F3 Law

Here and Now:

Child Find Updated

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What We'll Cover . . .

- Overview of Child Find Legal Obligations
  - Federal (IDEA) and California law
- Recent Case Examples
- Child Find Obligations to Parentally Placed Private School Students
- Child Find Obligations to Homeless and Highly Mobile Students
- Child Find Under Section 504

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Introduction

- Identify . . . Locate . . . Evaluate
- **Child find** is one of the most important special education legal obligations for school districts
- It is a cornerstone of IDEA – along with IEPs and parental participation – and is foundation of FAPE

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Overview of Child Find Legal Obligations

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Child Find Legal Standard

- IDEA
  - Affirmative, ongoing duty to identify, locate and evaluate all children with disabilities residing in the state who are in need of special education
- California law
  - Education Code's child find requirements includes homeless children, wards of the state, children attending private schools
- Applies regardless of severity of disabilities

(34 C.F.R. § 300.111; Ed. Code, § 56301)

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Two Components of Child Find

- General "public notice" responsibility
  - Inform and educate public about need to locate and identify all children with disabilities
- Obligation to specific child
  - Triggered when district knows – or should know – that student may have a disability

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General Responsibilities

- Neither IDEA nor Education Code specifies which general activities are sufficient to meet child find obligations
  - No requirement that district directly notify every household (or every parent) within its boundaries about child find
  - "Even if District staff were to pull a handcart full of parental consent-for-evaluation forms through the streets of the villages and . . . suburbs comprising the District, ringing a bell, and crying, 'Bring out your disabled children!', it would not likely find each and every disabled child . . ."
- California Education Code obligates each SELPA to establish child find policies and procedures for use by its districts

(Letter to Siegel (OSEP 2018) 72 IDELR 221; Ed. Code, § 56301; Hillsboro School Dist. (SEA OR 1998) 29 IDELR 429)

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General Responsibilities

- U.S. Department of Education guidance:
  - Child find generally includes, but is not limited to, activities such as:
    - Widely distributing informational brochures
    - Providing regular public service announcements
    - Staffing exhibits at health fairs and other community events
    - Creating direct liaisons with private schools

(71 Fed. Reg. 46593 (Aug. 14, 2006))

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General Responsibilities

- Staff Training
  - Essential component of continuous child find responsibilities
  - Student v. Santa Barbara USD OAH decision:
    - OAH scolded District for lack of general training for staff about child find
    - Continuing failure to meet child find obligations deemed "egregious"
    - ALJ ordered six hours of mandatory training

(Student v. Santa Barbara Unified School Dist. (OAH 2013) No. 2012080468, 113 LRP 1802)

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Obligation to Individual Students

- Triggered when district has knowledge of – or reason to suspect – student has disability
  - Threshold for suspicion is "relatively low"
  - Appropriate inquiry: Whether student should be referred, not whether the student will qualify
  - Disability is "suspected," and therefore must be assessed by district, when district has notice that student has displayed symptoms of that disability

(Department of Educ. State of Hawaii v. Cari Rae S. (D. Hawaii 2001) 35 IDELR 90; Timothy O. v. Paso Robles Unified School Dist. (9th Cir. 2016) 67 IDELR 227)

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Obligation to Individual Students

- Affirmative obligation to act
  - Not dependent on parent request for evaluation
  - Child find not excused even when parent interferes with process
  - Passive approach – deciding not to "push" or to "wait and see" – equates to active and willful refusal to take action

(Compton Unified School Dist. v. Addison (9th Cir. 2010) 54 IDELR 71)

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What Triggers Child Find Duty?

- OAH: Clear signs that trigger child find duty include student who:
  - Is performing below grade average in basic academic functions such as reading and/or has failing grades
  - Has behavior and discipline problems
  - Has a significant number of absences from school
  - Is subject of concerns expressed by parents and teachers
  - Shows signs of substance abuse
  - Has medical diagnosis of a recognized disability
  - Has had psychiatric hospitalizations; and/or
  - Has made suicide attempts

(Student v. Oxnard School Dist. (OAH 2018) Case No. 2018080844, 119 LRP 322)

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What Triggers Child Find Duty?

- But courts have held that poor or declining grades, without more, do not necessarily establish that district has failed in its child find obligation
- Failing classes over short period of time is generally not enough notice to district that student may need special education assessment
- "The IDEA does not require a formal evaluation of every struggling student"

(Sherman v. Mamaroneck Union Free School Dist. (2d Cir. 2003) 39 IDELR 181; Student v. Capistrano Unif. School Dist. (OAH 2007) Case No. N2006040315, 107 LRP 7427; D.K. v. Abington School Dist. (3rd Cir. 2012) 59 IDELR 271)

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What Child Find Is Not . . .

- Child find does not guarantee eligibility; it is merely a locating and screening process that is used to identify those children who are potentially in need of special education and related services
- Nor does child find requirements address disputes about content/results of assessments, eligibility categories, or IEP offers after children have been located and identified

(Student v. Oxnard School Dist. (OAH 2018) Case No. 2018080844, 119 LRP 322)

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Child Find and General Education Interventions

- Students "shall be referred for special education instruction and services only after the resources of the [general] education program have been considered, and, where appropriate, utilized"
- But district may not delay its assessment of a student with a suspected disability on the basis that it is using an RTI approach to accommodate student in general education program

(Ed. Code, § 56303; Memorandum to State Directors of Special Education (OSEP 2011) 56 IDELR 50)

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Child Find and Virtual/Online Learning

- Child find procedures that rely mainly on informal teacher observation and referral may require additional consideration
- "Where virtual instruction limits or prevents the teacher's interaction and contact with a child, the SEA and LEA should examine whether existing child find policies and procedures are effective in meeting the State's responsibilities of identifying, locating, and evaluating children who may need special education and related services"

(Return to School Roadmap: Child Find under Part B of the Individuals with Disabilities Education Act (OSERS 2021) 121 LRP 29378)

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Violations of Child Find

- Issue of whether district had reason to suspect disability must be viewed based on what information it possessed at relevant time
  - "Snapshot" – not retrospective
- Violation of child find duty is "procedural" violation and amounts to denial of FAPE only if:
  - Impedes right of student to a FAPE;
  - Significantly impedes opportunity of parents to participate in decision-making; or
  - Causes deprivation of educational benefits

(34 C.F.R. § 300.513(a)(2); Ed. Code, § 56505, subd.(f))

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Violations of Child Find

- Failure to identify and assess student cannot be actionable child find violation unless student is subsequently found eligible for special education
  - No denial of FAPE if student is not eligible for FAPE
- But child find violation leading to failure to assess student who is subsequently found eligible generally results in liability for denial of FAPE
  - 9th Circuit: Absence of information concerning disability significantly impedes student's right to FAPE, parent's opportunity to participate in the decision-making process, and may cause a deprivation of educational benefits

(R.B.v. Napa Valley Unified School Dist. (9th Cir. 2007) 48 IDELR 60; Timothy O. v. Paso Robles Unified School Dist. (9th Cir. 2016) 67 IDELR 227, cert. denied, (2017) 117 LRP 15003)

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Violations of Child Find

- When child find violation is found to have denied student FAPE, typical remedies include:
  - Order directing district to conduct assessment;
  - Payment or reimbursement for costs associated with independent educational evaluations;
  - Reimbursement for private school tuition and related costs;
  - Compensatory education;
  - Staff training; and/or
  - Attorney's fees

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Child Find: Practice Pointers

- To avoid confusion over child find process and staff responsibilities
  - Ensure everyone has copy of – and understands – SELPA's child find policies and procedures
  - Conduct child find training – with periodic review – that includes all relevant staff
- Involve Student Study Team or other intervention personnel at first sign of problem so that interventions can be implemented, student's progress monitored, and referral made if interventions are not succeeding

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Child Find: Practice Pointers

- Be on the lookout for circumstances or behavior that signals need for evaluation, even when no one has requested one
  - These red flags might include: dramatically declining grades; excessive absenteeism; recent medical diagnosis; sudden withdrawal from peers in combination with declining school performance; etc.
- Make sure to thoroughly explain to parents any decision to implement pre-referral interventions, including advising them of their right to request special education assessment at any time

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Child Find: Practice Pointers

- When deciding not to refer student for eligibility assessment, do not rely solely on excellent classroom performance and grades; "gifted" students may have disabilities
- Districts must apply child find principles of identifying, locating, and evaluating students for special education or related services to high-performing students just as they would for any other student

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Recent Case Examples Illustrating Child Find Issues

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Case Example #1

Student v. Piedmont Unified School Dist. (OAH 2023)

Facts:

- After school resumed in-person learning in 2021, Student's third grade teacher noticed concerns with Student's spelling and phonemic awareness and Student did not meet grade-level writing standards
- Parent shared with District staff her concern that despite Tier 2 interventions, "disconnect" between Student's academic effort and progress was growing
- In response to Parent's concern, District convened Student Study Team meeting in January 2022 and school psychologist sent Parent assessment plan in February, even though Parent said she was not pursuing special education assessment

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Case Example #1

Student v. Piedmont Unified School Dist. (OAH 2023)

Decision:

- ALJ: District timely fulfilled its child find duty to Student as of February 2022
- Student's failure, in 2021, to meet two grade-level writing standards was not sufficient to require special education assessment
- January 2022 Student Study Team meeting discussions triggered District's duty to assess Student for specific learning disability
- Even if District had committed procedural violation, it was harmless error since Parents did not show Student was eligible for IDEA services

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

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Case Example #2

Student v. Sequoia Union High School Dist. (OAH 2022)

Facts:

- In May 2020, Parents emailed three teachers indicating Student had severe mental health issues and that they were considering residential rehabilitation facility so Student would not injure herself and requested teachers excuse Student from assignments
- Teachers excused Student from assignments but did not refer for assessment, despite expressing concern for her health and safety
- Student returned to school for 11th grade and District began Section 504 process, ultimately providing special ed assessment plan in October 2020

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Case Example #2

Student v. Sequoia Union High School Dist. (OAH 2022)

Decision:

- ALJ: District was on notice of Student's severe mental health needs and need for assessment in May 2020
- District was aware that Student's anxiety and depression were so severe that Student stopped attending classes and completing work
- Delay in assessment referral violated child find obligation and denied FAPE
  - As a result of District's delay in assessing Student, Parents were "left on their own to find a placement suitable to address Student's severe mental health needs at their expense"

(Student v. Sequoia Union High School Dist. (OAH 2022) Case No. 2021110212, 122 LRP 14964)

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Case Example #3

Amaya v. Chaffey Joint Union High School Dist. (C.D. Cal. 2022)

Facts:

- 17-year-old Student moved to District from Honduras, residing with Uncle and Aunt
- Before school began, advocate contacted District's special education director to advise that "two students" would be enrolling in District and would require assessments
- Advocate did not provide the students' names, alleged disabilities or his relationship to the students
- Registration document for Student did not indicate existence of any disability and neither Uncle nor Aunt requested assessments

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Case Example #3

Amaya v. Chaffey Joint Union High School Dist. (C.D. Cal. 2022)

Decision:

- District Court affirmed ALJ decision of no child find violation as result of District's failure to assess Student
- "Piecemeal and cryptic nature" of communications from advocate to District failed to put District on notice
- Counselor who met Student at time of enrollment did not suspect existence of disability
- Student performed well in class and was focused and engaged

(Amaya v. Chaffey Joint Union High School Dist. (C.D. Cal. 2022) 122 LRP 14503)

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Case Example #4

Student v. Los Alamitos Unified School Dist. (OAH 2021)

Facts:

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

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Case Example #4

Student v. Los Alamitos Unified School Dist. (OAH 2021)

Decision:

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

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

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Case Example #5

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

Facts:

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

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Case Example #5

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

Decision:

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

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

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Case Example #6

Student v. San Juan Unified School Dist. and Visions in Education Charter School (OAH 2020)

Facts:

- 15-year-old enrolled in Visions Charter School within District in February 2020
- Student had previously been exited from special ed (SLD) in 2017 by another district
- Shortly after Student enrolled in Visions, Parent requested special ed support and offered to share previous assessment reports
- Visions sent PWN to Parent declining to assess Student, noting Student's academic success

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Case Example #6

Student v. San Juan Unified School Dist. and Visions in Education Charter School (OAH 2020)

Decision:

- ALJ: Parent's request triggered District's child find duty to assess Student
- Threshold for suspecting disability is "relatively low"
- PWN was legally deficient because it failed to describe each assessment or record used as basis for decision not to assess
- Parent was unable to determine that one of Student's previous independent assessments was not part of records

(Student v. San Juan Unified School Dist. and Visions in Education Charter School (OAH 2020) Case No. 2020050817, 77 IDELR 145)

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Case Example #7

Student v. Bellflower Unified School Dist. (OAH 2019)

Facts:

- Student's academic struggles began in third grade
- District provided general ed interventions in fifth grade, which were somewhat successful
- But academic performance continued to decline over following three school years
- Teachers attributed Student's struggles to lack of motivation and, therefore, no referrals were made
- Student ultimately found eligible in 2019 under SLD and OHI categories

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Case Example #7

Student v. Bellflower Unified School Dist. (OAH 2019)

Decision:

- ALJ: District committed child find violation that denied FAPE
- Student consistently displayed symptoms of processing disorder and attention deficit disorder
- "District . . . allowed the subjective opinion of a staff member to circumvent its responsibility to thoroughly assess Student"
- When school psychologist ultimately reviewed Student's educational history, he quickly identified Student's processing and attention as potential areas of disability

(Student v. Bellflower Unified School Dist. (OAH 2019) Case No. 2019051216, 75 IDELR 286)

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Case Example #8

Student v. Capistrano Unified School Dist. (OAH 2017)

Facts:

- Student had sports-related head injury in October 2014
- Expressed suicidal ideations in May 2015
  - Hospitalized on two occasions, but Parent did not inform District as to reason
- Parent discussed Student's mental health issues with District in September 2015
  - After Student told math teacher about suicidal ideations in October 2015, she was again hospitalized
- Upon return from hospital, Student had difficulties coping
- Assessed and found eligible as ED in early 2016

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Case Example #8

Student v. Capistrano Unified School Dist. (OAH 2017)

Decision:

- Student's October 2014 head injury did not affect school performance and did not trigger child find
- Psychiatric hospitalization in May 2015 also did not affect school performance
- No evidence Parent informed District that Student's hospitalization was for mental health reasons
- No effect at school until Student expressed suicidal ideations to teacher in October 2015

(Student v. Capistrano Unified School Dist. and Capistrano Unified School Dist. v. Student (OAH 2017) Case Nos. 2016100466 and 2017030402, 117 LRP 24357)

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Child Find Obligations to Parentally Placed Private School Students

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Responsibility

- Child find rules apply equally for public school students and student placed by their parents in private school
- Purpose of child find for parentally placed private school students is to ensure accurate count of students with disabilities attending private schools for purposes of determining equitable services that district may provide to those students
- As such, responsibility for carrying out general child find activities lies with district where private school is located

(Letter to Eig (OSEP 2009) 52 IDELR 136; 34 C.F.R. § 300.131; Ed. Code, § 56171; Letter to Jenner (OSERS 2023) 123 LRP 33283)

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Extent of Required Activities

- General child find activities must be similar and completed in time period comparable to that for students attending public schools
- USDOE: "Similar" activities generally include, but are not limited to, activities such as:
  - Holding professional development sessions for private school teachers on IDEA's evaluation and reevaluation requirements
  - Posting flyers in private school facilities to inform stakeholders of availability of child find
  - Facilitating round table discussions with community members

(34 C.F.R. § 300.131; Ed. Code, § 56301; 71 Fed. Reg. 46593 (Aug. 14, 2006); Questions and Answers on Serving Children With Disabilities Placed by Their Parents in Private Schools (OSERS 2022) 80 IDELR 197)

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Assessment Responsibility

- Once student is identified, district where private school is located is responsible for assessment to determine eligibility, and, if eligible, offer ISP
- Although OSEP and OSERS do not recommend it, parents theoretically can request assessments from both district where the private school is located (for the purpose of provision of equitable services) and from district where the student resides (for the purpose of having program of FAPE made available to student)
  - If that occurs, technically both districts are legally responsible for conducting assessments

(34 C.F.R. § 300.131; Ed. Code, § 56171; Letter to Eig (OSEP 2009) 52 IDELR 136)

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Child Find and Private School Students: Practice Pointers

- Although district in which private school is located is responsible for assessing parentally placed private school students suspected of having disabilities, remember that this does not relieve student's district of residence of its duty to assess all resident children suspected of having disabilities
- When parents request FAPE assessment, district cannot refuse on grounds that student attends private school in another district

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Child Find Obligations to Homeless and Highly Mobile Students

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McKinney-Vento Act

- Homeless children = Children who lack fixed, regular and adequate nighttime residence
- Homeless children must receive services comparable to children who are not homeless
  - Equal access to FAPE
  - Ability to participate in special ed cannot be hindered by homelessness or frequent school transfers

(42 U.S.C. § 11433)

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Child Find Duties

- Homeless or highly mobile students are at greater risk of undiagnosed disabilities and need for special education because of frequent moves from district to district
- Districts should coordinate with staff of emergency shelters, transitional shelters, independent living programs, street outreach programs, and other advocacy organizations to assist in identifying warning signs of disability as quickly as possible
- Districts must begin initial assessment process even if aware student is homeless and might leave school prior to completion of assessment

(Questions and Answers on Special Educ. and Homelessness (OSERS 2008) 110 LRP 212)

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Child Find and Homeless Students: Practice Pointers

- Alert child find personnel that homeless and highly mobile students must be included in established protocol
- Although attendance issues and difficulties adjusting to transitions are common for highly mobile students, they also can be signs of a disability

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Child Find Under Section 504

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Scope of Child Find

- Section 504 child find rules are similar to IDEA
  - Public schools must take steps to identify and locate children with disabilities and to publicize the rights established by Section 504
  - Encompasses all children within boundaries, including homeless children
  - No specifics in law on appropriate child find activities
  - OCR Letters of Findings emphasize public awareness programs, notices, news releases and publication of Section 504 procedural safeguards

(34 C.F.R. § 104.32; Celina (TX) Indep. School Dist. (OCR 2000) 34 IDELR 41)

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Parentally Placed Private School Students

- But, unlike IDEA, if student resides in different district from private school, district of student's residence is responsible for child find and assessments under Section 504
- District where private school is located has no obligation to evaluate student for Section 504 eligibility and services unless student resides in the district

(34 C.F.R. § 104.32; West Seneca (NY) School Dist. (OCR 2009) 53 IDELR 237)

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Child Find and Section 504: Practice Pointers

- Although Section 504 has child find requirement similar to IDEA, it has different standards for when student should be identified and evaluated
- In particular, be alert to:
  - Impact of possible disability on all major life activities – not just learning
  - Student's individualized health care plan may not be considered when determining duty to evaluate
  - Diagnosis of ADHD may trigger child find

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Conclusion

- Understand the importance of child find!
  - One of the most frequently litigated issues resulting in lost time and resources
- Successfully identifying, locating and evaluating a student with disabilities is first major step toward developing effective strategies, goals and services to enable student to succeed in school and beyond, which is every district's mission

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Spotlight on Practice:

Ensuring a "Clear Written Offer" of FAPE

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What We'll Cover . . .

- Background: Union School District v. Smith
  - Facts
  - Ruling
  - Impact, Interpretation and Expansion of Union
- Application of Union to Specific IEP Issues
  - Clarity and Coherency of FAPE Offer
  - Specificity
  - Timeliness
- Spotlight on Practice: Practical Pointers to Help Ensure Compliance
- Consequences and Remedies for District's Failure to Make "Clear Written Offer" of FAPE

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Background: Union School District v. Smith

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Introduction

- Union School District v. Smith ("Union")
  - 9th Circuit ruled that districts must make formal written offer in the IEP that identifies student's proposed placement in manner clear enough to permit parents to "make intelligent decision whether to agree or disagree"
  - Subsequent decisions by courts and ALJs have interpreted, expanded and applied Union to cases where aspects of proposed IEPs are challenged for being less than sufficiently specific or clear

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Facts of Union

- Parent and Student temporarily relocated from family's residence in San Jose to Southern California (Los Angeles area) so that Student could attend private clinic for children with autism
- During IEP team meeting, District discussed placement that it could offer; however, because Parents rejected it, IEP team never formally offered placement in writing
- District Court determined that District denied Student FAPE
  - Awarded Parents reimbursement for tuition, transportation and lodging expenses incurred in placing their child at private clinic
  - District and California Department of Education appealed to 9th Circuit

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9th Circuit's Ruling

- 9th Circuit affirmed lower court's decision
- Any placement that was not formally offered could not be considered
- Parents' expressed unwillingness to accept District's proposed placement did not excuse District from making formal offer
- District failed to offer FAPE, even though it might have been able to make FAPE available
- U.S. Supreme Court subsequently declined to hear appeal

(Union School Dist. v. Smith (9th Cir. 1994) 15 F.3d 1519, 20 IDELR 987, cert. denied, (1994) 513 U.S. 965)

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9th Circuit's Ruling (cont'd)

- 9th Circuit quotes:
  - "The requirement of a formal, written offer creates a clear record that will do much to eliminate troublesome factual disputes many years later about when placements were offered, what placements were offered, and what additional educational assistance was offered to supplement a placement, if any"
  - "This formal requirement has an important purpose that is not merely technical, and we therefore believe it should be enforced rigorously"

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9th Circuit's Ruling (cont'd)

- Purpose of the Written Offer:
  - To alert parents of the need to consider seriously whether district's proposed placement is appropriate under IDEA
  - To help parents determine whether to oppose or accept placement with supplemental services; and
  - To ensure that district is more prepared to introduce sufficient relevant evidence of appropriateness of its placement at due process

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9th Circuit's Ruling (cont'd)

- Decision in Union established following definition of a procedurally valid offer of FAPE:
  - It is the formal offer for services and educational placement
  - It meets the IDEA requirements for prior written notice
  - It is in writing
  - It is presented to the parent

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Impact and Interpretation

- Although Union involved District's failure to produce any formal written offer of placement, the principles outlined by 9th Circuit have been expanded and used to support numerous judicial and administrative decisions invalidating IEPs that, although formally offered, were insufficiently clear and specific with respect to services and/or placement

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Impact and Interpretation (cont'd)

- Example: Glendale Unified School Dist. v. Almasi (C.D. Cal. 2000): Union requires "a clear, coherent offer which [Parent] reasonably could evaluate and decide whether to accept or appeal"
  - District offered Parents choice of four possible placements
  - Court held that when district offers multiple placements and forces parents to choose from list, such offer places an undue burden on parents to eliminate potentially inappropriate placements, and does not comply with Union

(Glendale Unified School Dist. v. Almasi (C.D. Cal. 2000) 33 IDELR 221)

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Failure to Make "Clear Written Offer" Is Procedural Violation

- District's procedural errors – including failure to make "clear written offer" – do not automatically require finding that FAPE was denied
- Remember: Procedural violation results in denial of FAPE only if it:
  - Impeded student's right to FAPE;
  - Significantly impeded parent's opportunity to participate in decision-making process regarding provision of FAPE to student; or
  - Caused a deprivation of educational benefits

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Application of Union to Specific IEP Issues

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Clarity and Coherency of Offer

- Offer Must Be in Writing
  - IEP defined by IDEA as "written statement"
  - Union, as well as subsequent judicial and administrative rulings, make it clear that verbal offer of services and/or placement at IEP meeting, which is not subsequently reduced to writing, will not satisfy IDEA's requirements
    - San Jacinto USD (OAH 2008): Verbal offer of accommodations was never documented. "Parents could not be expected to adequately participate in the educational decision making process."
    - Baldwin Park USD (OAH 2016): District's failure to write down placement offer at IEP meeting "was sloppy work indeed," but did not constitute denial of FAPE. Why? Parents were "educated and articulate," knew exactly what placement District was offering and presented their objections and concerns regarding the placement

(Student v. San Jacinto Unified School Dist. (OAH 2008) Case No. 2008020225, 108 LRP 40134; Student v. Baldwin Park Unified School Dist. (OAH 2016) Case No. 2016050319, 116 LRP 47863, aff'd, (C.D. Cal. 2020))

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Clarity and Coherency of Offer

- Confusion and Vagueness
  - Numerous due process cases over whether district's proposed IEP is too confusing and/or vague for parents to understand, therefore resulting in denial of FAPE; or whether IEP is sufficiently clear to satisfy requirements of Union . . .

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Case Example #1

Student v. Rocklin Unified School Dist. (OAH 2021)

Facts:

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

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Case Example #1

Student v. Rocklin Unified School Dist. (OAH 2021)

Decision:

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

(Student v. Rocklin Unified School Dist. and Rocklin Unified School Dist. v. Student (OAH 2021) Case Nos. 2020110250 and 2020120137, 121 LRP 12194)

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Case Example #2

Pivot Charter School v. Student (OAH 2021)

Facts:

- IEP offered elementary school Student with autism a placement in regular classroom in public day school, but then stated Student would spend 100 percent of day outside regular class
  - Student would not participate in regular class because of core curricular, speech and language, social/emotional and fine motor deficits
- But special education director indicated that proposed placement included mainstreaming and Student would be in the general education setting with typically developing peers throughout day
- Parent did not consent to Charter School's proposed offer of FAPE and Charter School filed for due process hearing to implement IEP

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Case Example #2

Pivot Charter School v. Student (OAH 2021)

Decision:

- ALJ: Proposed IEP was unclear "for several reasons" and did not comply with requirements of Union
  - "Fundamental contradiction" in IEP over where Student would spend school day, which resulted in confusion
  - Special education director also was unable to differentiate between two possible programs available to Student
  - It was unclear if 1800 minutes of weekly specialized academic instruction (six hours daily) would be implemented with one-to-one instruction or small group instruction, or some combination thereof

(Pivot Charter School v. Student (OAH 2021) Case No. 2020120031, 121 LRP 18300)

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Clarity and Coherency of Offer

- Clerical or Typographical Errors
  - Generally, based on various OAH decisions, minor clerical or typographical errors in IEP document have not been enough to result in finding that district's offer was insufficiently clear or coherent

(See, e.g., Student v. Folsom Cordova Unified School Dist. and Folsom Cordova Unified School Dist. v. Student (OAH 2016) Case Nos. 2015110595 and 2015090251, 116 LRP 25300; Student v. Sacramento City Unified School Dist. (OAH 2015) Case No. 2014120055, 115 LRP 34155)

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Clarity and Coherency of Offer

- Native Language Requirement
  - Districts must take whatever steps are necessary to ensure that parents understand proceedings of meeting, including arranging for an interpreter for parents with deafness or whose native language is other than English
  - Parents must be fully informed of all information relevant to activity for which consent is sought, in parents' native language or other mode of communication

(34 C.F.R. § 300.322(e); Ed. Code, § 56341.5, subd. (i); 34 C.F.R. § 300.9, Ed. Code § 56021.1)

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Specificity

- Identification of Specific School or Classroom Locations
  - Split among circuit courts as to whether IEP must specifically identify particular school in which district plans to place student
  - USDOE: "Placement refers to the provision of special education and related services rather than to a specific place, such as a specific classroom or specific school"

(A.K. v. Alexandria City School Bd. (4th Cir. 2007) 47 IDELR 245; T.Y. v. New York City Dep't of Educ. (2d Cir. 2009) 53 IDELR 69; 71 Fed. Reg. 46687 (Aug 14, 2006))

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Specificity

- Identification of Specific School or Classroom Locations
  - 9th Circuit: Rachel H. v. Department of Education, State of Hawaii (9th Cir. 2017) 70 IDELR 169
    - District's proposed IEP for Student attending private school indicated program could be "implemented on a public school campus"
    - Parent claimed IDEA violation for not identifying specific school in placement offer
    - 9th Circuit found no procedural violation
    - Relied on USDOE guidance
    - "Location" refers to type of environment that is appropriate place for provision of service"

(Rachel H. v. Dep't of Educ., State of Hawaii (9th Cir. 2017) 70 IDELR 169)

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Specificity

- Identification of Specific School or Classroom Locations
  - 9th Circuit: Rachel H. v. Department of Education, State of Hawaii (9th Cir. 2017) 70 IDELR 169 (cont'd)
    - 9th Circuit cautioned that child's circumstances might demand that IEP identify specific location in order to offer FAPE
    - But IDEA does not require that every IEP identify anticipated school where services will be delivered

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Specificity

- Identification of Specific School or Classroom Locations
  - Four cases decided since Rachel H. illustrate variety of analyses courts and hearing officers employ when faced with deciding the specificity required in placement offer . . .

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Case Example #1

E.M. v. Poway Unified School Dist. (C.D. Cal. 2020)

Facts:

- IEP team recommended NPS placement for elementary school Student with autism to address his behaviors
- Team recommended two NPSs and team members provided Parents with general information regarding NPSs
  - No specifics, such as program details, class size, student-adult ratio, or venue of the offered nonpublic schools, were discussed
- Parents filed for due process based on disagreement with need for NPS placement; District also filed to defend its FAPE offer
- Issues were appealed to District Court

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Case Example #1

E.M. v. Poway Unified School Dist. (C.D. Cal. 2020)

Decision:

- Court ruled that District failed to offer Student FAPE by not providing specific information about its proposed NPS placement
  - No NPS personnel or knowledgeable District staff were present at IEP team meetings
- Team members only spoke in generalities about NPS placements and merely provided names of schools
- Parents' opportunity to participate in decision-making process was significantly impeded because they were unaware of specifics of services being offered to their child

(E.M. v. Poway Unified School Dist. (S.D. Cal. 2020) 75 IDELR 244)

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Case Example #2

William S. Hart School Dist. v. Antillon (C.D. Cal. 2021)

Facts:

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

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Case Example #2

William S. Hart School Dist. v. Antillon (C.D. Cal. 2021)

Decision:

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

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

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Case Example #3

Student v. Tulare Unified School Dist. (OAH 2021)

Facts:

- District's 2020 IEP recommended that preschool Student with autism attend combined program of smaller intervention group and larger general education classroom
- Specific classroom would be determined after school resumed at start of 2020-2021 school year and after Parent observed classrooms
  - District provided two general education preschool classes: Larger class met five days per week, three hours per day and had morning and afternoon sessions; smaller class met twice weekly for two hours each session
  - Programs were located at various locations within the school district, and Parent had option of selecting location, subject to availability

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Case Example #3

Student v. Tulare Unified School Dist. (OAH 2021)

Decision:

- ALJ upheld Parent's challenge to IEP, finding offer of placement was ambiguous because IEP document contained no description of settings for "smaller intervention group" or "larger general education classroom"
  - Extent to which Student would participate with nondisabled peers was unclear
- District also could not offer multiple placement options, each of which included distinct programs, and request parent to choose
- Procedural error did not deny FAPE because Parent understood difference between classes, had toured school sites, and had observed classrooms
  - Lack of description of classes in IEP did not deny Parent meaningful participation

(Student v. Tulare City Unified School Dist. (OAH 2021) Case No. 2021030770, 121 LRP 33785)

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Case Example #4

Alta Loma Elem. School Dist. v. Student (OAH 2020)

Facts:

- District proposed placing 7-year-old Student with autism in County autism program with 25 percent of day in general education setting
- Parent contended that District denied FAPE by failing to include all necessary elements in proposed IEP
- Parent claimed, among other items, that District's proposed IEP:
  - Did not identify curriculum it was offering
  - Did not specify how mainstreaming offered in IEP would be implemented
  - Did not specify which of County autism program classroom locations it was offering

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Case Example #4

Alta Loma Elem. School Dist. v. Student (OAH 2020)

Decision:

- ALJ found for District on all counts
  - IEP adequately explained extent to which Student would not participate with nondisabled peers; District did not have to provide class schedule or specific times that mainstreaming activities would take place
  - County autism program classrooms were substantively the same and Student would receive same specialized instruction and embedded supports in any of County autism program classrooms
  - Citing Rachel H., ALJ stated that IDEA permits District flexibility to assign Student to particular school or classroom made available by County

(Alta Loma Elem. School Dist. v. Student (OAH 2020) Case No. 2019090224, 120 LRP 12213)

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Specificity

- Details of Offered Programs and Services
  - IEPs must contain projected date for beginning of special education services and modifications, and "the anticipated frequency, location, and duration of those services and modifications"
  - Length of time that offered service will be delivered must be "stated [in an IEP] in a manner that is clear to all who are involved"

(34 C.F.R. § 300.320(a)(7); Ed. Code, § 56345, subd.(a)(7); J.L. v. Mercer Island School Dist. (9th Cir. 2010) 53 IDELR 280)

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Case Example

Los Angeles Unified School Dist. v. A.O. (C.D. Cal. 2022)

Facts:

- District offered placement to Student with bilateral hearing loss in Deaf/Hard of Hearing special day program at its elementary school
- Proposed service included 1350 minutes per week in SDC; 20 minutes of audiology services to be provided between one and five times per month; and 30 minutes of language and speech services to be provided between one and 10 times per week
- Parents rejected District's offer and requested reimbursement for Student's attendance at NPS for DHH children

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Case Example

Los Angeles Unified School Dist. v. A.O. (C.D. Cal. 2022)

Decision:

- Court affirmed ALJ's reimbursement award
  - Because District used ranges instead of finite numbers in describing frequency of services, Parents were unable to understand FAPE offer
    - "Parents were unable to decide if they agreed with the proposed services without knowing how [District] would provide the services" and "were left without vital information they needed to decide if they agreed with services offered"
    - District's speech and language pathologist and audiologist "provided conflicting understandings regarding how the services were to be provided"
- But court ruled District did not need to specify whether speech and language therapy services would be provided individually or in group setting
- **Update:** *In February 2024, 9th Circuit panel upheld district court's findings, except that panel determined Student needed individual speech and language therapy services for FAPE*

(Los Angeles Unified School Dist. v. A.O. (C.D. Cal. 2022) 80 IDELR 98, aff'd in part, (9th Cir. 2024), 124 LRP 5221)

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Timeliness

- Offer Prior to Finalization of IEP Process
  - ALJs generally have rejected parental claims alleging failure to make "clear written offer" when facts indicate that IEP development process was not yet completed
    - Example: Goals not yet fully developed
    - Example: Annual meeting adjourned due to lack of time to finish

(Student v. Redwood City School Dist. (OAH 2014) Case No. 2013080751, 114 LRP 17377; Student v. East Whittier City School Dist. (OAH 2009) Case No. N2008090101, 109 LRP 5790, aff'd, (C.D. Cal. 2010) 112 LRP 15461)

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Timeliness

- Offer In Place at Beginning of School Year
  - Law requires districts to have IEP in effect by beginning of school year; failure to do so is a procedural violation
  - In some circumstances, districts have been excused from not having IEP in place at beginning of the school year when they made decision to prioritize ensuring parents participate in IEP process

(34 C.F.R. § 300.323(a); Ed. Code, § 56344(b); Doug C. v. State of Hawaii Dept of Educ. (9th Cir. 2013) 720 F.3d 1038, 61 IDELR 91)

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Timeliness

- Offer In Place at Beginning of School Year (cont'd)
  - And in a very few instances, district's failure to have Student's IEP in place when the school year started have been held to constitute harmless error
    - J.W. v. Fresno USD (E.D. Cal. 2009)
      - District's failure to have the Student's IEP in place when school year started constituted procedural violation but was harmless error and did not deny FAPE
      - Why? Parent knew what the offer was, had already decided not to accept it and received the formal written offer shortly after new school year began

(J.W. v. Fresno Unified School Dist. (E.D. Cal. 2009) 52 IDELR 194, aff'd, (9th Cir. 2010) 55 IDELR 153)

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Timeliness

- Delays in Finalizing IEP Offer
  - Breach of requirements of Union can also result if district unreasonably delays finalizing student's IEP or facilitating placement
    - Soledad USD (OAH 2017)
      - District suggested Student could be placed in SDC in another district, but after neighboring district refused to accept Student, District never reconvened IEP meeting to formalize new placement offer
      - ALJ ruled District denied FAPE by failing to make clear written offer of placement as it was reasonable for Parents to believe that placement in other district's SDC was likely

(Student v. Soledad Unified School Dist. (OAH 2017) Case No. 2017060205, 117 LRP 43281)

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Spotlight on Practice: Practical Pointers to Help Ensure Compliance

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Where Should the Offer of FAPE Be Made?

- Best place is at IEP meeting
- Offer may be finalized or clarified (but not materially changed) in subsequent letter to parents
- But if district makes offer that is totally outside of IEP process, it likely will be found to have deprived parents of any meaningful participation in process

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Clarity of Offer

- If IEP team members and staff are uncertain how to interpret district's offer, chances are parents are uncertain as well
- Always ask entire IEP team if they understand offer
- If they do not, or if there is any uncertainty, be sure to entertain and answer questions until there is no room for doubt

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Tips to Avoid Disputes Over IEP Notes

- Take notes and document each major topic of discussion
- Summarize all issues discussed, requests made and district's responses
- Identify all options considered by IEP team and be sure to distinguish options from the actual offer of FAPE
- Specify all elements of offer; if the IEP forms rely on codes, clarify services and placement in meeting notes
- If there is verbal agreement to anything, include that in notes
- Proofread notes prior to finalizing IEP

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Detail, Detail, Detail!

- Before finalizing IEP, double check to make sure document includes
  - Duration and frequency for all services
  - Start and end date for all services
  - Avoid the phrase "as needed"
- If IEP contemplates ESY, include specific placement being offered, including frequency and duration of services

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Methodology and Service Providers

- Remember that, in general, there is no requirement to identify particular methodology or curriculum in IEP
  - But if the team feels student requires specific methodology and is committing to providing that, then such methodology may be appropriate to include in IEP notes

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Methodology and Service Providers

- Generally, there is no requirement to list names of classroom teacher, aide SLP, OT, APE or any other district provider who will be providing services for student:
  - Be cautious about personnel decisions
  - Do not feel compelled to commit to the services of specific staff member
  - Do not feel compelled to discuss and document staff qualifications on IEP

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Lessons Learned: What to Avoid When Making a Placement Offer

- Do not fail to put the offer in writing because parents have stated that they will not agree to that placement
- Do not offer multiple placements
- Do not offer a type of placement (e.g., an SDC) and leave it up to parents to select school site

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Consequences and Remedies for District's Failure to Make "Clear Written Offer" of FAPE

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Consequences of Failure to Make "Clear Written Offer"

- When failure rises to level of denial of FAPE:
  - Reimbursement for private placement or privately obtained services
    - May include transportation costs for both parents and student
  - Compensatory education
    - Can include payment for specific services student requires due to missed educational opportunity
    - Can include continued funding of private placement

(Ed. Code, § 56175; 34 C.F.R. § 300.148; 34 C.F.R. § 300.516(c)(3))

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Consequences of Failure to Make "Clear Written Offer"

- When failure rises to level of denial of FAPE:
  - Order requiring modification of district practices
    - E.g., ceasing practice of leaving ending dates for various programs blank; avoiding qualifying offer of services with phrase "as needed"; making best efforts to present offers to Parents in single document at single time
  - Attorney fees when parents are prevailing party

(Student v. Natomas Unified School Dist. (OAH 2012) Case No. 2012070797, 112 LRP 57995; 34 C.F.R. § 300.517(a)(1)))

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Take Aways . . .

- Every IEP needs a written offer of services and placement—and that written offer needs to be clear to parents
- Written offer is all about communication with parents, so they know what to expect and can decide if they want to challenge district's proposal
- A good test is whether offer of FAPE is clear enough that your staff can read it and know what it means, and also clear enough that special educators – whether in or out of your district – can understand it and implement it

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Legal Update

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Recent OAH Decisions

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Assessments and Consent

Hueneme Elementary School District

Facts:

- District proposed reassessing 13-year-old Student with OHI and SLI
- Student was last assessed in 2018; since then, Student experienced significant developmental changes, including puberty, COVID-19 isolation, and virtual schooling
- After Grandparent signed assessment plan, District made numerous unsuccessful attempts to obtain Grandparent's cooperation and collaboration with reassessments, including agreeing to alternate testing site
- District filed for due process hearing seeking to assess Student without having received consent

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Assessments and Consent

Hueneme Elementary School District

Decision:

- ALJ ordered Grandparent to cooperate in making Student available for assessments as requested by District
- District demonstrated that reassessment was necessary
- Grandparent's professed desire to cooperate with District to assess Student was "illusionary"
- Grandparent, assisted by her advocate, "exhibited long-standing uncooperative behaviors and interference with all attempts to reassess Student," including not allowing District to contact medical providers and imposing numerous and changing conditions on assessments

(Hueneme Elem. School Dist. v. Student (OAH 2023) Case No. 2023030299, 123 LRP 23775)

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Assessments and Consent

Why Does This Case Matter to Us?

- ALJ noted the similarities in this circumstance to Student R.A. v. West Contra Costa Unified School District (N.D. Cal. 2015), in which court ruled that Parents effectively withdrew their consent to assess based upon conditions they imposed on assessments
  - "The same is true in this matter. Grandparent signed consenting to the May 2, 2022 assessment plan, but Grandparent's actions evidenced she did not intend to allow [District] to assess unless [District] met her demand for control of the assessment site and presence in the room with Student's during testing. As such Grandparent's demands were unreasonable, rendering her consent to reassess no consent at all."

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IEP Development

Victor Elementary School District

Facts:

- Evaluations of 6-year-old Student with autism and OHI revealed that Student had not yet developed foundational skills necessary to participate in kindergarten classroom
- District developed IEP proposing placement in moderate-to-severe classroom; Parent believed that appropriate placement for Student was mild-to-moderate classroom with support of 1:1 ABA-trained aide
- District subsequently agreed to fund IEE
- Two months after IEE was completed, Parent filed for due process: (1) disputing District's offer of placement; (2) claiming District failed to invite independent assessor to IEP team meeting to discuss/adopt results

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IEP Development

Victor Elementary School District

Decision:

- ALJ ruled in favor of District
  - Offer of placement was appropriate given severity of Student's disabilities
  - District did not believe Student required 1:1 aide at time IEP was developed, although independent assessor subsequently concluded Student would need aide to succeed even in moderate-to-severe program
  - District was not legally required to convene IEP team meeting to discuss IEE within any specific timeline
  - Neither IDEA nor California law required District to adopt findings from IEE as long as IEE was "considered," which IEP team did at meeting following filing of due process complaint

(Student v. Victor Elem. School Dist. (OAH 2023) Case No. 2023020494, 123 LRP 31643)

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IEP Development

Why Does This Case Matter to Us?

- Debate concerning provision of aide for Student in this case illustrates "snapshot" rule set forth by 9th Circuit in Adams v. State of Oregon (9th Cir. 1999)
- Statement from 9th Circuit has become one of most frequently quoted pronouncements about special education made by court:
  - "Actions of the school systems cannot . . . be judged exclusively in hindsight. . . . [A]n individualized education program ("IEP") is a snapshot, not a retrospective"
- Here, at time decision was made denying 1:1 aide, no evidence had been presented to IEP team that Student might require such support

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IAES

Palo Alto Unified School District

Facts:

- 9-year-old Student with autism bit paraprofessional who was holding Student's hand during field trip
- Principal observed paraprofessional "with a terrified look on her face, crying, and having trouble talking, breathing, and possibly in shock" with wound approximately 3.5 inches by 2.5 inches
- Paraprofessional described level of pain as "10"
- IEP determined injury was "serious bodily injury" and proposed IAES
- Parents claimed Student's conduct did not amount to serious bodily injury, disputed appropriateness of IAES, and claimed failure to conduct manifestation determination review denied Student FAPE

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IAES

Palo Alto Unified School District

Decision:

- ALJ ruled that Student's conduct constituted serious bodily injury justifying 45-day IAES removal by District
  - Injury caused paraprofessional extreme pain resulting in modified work schedule
- Parents failed to prove IAES was inappropriate
- However, District's failure to conduct manifestation determination review significantly impeded Parents' rights
  - ALJ rejected District's contentions that MD review was not required because District had conceded Student's conduct was manifestation of his disabilities and, alternatively, that its IEP team meetings were equivalent to MD review

(Student v. Palo Alto Unified School Dist. (OAH 2023) Case No. 2023070050, 123 LRP 29040)

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IAES

Why Does This Case Matter to Us?

- Although IDEA allows removal to IAES for drugs and weapons violations and infliction of serious bodily injury regardless of whether student's behavior is determined to be manifestation of student's disability, districts still must conduct manifestation determination review within 10 school days after any decision to change student's placement, regardless of whether the conduct amounts to a special circumstance justifying removal to an IAES

(71 Fed. Reg. 46714, 46720 (Aug. 14, 2006); Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA's Discipline Provisions (OSERS 2022) 81 IDELR 38)

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LRE

Santa Ana Unified School District

Facts:

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

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LRE

Santa Ana Unified School District

Decision:

- Applying Rachel H. factors, ALJ ruled that District's proposed placement was LRE
- Although Student "had ability to learn," he frequently resisted instruction and missed about 50 percent of instructional time due to behaviors
- Student did not obtain nonacademic benefit from SDC placement because most other students feared him and acted as if they were "walking on eggshells" when Student was nearby
- Behaviors disrupted instruction and others' ability to learn
- ALJ determined Student could receive FAPE in small NPS setting

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

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LRE

Why Does This Case Matter to Us?

- Argument often made by parents in asserting that student could succeed in general education placement (or a placement less intensive than that proposed by district) is that student's behaviors could be controlled with 1:1 aide or additional aide support
- Here, District teachers and staff were prepared and able to recount Student's behavioral development in detail to support District's position that additional aides would not help in Student's current placement, as they credibly established by numerous examples that Student could not be regulated by two adults within five feet

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Predetermination

Cabrillo Point Academy

Facts:

- Parents requested assessment of 4-year-old Student shortly after enrolling him in Charter School
- IEP team determined Student qualified under autism and SLI categories
- Prior to meeting, several IEP team members toured NPS (Oak Grove)
- Parents claimed Charter School predetermined Student's placement at Oak Grove and presented them with "take it or leave it" offer at IEP team meeting without first determining services
- Charter School claimed it ended meeting due to time constraints and offered to reconvene to continue discussion concerning FAPE offer

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Predetermination

Cabrillo Point Academy

Decision:

- ALJ determined Charter Schools IEP team engaged in predetermination
- Program specialist acknowledged Charter School made its decision to offer Student placement at Oak Grove prior to meeting
- IEP team had not yet discussed Student's required services, including their length, frequency, and duration
- No evidence that IEP was merely "draft" or that parties had subsequent further discussions about continuum of placement options or Student's LRE
- Denial of FAPE resulted despite ALJ's acknowledgment that Parents and advocate disrupted IEP process

(Student v. Cabrillo Point Academy and Cabrillo Point Academy v. Student (OAH 2023) Case Nos. 2023020680 and 2023020409, 123 LRP 23771)

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Predetermination

Why Does This Case Matter to Us?

- Although districts are permitted to form opinions and compile reports prior to IEP team meeting, such conduct is only harmless as long as school officials are willing to listen to parents
- Predetermination of placement violates IDEA because statute requires that placement be based on IEP, and not vice versa
- Here, as noted above, evidence showed that Charter School, prior to any discussion of services, independently developed IEP that would place Student in preexisting, predetermined program, and was unwilling to consider other alternatives

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Noteworthy Decisions from the Courts

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ESY

M.C. v. Los Angeles Unified School District and CDE

Facts:

- Student with Down syndrome received instruction, with supports, in general education classroom during regular school year
- As District only operated special education programs during ESY, IEP team considered core curriculum SDC and more intensive alternative curriculum SDC for Student
- Parent objected to IEP, preferring core curriculum SDC for ESY instead of alternative curriculum SDC selected by IEP team
- Parent filed for due process hearing
- ALJ determined District's placement did not deny FAPE

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ESY

M.C. v. Los Angeles Unified School District and CDE

Decision:

- Court reversed ALJ, finding District's ESY placement denied FAPE
- IDEA's LRE obligation fully applies to ESY
- Districts must meet LRE by alternative means, including placement with other agencies, if no general education ESY class is available
  - Court found California regulation 5 C.C.R. § 3043(g) [LEAs not required to meet gen ed component of IEP during ESY if LEA does not offer regular ESY programs] violated IDEA
  - **Note: 5 C.C.R. § 3043(g) was repealed effective January 1, 2023**
- District also predetermined ESY placement by offering 20 days as "take it or leave it offer" instead of assessing whether Student required longer program

(M.C. v. Los Angeles Unified School Dist. and Calif. Dept of Educ. (C.D. Cal. 2023) Case No. 2:20-cv-09127-CBM-E)

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ESY

Why Does This Case Matter to Us?

- In this decision, district court opined that "[t]he LRE requirement applies in the same way to ESY placements as it does to school year placements and is therefore not limited to programs that a school district already offers"
- This statement, combined with repeal in 2023 of 5 C.C.R. § 3043(g), should serve as a reminder to districts and IEP teams to review, and if necessary, revise their ESY policies and available placements

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IEPs

E.V.E. v. Grossmont Union High School District

Facts:

- High-school Student with generalized anxiety struggled to attend school and received failing grades in 3 out of her 5 classes
- IEP team discussed moving Student to MERIT Academy, which offered more structured learning environment
- Parent requested other options
- General education teacher was excused from meeting to teach class
- District sought to implement IEP absent Parents' consent
- Parent claimed District predetermined placement and violated procedures by not having general education teacher present at meeting

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IEPs

E.V.E. v. Grossmont Union High School District

Decision:

- District court affirmed ALJ's decision in District's favor
- No evidence that District predetermined Student's placement at MERIT
- General education teacher's absence did not prevent IEP team from carefully considering general education placement, as teacher had never met Student and could not have helped creating IEP
  - Even if District committed procedural violation, no denial of FAPE resulted
- Court rejected Parents' claim that IEP was "fatally unclear" due to clerical errors concerning number of service minutes
  - Errors were clarified elsewhere in document and did not create confusion

(E.V.E. v. Grossmont Union High School Dist. (S.D. Cal. 2023) 123 LRP 27633)

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IEPs

Why Does This Case Matter to Us?

- As in this new case, and as discussed in our previous session, most merely clerical errors in drafting IEPs that do not cause confusion among parties will not result in failure to present "clear written offer" of FAPE
- Many courts have held that to hold IEP inappropriate simply because of a clerical error omitting a recommendation, which appeared in meeting minutes and was reflected in conduct of the parties, would "exalt form over substance" (See, e.g., M.H. v. New York City Dep't of Educ. (S.D.N.Y. 2011) 56 IDELR 69)

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IEEs

T.S. v. Long Beach Unified School District

Facts:

- District and Parents of 13-year-old with autism entered into settlement agreement under which District agreed to fund various IEEs, including visual processing evaluation
  - Parties could not agree on OT assessor, so OT was excluded from agreement
- Vision assessor recommended "accommodative support glasses" and advised he would need to follow up on Student's progress in a few months
- In subsequent due process complaint, Parents claimed District denied FAPE by:
  - Failing to either fund OT IEE or file for due process; and
  - Failing to provided another vision therapy IEE subsequent to assessor's follow-up recommendation

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IEEs

T.S. v. Long Beach Unified School District

Decision:

- District court upheld ALJ's findings in District's favor
- District had not previously assessed Student in area of OT, so there existed no school OT assessment with which Parents could have disagreed
  - IEP notes did not support Father's testimony that he requested OT IEE
  - District was not required to fund IEE merely because Parents raised it as concern
- Record did not support position that vision assessor's comments about following up on his recommendation of support glasses amounted to recommendation for a "second vision therapy evaluation"
  - Evidence did not show that Student needed vision therapy services or another vision therapy assessment to access his education

(T.S. v. Long Beach Unified School Dist. (C.D. Cal. 2023) 123 LRP 21141)

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IEEs

Why Does This Case Matter to Us?

- Court rejected theory that when area of suspected disability is not assessed by district, parent may seek and obtain IEE as remedy for district's failure
  - In Student v. Torrance Unified School District (OAH 2016), ALJ observed that "the IDEA unequivocally requires that a parent seeking an independent evaluation at public expense disagree with an assessment 'obtained by the public agency.' Where no assessment was performed, or the school district refused to initiate an assessment on request, the parent's recourse is to file for due process, as a result of which the parent may be awarded an independent assessment as an equitable, rather than statutory, remedy"
- In this case, equity did not support such award

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Parent Participation

J.G. v. Los Angeles Unified School District

Facts:

- District timely convened annual IEP team meeting for Student with Down syndrome in February 2019
- Independent assessor presented results of AAC and AT IEEs, but psychologist selected by Parents to conduct psychoeducational IEE was not present at meeting, so meeting was reconvened approximately one month later
- Another meeting was held two months later after Parents visited comprehensive high school campus as possible placement
- Parents subsequently asserted that District denied FAPE by failing to develop Student's IEP by annual due date of February 19, 2019

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Parent Participation

J.G. v. Los Angeles Unified School District

Decision:

- Court upheld ALJ's decision rejecting Parents' claim
- District's decision to reconvene meeting to ensure informed parental participation in placement deliberation process was "in keeping with Ninth Circuit guidance"
- Even if three-month delay in developing Student's 2019 IEP was procedural violation, it did not result in substantive denial of FAPE because there was no loss of educational opportunity
  - Student was making significant progress on his February 20, 2018 IEP goals throughout the 2018-2019 school year and also made academic progress

(J.G. v. Los Angeles Unified School Dist. (C.D. Cal. 2023) 123 LRP 20855)

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Parent Participation

Why Does This Case Matter to Us?

- 9th Circuit "guidance" noted in court's decision refers to Doug C. v. State of Hawaii Department of Education (9th Cir. 2013)
  - In Doug C., 9th Circuit stated that courts and IDEA stress importance of parental participation in IEP process and that delays in meeting IEP deadlines do not deny FAPE where they do not deprive student of any educational benefit
- There continues to be misperception that if annual deadline has passed without new IEP in place, services will "lapse"
  - As 9th Circuit pointed out in Doug C., although IDEA mandates annual review of IEPs, there is no authority for proposition that district cannot provide any services to student whose annual review is overdue

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Latest Federal Guidance

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Early Childhood

Early Childhood Transition Questions and Answers

- OSEP updated its guidance from 2009, summarizing legal requirements
- Upon receipt of the referral from Part C, LEA must provide parent with PWN
  - Lead agency's transition notification constitutes initial referral to Part B for LEA
- LEA then must either seek parental consent for evaluation or send PWN explaining why it believes student is not eligible
- If child is eligible, LEA must ensure IEP developed and implemented by child's third birthday
- LEA is responsible, if parent requests it, for inviting Part C service coordinator (or other Part C representatives) to initial IEP team meeting
  - LEAs should use initial IEP team meeting to explain and educate parents about Part B eligibility requirements and evaluation procedures

(Early Childhood Transition Questions and Answers (OSEP 2023) 123 LRP 34371)

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Virtual Private Schools

Letter to Jenner

- OSERS was asked how to determine the location of virtual private schools for purposes of providing equitable services
- In situations where virtual private school does not have a clear physical location where students primarily receive instruction, the state has discretion for determining how to meet the equitable services requirement
  - "A reasonable option is for equitable services to be provided to an eligible student attending a virtual private school by the LEA in which the student is located while receiving their education (most often the LEA in which the student resides if the student attends virtual private school at their home)"
  - Under this approach, it is possible that multiple LEAs, including LEAs in different states, would be responsible for providing equitable services to students enrolled in the virtual private school

(Letter to Jenner (OSERS 2023) 123 LRP 33283)

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New Developments Affecting Special Education

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New Laws for 2024

AB 87—Section 504 Team Meetings

- Authorizes parent, guardian or LEA to audio record any meetings and team meetings for students held pursuant to Section 504
  - Parallels language currently in place for IEP team meetings

AB 248—The Dignity for All Act

- Current law includes the terms "mentally retarded persons," "mentally retarded children," "retardation," and "handicap" in various sections of state codes
- This law makes non-substantive changes to those provisions to eliminate this obsolete terminology

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New Laws for 2024

AB 611—Nonpublic, Nonsectarian Schools or Agencies

- Requires contracting LEA and charter school, within 14 days of becoming aware of any change to certification status of nonpublic, nonsectarian school or agency, to notify parents who attend such school or agency of change in certification status
- Notice must include copy of procedural safeguards

AB 1466—Restraint and Seclusion

- Current law requires LEAs to collect and, no later than 3 months after end of school year, report to the State Department of Education annually on use of behavioral restraints and seclusion for students enrolled in or served by LEA for all or part of prior school year
- AB 1466 requires LEAs to post report on their internet websites annually

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New Laws for 2024

AB 1651—Emergency Medical Care

- Requires districts, COEs and charter schools to store emergency epinephrine auto-injectors in an accessible location upon need for emergency use and include that location in specified annual notices.
- Extends definition of "volunteer" and "trained personnel" to include holder of an Activity Supervisor Clearance Certificate

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New Laws for 2024

SB 274—Suspensions and Expulsions

- Extends prohibition against suspension of students enrolled in any of grades 6 to 8, inclusive, including those students enrolled in charter school, for disrupting school activities or otherwise willfully defying the valid authority of supervisors, teachers, administrators, school officials, or other school personnel engaged in performance of their duties to all grades, by 4 years (until July 1, 2029)
  - Beginning July 1, 2024, prohibits suspension of students enrolled in any of grades 9 to 12, inclusive, including those students enrolled in charter school, for those acts until July 1, 2029
  - Law retains teacher's existing authorization to suspend any student in any grade from class for willful defiance, for day of suspension and day following

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