplementary Aids and Services

“Aids, services, and other supports that are provided in **regular education classes**, other education-related settings, and in extracurricular and nonacademic settings, to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate”

(34 C.F.R. § 300.42)

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## **LRE: Key Legal Elements**

### **Maximum Extent Appropriate**

- Even if not fully included, the student must be educated with nondisabled peers to the maximum extent appropriate

### **Nature or Severity of the Disability**

- Placement not necessarily based on category of disability; LRE varies depending on unique needs of student

### **“Satisfactorily”**

- IEP team must interpret “satisfactorily” in consider whether placement in a general education classroom with supplementary aids and services is appropriate

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## **Continuum of Alternative Placements**

- Each public agency must ensure continuum of alternative placements is available to meet needs of students with disabilities for special education and related services
  - In California, obligation is on SELPAs
- Continuum must make provision for supplementary aids and services to be provided in conjunction with general education class placement

(34 C.F.R. § 300.115; Ed. Code, § 56360)

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## The Continuum

- Instruction in regular classes
- Related services
- Resource Specialist Programs/Learning Centers
- Special day classes/Self contained classes
- Nonpublic schools
- Instruction in the home, hospitals, and institutions

(34 C.F.R. § 300.115; Ed. Code, § 56361)

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## Continuum of Placements

### Full Inclusion

- Placement full-time in a general education classroom with supplementary aids and services

### Mainstreaming/Inclusion

- Primary placement in a more specialized setting;
- Part-time in general education classroom; and
- Academic and/or non-academic services provided to support general education curriculum

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## Modifications to Curriculum

Districts also must ensure children with disabilities are not removed from education in age-appropriate general education classrooms solely because of needed modifications to general curriculum

(34 C.F.R. § 300.116(e); Letter to Wohle (OSEP 2008) 50 IDELR 138)

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## Placement in Neighborhood School

- Unless IEP requires otherwise, students with disabilities should be educated in their neighborhood school
- Courts have consistently held that IDEA creates presumption in favor of neighborhood school, but does not guarantee it
- If IEP services are not available at the home school, student may be placed in another school that can offer services

(34 C.F.R. § 300.116(b)(3),(c); Ed. Code, § 56342, subd. (b); 71 Fed. Reg. 46588 (Aug. 14, 2006))

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## IEP Team Obligations

- IEP team must start by considering least restrictive placement that may be appropriate for a student
- IEP team can place a student in a particular classroom or school based on availability of special education services; however, it cannot allow such concerns to dictate a student's placement on the LRE continuum
- While the IEP team must consider range of placements, nothing in IDEA requires team to consider every possible placement along continuum

(34 C.F.R. § 300.116(b)(3),(c); Ed. Code, § 56342, subd. (b); 71 Fed. Reg. 46588 (Aug. 14, 2006); Student v. William S. Hart Union High School Dist. (OAH 2016) Case No. 2016020807)

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## LRE and Ninth Circuit Precedent

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## Early Decisions from Other Circuits

- Prior to Ninth Circuit's decision in Sacramento City Unified School District v. Rachel H., notable decisions from other circuits established standards for when students could be educated satisfactorily in general education classroom
- First of such decisions, from Sixth Circuit, held that districts generally may not remove a student with disability from general education setting if the student can receive some benefit from that placement
- Six years later, Fifth Circuit set out two-part test for determining school compliance with IDEA's LRE mandate: (1) "whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child;" and, if not, (2) "whether the school has mainstreamed the child to the maximum extent appropriate"

(Roncker v. Walter (6th Cir. 1983) 554 IDELR 381; Daniel R.R. v. State Board of Education (5th Cir. 1989) 441 IDELR 433)

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## Early Decisions from Other Circuits

- In 1993, Third Circuit adopted and refined Daniel R.R. test for whether a student can be "educated satisfactorily" in a general education class with supplementary aids and services.
- Third Circuit's test required consideration of the following factors:
  - Whether district has made reasonable efforts to accommodate student in a regular classroom
  - Educational benefits available to the student in regular class, with appropriate supplementary aids and services, as compared to benefits provided in a special class
  - Possible negative effects, including those a student would have on other students in student's classroom

(Oberti v. Board of Education of the Borough of Clementon School Dist. (3d Cir. 1993) 19 IDELR 908)

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## **Rachel H.: Establishing the Standards**

- Landmark case from Ninth Circuit addressing LRE standards for educating students with disabilities in general education classrooms with their peers is Sacramento City Unified School District v. Rachel H., which set forth a standard that borrowed from both Daniel R.R. and Oberti
- Noting preference by Congress for educating students with disabilities in general education classrooms with their peers, Ninth Circuit established four factors to examine in determining whether a general education setting is appropriate LRE for the student

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## **Sacramento City USD v. Rachel H.** **(9th Cir. 1994)**

### **Facts**

- 11-year-old with intellectual disability
- Parent wanted general education setting
- District proposed SDC placement with mainstreaming
- Parent withdrew Student and placed her in general education private school classroom

72

## **Sacramento City USD v. Rachel H.** **(9th Cir. 1994)**

### **Decision**

- Ninth Circuit court found that Student received substantial educational benefit in general education setting
- Student's goals could be implemented with an aide
- Student built self-confidence and formed friendships with peers
- Student was not a distraction and did not interfere with teacher's ability to teach other students
- District did not offer persuasive evidence regarding supposed higher cost of full inclusion

(*Sacramento City Unified School District v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 20 IDELR 812)

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## **Sacramento City USD v. Rachel H.** **(9th Cir. 1994)**

### **Ninth Circuit's Four-Factor Balancing Test**

- Educational (academic) benefits of placement full-time in general classes
- Non-academic benefits of such placement
- Effect student has on teacher and other children in classroom
- Costs of mainstreaming

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## **Sacramento City USD v. Rachel H.** **(9th Cir. 1994)**

### **Factor 1: Educational (Academic Benefits)**

- Notwithstanding presumption in favor of inclusion, districts generally are not required to place a student with a disability in a general classroom if the student will not receive sufficient educational benefit in that classroom, even with provision of supplementary aids and services

75

## **Sacramento City USD v. Rachel H.** **(9th Cir. 1994)**

### **Factor 2: Non-Academic Benefit)**

- Behavioral models
- Communication models
- Increased self-esteem
- Socialization skills
- Language models
- But: Benefit is more than simply sitting in classroom with nondisabled children

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## **Sacramento City USD v. Rachel H.** **(9th Cir. 1994)**

### **Factor 3: Effect on Teacher and Other Students**

- Distracts other students in class?
- Threatens safety of other students or poses danger to student own safety?
- Engages in significantly disruptive behavior, even with use of behavioral interventions, which interferes with education of classmates?
- Requires so much of teacher's time and attention that student interferes with learning of others in classroom?
- Requires high level of adult support to perform tasks?

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## **Sacramento City USD v. Rachel H.** **(9th Cir. 1994)**

### **Factor 4: Cost**

- Although listed as a factor by the court in Rachel H., cost is not usually identified as a factor in placement decisions
- It is seldom litigated

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## **Poolaw: Applying the Standards**

- Ninth Circuit's decision in Poolaw v. Bishop instructs that a student does not have to fail in a less restrictive environment before moving to more restrictive one; less restrictive environments must always be considered, but they do not always have to be tried
- When less restrictive placement is manifestly inappropriate for a student, need for more restrictive placement trumps purely mechanical approach to IDEA's LRE requirements, moving one step at a time along continuum
- Poolaw also is reminder that the Rachel H. factors are not equal—because districts must provide FAPE (educational benefit); if FAPE cannot be delivered in a particular setting, IEP team need not analyze remaining factors

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## **Poolaw v. Bishop (9th Cir. 1994)**

### **Facts**

- Student was assessed while in District's Head Start program, where assessor recommended residential placement at Arizona School for the Deaf and Blind ("ASDB") because Student's profound hearing loss would preclude effective functioning in school classroom
- Parents moved to Louisiana, then to Idaho, where district's IEP initially placed Student in a general classroom with supports
- Parents returned to Arizona and advised District that they desired a mainstream placement
- District determined that mainstreaming Student would not result in educational benefit and proposed that Student be placed at ASDB

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## **Poolaw v. Bishop (9th Cir. 1994)**

### **Decision**

- 9th Circuit agreed with ALJ and district court, ruling that ASDB was LRE
- District appropriately relied upon records of Student's prior mainstream placement and was not required to implement supplemental services before choosing a more restrictive alternative further along continuum
- 9th Circuit applied Rachel H. test for inclusion
  - Student could not receive any educational benefit from full or partial mainstreaming until he acquired greater communication skills
  - Although Student could receive some limited nonacademic benefit from mainstream placement, at ASDB he could develop increased ability to communicate and his social interaction skills would mature
  - Student's educational concerns outweighed absence of any detrimental impact on others

(Poolaw v. Bishop (9th Cir. 1995) 67 F.3d 830, 23 IDELR 406)

81

## **Other Ninth Circuit Cases: Solorio v. Clovis Unif. Sch. Dist. (2019)**

### **Facts**

- District proposed moving 14-year-old Student with intellectual disability to special day class ("SDC") for 42 percent of the school day, which would include all of her academic instruction
- Proposed change stemmed from District's concern about Student's lack of progress in general academic classes
- When Parent objected to proposed placement change, District filed due process complaint seeking ruling that its IEP offered FAPE to Student
- ALJ and district court found in District's favor

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## **Solorio v. Clovis Unif. Sch. Dist.** **(9th Cir. 2019)**

### **Decision**

- Ninth Circuit affirmed, applying Rachel H. balancing test
- Student was not receiving academic benefit from her general education curriculum; Student could not participate in the general education classes and could not understand texts
- Student was not deriving substantial nonacademic benefit from her presence in general education classes
- Although Student had no behavioral issues, two of three Rachel H. factors weighed against a general education classroom as LRE

(Solorio v. Clovis Unified Sch. Dist. (9th Cir. 2019, unpublished) 748 F.App'x 146, 74 IDELR 2)

83

## **Other Ninth Circuit Cases: R.M. v. Gilbert Unif. Sch. Dist. (2019)**

### **Facts**

- District wanted to increase service minutes provided to kindergarten Student with Down syndrome, who had been attending his home school
- IEP team also proposed implementing IEP at another school in its “Academic SCILLS” program
- District issued PWN stating that Student would be attending the new school with increase of service minutes to 125 per day outside of general education classroom
- Parents filed for due process, claiming proposed IEP was not LRE and that new setting constituted placement change

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## **R.M. v. Gilbert Unif. Sch. Dist.** **(9th Cir. 2019)**

### **Decision**

- ALJ, district court and Ninth Circuit upheld District's FAPE offer
- Student's needs were not being met in general ed classroom, where he was "his own learning island" with his paraprofessional
- "Lack of educational benefit in a general classroom outweighs any comparably small social benefits"
- Ninth Circuit made it clear in this case that four factors in Rachel H. balancing test did not necessarily carry equal weight
- Also, move to new school was change of location, not change of placement because new school could execute Student's IEP as written

(R.M. v. Gilbert Unified Sch. Dist. (9th Cir. 2019, unpublished) 768 F.App'x 720, 74 IDELR 92)

85

## **Redondo Beach: Refining the Standards**

- In its decision in D.R. v. Redondo Beach Unified School District, Ninth Circuit made it clear that courts and ALJs should continue to apply four-factor Rachel H. test for inclusion
- But analyses of first factor (academic benefit) and second factor (nonacademic benefit, i.e., socialization) will be influenced by Ninth Circuit's decision in Redondo Beach, which strongly emphasized progress toward meeting student's IEP goals

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## **D.R. v. Redondo Beach USD** **(9th Cir. 2022)**

### **Facts**

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

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## **D.R. v. Redondo Beach USD** **(9th Cir. 2022)**

### **ALJ and District Court's Decision**

- ALJ and district court determined that District offered FAPE in LRE
- ALJ attributed Student's progress to assistance of his one-to-one aide and specialized instruction he received outside of the general education classroom
- District court noted that Student's academic progress did not appear to stem from his placement in general education setting for 75 percent of each school day
  - "Although Parents' belief that Student would benefit most from full time inclusion in a regular education classroom is clearly sincere, and the Court is sympathetic to their desire to provide their child with the best possible educational and non-academic benefits, the Court concludes that ALJ did not err in concluding that the District provided Student a FAPE in the LRE"

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## **D.R. v. Redondo Beach USD** **(9th Cir. 2022)**

### **Ninth Circuit's Decision**

- 9th Circuit overturned District Court decision
- Case hinged on first factor of Rachel H. test—academic benefits of general classroom placement
- District Court erred by focusing only on Student's grade-level performance in determining that he did not receive sufficient benefit in general education classroom
- Grade-level performance is not appropriate benchmark for all children with disabilities

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## **D.R. v. Redondo Beach USD** **(9th Cir. 2022)**

### **Decision (cont'd)**

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

(D.R. v. Redondo Beach Unif. School Dist. (9th Cir. 2022) 56 F.4th 636, 122 LRP 48314)

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## **D.R. v. Redondo Beach USD** **(9th Cir. 2022)**

### **Quote from the Court**

- “If a child is making substantial progress toward meeting his IEP's academic goals, the fact that he might receive a marginal increase in academic benefits from a more restrictive placement will seldom justify sacrificing the substantial non-academic benefits he derives from being educated in the regular classroom.”

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## **D.R. v. Redondo Beach USD** **(9th Cir. 2022)**

### **Point to Ponder**

- IDEA requires, to the maximum extent appropriate, that a child with a disability must be educated with children who are not disabled
- However, at several points in its decision, Ninth Circuit references that school districts must ensure that children with disabilities are educated alongside their nondisabled peers to the maximum extent appropriate
- Query whether Ninth Circuit's use of word “alongside” indicates court's view that special education students merely need to be close to general education students, but not necessarily integrated into the curriculum?

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## Recent LRE Decisions from Other Circuits

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### **Other Circuits, Other Opinions . . .**

#### **H.W. v. Comal Indep. Sch. Dist. (5th Cir. 2022)**

- Student with Down syndrome received instruction in general ed setting, where she mastered 11 of 17 goals
- Parents objected to district's proposed placement change to blended placement in which student would receive academic instruction in SDC
- 5th Circuit upheld proposed placement as LRE
- Progress toward goals was outweighed by student's regression in test scores, and failing all second-grade courses despite modified curriculum for pre-K level
- Student rarely interacted with nondisabled peers and exhibited disruptive classroom behaviors

(H.W. v. Comal Indep. Sch. Dist. (5th Cir. 2022) 81 IDELR 2)

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## **Other Circuits, Other Opinions . . .**

### **J.P. v. Belton Sch. Dist. No. 124 (8th Cir. 2022)**

- 9-year-old student with severe disabilities made little to no progress toward his IEP goals during his time in special education classroom
- District proposed changing student's placement from special education classroom in his neighborhood school to state-run school for children with severe disabilities
- 8th Circuit upheld district's proposed placement
- Court: LRE requirement does not exist in isolation; district needs to ensure student receives appropriate educational benefit
- Evidence showed that student received minimal benefit at neighborhood elementary school; not only was student making minimal progress toward his IEP goals, but he did not participate in activities with his nondisabled peers

(J.P. v. Belton Sch. Dist. No. 124 (8th Cir. 2022) 81 IDELR 124)



## **Case Examples: Recent OAH LRE Decisions (Post-Redondo Beach)**



## **Capistrano USD (OAH 2024)**

### **Facts**

- District placed kindergarten Student with autism, OHI and SLI at his school of residence (Las Palmas) in Spanish/English immersion program for 2022-2023
- Student exhibited significant non-compliant behaviors, including elopement
- District's proposed February 2023 IEP amendment offered Student placement in mild-to-moderate SDC in the Success Through Academic Readiness and Social Skills ("STARS") program
- Team members believed such placement was necessary for Student to make progress towards his academic, behavior, social-emotional and sensory goals
- Parent believed Student would mimic other's maladaptive behavior in "STARS" and sought continued placement in general education class at neighborhood school

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## **Capistrano USD (OAH 2024)**

### **Decision**

- Citing to Redondo Beach and balancing Rachel H. factors, ALJ agreed with District and determined that Student did not receive educational benefit from full inclusion in general education, even with use of supplementary aids and services
- Student did not make progress towards his IEP goals in general education setting and could not keep up with peers academically
- Student also did not receive nonacademic benefits in his general education classroom, not making progress on behavioral goals
- Student's maladaptive behaviors caused teacher to lose instructional time with rest of class and peers were distracted by Student's "yelling, noises and behaviors"

(Student v. Capistrano Unified School Dist. and Capistrano Unified School Dist. v. Student (OAH 2024) Case Nos. 2023120742 and 2024040536, 124 LRP 33092)

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## **Santa Ana USD (OAH 2023)**

### **Facts**

- Student was initially placed in a general education classroom in which he exhibited serious and disruptive dysregulated behaviors
- Student subsequently qualified as ED and OHI
- District placed Student in a segregated “ATLAS” SDC, but when behaviors worsened, District proposed NPS placement that could address mental health needs
- District believed it could not adequately address Student’s increasingly violent behaviors that resulted in two behavioral emergency reports
- Parents believed Student could succeed in SDC with 1:1 aide and that another change of placement would further destabilize Student

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## **Santa Ana USD (OAH 2023)**

### **Decision**

- Applying Rachel H. factors, ALJ ruled that District’s proposed placement was LRE
  - Factor #1: Although Student “had ability to learn” and received passing grades, he frequently resisted instruction and missed about 50% of instructional time due to behaviors. Student was not making significant progress on his annual goals, which provided best measurement of his academic achievement in his current placement (citing to Redondo Beach)
  - Factor #2: Student did not obtain nonacademic benefit from SDC placement because most other students feared him and acted as if they were “walking on eggshells” when Student was nearby
  - Factor #3: Student’s many verbal outbursts distracted both teachers and students; staff and other students were subjected to his verbal abuse every school day

(Santa Ana Unified School Dist. v. Student (OAH 2023) Case No. 2022030528, 123 LRP 23777)

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## Practical Pointers on LRE Issues

- IEP teams should offer a placement outside general educational environment only if the nature or severity of a student's disability is such that education in general education classes with use of supplementary aids and services "cannot be achieved satisfactorily"
- Remember that IEP team does not have to discuss every possibility on the continuum, but best practice is to always consider the following: (1) whether current placement is appropriate; (2) whether more restrictive placement is appropriate; (3) whether less restrictive placement is appropriate
- IEP teams should avoid vague or generalized recommendations regarding LRE; IEP must clearly and specifically document options considered on continuum of alternative placements

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## Practical Pointers on LRE Issues

- Final placement decisions must not be made without parental input unless absolutely necessary (for example, parent refuses to participate); nor should those decisions be made outside of the IEP process (i.e., without meeting)
- If possible, make sure more restrictive placement provides student with some opportunity to be educated with nondisabled peers and/or participate in extracurricular activities, lunch, recess, etc. as appropriate
- Districts should conduct regular in-service training on LRE and continuum of alternative placement rules and issues

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## Conclusion

- As topics and case summaries illustrate, LRE determinations are, by necessity, exceptionally fact-intensive and require consideration of different options along placement continuum
- Decisions are also often difficult and contentious, and subject to considerable scrutiny by ALJs and courts, who carefully review whether IEP team has adequately addressed LRE in legally compliant manner
- When there is uncertainty about appropriate placement for student, districts must make documented, diligent, and good-faith effort to educate student in LRE before considering more restrictive option along continuum

*Information in this presentation, including but not limited to PowerPoint materials 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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## Legal Update



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## Recent OAH Decisions

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## Child Find

### Stockton Unified School District

#### Facts:

- 11-year-old Student, who had not been assessed for special education, moved to District in 2022 and was placed in general education classroom for 2022-2023
- Parent notified District of Student's ADHD diagnosis and requested Section 504 plan
- Student began to complain of stomach pains and headaches at school, and also had isolated minor behavior incidents
- District convened three SST meetings for Student during school year and found that, with supports currently in place, Student did not require Section 504 plan
- Parent filed due process complaint alleging child find violation; District offered to conduct assessment, but Parent did not consent to assessment plan

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## Child Find

### Stockton Unified School District

#### Decision:

- ALJ rejected Parent's claim
- No suspicion that Student's ADHD or anxiety impacted his education in any manner
- Parent failed to establish that Student's educational performance was impacted to degree that would raise "even a slight suspicion" of a disability
- Parent could not show any impediment to Parent's participation in the decision-making process
- Once Parent refused to sign assessment plan, any further obligation under child find ceased to exist

(Student v. Stockton Unified School Dist. (OAH 2024) Case No. 2024020649, 124 LRP 24395)

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# Child Find

## Why Does This Case Matter to Us?

- Student is not automatically eligible for special education and related services, even if identified through child find
- Once identified, student must still undergo initial evaluation to confirm eligibility
- District must obtain informed parental consent before conducting evaluation for IDEA eligibility and, without such consent, it does not have unfettered discretion to proceed with evaluation when conducting child find

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# Exit from Special Education

Madera Unified School District

## Facts:

- District first assessed Student at age 3 and found serious delays across all domains
- IEP team determined Student qualified under category of autism
- District reassessed Student at age 4 for transition to kindergarten, although it began assessments before Parents had consented to assessment plan
- Autism Spectrum Rating Scales indicated very elevated scores in 8 of 10 areas
- Autism Diagnostic Observation Schedule, however, indicated minimal to no symptoms of autism
- On basis of Autism Diagnostic Observation Schedule, IEP team proposed exiting Student, although Student failed to meet any IEP goals

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## Exit from Special Education

### Madera Unified School District

#### Decision:

- ALJ rejected District's request to exit Student
- Student was severely delayed and required special education and related services to access her educational program
- Assessment process was also flawed
  - District commenced reassessing Student without Parents' consent
  - District did not present evidence, such as manufacturer's instructions or testing protocols, to show Autism Diagnostic Observation Schedule testing was conducted correctly
  - "There were significant discrepancies between [this] testing and all other autism assessments for Student"

(Madera Unified School Dist. v. Student (OAH 2024) Case No. 2024070994, 124 LRP 35516)

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## Exit from Special Education

### Why Does This Case Matter to Us?

- IDEA and California law prohibit districts from relying on single measure or assessment as sole basis for determining whether student is eligible (or no longer eligible) for special education or in determining appropriate content of eligible student's IEP
- Law also requires districts to demonstrate that assessments and other evaluation materials are implemented in the way in which they were intended and administered by trained and knowledgeable personnel
- District in this case fell short of meeting both requirements

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## Exit from Special Education

Simi Valley Unified School District

- District initially found Student eligible for special education under category of autism in October 2020, when she was a second-grader
- At that time, Student was struggling academically and had difficulty socializing with peers and making friends
- District conducted triennial assessment in 2023
- Based on those results, District IEP team members recommended that Student be exited from special education because she no longer met eligibility requirements
- Parent disagreed, believing that Student had improved because of her IEP services and asserted that Student required continued support of an IEP

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## Exit from Special Education

Simi Valley Unified School District

### Decision:

- ALJ found that IEP team appropriately determined that Student was no longer eligible for special education and that District could exit Student from special education absent Parent's consent
- District's triennial assessment met all legal requirements and Parent meaningfully participated in IEP process
- Evidence established that Student no longer displayed characteristics associated with autism to any significant degree at school, as she self-regulated, was independent, did not have impaired verbal or nonverbal communication, and did not display deficits typically associated with autism
- Assessment established that Student did not meet eligibility criteria for SLI or SLD
- District introduced persuasive evidence that Student no longer required specialized instruction and related services to receive educational benefit, as her special education teacher "candidly testified" that Student no longer needed her

(Simi Valley Unified School Dist. v. Student (OAH 2024) Case No. 2024080102, 124 LRP 38064)

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# Exit from Special Education

## Why Does This Case Matter to Us?

- Even if student meets criteria for having a qualifying disability or disabilities, second inquiry in determining eligibility is whether student required specialized instruction and related services to receive educational benefit
- When determining if student needs special education, courts and ALJs consider whether student can receive educational benefit in, or with modification to, general education setting
- In this case, District witnesses all persuasively testified that Student succeeded and would continue to succeed in general education classroom without specialized academic instruction

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# IEP Development

## The Accelerated Schools

### Facts:

- 13-year-old Student, eligible as ED, received nine disciplinary sanctions from November 9, 2021 to November 2, 2023; last five suspensions involved physical aggressions towards staff or peers
- Charter School proposed change of placement to NPS, which could offer Student a small classroom, therapeutic room to assist with impulsive and emotional outbursts, and teacher and assistant who were trained in crisis intervention
- Parent objected to offer of NPS placement
- District filed for due process hearing to defend its proposed IEP, seeking order allowing it to implement IEP over Parent's objections

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## IEP Development

### The Accelerated Schools

#### Decision:

- ALJ refused Charter School's request, finding several problems with proposed IEP
- Four goals in proposed IEP were not achievable based on Student's weaknesses in reading, writing, comprehension, expression and mathematics
- Student's behavior escalated to a degree that BIP, without modification, was no longer feasible for implementation
- Student's cognitive score of 52 and present levels of performances were inconsistent with many of accommodations and modifications proposed in IEP
- Charter School's offer for SAI minutes at NPS did not comply with the legal requirement for instructional time.

(The Accelerated Schools v. Student (OAH 2024) Case No. 2024030887, 124 LRP 29274)

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## IEP Development

### Why Does This Case Matter to Us?

- During IEP development, IEP team must consider strengths of student, concerns of parents for enhancing student's education, results of most recent evaluations of student, and student's academic, developmental, and functional needs
- "Educational benefit" to be provided to student requiring special education is not limited to addressing student's academic needs, but also social and emotional needs that affect academic progress, school behavior, and socialization
- Here, ALJ determined that charter school's proposed IEP fell short of meeting these requirements

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# Manifestation Determinations

## Kern High School District

### Facts:

- 10th-grade Student, eligible under OHI (ADHD), also had medical diagnosis of autism
- Student was suspended for making terrorist threat against school officials or school property
  - At end of baseball practice, Student accessed teammate's backpack, using teammate's cellphone to call 911 to report active shooter at neighboring high school
  - Police report concluded that two student witnesses observed Student removing cellphone from his teammate's bag and making the call
- Subsequent MD review concluded that Student's conduct was not caused by or had a direct or substantial relationship to Student's disability

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# Manifestation Determinations

## Kern High School District

### Decision:

- ALJ upheld MD team's conclusion
  - Parents provided no evidence that District failed to consider any recent mental health changes, hospitalizations, periods of emotional and behavioral dysregulation, or new diagnosis made through Student's personal medical providers
  - ALJ rejected Parents' assertion that some peers thought his behavior was a joke
  - Calculated behavior had "nothing more than an attenuated relationship to his [ADHD]"
  - Student' mental health clinician also credibly testified that opportunistic nature of Student's actions were inconsistent with behaviors expected of someone with autism
  - District, including baseball coach, appropriately implemented IEP and BIP, which called for maintaining supervision of Student

(Student v. Kern High School Dist. (OAH 2024) Case No. 2024060613, 124 LRP 29282)

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# Manifestation Determinations

## Why Does This Case Matter to Us?

- Manifestation determination reviews are not simple analysis of right or wrong—team must determine whether the disability, as it affects particular student, is related to that student's specific misconduct
- Direct causal relationship between behavior and disability must be established
- Here, ALJ credited consistent testimony from several District's witnesses, including Student's behaviorist, that Student's behavior was calculated (requiring multiple steps to complete) and not impulsive, and, therefore, not a manifestation of his ADHD

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# One-to-One Aides

## Stockton Unified School District

### Facts:

- 17-year-old Student with Down syndrome attended District's moderate-to-severe special education program
- IEP proposed by District called for Student to participated in highly structured specialized academic instruction for 90 percent of her school day, with most of her classes having at least two to three paraprofessionals and teacher
- Parent claimed proposed IEP failed to provide FAPE because it did not offer Student a one-to-one aide at school to assist with toileting and mobility concerns, as well as failing to offer ABA services at home

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## One-to-One Aides

### Stockton Unified School District

#### Decision:

- ALJ concluded that Parent failed to establish Student had deficits that required one-to-one aide to access her academic program
- District provided Student with wheelchair to help her transition between classes
- Teacher and staff met Student's toileting needs, including when she occasionally soiled herself
- Teacher credibly testified that dedicated aide would hinder Student's independent living skills, which staff wanted to promote
- Parent failed to substantiate Student's need for ABA therapy program, as Student did not have autism or exhibit problematic behaviors

(Student v. Stockton Unified School Dist., (OAH 2024) Case No. 2024050109, 124 LRP 33106)

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## One-to-One Aides

### Why Does This Case Matter to Us?

- Though not specifically delineated by statute, one-to-one aide may be required to assist student with disabilities to benefit from special education
- Districts should consider all relevant information in determining whether to grant request for a dedicated aide, including student's independence, possibility of over-reliance upon the aide, and supports currently available to student
- In this case, district witnesses credibly testified as to Student's independence and sufficient available support for her through low student-to-staff ratio and numerous paraprofessionals available to assist her

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## Noteworthy Decisions from the Courts

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### **FAPE Obligation**

J.B. v. Kyrene Elem. School Dist. (9th Cir.)

#### **Facts:**

- District refused to hold additional IEP meetings for parentally placed private school Student with multiple disabilities based on Parent's refusal to consent to reevaluations and her rejection of District's offer of FAPE through statement of her intent to continue unilateral placement
- District's subsequent PWN only cited Student's continued enrollment in private school and stated that District had no obligation to convene IEP meetings for provision of FAPE until Student reenrolled in public school
- Parent sought tuition reimbursement

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## FAPE Obligation

J.B. v. Kyrene Elem. School Dist. (9th Cir.)

### Decision:

- 9th Circuit rejected reimbursement claim
- Parent's "rejection of [the final] FAPE offer, along with her non-consent to [District's] attempts to reevaluate [Student], relieved [District] of any IDEA obligations."
- But invalid explanation provided in district's PWN amounted to procedural violation of IDEA since if Student enrolled in private school needs special education and related services, District where Student resides is responsible for making FAPE available to student
- Nonetheless, Parent's continued resistance to District's efforts to provide student FAPE made error harmless; District had legitimate reasons for its refusal to hold additional IEP meetings for Student (failure to consent to reevaluations, statement of intent to continue private placement)

(J.B. v. Kyrene Elem. School Dist. (9th Cir.) 124 LRP 30919)

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## FAPE Obligation

### Why Does This Case Matter to Us?

- Under IDEA, student's district of residence is not obligated to continue offering FAPE if parent of privately placed student "makes clear his or her intent" to keep student enrolled in out-of-district private school
- OSEP has clarified that when parents place student in private school and then make it clear that they do not intend to re-enroll student in district, district does not have to continue to offer FAPE
- As district court and ALJ found in case, affirmed by Ninth Circuit, Parent made it clear throughout the fall semester 2013—and particularly on December 19, 2013—that she did not intend to re-enroll Student in District

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## **FBA**s

W.A. v. Panama-Buena Vista Union School Dist. (E.D. Cal.)

### **Facts:**

- Kindergarten Student exhibited several negative behaviors, which escalated when he entered 1st grade
- Behaviors included extreme physical aggression toward peers and staff
- District found Student eligible for special education under ED and OHI categories
- When Parent did not consent to IEP, District offered to conduct additional assessments, which included FBA
- Parent disputed results of FBA and sought IEE
- District filed for due process hearing to defend FBA
- ALJ found FBA met all required standards and was appropriately conducted

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## **FBA**s

W.A. v. Panama-Buena Vista Union School Dist. (E.D. Cal.)

### **Decision:**

- District court upheld ALJ's findings regarding adequacy of District's FBA
- Court rejected Parent's assertion that FBA relied upon insufficient quantitative data, noting that school psychologist included sufficient data, information, analysis, and reporting, which included interviews, observations, and thorough records review
- Court also rejected Parent's argument that FBA did not support school psychologist's hypothesis that "access" was function of Student's target maladaptive behavior, as teacher testimony indicated that "Student was triggered by being denied an activity or to avoid having to complete an activity"
- FBA contained appropriate functional equivalent replacement behavior ("FERB") and behavioral goals

(W.A. v. Panama-Buena Vista Union School Dist. (E.D. Cal. 2024)124 LRP 22428)

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## FBA's

### Why Does This Case Matter to Us?

- IDEA does not describe steps required to conduct/complete FBA
- USDOE: IDEA "requires the public agency to ensure that the child is assessed in all areas related to the suspected disability. . . . Decisions regarding the areas to be assessed are determined by the suspected needs of the child. If a child's behavior or physical status is of concern, evaluations addressing these areas must be conducted."
- FBAs are generally understood to include these steps: 1) defining the problem behavior; 2) collecting data about the antecedents and consequences of the behavior; and 3) developing a hypothesis about the function of the behavior

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## Nonpublic Schools

Loffman v. California Dep't of Educ. (9th Cir.)

### Facts:

- By way of background, California contracts with certain "nonpublic schools" to provide FAPE to students with disabilities; by statute, California requires that NPS be "nonsectarian" to apply for certification as approved NPS
- Under state regulatory definition of "nonsectarian," no school with religious affiliation can serve as approved NPS, regardless of content of its curriculum
- Parents of Students with autism who wanted their children to attend Orthodox Jewish schools alleged that CDE's refusal to add religious schools to its list of certified NPSs violated First Amendment's Free Exercise Clause and the 14th Amendment's Equal Protection Clause
- District court dismissed claims

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## Nonpublic Schools

Loffman v. California Dep't of Educ. (9th Cir.)

### Decision:

- Ninth Circuit reinstated Parents' action
- Parents successfully alleged that state (i.e., CDE) burdened their sincere religious practice by enforcing policy that was neither neutral nor generally applicable
- Burden then "shifts to the defendant" to show that challenged action survives strict scrutiny
- Court found that CDE failed to demonstrate that nonsectarian requirement survived this stringent level of review
- CDE did not show that nonsectarian requirement was narrowly tailored to serve compelling interest in neutrality
- Ninth Circuit returned case to district court for consideration of claims on their merits

(Loffman v. California Dep't of Educ. (9th Cir.) 124 LRP 37590)

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## Nonpublic Schools

### Why Does This Case Matter to Us?

- While this ruling by Ninth Circuit does not require California districts to consider placements in nonpublic religious schools immediately, such possibility exists in near future depending on how district court rules on merits of claims on remand and whether issues in question are ultimately appealed to U.S. Supreme Court

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## Latest Federal Guidance

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### Adaptive Physical Education

#### Letter to Tymeson

- OSEP: Although IDEA regulations do not specifically require IEP team to include an individual who has knowledge in special physical education, adaptive physical education teacher could be part of team as individual who has knowledge or special expertise regarding student's unique special physical education needs
- Individual who has knowledge in special physical education may also fill other roles on IEP team, including general education teacher; special education teacher; individual who can interpret the instructional implications of evaluation results; or representative of district who is qualified to provide, or supervise the provision of, specially designed instruction
- **Note:** OSEP observed that 34 CFR § 300.39 uses the term "adapted physical education" while the comments to 2006 final regulations use the terms "adapted physical education" and "adaptive physical education" interchangeably, although both refer to the provision of specially designed instruction to meet the unique needs of students with disabilities and to ensure their access to the general education curriculum, where possible

(Letter to Tymeson) (OSEP 2024) 124 LRP 33432)

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# FBA's

## Dear Colleague

- IEP teams can use FBAs to gain better understanding of student's behavioral needs and to determine the positive behavioral interventions and supports needed to provide FAPE
  - By incorporating FBA into MTSS/PBIS framework, educators can proactively address interfering behaviors through tiered-prevention mode
- FBAs are part of IDEA evaluation process, with applicable procedural safeguards, including parental consent requirements when:
  - FBA is one of assessment tools and strategies conducted as part of initial evaluation or reevaluation; or
  - FBA, along with a review of additional data, is used as initial evaluation or reevaluation
- FBA may also be used in situations when LEA is not evaluating or reevaluating student for eligibility or continued eligibility under IDEA
  - In such circumstances, IDEA does not require parental consent, "but parents, and the student as appropriate, may provide important information related to the FBA"

(Dear Colleague: Using FBAs to Create Supportive Learning Environments (OSERS/OESE 2024) 124 LRP 39889)

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# IEPs

## Letter to McAndrews and Ramirez

- OSEP responded to allegation that some districts' IEPs allotted only minimal time for SDI while, in reality, students received much more SDI than was listed in their IEPs
- OSEP: "The amount of time to be committed to each of the various services to be provided must be appropriate to the specific service, and clearly stated in the IEP in a manner that can be understood by all involved in the development and implementation of the IEP"
- Districts cannot unilaterally change amount of services included in student's IEP
- "[I]f the public agency wants to revise the child's IEP, including the amount of services in the child's IEP, after the IEP team meeting, it must engage the parent in further discussion, which may, but need not necessarily, occur through an IEP team meeting"

(Letter to McAndrews and Ramirez (OSEP 2024) 124 LRP 33702)

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## New Developments Affecting Special Education

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### New California Laws for 2025

#### **AB 438—Postsecondary Transition**

- Requires, as of July 1, 2025, measurable postsecondary goals and transition services, if determined appropriate by a student's IEP team, beginning when student is starting their high school experience and not later than the first IEP to be in effect when the student is 16 years of age

#### **AB 1938—Deaf, Hard-of-Hearing or Deaf-Blind Students**

- Effective January 1, 2025, IFSP teams and IEP teams, when determining the least restrictive environment for a deaf, hard of hearing, or deaf-blind student, must consider the language needs of student and to consider reviewing placements and services available to student

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## **New California Laws for 2025**

### **AB 2173—Emotional Disability**

- Effective January 1, 2025, term “emotional disturbance” may also be known as “emotional disability” under state law

### **AB 2711—Suspensions and Expulsions: Voluntary Disclosures**

- Prohibits suspension of student for controlled substances, alcohol, intoxicants or tobacco products if student voluntarily discloses, in order to seek help through services or supports, their use of a controlled substance, alcohol, intoxicants of any kind, or a tobacco product, solely for that disclosure

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## **New California Laws for 2025**

### **SB 445—State IEP Template**

- Requires State DOE, by January 1, 2027, or no later than 18 months after its IEP template is converted to a digital platform, whichever date comes first, to translate IEP template into the top 10 most commonly spoken languages used across state (other than English)


### **SB 483—Restraints**

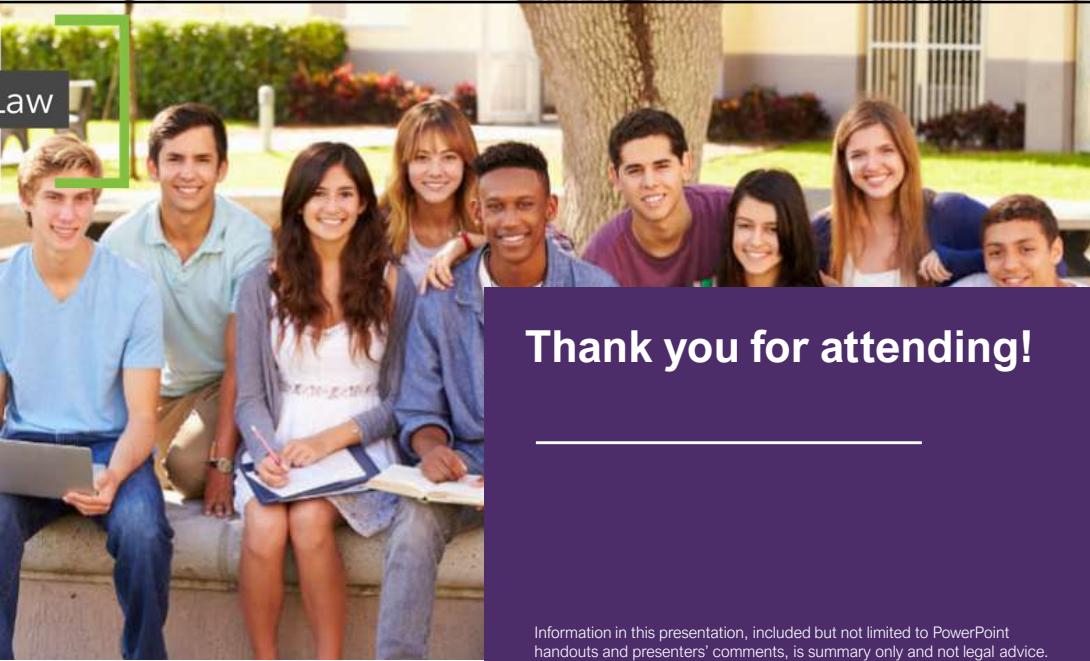
- Effective January 1, 2025, prohibits use of prone restraint, defined to include prone containment, by educational provider; also prohibits use of prone restraint, including prone containment, on student with disabilities in public school programs

### **SB 939—Neurodivergent Students**

- Effective January 1, 2025, adds neurodivergent students to list of students (LGBTQ students or students who may face bias or bullying on basis of religious affiliation) currently protected under California’s Safe Place to Learn Act, requiring state to assess whether districts have provided information related to support of such students

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**F3 Law**



## Thank you for attending!

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Information in this presentation, included but not limited to PowerPoint handouts and 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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