Special Education Law: The Ultimate Guide

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Special Education Law: The Ultimate Guide

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JAMES VICTOR KOSNETT is the senior attorney of the Kosnett Law Firm in Los Angeles. Mr. Kosnett has represented students, their families, and licensed professionals throughout central and southern California since 1976. He focuses his practice in the areas of education, administrative law, and professional licensing; and his son, Louis Kosnett, primarily practices civil litigation and criminal law. Mr. Kosnett's experience ranges from school hearings at every level (elementary through post-graduate), before the Office of Administrative Hearings and federal, state, and local agencies, to courts at every level (superior to appellate state courts, and federal district courts and circuit courts of appeal). He earned his B.A. degree from Yale University and his J.D. degree from the UCLA School of Law. Mr. Kosnett is a member of the State Bar of California, and the Los Angeles County and Beverly Hills bar associations.

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ALISON SAROS is an attorney and founder of Saros Law, combining her prior career as a prosecutor with her experience working in public school systems for the last 5 years as a teacher and school counselor. She serves the South Bay and Greater Los Angeles in the areas of educational law, civil rights, criminal defense and family law. Ms. Saros earned her B.A. degree from Michigan State University and her J.D. degree from Southwestern University School of Law. She spent the first 16 years of her career prosecuting criminal cases as a Los Angeles County deputy district attorney. Ms. Saros also worked for several years as an adjunct professor of law teaching criminal law in practice at Southwestern University School of Law and teaching and training fellow deputy district attorneys and law enforcement, primarily on constitutional issues. With a desire to help children in the school system, Ms. Saros switched directions. She obtained teaching credentials, worked as a teacher and simultaneously returned to graduate school to pursue a master's in school counseling from LMU.

SUZANNE N. SNOWDEN is a partner with SJM Law Group. She dedicates her career to representing children with disabilities and their families. Ms. Snowden has extensive trial experience in administrative proceedings. Ms. Snowden currently practices before the Office of Administrative Hearings, the United States District Court, and the Ninth Circuit Court of Appeals representing families with special needs children in educational actions involving the Individuals with Disabilities Improvement in Education Act (IDEA), the Americans with Disabilities Act, and Section 504 of the Rehabilitation Act of 1973. Ms. Snowden also provides informational seminars on special education to parent groups and interested parties. She was lieutenant governor for the American Bar Association Law School Division. Ms. Snowden was also awarded the State Bar of California's Wiley W. Manual Award for her work in public interest, was named in the *Who's Who in American Law Students*, and received The Outstanding Academic Achievement Award. She earned her B.A. degree from the University of California, Los Angeles and her J.D. degree from Southwestern University School of Law.

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Essential Special Education Legal Updates You Need to Know

Submitted by Melissa J. Amster

I. Essential Special Education Legal Updates You Need to Know

- In *Endrew F. v. Douglas County School System*, 137 S. Ct. 988 (2017) parents of a child who attended a public school until 4th grade removed the child from the public school system and unilaterally placed him in a private special education school. The parents claimed that the public school was failing to help their son, and that upon placement in the private school, he was able to make academic, social and behavioral progress. The parents filed a complaint with the Colorado Board of Education on the basis that the school district failed to provide a FAPE and sought reimbursement for the private school costs. Their complaint was denied by an administrative law judge who found that Endrew had made some academic progress and thus, the school system met their burden under IDEA.
- The parents then sued the school system in the federal district court on the basis of inadequate IEP planning and denial of a FAPE. The District Court agreed with the administrative law judge and found that the child had received a FAPE. The court stated that the school system met its burden since the child had shown at least minimal progress and as such, the school system was compliant with the "some educational benefit' standard. The parents appealed, but the Tenth Circuit upheld the district court's decision stating that the state had met its burden under IDEA by providing the student with an IEP that proved some educational benefit in line with the Rowley standard of "more than de minimis". The parents then appealed to the Supreme Court and oral arguments were heard on January 11, 2017.
- The question presented to the court was what level of education are school districts required to provide students with disabilities as mandated by the IDEA. Student argued that the Tenth Circuit merely more than de minimis benefit standard is in contradiction with the goals outlined in IDEA. In contrast, the district contended that the decision by the Tenth Circuit was correct and that the standard, which they view as clearly defined under Rowley, must be maintained.
- In its ruling the Supreme Court neither agreed or disagreed with either party. Instead they stated that the standard in Rowley was essentially applicable to a student who was able to move from grade to grade. Specifically, the discussion and standard focused on

progression in the general education curriculum.

- The Court stated that Rowley did not address the situation where the student was not fully integrated in the general education classroom and not able to achieve at grade level. However, notwithstanding their ability to move from grade to grade, a child's' IEP ought to be "appropriately ambitious in light of their circumstances". The Court then rejected the Tenth Circuits' interpretation and stated that, "it cannot be right that the IDEA generally contemplates grade-level advancement for children with disabilities who are fully integrated in the regular classroom, but is satisfied with barely more than de minimis progress for children who are not." The Court also rejected the students' argument that in order to meet the IDEA's mandate that the IEP but be "substantially equal to opportunities afforded students without disabilities". The Court held that this standard had been rejected by the court in Rowley and that Congress had not changed the definition of a FAPE to warrant the acceptance of this standard.
- The Court seemingly focused more on what the rate of progress student should make based upon input from parents and teachers.
- Endrew is a reset of the "FAPE standard" is the need for IEP teams to make sure that they gather and consider information/data regarding where a child really is, how quickly they learn and what the ultimate goals are for that child.
- How to implement the Endrew reset:
    - Part 1: Identifying Long Term Goals
        - The first step in developing an IEP that delivers a FAPE is to consider where the child's going. Specifically, where do the parents feel the child will be when they are 22. In general, when children are young this discussion focuses on whether the parents see the child seeking post secondary education or pursing employment. As the child gets older this discussion should become more specific and focused. This discussion is important for two reasons. It focuses the parents and the school on what the ultimate goal of a child's education is, and it also allows the IEP team to look at the broad areas of strengths and needs a child has and needs to develop. For example, in the case of a middle school child with Aspergers

whose post secondary plan includes going to college the IEP team should consider how developed the child's social skills, independent work and living skills are as well as any academic needs. Specifically, the team must look at what skills will be required for the student to be successful in college and what their current deficits are in these areas. The same holds true for a student whose disabilities are more impactful. Although the post secondary goal might be different the analysis is the same - if the student is going to obtain and keep employment what skills will they need and what do they currently have. A discussion this sort helps narrow the IEP and focuses on specific skill levels. This discussion in turn provides the IEP team with a framework on which to examine where the present level of performance is in these areas. It also allows the team to determine what are the potential barriers that the student demonstrates that might make obtaining these goals difficult.

- Part 2: Identifying the Student's Rate of Skill Acquisition:
  - An understanding of how and how quickly a student learns has always been important in developing an effective IEP. However, following the holding in Endrew stating that a FAPE is offered only if the IEP is "appropriately ambitious in light of their circumstances" an understanding of the rate of skill acquisition is essential.
  - The term "rate of skill acquisition" is essentially what it says: how long does it take a student to learn and generalize a skill. Although this appears to be a relatively straight forward determination, it is really quite complicated and requires an analysis of each area of a student's educational plan and performance. This is particularly important since the rate which a student acquires skills in one area may be significantly different than another. As evidenced by the three case studies below determining a student's rate of skill acquisition can be variable and subjective depending on what is being looked at.
- Once an IEP team has determined where a child is planning on going, and after there has been an analytical discussion and determination of the child's rate of

skill acquisition, it is time to develop the goals. Based on the guidance provided following the *Endrew* decision the starting point for the development should be the baseline data gathered in addition to the identified areas of need. Thus, to create an effective IEP the team must take the long-term goals, examine the components necessary for the student to eventually achieve these goals, identify where the student is with respect to these skills and then attempt to determine how quickly a student can make progress on meeting these objectives based on the skill acquisition analysis.

- Although the substance of the goal is arguably the most important part of the IEP, it is also important that the team ensure that the goal is being measured in an appropriate manner ensure a FAPE. Specifically, the team must determine what the "purpose" of the goal is. Is it a goal designed to ensure consistency of the skill, acquisition of a new skill, or generalization of a previously learned skill? If the goal is to acquire a new skill the team may want to consider what could be considered a mastery based on a concrete standard.

Cases Citing Endrew F.

- *M.C. v. Antelope Valley Union High School District,* 2:13-cv-01452 (9th Cir. 2017)
  - "Under the IDEA, parental participation doesn't end when the parent signs the IEP. Parents must be able to use the IEP to monitor and enforce the services that their child is to receive. When a parent is unaware of the services offered to the student—and, therefore, can't monitor how these services are provided—a FAPE has been denied, whether or not the parent had ample opportunity to participate in the formulation of the IEP." Id. This violation required the hiring of counsel, and in incurring unnecessary legal fees is, of course, a form of prejudice that denies a student and his parents an educational benefit. See *Parents on Behalf of Student v. Julian Charter Sch*., OAH No. 2012100933, at 2 (Jan. 17, 2013) (order denying motion to dismiss)." Id.
  - On appeal from the United States District Court for the Central District of California Student lost with OAH and in the District Court. In this revised opinion on appeal, Ninth Circuit held that an IEP is "like a contract" and cannot be changed unilaterally. Decision also found that the school district failed to identify

the supports to be provided the student and that the district had failed to file a timely response. Court held that in such a circumstance "the ALJ must not go forward with the hearing. Rather it must order a response and shift the cost of the delay to the school district, regardless of who is ultimately the prevailing party."

- Plaintiffs also claim that the District denied M.C. a FAPE by failing to develop measurable goals in all areas of need, including "the areas of life skills, residential travel, and business travel." Additionally, plaintiffs argue that the District failed to provide adequate orientation and mobility services, as well as adequate social skills instruction. The district court found that plaintiffs failed to meet their burden of showing that the IEP wasn't "reasonably calculated to confer [M.C.] with a meaningful benefit." J.W., 626 F.3d at 439. In doing so, it relied on the Supreme Court's comment in Rowley that, by "an 'appropriate' education, it is clear that [Congress] did not mean a potential-maximizing education." 458 U.S. at 197 n.21, 102 S.Ct. 3034. But Rowley "d[id] not attempt to establish any one test for determining the adequacy of educational benefits." Id. at 202, 102 S.Ct. 3034. Recently, the Supreme Court clarified Rowley and provided a more precise standard for evaluating whether a school district has complied substantively with the IDEA: *1201 "To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." Endrew F., at ——, 137 S.Ct. 988. In other words, the school must implement an IEP that is reasonably calculated to remediate and, if appropriate, accommodate the child's disabilities so that the child can "make progress in the general education curriculum," id. at ——–, 137 S.Ct. 988 (citation omitted), taking into account the progress of his non-disabled peers, and the child's potential. We remand so the district court can consider plaintiffs' claims in light of this new guidance from the Supreme Court.

- *Oakland Unified School District v. Student*, January 16, 2018 2017110917:
  - In Endrew F. ex rel., Joseph F. v. Douglas County School Dist. (2017) 580 U.S. ____, 137 S.Ct. 988, 996, the Supreme Court clarified that "for children receiving instruction in the regular classroom, [the IDEA's guarantee of a substantively adequate program of education to all eligible children] would generally require an

IEP 'reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.'" For a case in which the student cannot be reasonably expected to "progress[ ] smoothly through the regular curriculum," the child's educational program must be "appropriately ambitious in light of [the child's] circumstances . . . ." (Ibid.) The IDEA requires "an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." (Id. at 1001.) Importantly, "[t]he adequacy of a given IEP turns on the unique circumstances of the child for whom it was created." (Ibid.) Student v. Hermosa Beach City School District March 23, 2018 2017060038 Judge: Christine Arden LEGAL CONCLUSIONS 3. In Board of Education of the Hendrick Hudson Central School District v. Rowley (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (Rowley), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. Rowley expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (Id. at p. 200.) Instead, Rowley interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (Id. at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since Rowley, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (J.L. v. Mercer Island School Dist. (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the Rowley standard and could have expressly changed it if it desired to do so.].) Although sometimes described in Ninth Circuit cases as "educational benefit," "some educational benefit" or "meaningful educational benefit," all of these phrases mean the Rowley standard, which should be applied to determine whether an individual child was provided a FAPE. (Id. at p. 951, fn. 10.) In a unanimous decision, the United States Supreme Court declined to

interpret the FAPE provision in a manner that was at odds with the Rowley court's analysis, and clarified FAPE as "markedly more demanding than the 'merely more than the de minimus test'…" (Endrew F. v. Douglas School Dist. RE-1 (2017) 137 S.Ct. 988, 1000 (Endrew F.)). The Supreme Court in Endrew stated that school districts must "… offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances." (Id. at p. 1002.) O

- *Student v. San Francisco Unified School District*, June 22, 2017 2017050108:
    - In Endrew F. ex rel., Joseph F. v. Douglas County School Dist. (2017) 580 U.S. __ [137 S.Ct. 988, 996], the Supreme Court clarified that "for children receiving instruction in the regular classroom, [the IDEA's guarantee of a substantively adequate program of education to all eligible children] would generally require an IEP 'reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.'" Put another way, "[f]or a child fully integrated in the regular classroom, an IEP typically should, as Rowley put it, be 'reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.'" (Id. at 999 (citing Rowley, supra, 458 U.S. at pp. 203□04).) The Court went on to say that the Rowley opinion did not "need to provide concrete guidance with respect to a child who is not fully integrated in the regular classroom and not able to achieve on grade level." (Id. at 1000.) For a case in which the student cannot be reasonably expected to "progress[] smoothly through the regular curriculum," the child's educational program must be "appropriately ambitious in light of [the child's] circumstances . . . ." (Ibid.) The IDEA requires "an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." (Id. at 1001.) Importantly, "[t]he adequacy of a given IEP turns on the unique circumstances of the child for whom it was created." (Ibid.)
- *Student v. Colton Joint Unified School District*, December 20, 2017 2017060750:
    - The Supreme Court's recent decision in Endrew F. v. Douglas County Sch. Dist. RE□1 (2017) 580 U.S.____ [137 S.Ct. 988] reaffirmed that to meet its substantive obligation under the IDEA, a school district must offer an IEP

reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. The Ninth Circuit further refined the standard in M.C. v. Antelope Valley Unified School Dist. (9th Cir. 2017) 858 F.3d 1189, 1194, 1200□1201, stating that an IEP should be reasonably calculated to remediate and, if appropriate, accommodate the child's disabilities so as to enable the child to make progress in the curriculum, taking into account the child's potential.

- *Student v. Hermosa Beach City School District*, March 23, 2018 2017060038:
    - In Board of Education of the Hendrick Hudson Central School District v. Rowley (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (Rowley), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. Rowley expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (Id. at p. 200.) Instead, Rowley interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (Id. at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since Rowley, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (J.L. v. Mercer Island School Dist. (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the Rowley standard and could have expressly changed it if it desired to do so.].) Although sometimes described in Ninth Circuit cases as "educational benefit," "some educational benefit" or "meaningful educational benefit," all of these phrases mean the Rowley standard, which should be applied to determine whether an individual child was provided a FAPE. (Id. at p. 951, fn. 10.) In a unanimous decision, the United States Supreme Court declined to interpret the FAPE provision in a manner that was at odds with the Rowley court's analysis, and clarified FAPE as "markedly more demanding than the 'merely more than the de minimus test'…"

(Endrew F. v. Douglas School Dist. RE-1 (2017) 137 S.Ct. 988, 1000 (Endrew F.)). The Supreme Court in Endrew stated that school districts must "… offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances." (Id. at p. 1002.)

- *L.J. v. Pittsburg Unified School District*, 850 F.3d 996 (9th Cir. 2017)
    - On appeal from the United States District Court for the Northern District of California. This is the is the opinion that amends and supersedes opinion at 835 F.3d 1168. OAH found student not eligible for special education services because not disabled. District court granted summary judgment for school district. Ninth Circuit rejected argument that specialized services provided to student in general education were interventions available for all students and not special education. Denied rehearing en banc but did amend opinion. In this opinion, Court continues to hold that student did exhibit need for special education services and failure of district to provide was improper and that failure of the school district to disclose to mother its assessments, treatment plans and notes interfered with mother's ability to participate in IEP formulation.

Other Cases

- *Timothy O. v. Paso Robles Unified School District*, 822 F.3d 1105 (9th Cir. 2016)
    - On appeal from United States District Court for the Central District of California Ninth Circuit overturned OAH decision and district court decision ruling against student. Ninth Circuit held that school district's failure to assess student for autism clearly and substantially violated IDEA, that informal observation by school psychologist was not sufficient, and that student had been denied FAPE.
    - The Court held that under the IDEA, the school district has an affirmative obligation to formally assess the student for autism using reliable, standardized and statutorily proscribed methods. In the case, Paso Robles USD ignored the clear evidence requiring to do so and instead determined that Luke was not autistic based on the view of a staff member who opined after a casual observation, that he did not display signs of autism. The Court stated, "the failure

to formally assess the student's disability rendered the provision of a free appropriate education impossible and left his autism untreated for years." *Id.*

- *I.R. ex rel. E.N. v. Los Angeles Unified School Dist.*, 805 F.3d 1164 (2015)
    - LAUSD has argued that its sole obligation under the IDEA was to offer I.R. a FAPE, an obligation it claims was satisfied by its November 9, 2010 offer of special education placement, along with its later, similar offers during 2011. I.R., in response, has argued that school districts also have a duty to provide a FAPE to students by implementing any proposed plan. We do not agree that a school district's duty extends quite this far. As I.R. herself argues, parents retain the right to refuse consent to an offer of a FAPE. See 34 C.F.R. § 300.300(d)(3). Accordingly, it would prove impossibly onerous to require school districts to somehow implement a rejected IEP and provide a FAPE in the face of such refusal. But this does not mean that the mere offer of a FAPE is enough to immunize a district from liability. As we have explained, school districts in California must comply with the additional requirement imposed by the California Education Code of initiating a due process hearing if agreement between the district and the parent on an appropriate placement cannot be reached. LAUSD's failure to initiate a due process hearing, as was required under California law, directly resulted in a clear injury, namely I.R. remaining in an inappropriate program for a much longer period of time than should have been the case. On remand, the district court shall determine the appropriate remedy for this injury.

UNITED STATES DEPARTMENT OF EDUCATION

WASHINGTON, DC 20202

December 7, 2017

Questions and Answers (Q&A) on *U. S. Supreme Court Case Decision*
Endrew F. v. Douglas County School District Re-1

On March 22, 2017 the U.S. Supreme Court (sometimes referred to as Court) issued a unanimous opinion in *Endrew F. v. Douglas County School District Re-1, 137 S. Ct. 988*. In that case, the Court interpreted the scope of the free appropriate public education (FAPE) requirements in the Individuals with Disabilities Education Act (IDEA). The Court overturned the Tenth Circuit's decision that Endrew, a child with autism, was only entitled to an educational program that was calculated to provide "merely more than *de minimis*" educational benefit. In rejecting the Tenth Circuit's reasoning, the Supreme Court determined that, "[t]o meet its substantive obligation under the IDEA, a school must offer an IEP [individualized education program] that is reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." The Court additionally emphasized the requirement that "every child should have the chance to meet challenging objectives."

The *Endrew F.* decision is important because it informs our efforts to improve academic outcomes for children with disabilities. To this end, the U.S. Department of Education (Department) is providing parents and other stakeholders information on the issues addressed in *Endrew F.* and the impact of the Court's decision on the implementation of the IDEA. Because the decision in *Endrew F.* clarified the scope of the IDEA's FAPE requirements, the Department's Office of Special Education and Rehabilitative Services (OSERS) is interested in receiving comments from families, teachers, administrators, and other stakeholders to assist us in identifying implementation questions and best practices. If you are interested in commenting on this document or have additional questions, please send them to OSERS by email at EndrewF@ed.gov.

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QUESTIONS AND ANSWERS

OVERVIEW

1. What were the facts surrounding the *Endrew F.* decision?

Endrew, a child with autism, attended public school from kindergarten through fourth grade. In April of 2010, Endrew's parents rejected the 5th grade individualized education program (IEP) proposed by the Douglas County School District. Endrew's parents believed the proposed IEP was basically the same as the previous IEPs under which their child's academic and functional progress had stalled. Endrew's parents subsequently withdrew him from public school and placed him in a private school that specialized in the education of children with autism. Endrew's behavior in the private school setting improved significantly; his academic goals were strengthened and he thrived. This case arose because Endrew's parents were unable to obtain tuition reimbursement for the cost of the private school placement.

Endrew's parents sought reimbursement for the private school tuition payments at a due process hearing, and subsequently sought judicial review of the hearing decision in the U.S. District Court for the District of Colorado after the hearing officer did not grant the relief they were seeking. The District Court affirmed the hearing officer's decision, and they appealed to the U.S. Court of Appeals for the Tenth Circuit. In these proceedings, Endrew's parents argued that the IEP proposed by the public school was mostly unchanged from his previous IEPs, under which he made "minimal progress." The Tenth Circuit rejected the parents' arguments and concluded that Endrew had received FAPE through the district's IEPs because they were calculated to provide educational benefit that is merely more than *de minimis* (i.e., more than trivial or minor educational benefit). Endrew's parents then appealed the case to the U.S. Supreme Court. The Court overturned the Tenth Circuit's decision.

2. What is the crucial issue that was addressed in the *Endrew F.* decision?

Endrew F. clarified the substantive standard for determining whether a child's IEP – the centerpiece of each child's entitlement to FAPE under the IDEA – is sufficient to confer educational benefit on a child with a disability.

3. What was the Supreme Court's final decision in *Endrew F.*?

The Court held that to meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. In clarifying the standard, the Court rejected the "merely more than *de minimis*" (i.e. more than trivial) standard applied by the Tenth Circuit. In determining the scope of FAPE, the Court reinforced the requirement that "every child should have the chance to meet challenging objectives."[1]

[1] 137 S.Ct. at 1000.

CLARIFICATION OF IDEA's FAPE REQUIREMENT

4. How is FAPE defined in the IDEA?

Under the IDEA, FAPE is a statutory term.[2] It is defined to include special education and related services that

(1) are provided at public expense, under public supervision and direction, and without charge;

(2) meet the standards of the State educational agency (SEA), including IDEA Part B requirements;

(3) include an appropriate preschool, elementary school, or secondary school education in the State involved; and

(4) are provided in conformity with an IEP that meets the requirements of 34 CFR §§300.320 through 300.324.

Further, each child with a disability is entitled to receive FAPE in the least restrictive environment (LRE).[3]

5. Prior to *Endrew F.*, what did the Court say about the substantive standard for FAPE?

Prior to *Endrew F.*, courts relied on the landmark case *Board of Education of Hendrick-Hudson Central School District v. Rowley*. 458 U.S. 176 (1982) ("*Rowley*"). In *Rowley*, the Court held that Amy Rowley, a child with a disability involved in the case, would receive FAPE if her IEP was "reasonably calculated to enable the child to achieve educational benefits." In *Rowley*, the Court did not establish any one test for determining educational benefit provided to all children covered by the IDEA. The Court did, however, discuss what appropriate progress would be for a child with a disability who was performing above average in the general education classroom with the supports included in her IEP. In *Rowley,* the Court emphasized that an IEP had to be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.

6. What does "*de minimis*" mean and why did the Tenth Circuit Court apply the "*de minimis"* standard in the *Endrew F.* case?

"*De minimis*" is a Latin term which means too trivial or minor to consider. Because the Supreme Court in *Rowley* did not establish one particular test for educational benefit, lower courts (Federal District Courts and Circuit Courts) disagreed over how to determine educational benefit and applied different substantive standards. For example, prior to *Endrew F.,* six U.S. Court of Appeals Circuit Courts applied a "merely more than *de minimis*" standard when considering educational benefit. One of those courts was the U.S. Court of Appeals for the Tenth Circuit, where Endrew and his parents lived. Therefore, initially the court applied the "*de minimis*" standard to Endrew's case. This meant that in order to meet its FAPE obligations, the school district only had to show that the child's IEP was designed to provide a child with a disability more than trivial or minor educational benefit.

[2] 20 U.S.C. 1401(9) and 34 CFR §300.17.
[3] 20 U.S.C. 1412(a)(5) and 34 CFR §§300.114-300.117

7. How did *Endrew F.* clarify the standard for determining FAPE and educational benefit?

With the decision in *Endrew, F*., the Court clarified that for all students, including those performing at grade level and those unable to perform at grade level, a school must offer an IEP that is "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." This standard is different from, and more demanding than, the "merely more than *de minimis*" test applied by the Tenth Circuit. As the Court stated, "[t]he goals may differ, but every child should have the chance to meet challenging objectives." [4]

8. Does the standard in *Endrew F*. apply prospectively to IDEA cases?

Yes. The Supreme Court decisively rejected the "merely more than *de minimis*" standard used by the Tenth and other Circuits; therefore that standard is no longer considered good law. The Court explained, "[a] student offered an educational program providing merely more than *de minimis* progress from year to year can hardly be said to have been offered an education at all…The IDEA demands more." Now, as a result of *Endrew F*., each child's educational program must be appropriately ambitious in light of his or her circumstances, and every child should have the chance to meet challenging objectives.

9. Does the standard in *Endrew F.* only apply to situations similar to the facts presented in *Endrew F.*?

No. The standard that the Court announced in *Endrew F.* clarifies the scope of the FAPE requirements in the IDEA and, as such, applies to the provision of FAPE to any IDEA-eligible child with a disability, as defined by the law. The standard in *Endrew F.* applies regardless of the child's disability, the age of the child, or the child's current placement.

CONSIDERATIONS FOR IMPLEMENTATION

10. What does "reasonably calculated" mean?

The "reasonably calculated" standard recognizes that developing an appropriate IEP requires a prospective judgment by the IEP Team. Generally, this means that school personnel will make decisions that are informed by their own expertise, the progress of the child, the child's potential for growth, and the views of the child's parents. IEP Team members should consider *how* special education and related services, if any, have been provided to the child in the past, including the effectiveness of specific instructional strategies and supports and services with the student. In determining whether an IEP is reasonably calculated to enable a child to make progress, the IEP Team should consider the child's previous rate of academic growth, whether the child is on track to achieve or exceed grade-level proficiency, any behaviors interfering with the child's progress, and additional information and input provided by the child's parents. As stated by the Court, "any review of an IEP must consider whether the IEP is reasonably calculated to ensure such progress, not whether it would be considered ideal."[5]

[4] 137 S.Ct. at 1000.
[5] 137 S.Ct. at 999.

11. What does "progress appropriate in light of the child's circumstances" mean?

The essential function of an IEP is to provide meaningful opportunities for appropriate academic and functional advancement, and to enable the child to make progress. The expectations of progress in the IEP must be appropriate in light of the child's unique circumstances. This reflects the focus on the individualized needs of the particular child that is at the core of the IDEA. It also reflects States' responsibility to offer instruction "specially designed" to meet a child's unique needs through an IEP.[6]

While the Court did not specifically define "in light of the child's circumstances," the decision emphasized the individualized decision-making required in the IEP process and the need to ensure that every child should have the chance to meet challenging objectives. The IDEA's focus on the individual needs of each child with a disability is an essential consideration for IEP Teams. Individualized decision-making is particularly important when writing annual goals and other IEP content because "the IEP must aim to enable the child to make progress."[7] For example, the Court stated that the IEP Team, which must include the child's parents[8] as Team members, must give "careful consideration to the child's present levels of achievement, disability, and potential for growth."

12. How can an IEP Team ensure that every child has the chance to meet challenging objectives?

The IEP must include annual goals that aim to improve educational results and functional performance for each child with a disability. This inherently includes a meaningful opportunity for the child to meet challenging objectives. Each child with a disability must be offered an IEP that is designed to provide access to instructional strategies and curricula aligned to both challenging State academic content standards and ambitious goals, based on the unique circumstances of that child. The IEP must be developed in a way that ensures that children with disabilities have the chance to meet challenging objectives, as reflected in the child's IEP goals. Each child's IEP must include, among other information, an accurate statement of the child's present levels of academic achievement and functional performance and measurable annual goals, including academic and functional goals.[9] This information must include how the child's disability affects the child's involvement and progress in the general education curriculum.

How IEP Team members evaluate and assess this information, as well as the establishment of the child's IEP goals, will each contribute to ensuring the child has access to challenging objectives. The IEP Team's effectiveness in gathering and interpreting this information will ensure that, in establishing IEP goals, the child has the opportunity to meet challenging objectives. As the Court

[6] 137 S.Ct. at 999.
[7] 137 S.Ct. at 999.
[8] The term "parent" means a biological or adoptive parent of a child; a foster parent, unless State law, regulations, or contractual obligations with a State or local entity prohibit a foster parent from acting as a parent; a guardian generally authorized to act as the child's parent, or authorized to make educational decisions for the child (but not the State if the child is a ward of the State); an individual acting in the place of a biological or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives, or an individual who is legally responsible for the child's welfare; or a surrogate parent who has been appointed in accordance with 34 CFR §300.519. 34 CFR §300.30.
[9] 20 U.S.C. 1414(d)(1)(A)(i)(I)-(IV) and 34 CFR §300.320(a)(1)–(4).

stated in *Endrew F.,* "the IEP must aim to enable the child to make progress."[10] Determining an appropriate and challenging level of progress is an individualized determination that is unique to each child. When making this determination, each child's IEP Team must consider the child's present levels of performance and other factors such as the child's previous rate of progress and any information provided by the child's parents.

13. How can IEP Teams determine if IEP annual goals are appropriately ambitious?

As the Court stated, "advancement from grade to grade is appropriately ambitious for most children in the regular classroom;" however, the Court also noted that while these "goals may differ…every child should have the chance to meet challenging objectives."[11] In order to make FAPE available to each eligible child with a disability, the child's IEP must be designed to enable the child to be involved in, and make progress in, the general education curriculum.[12] The term "general education curriculum" is "the same curriculum as for nondisabled children."[13] We have previously clarified that the phrase "the same curriculum as for nondisabled children" is the curriculum that is based on a State's academic content standards. This alignment, however, must guide, and not replace, the individualized decision-making required in the IEP process. This decision-making continues to "require careful consideration of the child's present levels of achievement, disability, and potential for growth" as discussed in question #11.[14]

14. How can IEP Teams implement the *Endrew F.* standard for children with the most significant cognitive disabilities?

The Department recognizes that there is a small number of children—those with the most significant cognitive disabilities—whose performance can be measured against alternate academic achievement standards.[15] Alternate academic achievement standards also must be aligned with the State's grade-level content standards.

Therefore, annual IEP goals for children with the most significant cognitive disabilities should be appropriately ambitious, based on the State's content standards, and "reasonably calculated to enable the child to make progress appropriate in light of the child's circumstances."

15. What actions should IEP Teams take if a child is not making progress at the level the IEP Team expected?

An IEP is not a guarantee of a specific educational or functional result for a child with a disability. However, the IDEA does provide for revisiting the IEP if the expected progress is not occurring. This is particularly important because of the Court's decision in *Endrew F.*, which clarifies that the standard for determining whether an IEP is sufficient to provide FAPE is whether the child is offered an IEP reasonably calculated to enable the child to make progress that is appropriate in light of the child's circumstances. At least once a year, IEP Teams must review the child's IEP to determine whether the annual goals for the child are being achieved.

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[10] 137 S.Ct. at 999.
[11] 137 S.Ct. at 1000.
[12] 20 U.S.C. 1414(d)(1)(A) and 34 CFR §300.320(a).
[13] 20 U.S.C. 20 U.S.C. 1414(d)(1)(A)(i)(I)(aa) and 34 CFR §300.320(a)(1)(i).
[14] 137 S.Ct. at 999.
[15] See section 1111(b)(1)(E) of the Elementary and Secondary Education Act (ESEA), and Section 200.6(c) of the Department's regulations for Title I Part A of the ESEA.

The IEP Team also may meet periodically throughout the course of the school year, if circumstances warrant it. For example, if a child is not making expected progress toward his or her annual goals, the IEP Team must revise, as appropriate, the IEP to address the lack of progress.[16] Although the public agency is responsible for determining when it is necessary to conduct an IEP Team meeting, the parents of a child with a disability have the right to request an IEP Team meeting at any time. If a child is not making progress at the level the IEP Team expected, despite receiving all the services and supports identified in the IEP, the IEP Team must meet to review and revise the IEP if necessary, to ensure the child is receiving appropriate interventions, special education and related services and supplementary aids and services, and to ensure the IEP's goals are individualized and ambitious.

Public agencies may find it useful to examine current practices for engaging and communicating with parents throughout the school year as IEP goals are evaluated and the IEP Team determines whether the child is making progress toward IEP goals. IEP Teams should use the periodic progress reporting required at 34 CFR §300.320(a)(3)(ii) to inform parents of their child's progress. Parents and other IEP Team members should collaborate and partner to track progress appropriate to the child's circumstances.

16. Must IEPs address the use of positive behavioral interventions and supports?

Where necessary to provide FAPE, IEPs must include consideration of behavioral needs in the development, review, and revision of IEPs.[17] IEP Teams must consider and, if necessary to provide FAPE, include appropriate behavioral goals and objectives and other appropriate services and supports in the IEPs of children whose behavior impedes their own learning or the learning of their peers. [18]

17. How does the *Endrew F.* decision impact placement decisions?

Consistent with the decision in *Endrew F.*, the Department continues to recognize that it is essential to make individualized determinations about what constitutes appropriate instruction and services for each child with a disability and the placement in which that instruction and those services can be provided to the child. There is no "one-size-fits-all" approach to educating children with disabilities. Rather, placement decisions must be individualized and made consistent with a child's IEP. [19] We note that placement in regular classes may not be the least restrictive placement for every child with a disability. The IDEA Part B regulations specify that each public agency must ensure that a continuum of alternative placements (including instruction in regular classes, special classes, special schools, home instruction, placement in private schools, and instruction in hospitals and institutions) is available to meet the needs of children with disabilities for special education and related services.[20]

[16] 20 U.S.C. 1412(d)(4)(A).
[17] 20 U.S.C. 1414(d)(3)(B)(i) and 34 CFR §300.324(a)(2)(i) and (b)(2).
[18] 20 U.S.C. 1414(d)(1)(A)(i)(I)-(IV) and 34 CFR §300.320(a)(4).
[19] 20 U.S.C. 1412(a)(5)
[20] 20 U.S.C. 1412(a)(5)

18. Is there anything IEP Teams should do differently as a result of the *Endrew F.* decision?

The Court in *Endrew F*. held that to meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances and expressly rejected the merely more than *de minimis,* or trivial progress standard. Although the Court did not determine any one test for determining what appropriate progress would look like for every child, IEP Teams must implement policies, procedures, and practices relating to

(1) identifying present levels of academic achievement and functional performance;

(2) the setting of measurable annual goals, including academic and functional goals; and

(3) how a child's progress toward meeting annual goals will be measured and reported, so that the *Endrew F.* standard is met for each individual child with a disability.

Separately, IEP Teams and other school personnel should be able to demonstrate that, consistent with the provisions in the child's IEP, they are providing special education and related services and supplementary aids and services; making program modifications; providing supports for school personnel; and allowing for appropriate accommodations that are reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances and enable the child to have the chance to meet challenging objectives.

19. Is there anything SEAs should do differently as a result of the *Endrew F.* decision*?*

SEAs should review policies, procedures, and practices to provide support and appropriate guidance to school districts and IEP Teams to ensure that IEP goals are appropriately ambitious and that all children have the opportunity to meet challenging objectives. States can help ensure that every child with a disability has an IEP that enables the child to be involved in and make progress in the general education curriculum and is appropriately ambitious in light of the child's circumstances.[21] While many States and school districts are already meeting the standard established in *Endrew F.,* this is an opportunity to work together to ensure that we are holding all children with disabilities to high standards and providing access to challenging academic content and achievement standards.

20. Has the *Endrew F.* decision affected parents' due process rights under the IDEA?

No. Parents can continue to use the IDEA Part B mediation and due process procedures if they disagree with IEP Team determinations about the special education and related services that are appropriate and necessary for their child to receive FAPE.[22] As reflected in *Endrew F*., the IDEA provides a mechanism whereby parents may opt to place their child in a private school setting in circumstances where they believe FAPE has been denied. If a court or hearing officer determines that a school failed to make FAPE available in a timely manner prior to enrollment in a private school setting, that the private placement is appropriate, and that the parents provided notice to the school district, parents may recover the costs of the private placement.[23] Nothing in *Endrew F.* changes or amends these procedural due process rights.

[21] 20 USC §1414(d)(1)(A)(i)(IV); 137 S.Ct. at 1000.
[22] 34 CFR §§300.506-300.516
[23] 34 CFR §300.148(c).

Bullying and Harassment: Ensuring Special Needs Students Receive Free and Appropriate Public Education (FAPE)

Submitted by Jenny Chau

Bullying and Harassment: Ensuring Special Needs Students Receive Free and Appropriate Public Education (FAPE)

A. When bullying of special needs students exposes schools to significant legal liabilities.

A school district's failure to adequately address bullying or harassment of a student with a disability may expose it to potential liability under federal statutes, including, the Individuals with Disabilities Education Act ("IDEA"), Section 504 of the Rehabilitation Act ("Section 504), the Americans with Disabilities Act ("ADA"), and Section 1983 of the Constitution, as well as state law, such as the Unruh Civil Rights Act, and negligence, to name a few.

By way of its enactment of a scheme of interrelated statutes, the California Legislature has imposed on public schools an affirmative duty to protect public school students from discrimination and harassment engendered by race, gender, sexual orientation or disability. [1]

Education code § 32282 requires that public schools develop and implement comprehensive school safety plans which include an anti-discrimination and anti-harassment policy.[2] The Legislature has encouraged schools to include in their safety plans "...policies and procedures aimed at the prevention of bullying."

For example, in *Doe v. Roe School District*, where a 14 year old special needs child suffered emotional distress after being raped by other students over the course of several months near a bathroom located outside an enclosed area designed to keep the child safe at lunch, the school district paid a $3 million settlement.[3] In another case in Los Angeles County, the school district paid a settlement of $1.35 million, when the bullied student, who attempted suicide after several students bullied him, sued the school district

[1] *Hector F. v. El Centro Elementary School Dist.* (2014) 227 Cal.App.4th 331, 333

[2] Ed. Code Section § 32282(a)(2)(e).

[3] Confidential Dkt No. (Riverside Cty. Super. Ct. 2012).

for failing to suspend the bullies under its zero-tolerance bullying policy.[4] In *Walsh v. Tehachapi Unified School District*, the school district paid a settlement of $750,000 and injunctive relief [5].

B. Understanding FAPE in Different Forms: IDEA and Section 504

1. FAPE under the Individuals with Disabilities Education Act[6]

In 2017, the U.S. Supreme Court in *Endrew F. v. Douglas County Sch. Dist.* has held that to provide a free appropriate public education ("FAPE"), a student's individualized education program ("IEP") must be reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances[7]. The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created.[8]

Regarding appropriate progress, for a child that is fully integrated in the regular classroom, an IEP typically should be "reasonably calculated to enable a child to achieve passing marks and advance from grade to grade."[9] When grade level advancement is not a reasonable prospect, an IEP must be appropriately ambitious in light of the child's circumstances[10].

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[4] *Doe v. Roe School District*, Confidential Dkt. No. (Los Angeles Cnty. Super. Ct. 2012).

[5] No. 11-cv-1489 (E.D. Cal. 2014)

[6] 20 U.S.C. § 1400 et seq.

[7] 137 S. Ct. 988, 1001 (2017).

[8] *Id.*

[9] *Endrew F.* at 999, citing *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley*,458 U.S. 176, 203-204203, n. 25

[10] *Endrew F.* at 1000.

2. FAPE under Section 504

Section 504 of the Rehabilitation Act ("Section 504") provides that:

> No otherwise qualified individual with a disability in the United States ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.[11]

The Department of Education's Section 504 regulations require that recipients of federal funds to provide a free appropriate public education ("FAPE") to each qualified handicapped person and define appropriate education as:

> regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of [34 C.F.R.] §§ 104.34, 104.35, and 104.36[12]

34 C.F.R. § 104.34 requires that school districts place disabled individuals in a regular educational environment, unless it can be shown that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily. When a disabled individual is removed from a regular

[11] 29 U.S.C. § 794

[12] 34 C.F.R. § 104.33

environment, the facility in which she is placed must be comparable to that used by non-disabled students.[13]

3. IDEA v. 504

The ninth circuit explains the difference between FAPE under the IDEA and Section 504 in *Mark H. v. Lemahuieu*[14]. The court states that "unlike FAPE under IDEA, FAPE under Section 504 is defined to require a comparison between the manner in which the needs of disabled students are met and focuses on the design of the child's educational program."[15] The court in *Mark H.* also states that the Section 504 regulations provide that implementing an IEP in accordance with the IDEA is one means of meeting the FAPE requirements specified in Section 504 regulations, but not necessary to satisfy the Section 504 requirements.[16] Under Section 504, school districts need only design education programs for disabled persons that are intended to meet their educational needs to the same degree that the needs of nondisabled students are met.[17]

C. Recognizing Harassment and Interference with Special Education Services

California defines bullying as any severe or pervasive physical or verbal act or conduct, including communications made in writing or by means of an electronic act, and including one or more acts committed by a pupil or group of pupils as defined in section 48900.2, 48900.3, 48900.4, directed toward one or more pupils that has or can be reasonably predicted to have the effect of one or more of the following: (A) Placing a reasonable pupil or pupils in fear of harm to that pupil's or those pupils' person or

[13] 34. C.F.R. § 104.34(c).

[14] 513 F.3d 922 (9th Cir. 2008).

[15] *Id.* at 933.

[16] *Id.*, 34 U.S.C. § 104.33(b)(2).

[17] *Mark H. at 936-937.*

property, (B) Causing a reasonable pupil to experience a substantially detrimental effect on his or her physical or mental health, (C) Causing a reasonable pupil to experience substantial interference with his or her academic performance. (D) causing a reasonable pupil to experience substantial interference with his or her ability to participate in or benefit from the services, activities, or privileges provided by a school.[18]

The U.S. Department of Education Office of Civil Rights has defined disability based harassment as intimidation or abusive behavior toward a student based on disability that creates a hostile environment which limits people with disabilities from participating in or benefiting from school activities or services.[19] In *Davis v. Monroe County Board of Education,* the Supreme Court held that peer-on-peer harassment cases require a showing of deliberate indifference on the part of the school in order to impose liability.[20]

Relying on the principals in *Davis*, District courts have applied a five part test for imposing liability for peer-on-peer disability harassment:

1) the student is an individual with a disability;
2) the was harassed based on his disability;
3) the harassment "was sufficiently severe or pervasive" that it altered his education and created an abusive environment;
4) the school knew of the harassment; and
5) the school was deliberately indifferent to the harassment. [21]

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[18] Cal. Educ. Code § 48900(r).

[19] *Dear Colleague Letter,* Oct 26, 2010, https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf

[20] 526 U.S. 629 (1999).

[21] *Werth v. Board of Directors of the Public Schools of Milwaukee*, 472 F. Supp. 2d 1113 (E.D. Wis. 2007)

1. When is it a denial of FAPE under the IDEA?

If a teacher is deliberately indifferent to teasing of a disabled child and the abuse is so severe that the child can derive no benefit from the services that he or she is offered by the school district, the child has been denied a FAPE.[22]

Schools have an obligation to ensure that a student with a disability who is the target of bullying behavior continues to receive FAPE in accordance with her IEP. The school should, as part of its appropriate response to the bullying, convene the IEP team to determine whether, as a result of the effects of the bullying, the student's needs have changed such that the IEP is no longer designed to provide FAPE.[23]

For example, a district court in Hawaii found that the detailed crisis plan that the Hawaii ED developed for an 11-year old with autism who had left the public school system due to severe bullying by schoolmates was enough to show that the District took adequate steps to address actual and perceived peer harassment and affirmed the administrative decision that the IEP was reasonably calculated to provide the student a FAPE.[24]

2. When is it a denial of FAPE under Section 504?

As with the IDEA, school districts have a duty to ensure that students with a disability who are bullied must continue to receive a FAPE under Section 504. If the school's investigation reveals that the bullying created a hostile environment and there is reason to believe that the student's Section 504 FAPE services may have been affected by

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[22] *M.L. v. Federal Way School Dist*., 394 F.3d 634, 650 (9th Cir. 2005)

[23] *Dear Colleague Letter* , August 20, 2013, https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/bullyingdcl-8-20-13.pdf

[24] *J.M. v. Department of Educ., State of Hawaii,* 224 F.Supp.3d 1071 (2016), overruled on other grounds by *R.E.B. v. State of Hawaii Dept. of Educ.*, 870 F.3d 1025 (2017).

the bullying, the school has an obligation to remedy those effects on the student's receipt of FAPE. [25]

Changes in academic performance or behavior that could trigger the duty to convene the IEP or 504 team include a sudden decline in grades, the onset of emotional outbursts, an increase in the frequency or intensity of behavioral interruptions, or a rise in missed classes or sessions of Section 504 services.[26]

D. Special Needs Students as Perpetrators: How to Handle It.

1. Child find

Bullying can be a red flag that either the student being bullied or the student engaging in bullying may be a student with a disability in need of special education and related services.[27] Where the student engaging in bullying has not been identified as a student with a disability, the bullying behavior could potentially indicate that the child is eligible as a student with a disability, and thus the district's child find obligations may be triggered. School districts have an affirmative, ongoing obligation under the IDEA to identify, locate, and evaluate students with disabilities or those suspected of having disabilities who may be in need of special education and related services. [28]

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[25] *Dear Colleague letter*, August 20, 2013; Dear Colleague Letter, October 21, 2014 https://www2.ed.gov/about/offices/list/ocr/letters/colleague-bullying-201410.pdf

[26] *Dear Colleague Letter*, October 21, 2014 https://www2.ed.gov/about/offices/list/ocr/letters/colleague-bullying-201410.pdf

[27] *Dear Colleague letter*, August 20, 2013

[28] 34 C.F.R. § 300.111

2. IEP

For students who are already eligible for special education, if a student's behavior impedes his learning, the IEP team must consider the use of positive behavioral interventions and supports and other strategies to address that behavior. [29] If a student with a disability engages in bullying behavior, the IEP team should review the student's IEP to determine if additional supports and services are needed to address the inappropriate behavior. [30]

3. Reevaluation

A public agency must ensure that a reevaluation of each child with a disability is conducted in accordance with 34 C.F.R. § 300.304 through 34. C.F.R § 300.311 if the public agency determines that the educational or related services needs of the child warrant a reevaluation or if the child's parent or teacher requests a reevaluation.[31] A school district may violate the IDEA if it fails to reevaluate a student with a disability whose bullying behaviors indicates that the student has an additional disability or has disability-related needs that are not being adequately addressed by his or her IEP.

4. Discipline Considerations

If a district's discipline of a student for bullying constitutes a significant change of placement (the student is removed for more than 10 consecutive school days or is subjected to a pattern of shortened removals exceeding 10 days), the district must conduct a manifestation determination review to establish whether the bullying was caused by or had a direct and substantial relationship to the child's disability, or the direct result of the

[29] 34 C.F.R. § 300.324.

[30] *Dear Colleague letter,* August 20, 2013.

[31] 34 C.F.R § 300.303(a).

district's failure to implement the IEP. [32] If the manifestation determination review team determines that the student's bullying is not a manifestation of a disability and removes him from his placement for more than 10 days, the district must continue to provide the student with educational services so as to enable the child to continue to participate in the general education curriculum and progress toward his IEP goals.[33]

E. Documenting Responses to Bullying and Harassment

Once a school has notice of possible disability-based harassment, it must take prompt and effective steps to determine what occurred and to end any harassment, eliminate a hostile environment if one has been created, and prevent harassment from recurring.[34]

A district may violate Section 504 if it has adequate notice that student-on-student harassment based on disability is occurring and fails to take prompt and effective action to stop it, remedy the effects of the harassment, and prevent its recurrence. [35]

A district may be found liable for violations under 504 and the ADA if it fails to ensure that provisions to address peer harassment complaints in student's IEP is implemented until after the student was subjected to further harassment.[36]

[32] 34 C.F.R. § 300.530.

[33] 34 C.F.R. § 300.530(d).

[34] *See Clayton County (GA) Sch. Dist*., (OCR 2016).

[35] *See Los Angeles Unified Sch. Dist.* (OCR July 28, 2006).

[36] *See Santa Monica-Malibu Unified School District* (OCR June 30, 2010).

Developing Legally Compliant IEPs That Benefit Students: With Examples

Submitted by Christian M. Knox

A. EVALUATION BEST PRACTICES

For purposes of evaluating a child for special education eligibility, the district must ensure that "the child is assessed in all areas of suspected disability." (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) Title 34 Code of Federal Regulations Section 300.304(c)(6) indicates that a school district is required to ensure that the evaluation is sufficiently comprehensive to identify all of the child's needs for special education and related services, whether or not commonly linked to the disability category in which the child has been classified.

It has been commonly held that a school district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information to determine whether the child is eligible for special education services. (20 U.S.C. § 1414(b)(2)(A); 34 C.F.R. § 300.304 (b)(1).) Pursuant to 20 U.S.C. § 1414(b)(2)(C), the assessment must use technically sound instruments that assess the relative contribution of cognitive, behavioral, physical, and developmental factors. (*See also*; 34 C.F.R. § 300.304(b)(3).) California Education Code section 56320 provides that assessment materials must be used for purposes for which they are valid and reliable. (20 U.S.C. § 1414(b)(3)(A)(iii); 34 C.F.R. § 300.304(c)(1)(iii).)

The statutes are also clear that the tests and assessment materials must be administered by trained personnel in conformance with the test instructions and provide relevant, accurate, information as to Student's unique needs, and in all areas of suspected disability. (20 U.S.C. § 1414(b)(3)(A)(iii)-(v); 34 C.F.R. § 300.304(c)(7); Ed. Code, § 56320, subd. (b)(2), (3); Ed. Code, § 56320, subd. (d); Ed. Code, § 56320, subd. (c), (f).) In addition, assessments must be conducted by individuals who are both "knowledgeable of [the student's] disability" and "competent to perform the assessment." (Ed. Code, § 56320, subd. (g), 56322; see, 20 U.S.C. § 1414(b)(3)(A)(iv).)

"The personnel who assess the student shall prepare a written report that shall include, without limitation, the following: 1) whether the student may need special

education and related services; 2) the basis for making that determination; 3) the relevant behavior noted during observation of the student in an appropriate setting; 4) the relationship of that behavior to the student's academic and social functioning; 5) the educationally relevant health, development and medical findings, if any; 6) if appropriate, a determination of the effects of environmental, cultural, or economic disadvantage; and 7) consistent with superintendent guidelines for low-incidence disabilities (those affecting less than one percent of the total statewide enrollment in grades K through 12), the need for specialized services, materials, and equipment. (Ed. Code, § 56327.) The report must be provided to the parent at the IEP team meeting regarding the assessment. (Ed. Code, § 56329, subd. (a)(3).)" *Student v. Capistrano Unified School District*, OAH Case No. 2014040723 (2014).

In addition, California Education Code Section 56335 provides as follows:

(a) The Superintendent shall develop program guidelines for dyslexia 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. For purposes of this section, "educational services" means an evidence-based, multisensory, direct, explicit, structured, and sequential approach to instructing pupils who have dyslexia.

The California legislature has also indicated that phonological processing shall be included in the description of basic processing under the Education Code. (See, §56334).

Case Study: Triennial evaluation for a student ("M") who is in twelfth grade. She is eligible for special education under the qualifying condition of specific learning disability. M has deficits in reading decoding, reading fluency, reading comprehension, math, written expression, executive functioning, and social/emotional functioning. She has been diagnosed with attention deficit hyperactivity disorder, anxiety, and depression. In addition, she has had suicidal ideations and has had panic attacks which lasted several

hours. M is on a modified curriculum and only has to complete fifty percent of her school work. M is failing all of her classes.

The District did not complete any assessments for her last triennial evaluation. The triennial evaluation stated the following:

> "M's existing evaluation data has been reviewed. On the basis of this review it appears that she continues to evidence a disability that requires the provision of on-going special education services. It appears that additional psycho-educational testing is not needed at this time in order to develop an appropriate program of services."

In *Schaffer v. Weast*, 126 S.Ct. 528 (2005), the Supreme Court found that the right to an independent educational evaluation was a very important safeguard for parents. Title 34 of the Code of Federal Regulations Section 300.502(b)(5) indicates that Parents are only entitled to one independent educational evaluation at public expense each time a school district conducts an evaluation which with the parents disagree.

B. MITIGATING THE CHANCE FOR LEGAL LIABILITIES IN THE MEETING

The IEP meeting can be very challenging to control, and the likelihood that litigation may ensue may be unavoidable. However, there are certain steps that can be taken to mitigate the chance for legal liabilities. Many issues seem to arise over a lack of communication or parents feeling like they have not truly been heard in the IEP process.

First, a parent must be given the opportunity to meaningfully participate in the IEP process.

Federal and State law require that parents of a child with a disability must be afforded an opportunity to meaningfully participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. (20 U.S.C. § 1414(d)(1)(B)(i); Ed. Code, §§ 56304, 56342.5.) As clearly indicated in the law, a parent is a required member of the IEP team. (20 U.S.C. § 1414(d)(1)(B)(i); Ed. Code, § 56341,

subd. (b)(1).) The team must consider the concerns of the parents throughout the IEP process. (20 U.S.C. § 1414(c)(1)(B).

A parent has **meaningfully participated** in the development of an IEP when he or she is informed of the child's problems, attends the IEP team meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. *(N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Board of Education* (3d Cir. 1993) 993 F.2d 1031, 1036. Although school districts are required to consider parents' preferences, the IDEA does not require that a school district accept parents' choice of program. (*Blackmon v. Springfield R-XII School Dist.* (8th Cir. 1999) 198 F.3d 648, 658.)

A parent will not feel as though they have had meaningful participation in the process if the school district has predetermined the IEP.

A school district that **predetermines** the child's program and does not consider the parents' requests with an open mind has denied the parents' right to participate in the IEP process. (*Deal v. Hamilton County Board of Education* (6th Cir. 2004) 392 F.3d 840, 858; see also, *Ms. S. ex rel G. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1131.) The Office of Administrative Hearings has adopted the test set forth in *Hanson v. Smith*, (D. Md. 2002) 212 F.Supp.2d 474, 486 and *Doyle v. Arlington County School Board* (E.D.Va. 1992) 806 F.Supp. 1253, 1262; namely, whether the school district comes to the IEP meeting with an open mind and several options, and discusses and considers the parents' placement recommendations or concerns before the IEP team makes a final recommendation.

The school district should also ensure that **all necessary team members** are present at the IEP team meeting and that they stay for the entire meeting.

California Education Code, Section 56341, subdivisions (b)(1) and (5-6) provide for the members of the IEP team. According to the section, an IEP team must include at least one parent; a representative of the local educational agency; a regular education teacher of the child if the child is, or may be, participating in the regular education

environment; a special education teacher or provider of the child; an individual who can interpret the instructional implications of assessment results, and other individuals who have knowledge or special expertise regarding the pupil, as invited at the discretion of the district, the parent; and when appropriate, the student. (*See also*, 20 U.S.C. § 1414(d)(1)(B)(i), (iv-vi).)

In *M.L v. Federal Way School District* (9th Cir. 2005) 394 F.3d 634, 643 the Ninth Circuit Court held that regular education teachers often play a central role in the education of children with disabilities. The Court stated that "plain meaning of the terms used in section 1414(d)(1)(B) compels the conclusion that the requirement that at least one regular education teacher be included on an IEP team, if the student may be participating in a regular classroom, is mandatory - not discretionary." This holding was further explained in *R.B. v. Napa Valley Unified School Dist.* (9th Cir, 2007) 496 F.3d 932, which states that it is only necessary for a general education teacher who has instructed the child in the past or who may instruct the child in the future to be present.

It is also very important for the IEP team meeting to consider a continuum of placement options.

California Education Code, Section 56360 provides that a school district is required to have a continuum of program options available for a child. The continuum of program options includes, but is not limited to regular education; resource specialist programs; designated instruction and services; special classes; nonpublic, nonsectarian schools; state special schools; specially designed instruction in settings other than classrooms; itinerant instruction; and instruction using telecommunications in the home or hospitals or institutions. (Ed. Code, § 56361.) Although a continuum of placement options need to be available, a district does not need to discuss every possible placement at every IEP team meeting. (*Katherine G. v. Kentfield Sch. Dist.* (N.D.Cal. 2003) 261 F.Supp.2d 1159, 1189-1190.) Only placement options that are likely to be relevant to a student's needs must be discussed.

Case Study: J is fourteen years old and in the eighth grade. J is eligible for special education services under the qualifying condition of emotional disturbance (ED). J has average cognitive abilities. J has deficits in executive functioning, behavior, reading decoding, reading fluency, reading comprehension, written expression, social/emotional functioning, fine motor skills, sensory processing, and social skills. J has a long history of mental health issues. He has been diagnosed with mood disorder, not otherwise specified; intermittent explosive disorder; oppositional defiant disorder; and attention deficit hyperactivity disorder (ADHD). When J was five years old, he was diagnosed with schizophrenia. J has been hospitalized over fourteen times as a result of psychiatric holds. After hospitalizations, J has also been placed in crisis residential treatment at Edgewood in San Francisco and Rebekah's Children's Services on multiple occasions.

On January 25, 2016, the District convened an addendum IEP team meeting at parental request. J had only attended nine days of school since he was placed at Sutter Middle School in November 2015, and had only attended one day since the end of the winter break. It was reported that J would make himself vomit to avoid school. Ms. W once again requested that J be placed in residential treatment. The District did not discuss placement options with the Parents. The District's only proposal was to call the police when J refused to attend school and for Ms. W to try to obtain day treatment through Kaiser.

C. ENSURING LEGALLY DEFENSIBLE DOCUMENTATION FOR EVERY DECISION

Present Levels of Performance

Federal and State law specify in detail what an IEP must contain. (20 U.S.C. § 1414(d)(1)(A)(i); 34 C.F.R.§ 300.320; Ed. Code, § 56345.) Pursuant to California Education Code, Section 56345, an annual IEP must contain, among other things, a statement of the individual's present levels of academic achievement and functional performance, including the manner in which the disability of the individual affects his involvement and progress in the regular education curriculum. (20 U.S.C. § 1414(d)(1)(A)(i)(I); 34 C.F.R § 300.320 (a)(1).) The statement of present levels creates a

baseline for designing educational programming and measuring a student's future progress toward annual goals.

The most common mistake in reporting present levels of performance is merely providing a student's current grades in subjects. For example, in M's case, discussed above, her present levels of performance listed the classes she was taking and the grades she was receiving in each class. The only objective information contained in the present levels was test reporting from three years prior. This was particularly troublesome, because whether M could read at a functional level was at the crux of the case.

Goals in all areas of need

"An annual IEP must also contain a statement of measurable annual goals designed to: (1) meet the individual's needs that result from the individual's disability to enable the pupil to be involved in and make progress in the general curriculum; and (2) meet each of the pupil's other educational needs that result from the individual's disability. (20 U.S.C. § 1414(d)(1)(A)(i)(II); Ed. Code, § 56345, subd. (a)(2).) Annual goals are statements that describe what a child with a disability can reasonably be expected to accomplish within a 12-month period in the child's special education program. (*Letter to Butler* (OSERS 1988) 213 IDELR 118; *U.S. Dept. of Educ., Notice of Interpretation,* Appendix A to 34 C.F.R., part 300, 64 Fed. Reg. 12,406, 12,471 (1999 regulations).)" *Student v. East Side Union High School District,* OAH Case No. 2016061098 (2016).

Although M had identified needs in reading decoding, reading fluency, reading comprehension, math, written expression, executive functioning, and social/emotional functioning, the District had only developed goals in the areas of math and organization. Moreover, the baselines for the goals were from 2012 and the goals had expired, according to the IEP two years prior.

Assistive Technology

In *M.C. v. Antelope Valley High School District*, 858 F.3d 1189 (9th Cir. 2017), the Ninth Circuit Court held that the specific assistive technology devices must be

delineated in a student's IEP. The Court found a discussion of the devices, without documentation of the devices to be provided in the IEP, a denial of FAPE. The Court held, "Because the IEP didn't specify which AT devices were being offered, M.N. had no way of confirming whether they were actually being provided to M.C. The District's failure to specify the AT devices that were provided to M.C. thus infringed M.N.'s opportunity to participate in the IEP process and denied M.C. a FAPE."

Clear Written Offer

Perhaps the most important documentation issue in special education law is ensuring that the offer is clear. The Ninth Circuit, in *Union School Dist. v. Smith* (1994) 15 F.3d 1519, held that a district is required by the IDEA to make a clear written IEP offer that parents can understand. The Court stated. "We find that this formal requirement has an important purpose that is not merely technical, and we therefore believe it should be enforced rigorously." The creation of a clear written offer eliminates many troublesome factual disputes about "when placements were offered, what placements were offered, and what additional educational assistance was offered to supplement a placement, if any." Furthermore, a formal, specific offer from a school district will greatly assist parents in "present[ing] complaints with respect to any matter relating to the ... educational placement of the child." 20 U.S.C. § 1415(b)(1)(E). (*Union School Dist. v. Smith*, supra, 15 F.3d at p. 1526; see also *J.W. v. Fresno Unified School Dist*. supra, 626 F.3d at pp. 459-461; *Redding Elementary School Dist. v. Goyne* (E.D.Cal., March 6, 2001, No. Civ. S001174) 2001 WL 34098658, pp. 4-5.)

Although *Union* involved a District's failure to produce any formal written offer, there have been many decisions that invalidated IEPs which were insufficiently clear and not specific enough to permit parents to make an intelligent decision whether to agree, disagree, or seek relief through a due process hearing. (See, e.g., *Glendale Unified School Dist. v. Almasi* (C.D.Cal. 2000) 122 F.Supp.2d 1093, 1108; *Mill Valley Elem. School Dist. v. Eastin* (N.D.Cal., Oct. 1, 1999, No. 98-03812) 32 IDELR 140, 32 LRP 6047). In *Glendale*, the Court stated that *Union* requires "a

clear, coherent offer which [parent] reasonably could evaluate and decide whether to accept or appeal."

The IEP must also contain a projected date for the beginning of the special education services and the anticipated frequency, location, and duration of those services and modifications." (20 U.S.C. § 1414(d)(1)(A)(VII); see also 34 C.F.R. § 300.320(a)(7); Ed. Code, § 56345, subd. (a)(7).) In *J.L. v Mercer Island School* District, 592 F.3d 938 (9th Cir. 2009), the Ninth Circuit Court stated that the length of time that an offered service will be delivered must be "stated [in an IEP] in a manner that is clear to all who are involved." Therefore, if a district omits a statement of the duration of an offered service or accommodation from the IEP, it is a procedural violation of the IDEA. (*See, e.g, Student v. Natomas Unified Sch. Dist.* (OAH, Nov. 20, 2012, No. 2012070797; *Student v. Roseville Joint Union High Sch. Dist., et al.* (OAH, Nov. 14, 2011, No. 2011061341.)

Case Study: T is fifteen years old and was in tenth grade during the 2015-2016 school year. T is eligible for special education under the primary qualifying condition of Other Health Impairment. T has been diagnosed with Psychotic Disorder NOS, Mood Disorder NOS, Post-Traumatic Stress Disorder, Schizophrenia, and Adjustment Disorder with mixed disturbance of emotion and conduct. Due to these severe mental health disabilities, T has verbally aggressive, intimidating, and defiant behaviors at school that severely impede his ability to access his education.

In an IEP dated April 23, 2015 T was offered fifty-seven minutes of specialized academic instruction per day, one hour of college awareness per year, and one hour of career awareness per year. The IEP indicated that T would be mainstreamed for ninety-eight percent of his school day. However, the IEP notes indicated that "PS ["program specialist"] offer of ED therapeutic program with specialized academic instruction and individual and group therapy and eligible for extended school year and transpiration [sic]." What was the IEP offer?

D. <u>IEP PROGRESS MONITORING</u>

"An IEP must state when periodic reports on the progress the child is making toward meeting his annual goals (such as through quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided." (20 U.S.C. § 1414(d)(1)(A)(III); 34 C.F.R. § 300.320(a)(3)(ii); Ed. Code, § 56345, subd. (a)(3); *Student v. Natomas Unified School District*, supra.) However, the failure to provide progress reports does not necessarily result in a finding of a denial of FAPE. Nevertheless, there is a strong argument to be made that a parent is denied meaningful participation in the IEP process if they are not regularly informed of progress on goals. Issues also arise when the progress report on the goal indicates that the student met the goal but the notation in the comments section indicates that the goal was not met as written. Frequently, this is seen when the goal does not provide for prompting, yet the comments state that the goal was met with prompts. Special Education staff should be monitoring progress on goals with data that can be shown to a parent if requested.

If a student is not making anticipated progress, the District must convene an IEP team meeting. (Educ. Code, §Section 56343(b).) This is another issue that can lead to litigation. A student may not make anticipated progress in a certain area and the related services level is decreased or goals are dropped. If a related service level is going to be decreased in the IEP, then reasons for the change should be well documented in the IEP. Another issue that raises concerns for litigation is maintaining a student in a placement when the he/she is not making anticipated progress. This is frequently seen in cases where a student is exhibiting school refusal behaviors.

Case Study: N was sixteen years old and was in the ninth grade during the 2015-2016 school year. N was eligible for special education under the qualifying condition of emotional disturbance. N had deficits in behavior, coping skills, and attendance. He had been diagnosed with Reactive Attachment Disorder, Post Traumatic Stress Disorder, Oppositional Defiant Disorder, Generalized Anxiety Disorder, and panic attacks. N suffered early childhood trauma which resulted in behaviors including encopresis, running away, poor grooming and hygiene, poor nutrition, and inappropriate handling of feces.

On January 22, 2014, the District convened N's annual IEP team meeting. The present levels of performance indicated that N had attended twenty-three out of eighty-six school days. N was offered placement in a nonpublic school. He refused to attend school. On October 14, 2014, the District convened an IEP team meeting to discuss N's lack of attendance. The District reported that it intended to contact the Department of Social Services (Child Protective Services) instead of making an appropriate placement. According to notes from a subsequent IEP team meeting, N began attending Advanced Path Academy as of November 2, 2014. On January 6, 2015, the District convened an addendum IEP team meeting. The notes from the addendum indicated that N had not attended Advanced Path since his enrollment in the program. The District then changed N's placement to home/hospital instruction. On January 29, 2015, the District convened another addendum IEP team meeting. The notes from the addendum meeting indicated that N had been placed on an involuntary psychiatric hold for three days. The District offered N placement back at the nonpublic school for one period per day and home instruction for five hours per week.

E. CHANGING THE IEP-ESSENTIAL GUIDELINES

The educational rights holders must be involved in any change to an IEP, even to correct an alleged typographical error. In *M.C. v. Antelope Valley High School District*, 858 F.3d 1189 (9th Cir. 2017), the Ninth Circuit Court found that a school district may not unilaterally change an IEP. The District had alleged that an Addendum/Amendment was developed to correct a typographical error. The Court held, "An IEP, like a contract, may not be changed unilaterally. It embodies a binding commitment and provides notice to both parties as to what services will be provided to the student during the period covered by the IEP. If the District discovered that the IEP did not reflect its understanding of the parties' agreement, it was required to notify M.N. and seek her consent for any amendment." The Court went on to state, "any such unilateral amendment is a per se procedural violation of the IDEA because it vitiates the parents' right to participate at every step of the IEP drafting process."

F. IEP DO'S AND DON'TS

In addition to the foregoing, here are a few IEP do's and don'ts.

Come to the meeting prepared to listen and provide helpful information. Ensure the parents/educational rights holders have an opportunity to provide input and information. Do not discount their input, but ask questions to ensure they feel like they are a part of the process.

If a service, placement, accommodation, or modification is offered at the IEP team meeting, be sure that it is included in the IEP document. If it is only an item of discussion and not intended to be an offer, clearly identify it as such in the notes. Do not send out the IEP to the parents until it has been finalized. Nothing will upset a parent more than to be provided with an IEP with an offer of service, placement, accommodation or modification, and then be provided a second IEP with the same service, placement, accommodation or modification removed.

504 Plan Eligibility and Accommodation Best Practices

Submitted by Alison Saros

NBI – National Business Institute
Special Education Law: The Ultimate Guide
For November 16, 2018
Los Angeles, CA
By: Alison Saros

V. 504 Plan Eligibility and Accommodation Best Practices

An understanding of 504 eligibility and accommodation best practices first requires exploration of the distinction between the Individuals with Disabilities Education Act (IDEA) and Section 504.

The **IDEA** is a federal statute that funds special education programs. Under IDEA, each state educational agency is responsible for administering IDEA within the state and distributing funds for special education programs. IDEA is meant to ensure that "all children with disabilities have available to them a free and appropriate public education [FAPE]."[1]

Section 504 is a federal anti-discrimination law that is part of the Rehabilitation Act of 1973. It is designed to protect the rights of individuals, specifically students, with disabilities in programs and activities that receive Federal financial assistance from the U.S. Department of Education. Section 504 provides:

> No otherwise qualified individual with a disability in the United States… shall, solely by reason of her or his disability, be excluded from the participation in, be

[1] 20. U.S.C. §1400(d)(1)(A)

denied the benefits of or be subjected to discrimination under any program or activity receiving Federal financial assistance…."[2]

A. 504 Plans v. IEP—How They Differ

1. Identification and Eligibility

IDEA: One primary difference between Section 504 and the IDEA is their respective definitions of disability. For IDEA eligibility, students must qualify in one of the 13 recognized classifications, or impairments, and thus need special education, which is generally understood to be a two-part definition. Each disabling condition has unique eligibility criteria that must be fulfilled in order for a child to qualify for IDEA services as a result of that disabling condition."[3] Qualification results in the development of Individual Education Program (IEP).[4]

Section 504: In contrast, Section 504 has a three-part definition that is broader than the IDEA. Eligibility for a Section 504 plan is not based upon a specific defined disability. Rather, a person with a "disability" is one who (1) "has a physical or mental impairment which substantially limits one or more major life activities"; (2) "has a record of such impairment"; or (3) "is regarded as having such an impairment."[5] The regulations further define the following phrases:

physical or mental impairment: any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the body systems:

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[2] 29 U.S.C. §794 (Section 504)

[3] 34 C.F.R. §300.8(c)
[4] 20 U.S.C. §1414(d)
[5] 34 C.F.R. §104.3(j)(1)

neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine or any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness and specific learning disabilities.[6]

major life activities: includes functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, working and learning.[7] The determination of whether a student has a physical or mental impairment that substantially limits a major life activity must be made on case-by-case basis.[8]

FAPE under Section 504 is defined slightly differently than FAPE under IDEA. Under IDEA, FAPE is established to create a plan comparing a child to his or own assessed needs. Under Section 504, however, a child is compared to other children, and FAPE requires related aids and services that:

(1) Are designed to meet individual educational needs of disabled persons as adequately as the needs of non-disabled persons are met; and

(2) Are based upon adherence to procedures that satisfy the requirements of law.[9]

[6] 34 C.F.R. §104.3(j)(2)(i)

[7] 34 C.F.R. §104.3(j)(2)(ii)

[8] U.S. Department of Education, Office for Civil Rights, *Frequently Asked Questions About Section 504 and the Education of Children with Disabilities*, http://www.2ed.gov/about/offices/list/ocr/504/faq.html.

[9] 34 C.F.R. §104.33(b)(1)

2. Dispute Resolution and Due Process Procedures

IDEA: Under the IDEA, each party is entitled to a resolution of the disagreement by following explicit procedural safeguards which include the following options:

- Mediation
- Due process complaint
- Resolution session
- Civil lawsuit
- State complaint
- Law suit[10]

Section 504: Section 504 provides several options for dispute resolution, but does not require a due process hearing.

- Mediation
- Alternative dispute resolution
- Impartial hearing
- Complaint to the office of civil rights
- lawsuit

3. Team Members

IDEA: The IEP team *must* include the parent, general education teacher, special education teacher, administrative designee, individuals who conducted assessment and/or can explain assessment procedures and results, others who know the student, and the student if appropriate.[11]

[10] 20 U.S.C. §1415(f)
[11] Cal. Ed Code §§56341(b) & (e)

Section 504: The 504 team is created by a group of people who are familiar with the child and who understand the evaluation data and special services options. The 504 team *may* include: The child's parent(s), general and special education teachers, and a school administrator such as a counselor, vice principal or principal.

4. Contents

IDEA: The IEP contains educational goals for the students and specifies the special education services and placement that will be provided. The IDEA lays out the specific steps that must be taken in the development of the IEP, and specifies what must be documented in the IEP.

Section 504: The 504 Plan identifies the disability and resulting educational impairment, and contains accommodations, supports or services that will be provided.

5. Notice

IDEA: For a special education student under IDEA with an existing IEP, the school district must provide ***prior written notice*** when proposing to make a change in the child's services or placement, no matter how slight.[12]

Section 504: When a student has a 504 Plan, notice is required before a "significant change" in placement is made. Written notice is not required.

6. Consent

IDEA: Parent consent is required for evaluation ***and*** provisions of services.

[12] 34 CFR §300.503(b)

Section 504: Parent consent is only required for evaluation.

B. Section 504 Best Practices

1. IDEA Procedures Should Be Used to Ensure Compliance with Section 504

a. Child Find

IDEA: Schools are required to locate, identify and evaluate ***all children*** with disabilities from birth through age 21. The Child Find mandate applies to all children who reside within a State, including children who attend private schools and public schools, highly mobile children, migrant children, homeless children, and children who are wards of the state.[13]

Section 504: School districts are required to ***annually*** identify and serve every qualified person with a disability residing within the district's jurisdictional boundaries, and to take appropriate steps to notify such person and their parents or guardians of the district's duties under Section 504.

b. Evaluation Under Section 504

Section 504 FAPE Compliance Checklist

- Identify and refer
- Evaluate
- Section 504 Meeting: "group of knowledgeable persons"

[13] 20 U.S.C. §1412(a)(3)

    - Determine Eligibility
    - Develop a Section 504 Plan
- Implementation
- Review progress
- Re-evaluate
- Procedural Safeguards
- Parental consent
- Discipline

Districts often overlook this very important step in developing a Section 504 Plan. Rather, they will simply use a medical diagnosis or a single assessment to determine eligibility and develop a plan. However, when a court reviews a school district's compliance with Section 504, a two-pronged analysis is used: (1) whether the District complied with the procedures set forth in the Act; and (2) whether the Section 504 Service Agreement developed through the Act's procedures is reasonably calculated to enable the child to receive meaningful educational benefits.

Compliance with Section 504 must be based upon an appropriate and comprehensive evaluation that identifies the student's complete educational needs. ***Comprehensive*** is the key word. If a District fails to comprehensively evaluate a student, it is in violation of Section 504. Under those circumstances, parents can pursue an Independent Educational Evaluation at the school's expense and/or utilize their procedural safeguards such as mediation and due process.

Evaluation Requirements

When a student is evaluated for 504 eligibility, the 504 team must ensure that evidence supports the 504 Plan. The evidence may include:

- Information drawn from a variety of sources;

- Aptitude and achievement tests, teacher recommendations, physical status, or adaptive behavior;
- An independent evaluation;
- A medical diagnosis may be considered, but is never a sufficient evaluation under 504; indeed, a medical diagnosis of an illness does not automatically qualify a student for a 504 plan;[14]
- A statement that the student's disability meets the eligibility criteria of section 504 regulations: (1) the student has a physical or mental impairment that substantially limits one or more major life activities; or (2) the student has a record of such impairment; or (3) the student is regarded as having such an impairment;[15]
- A description of how the student's disability limits specific major life activity; and
- A description of how the District followed requisite procedures in the development of the plan.

2. The ADAAA and 504 Plan Eligibility

Congress passed the Americans with Disabilities Act Amendments Act of 2008 (ADAAA) in December 2008, and became effective January 1, 2009.[16] This significant legislation corrected what Congress considered to be a departure from the intent of the original ADA (passed in 1990), which was brought about by several narrow interpretations of the law through Supreme Court rulings in *Sutton v. United Airlines*

[14] OCR'S Section 504 FAQs

[15] 34 CFR §104.3(j)

[16] 42 U.S.C. §12102)

(1999) and *Toyota Motor Manufacturing v. Williams* (2002). These rulings weakened the law and made it difficult for people with disabilities to receive the protection the law intended.[17]

The ADAAA did not change the basic definition of disability, but rather the manner in which the definition is to be interpreted. The ADAAA continues to define disability as an individual that:

(1) Has a physical or mental impairment;

(2) Which substantially limits one or more major life activities; or

(3) Who has a record of or is regarded as having such an impairment.

a. Significant Changes Made by ADAAA to the Definition of Disability

Impairment:

Under the ADAAA, an impairment is a physiological condition that affects a bodily system or any mental or psychological disorder.

The ADAAA does not provide a list of specific diseases or conditions that qualify as an impairment. Some examples of disabilities that may qualify a child for accommodations under the ADAAA include (but are not limited to): cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, diabetes, heart disease, HIV/AIDS, rheumatoid arthritis, Attention Deficit Hyperactivity Disorder (ADD/ADHD), cystic fibrosis, severe allergies, and asthma.

[17] *Sutton v. United Airlines, Inc.*, 527 US 471 (1999)

Substantially Limits:

According to the updated definition, the term "***substantially limits***" means more than "materially" limits but less than "severely" limits. In order to determine the level of limitation, one should consider the condition, manner, and duration of the impairment. The nature of the impairment, the severity of its impact on an individual, and the expected length of time the impairment may affect the individual must all be taken into account.

The ADAAA, however, states that a disability determination should be made without looking at how the impairment is affected by measures made to lessen its effect.[18] Mitigating measures ***may not*** be considered, such as hearing aids or medications, but eye glasses or contacts may be considered. Further, the determination should include substantially limiting impairments that may be episodic or go into remission (*i.e.* cancer, depression, or a seizure disorder).[19]

Expanded List of Major Life Activities

Before ADAAA: The definition of major life activities included but was not limited to: caring for oneself, performing manual tasks, seeing, hearing, speaking, breathing, learning, and working.

Now: The following activities have been added: eating, sleeping, walking, standing, lifting, bending, reading, concentrating, thinking, and communicating.

Of particular interest to students with learning disabilities and their parents is the clarification that "an individual with an impairment that substantially limits a major life

[18] 42 U.S.C. §12102(4)(E)

[19] 42 U.S.C. §12102(4)(D)

activity should not be penalized when seeking protection under the ADA simply because he or she managed their own adaptive strategies or received informal or undocumented accommodations that have the effect of lessening the deleterious impacts of their disability.''[20] For example, a student with learning disabilities who is performing well academically may, nonetheless, be a qualified individual under both the ADAAA and Section 504.

Impact on 504

The significant changes to Section 504 brought about by the ADAAA are likely to have substantial impact on the policies and procedures used by elementary and secondary schools. Specifically, the expanded list of major life activities — now including reading, concentrating, and thinking, in addition to learning — provides a basis for more students to be considered for eligibility under Section 504. Additionally, the clear and concise language regarding mitigating measures and the expansive list of measures included in the ADAAA provides a different framework for eligibility decisions. Because most Section 504 plans are currently being provided for students with AD/HD, many more students may be eligible when the effects of medication are not part of the consideration of "substantially limits." The same is true for the change clarifying that the impact of an impairment is to be measured at the time the impairment is active.

C. Determining Educationally (and Legally) Appropriate Accommodations

Section 504 requires school districts to provide a student with disabilities potential-maximizing education, which includes *reasonable accommodations* that give the student "the same access to the benefits of a public education as all other students."[21]

[20] Representative George Miller on the floor of the House; Congressional Record, Sept. 17, 2008, Page: H8294
[21] *J.D. v. Pawlet School District*, 33 IDELR 34 (2nd Cir. 2000)

A *reasonable accommodation* is a change, adaptation or modification to a policy, program, service, or workplace that allows a qualified person with a disability to participate fully in a program, take advantage of a service, or perform a job. A school must ensure that its policies allow for a student with a disability to access a similar level of activities as it does for a student without a disability.

Manifestation Determination Reviews (MDRs): Did the Disability Cause the Behavior?

Submitted by Suzanne N. Snowden

MANIFESTATION DETERMINATION

A manifestation determination refers to an evaluation of a child's misconduct to determine whether that conduct is a manifestation of the child's disability. It must be performed when a district proposes disciplinary measures that will result in a change of placement for a child with a disability. 34 CFR 300.530 (e).

California law is in accord with federal law. California law refers to a “child with a disability” as an “individual with exceptional needs” who is identified as disabled by an IEP team and requires special education and services. Under California Education Code section 48915.5, an individual with exceptional needs may be suspended or expelled from school in accordance with subsection (k) of Section 1415 of title 20 of the United States Code, including the discipline provisions in federal regulations and other provisions of California law that do not conflict with the federal law and regulations.

CHANGE IN PLACEMENT

A change in placement occurs when:

1. The removal is for more than 10 consecutive school days; or
2. The child has been subjected to a series of removals that constitute a pattern:
    i. Because the series of removals totals more than 10 school days in a school year;
    ii. Because the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals; and
    iii. Because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another. 34 CFR 300.536.

NOTICE

On the date on which the decision is made to make a removal that constitutes a change of placement of a child with a disability because of a violation of a code of student conduct, the school district must notify the parents of that decision and provide the parents the procedural safeguards notice described in § 300.504 (5)(h).

A school district must notify parents of an IEP meeting, including a manifestation determination IEP team meeting, early enough to ensure that they will have an opportunity to attend, and must schedule the meeting at a mutually agreed upon time and place. (34 C.F.R. § 300.322(a)(1), (2)(2006); Ed. Code, § 56341.5(a)-(c).

In the case of a manifestation determination IEP meeting, the notice must inform the parent of the decision to change the student's placement and must be accompanied by a copy of the parent's procedural safeguards. (20 U.S.C. § 1415(k)(1)(H).) The meeting may be conducted without a parent in attendance if the district is unable to convince the parents to attend, in which case it must keep a record of its efforts and its attempts to arrange a mutually agreed upon time and place. (34 C.F.R. § 300.322(d)(2006); Ed Code, § 56341.5 (h).)

CONDUCT THAT IS A MANIFESTATION OF THE STUDENT'S DISABILITY

Pursuant to 34 CFR 300.530 (e)(1), conduct must be found to be a manifestation of the child's disability if:

1. The conduct in question was caused by or had a direct and substantial relationship to the child's disability; or
2. The conduct in question was the direct result of the [district's] failure to implement the IEP.

The court in *Doe v. Maher*, (9th Cir. 1986) 793 F.2d 1470 addressed what the key questions are in determining whether the conduct is a manifestation of the child's disability. The court explained:

> "As we use them, these phrases are terms intended to mean the same thing. They refer to conduct that is caused by, or has a direct and substantial relationship to, the child's handicap. Put another way, a handicapped child's conduct is covered by this definition only if the handicap significantly impairs the child's behavioral controls. ... it does not embrace conduct that bears only an attenuated relationship to the child's handicap."

MANIFESTATION DETERMINATION REVIEW

A manifestation determination review is a meeting to decide whether or not the school may enforce regular discipline policy to a student with a disability for a violation of district policies.

A manifestation determination must be made by the district, the parent, and relevant members of the IEP team **as determined by the parent and the district.** (20 U.S.C. § 1415(k)(1)(E)(i).) The manifestation determination analyzes the child's behavior as demonstrated across settings and across times. All relevant information in the student's file, including the IEP, any observations of teachers, and any relevant information from the parents must be reviewed to determine if the conduct was caused by, or had a direct and substantial relationship to the student's disability, or was the direct result of the district's failure to implement the student's IEP. (34 C.F.R. § 300.530(e)(2006); 71 Fed. Reg. 46720 (Aug. 14, 2006).)

WHAT THE LAW REQUIRES

34 CFR 300.530 (5)(e)

> (1) requires that within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the school district, the parent, and relevant members of the child's IEP Team (as determined by the parent and the school district) must review **all relevant**

information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine:

(i) If the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or

(ii) If the conduct in question was the direct result of the school district's failure to implement the IEP.

(2) The conduct must be determined to be a manifestation of the child's disability if the school district, the parent, and relevant members of the child's IEP Team determine that a condition in either paragraph (e)(1)(i) or (1)(ii) of this section was met.

(3) If the school district, the parent, and relevant members of the child's IEP Team determine the condition described in paragraph (e)(1)(ii) of this section was met, the school district must take immediate steps to remedy those deficiencies.

A DETERMINATION THAT BEHAVIOR WAS A MANIFESTATION.

34 CFR 300.530 (5)(f)

(f) *Determination that behavior was a manifestation.* If the school district, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child's disability, the IEP Team must

(1) Either

(i) Conduct a functional behavioral assessment, unless the school district had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the child; or

(ii) If a behavioral intervention plan already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior; and

(2) Except as provided in paragraph (g) of this section, return the child to the placement from which the child was removed, unless the parent and the school district agree to a change of placement as part of the modification of the behavioral intervention plan.

SPECIAL CIRCUMSTANCES

34 CFR 300.530 (5)(g)

(g) *Special circumstances.* School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, if the child

(1) Carries a weapon to or possesses a weapon at school, on school premises, or to or at a school function under the jurisdiction of a state education agency or a school district;

(2) Knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of a state education agency or a school district; or

(3) Has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of a state education agency or a school district.

A DETERMINATION THAT THE BEHAVIOR WAS NOT A MANIFESTATION OF DISABILITY

If the district determines that a child's misconduct was not related to his disability, then the child is subject to the same sanctions for misconduct as a child without a disability. However, the child must continue to receive educational services so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP. 34 CFR 300.530 (d)(i).

EXPEDITED DUE PROCESS HEARINGS

Under IDEA 2004, the parent of a child with a disability can appeal a manifestation determination by filing a due process complaint. 34 CFR 300.532. In California, the due process complaint is filed with the Office of the Administrative Hearings (OAH)

Under the due process hearing requirements, the district must arrange for the hearing within 20 school days of the date the complaint was filed and the hearing officer must make a determination within 10 school days of the hearing. 34 CFR 300.532 (c)(2). In California, OAH will schedule the hearing on an expedited basis.

BURDEN OF PROOF IN MANIFESTATION DETERMINATION CHALLENGES

While the IDEA does not address the burden of proof in due process hearings, the U.S. Supreme Court held in *Schaffer v. Weast*, 44 IDELR 150 (U.S. 2005), that the party seeking relief bears the burden of persuasion.

If the parent disputes the results of a manifestation determination, the parent would bear the burden of showing that the child's misconduct was a manifestation of his disability. 71 Fed. Reg. 46,723-24 (2006).

Where the district has requested that a hearing officer remove a child to an interim alternative education setting, the district bears the burden of showing that the

continuation of the child's placement is substantially likely to result in injury to the child or others. 71 Fed. Reg. 46,723 (2006).

STAY-PUT

With some exceptions, when an appeal has been requested, the pupil shall remain in the then-current educational placement. (20 U.S.C. § 1415(j). This is commonly referred to as "stay put." One exception to the general stay put rule is in a disciplinary matter involving a weapon, drugs, or "serious bodily injury," where an alternative educational placement is made, the child shall remain in the interim alternative educational setting pending the decision of the hearing officer. (20 U.S.C. § 1415(k)(4)(A). In those circumstances, 20 U.S.C. section 1415(k)(1)(G) permits school personnel to remove a pupil to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability. In this case Student did not file an appeal before her expulsion.

The IDEA states that, when dealing with pupils with disabilities who have violated a code of conduct, school personnel are expressly permitted to consider "any unique circumstances on a case-by-case basis" in determining whether a change of placement order would be appropriate. (20 U.S.C. § 1415(k)(1)(A).

STUDENTS NOT YET FOUND ELIGIBLE

Generally, a manifestation determination review is not required in order to discipline a student without a disability. However, in some cases, students are entitled to a manifestation review even if the student, at the time of the misconduct, had not yet been found eligible.

The obligation applies if the district is deemed to have known the child was a student with a disability before the behavioral incident occurred. 34 CFR 300.534 (a).

These protections extend to students not previously identified as eligible for special education services only if the following factors are met:

> (1) the student has engaged in behavior that violated any rule or code of conduct of the school district and,
>
> (2) the school district had knowledge, or is deemed to have had knowledge, that the student was a child with a disability "before the behavior that precipitated the disciplinary action occurred." (20 U.S.C. § 1415 (k)(5)(A); 34 C.F.R. 300.534(a).)

A district which meets the statutory criteria for having the requisite knowledge is considered to have a "basis of knowledge." (20 U.S.C. § 1415 (k)(5)(B); 34 C.F.R. 300.534(b).)

English Language Learners (ELLs) and Special Education: Ensuring Legal Best Practices

Submitted by Cathleen M. Dooley

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NBI Seminar

Special Education Law: The Ultimate Guide

ENGLISH LANGUAGE LEARNER'S (ELLs) AND SPECIAL EDUCATION: ENSURING LEGAL BEST PRACTICES

Presenter: Cathleen M. Dooley, Esq.

ENGLISH LANGUAGE LEARNERS

On January 7, 2015, OCR and the Department of Justice issued a joint Dear Colleague Letter ("DCL") on the issue of avoiding discrimination against English Language Learner ("ELL") students (also denoted as limited-English proficient ("LEP") students) and limited English proficient parents.[1] The DCL states that in determining whether a district's ELL programs comply with civil rights laws, OCR will consider the following:

- Whether the educational theory underlying the language assistance program is recognized as sound by some experts in the field or is considered a legitimate experimental strategy;
- Whether the program and practices used by the school system are reasonably calculated to implement effectively the educational theory adopted by the school; and
- Whether the program succeeds, after a legitimate trial, in producing results indicating that the students' language barriers are actually being overcome within a reasonable period of time.

Districts are required to address the needs of ELL students because Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, or national origin and in 1970, the United States Supreme Court affirmatively linked the protections offered by this statute to the requirement that districts help LEP students overcome language barriers in *Lau v. Nichols,* 414 U.S. 563 (1970). Congress also passed the Equal Educational Opportunities Act ("EEOC") in 1970, which affirmed that local educational agencies and state educational agencies must

[1] http://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/raceorigin.html

affirmatively act to overcome language barriers that impede equal participation by students in instructional programs. 20 U.S.C. § 1703(f). Finally, Title III, Part A of the Elementary and Secondary Education Act of 1965 ("ESEA"), as amended ("Title III") provides federal funds to states to improve the English language acquisition of ELL students. OCR and the Department of Justice both have jurisdiction over these federal laws.

Though, obviously, not all ELL students will be eligible for special education, those who do present particular challenges for districts, which must navigate both special education requirements and ELL requirements. For instance, a determination that a student has a learning disability and requires special education cannot be based on inadequate education or language barriers. Yet a LEP student may present as having difficulty learning and a MET team must tease out whether that difficult is an actual learning disability or a result of language barriers.

A. Knowing when Referral is Appropriate

Districts have an obligation to identify and assess ELL students in need of language assistance in a timely, valid, and reliable manner. Schools must provide notices to all parents of ELL students regarding the students' identification as a student in need of language assistance services within **30 days** of the beginning of the school year. 20 U.S.C. §§ 6312(g)(1), 7012(a). This notice must be provided in a language that the parents can understand, and therefore, particularly with less common languages, the identification of the student must occur well before the 30 day deadline so that the notice can be translated into the parents' primary language. If written translation of the notice is not practical, districts must offer free oral interpretation of the written information. *See* 67 Fed. Reg. 71, 710, 750 (2002).

Districts and schools should refer suspected ELL learners, who are generally identified by a home language survey, for an English language proficiency assessment to determine proficiency in all four language domains: speaking, listening, reading, and writing. *See* DCL, 11. However, districts and schools should not rely entirely on these home language surveys. Any student identified, through whatever means, as a student with a Primary or Home Language Other than English (PHLOTE), should be assessed for English language proficiency.

OCR has found districts noncompliant in the area of referral in the following types of situations: a) does not have a process for identifying EL students, b) uses a process that fails to identify large numbers of students, c) fails to adequately assess English language proficiency for

those students referred for assessment, d) fails to timely assess ELL students' English proficiency, or e) fails to assess all four language domains. DCL, 11.

B. How ELLs Should be Evaluated

Evaluation to determine ELL status: as discussed above, districts must have an English language proficiency assessment program in place that is designed to identify ELL students across all four language domains (speaking, listening, reading, and writing). Once identified based on a valid and reliable English language proficiency assessment, districts have an obligation to provide language assistance services or programs designed to achieve English proficiency so that the students can participate meaningfully in the district's educational program without language assistance services. DCL, 12.

Continued evaluation once in language assistance program: Districts must monitor and evaluate ELL students who are in language assistance programs to ensure that they are making progress in acquiring English language proficiency and grade level core content. Monitoring must consider all four language domains. Districts must exit students from the language assistance programs once they are proficient in English, but also have an obligation to continue to monitor exited students to ensure that they were not existed prematurely. To exit a student from language assistance programing, a district must conduct an English language proficiency assessment that includes either separate proficiency scores in each language domain or a composite score. In either case, the proficiency score standard must be set at a level that will enable students to effectively participate in grade-level content instruction in English. Districts should maintain the records of these assessments because OCR can require that information in the event a complaint was filed.

Evaluating ELL students for special education needs: English language learners with disabilities have unique learning needs and challenges because of the interaction of their disability with learning a new language. ELL students with disabilities who qualify for services under the IDEA or Section 504 must be evaluated and served as any non-ELL student would be, and their language needs must be considered in evaluations and in the delivery of services. In other words, evaluations must be designed to provide information about the student's potential disability, not English language deficiency. Districts must ensure that all ELL students with disabilities are identified as such, but at the same time, must ensure that no ELL student is identified as a student with a disability simply because they lack English language proficiency.

Therefore, an evaluation might need to be conducted in the student's native language. 34 C.F.R. § 300.304(c)(1)(ii). OCR has determined that formal or informal policies that prohibit dual services in the areas of ELL language assistance and special education (or accommodations under a 504 Plan) are impermissible. DCL, 25. Similarly, districts must follow normal Section 504 identification and evaluation procedures for ELL students to ensure that ELL students who do not require specialized instruction, but who do have disability, are identified.

Parents of ELL students have the right to opt their student out of ELL programs. Even where that is the case, the district must administer IDEA and Section 504 evaluations in the appropriate language to avoid misclassification of the student. 34 C.F.R. § 300.304(c)(1)(ii).

C. IEP's for ELL Students

Districts must follow the same procedures for ELL students who are eligible for special education as they do for non-ELL students. In addition, districts must ensure that the parents of ELL students, who are often themselves not proficient in English, can meaningfully participate in the IEP process. This will often mean providing interpreters during IEP or MET meetings and providing translated special education documents.

1. IEP Meeting Essentials for ELL Students

Generally, the IEP team makes decisions about what services the student needs. The ELL coordinator and or the ELL teacher must be members of the IEP team when the student has both a disability and English language acquisition challenges because that teacher/coordinator will have important information to contribute to drafting the student's IEP. The IEP team must consider the language needs of the child as those needs relate to the child's IEP. 34 CFR § 300.324 (a)(2)(ii). The IEP team must identify the individual language needs of the student. The team must distinguish language proficiency from disability needs and determine what services are needed to support the language deficiencies.

2. Ensuring Language Instruction Meshes with IEP Objectives

The IEP drives the educational program and services. Special Education and English language programs must collaborate to determine the most effective approach to instruction for each individual student. The IEP team should determine whether all, some or none of the English language instruction will be delivered in either the Structure English Immersion, special education, or the general education programs.

D. Legally Compliant School Policies for English Language and Special Education Co-Services

Districts must ensure that the policies and procedures surrounding services provided to English language learners and special education students do not create legal non-compliance with any Federal or State law. Below are areas school districts should review to ensure legal compliance and quality programs for ELL students who have a disability.

Participation in ELP Assessment: Students dually identified are required to participate in ELP assessment as determined by their IEP Team. They can participate one of three ways: regular ELP assessment with no accommodations, regular ELP assessment with one or more accommodation listed in the IEP, or participate through an alternative assessment.

Avoid Discrimination: School districts must ensure that students do not experience discrimination, including harassment, exclusion, retaliation, or different treatment, because they are ELL students. For instance, a district may not implement a policy prohibiting students of non-majority national origin from speaking their primary language during the school day unless there is an educational justification for doing so. Students, therefore, cannot be prohibited or punished for speaking their primary language during unstructured, non-instructional time, such as during recess or at lunch.

Provision of services: Districts will violate civil rights laws where they do not provide ELL students a language assistance program that is educationally sound and proven successful. There is no requirement that schools use a particular program, but the program chosen must enable ELL students to attain English proficiency and parity of participation in the standard curriculum within a reasonable amount of time. Programs must not be implemented in a "one size fits all" manner. Students' individual needs and language levels must be considered in determining the amount of time a student receives services, including core instruction in the primary language and English language instruction, in a day.

Sufficient resources for program. Districts must "sufficiently staff and support" the language assistance program they have implemented for ELL students. This includes providing teachers who are highly qualified to provide language assistance services and trained administrators who can evaluate these teachers. Just as with provision of special education services, the needs of students must drive staffing, not the other way around. Therefore, a district cannot limit the amount of time students spend in ELL programs based on the availability of staff.

Equal access to programs: ELL students cannot be excluded from curricular or extracurricular programs, including the core curriculum, graduation requirements, specialized and advanced courses and programs, sports, and clubs, based on their ELL status. ELL students must have the opportunity to make the same core content progress as their non-EL peers. Therefore, districts may not provide specialized programing for ELL students, including bilingual or sheltered content classes, that teach a "watered-down" version of the standard curriculum. Any specialized education or related services must, similarly, provide as robust an opportunity for ELL students as they do for non-ELL special education students.

Integration: ELL students may not be unnecessarily segregated from non-ELL students (in both general education and special education classrooms). OCR recognizes that ELL students might have to receive separate instruction from their non-ELL peers for a period of time, but districts should ensure that ELL students are educated with their peers whenever possible, such as during PE, art, and music, and during non-instructional time.

Evaluate effectiveness of program: a district must periodically evaluate the effectiveness of the language assistance program if implements to ensure that ELL students are acquiring English proficiency and that each program is reasonably calculated to allow ELL students to "attain parity of participation in the standard instructional program within a reasonable period of time."

Communication with parents of ELL students: school districts have an obligation to ensure that parents of ELL students can meaningfully communicate with the school. A home

language survey can be a valuable tool to alert districts to parents who have limited English proficiency.

Students who opt out: students have the right to opt out of ELL programs. Despite that decision, a district has an obligation to meet the needs of an ELL student who has opted out of the language assistance program. OCR will investigate whether a parent's decision to opt a student out of ELL programing was "knowing and voluntary" so it is important that district staff avoid recommending opt out and that information regarding ELL be provided in the parent's primary language. Though a student may have opted out of language assistance programing, the student remains an ELL student. Therefore, the district must monitor his/her progress and if the student is not demonstrating appropriate growth in English proficiency or is struggling academically due to language barriers, the district should notify the parent of the problem and offer ELL programing once again. If parent again declines ELL programs, the district must continue to take "affirmative and appropriate steps" to meet its civil rights obligations, including providing training for the student's general education teacher on second-language acquisition. A district must continue to assess an ELL student's English language proficiency at least annually to determine progress and to determine whether the student is still legally entitled to ELL services.

E. Additional Tips

- Do not rely on paraprofessionals who tutor ELL students to supplement regular education instruction in lieu of providing ELL programing through adequately trained, highly qualified teachers.
- Develop an individualized programming schedule to ensure each student is gaining English language proficiency and making progress in the general curriculum.
- Do not exclude ELL students from gifted or other specialized programming (such as AP or honors courses) where they qualify for the programing. Lack of English proficiency should not disqualify them unless it can be demonstrated that English proficiency is necessary for meaningful participation.

- Conduct special education evaluations for ELL students in the language that is appropriate for adequately assessing the student and determining the student's disability related needs.
- Do not forget the ELL students whose parents have opted them out of programing - the district still has affirmative obligations related to those students.

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