



# Here and Now:

## Responding to Parents' Methodology Requests

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## What We'll Cover . . .



- Definition and General Legal Principles
  - IDEA and IEP Requirements
  - Specifying Methodology Decisions in Student's IEP
  - Practice Pointers
- Methodology and the Provision of FAPE
  - Autism Methodology Disputes
  - Reading Methodology Disputes
  - Other Methodology Disputes
- Methodology and Parent Participation
  - What Is (and What Is Not) an IEP Team Meeting?
  - Preparatory Meetings and Draft IEPs
  - Predetermination Issues
  - Practice Pointers

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# Definition and General Legal Principles

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## Defining “Methodology”

“Methodology” in context of education of students with disabilities simply means “the manner in which a school district chooses to teach a child with an IEP”

(Student v. Goleta Union School Dist. (OAH 2019) Case No. 2018060323, 119 LRP 1466)

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# IDEA Requirements



- IDEA requires that IEPs include statement of special education, related services and supplementary aids and services to be provided to student
- IDEA, however, does not require that IEPs identify specific methodology that district will use.
  - USDOE: “[T]here is nothing in the [IDEA] that requires an IEP to include specific instructional methodologies” (71 Fed. Reg. 46665 (Aug. 14, 2006).)
  - U.S. Supreme Court: Parents, no matter how well-motivated, do not have a right to compel a school district to provide specific program or employ specific methodology
  - 9th Circuit: District need not specify specific teaching methodology in IEP for some students, because teachers need flexibility

(34 C.F.R. § 300.320 (a)(4); 71 Fed. Reg. 46665 (Aug. 14, 2006); Board of Education of the Hendrick Hudson Central School District v. Rowley (1982) 458 U.S. 176, 553 IDELR 656; J.L. v. Mercer Island School Dist. (9th Cir. 2010) 53 IDELR 280)

# District Discretion



- Generally, districts have leeway in selecting educational methodology, but on condition that selected methodology can provides FAPE
  - District is required to provide appropriate methodology; it is not required to provide “best” methodology
  - However, courts have held that if student is not making appropriate progress with selected methodology, district should reconvene IEP team to discuss whether different methodology would be more effective
  - Additionally, IEP team cannot disregard “clear consensus” of evaluative materials showing that student needs particular methodology to receive FAPE

(M.M. and B.M. v. School Bd. of Miami-Dade County, Fla. (11th Cir. 2006) 45 IDELR 1; Falmouth School Dep’t v. Mr. and Mrs. Doe (1st Cir. 2022) 81 IDELR 151; A.M. v. New York City Dep’t of Educ. (2d Cir. 2017) 69 IDELR 51)

# Defining “Methodology”



What is and what is not “methodology,” and therefore up to district’s discretion, has been the crux of recent judicial and administrative decisions . . .

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# Case Example



Fruitvale School Dist. (OAH 2022)

## Facts:

- District offered 8-year-old Student with multiple disabilities counseling and speech and language services that failed to state whether services were in group or individual setting, or combination of two settings
  - District’s speech and language pathologist stated that speech and language services offer could be delivered as group or individual services depending on what students were available that day, as determined by the speech and language pathologist who was present at such time
- District filed for due process hearing seeking to demonstrate that its IEP offered Student FAPE

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## Case Example



Fruitvale School Dist. (OAH 2022)

### Decision:

- ALJ: District failed to show that its proposed IEP offered Student FAPE
- Decision regarding whether Student would receive individual or group services was not methodology choice by service provider or IEP team based upon Student's speech and language needs
  - Rather, it depended on other students' schedules and at sole discretion of speech and language pathologist, outside of IEP process
- IEP team, including Parent, should have had notice of type of delivery service model, group and/or individual, that Student would be offered

(Fruitvale School Dist. v. Student (OAH 2022) Case No. 2022080234, 123 LRP 1257)

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## Other Notable Decisions



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

- Court: There is no requirement that IEP offer must indicate whether services will be provided in individual or group settings
  - "Such information falls under the specific methodology of delivering the services, an aspect left to the discretion of the school districts"

Goleta Union School Dist. (OAH 2019)

- District claimed that "methodology" included 700 minutes per week of specialized academic instruction in special education classroom
  - ALJ: District "conflates educational services and placement with methodology, but they are two different things"

(Los Angeles Unif. School Dist. v. A.O. (C.D. Cal. 2022) 80 IDELR 98; Student v. Goleta Union School Dist. (OAH 2019) Case No. 2018060323, 119 LRP 1466)

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# Specifying Methodology in IEP



- While IDEA does not require IEPs to identify educational methodology district will use unless specific methodology is essential to provision of FAPE, it does not preclude IEP teams from doing so
    - Typically, though, IEP lacks such specificity so that many different methods and techniques can be used to meet student's educational needs
    - Failure to implement required IEP component may expose district to liability
    - If IEP mandates use of particular instructional methodology, district must ensure that proposed placement is able to implement that methodology
- (71 Fed. Reg. 46665 (Aug. 14, 2006); 34 C.F.R. § 300.323(c); Gill v. Columbia 93 School Dist. (W.D. Mo. 1999) 31 IDELR 29, *aff'd*, (8th Cir. 2000) 32 IDELR 254; T.C. and A.C. v. New York City Dep't of Educ. (S.D.N.Y. 2016) 68 IDELR 137)

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# Case Example



Temecula Valley Unif. School Dist. (OAH 2015)

## Facts:

- 8-year-old Student eligible for special ed as OHI
- IEP team agreed to reading methodology ("RAVE-O") via IEP amendment
  - IEP called for RAVE-O to be provided five times per week for 30 minutes in small group, with additional 30 minutes in afternoon four times per week to begin in March
- Teacher did not begin using RAVE-O until April and, ultimately, only provided it two times per week
- Teacher believed it was not appropriate methodology for Student

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# Case Example



Temecula Valley Unif. School Dist. (OAH 2015)

## Decision:

- Although Student progressed without full implementation of RAVE-O, ALJ found District violated FAPE obligation by failing to implement IEP
- Teacher improperly substituted her educational judgment for that of IEP team, which included methodology in IEP document
- When teacher chose not to implement RAVE-O, Parent was “cut out of the IEP process”
- ALJ awarded \$21,000 reimbursement for private behavior services obtained by Parent

(Student v. Temecula Valley Unified School Dist. (OAH 2015) Case No. 2014080713, 66 IDELR 202)

# Practice Pointers: Discussing Methodology at IEP Team Meetings



- Specify on your IEP team meeting agenda when, if necessary, methodology will be discussed, and provide team members, including parents, with copy of the agenda prior to meeting
  - This can help IEP team avoid getting bogged down in methodology disputes that can lengthen or disrupt meeting and hamper further communications with parents

## Practice Pointers: Discussing Methodology at IEP Team Meetings



- Unless there is clear consensus that student would only benefit from particular methodology, avoid naming specific program in student's IEP
  - IEP team should be aware that teachers and service providers will have greater flexibility if IEP does not require use of specific methodology
  - Explain to and educate parents on limitations of law and reasons why specific instructional methodologies should not be listed in IEP

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## Practice Pointers: Discussing Methodology at IEP Team Meetings



- Specific instructional methods should be addressed in IEP when team determines that they are necessary for FAPE
  - Document any such requirements under "special education and related services" in IEP document
- IEP team also must ensure that teachers are familiar with any instructional method required by student's IEP
  - If teacher cannot—or will not—implement required methodology, inclusion of that methodology in IEP will not shield district from FAPE claim

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# Methodology and the Provision of FAPE

## Review: Andrew F. FAPE Standard

- In order to meet their substantive obligation to provide FAPE under IDEA, districts must offer IEPs that are “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances”
- Program must be “appropriately ambitious”
- Supreme Court declined to establish any “bright-line” standards for IEPs
  - “The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created”

(Andrew F. v. Douglas County School Dist. RE-1 (2017) 580 U.S. 386, 69 IDELR 174)

## Review: Andrew F. FAPE Standard



- "The 'reasonably calculated' qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials"
- "The [IDEA] contemplates that this fact-intensive exercise will be informed not only by the expertise of school officials, but also by the input of the child's parents. . . ."

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## Review: Andrew F. FAPE Standard



- "Courts should not "substitute their own notions of sound educational policy for those of the school authorities which they review"
  - "By the time any dispute reaches court, school authorities will have had a complete opportunity to bring their expertise and judgment to bear on areas of disagreement. A reviewing court may fairly expect those authorities to be able to 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"

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## Methodology and FAPE



- Disputes over the adequate provision of FAPE under Endrew F. involve whether selected methodology meets standards set by Supreme Court
- Methodology disputes can also involve whether student has received meaningful access to education under standards of Section 504 and ADA
- The two most frequently litigated areas concerning provision of appropriate methodology involve students with autism and students with specific learning disability, particularly in reading and particularly as to students with dyslexia
- These issues are examined in more detail by the following case examples . . .

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## Autism Methodology and FAPE



- Due process claims over appropriate methodology for students with autism typically occur when parents request specific program to be used with their child in district's classroom and district believes that its own selected methodology can provide FAPE
  - Case law and hearing decisions traditionally support district's right to select methodology to be used for students with autism, particularly when district service providers are able to articulate reason(s) why they have selected particular program being implemented
  - Disputes often center around parents' request for a one-to-one aide to be present in student's classroom to implement methodology they desire (most frequently ABA)

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# Case Example #1



Smith v. Orcutt Union School Dist. (9th Cir. 2022)

## Facts:

- Ten-year-old Student with autism struggled with significant behavioral issues during school day
- Parent requested that District allow outside ABA therapists to accompany Student at school using ABA methodology techniques
- After District refused request, Parent sued District, claiming that it violated Student's rights under Title II of ADA and under Section 504 by failing to accommodate Student's outside ABA therapists and therefore denying him access to an education
- After district court ruled for District, Parent appealed to 9th Circuit

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# Case Example #1



Smith v. Orcutt Union School Dist. (9th Cir. 2022)

## Decision:

- 9th Circuit affirmed lower court's decision that Parent failed to prove violation of ADA or Section 504
- Although Student had significant behavioral issues, there was no evidence presented as to whether, or how, implementation of ABA methodology at school would help Student access his education
  - Parent's claim did not address extent to which Student's behavioral issues affected his ability to remain in classroom and participate in instructional time
  - Parent's expert witness merely discussed value of ABA methodology for children with autism generally without regard to specific Student

(Smith v. Orcutt Union School Dist. (9th Cir. 2022, unpublished) 81 IDELR 153)

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## Case Example #2



E.E. v. Norris School Dist. (E.D. Cal. 2023)

### Facts:

- Parents of first-grade Student with autism challenged various aspects of District's proposed IEP developed prior to 2019-2020 school year
- Specifically, Parents asserted that Student IEP should have specified that Student receive services from qualified personnel trained in ABA
- District prevailed on this issue at due process hearing
- ALJ's decision stated that Parent failed to cite authority that required District to specify in IEP document details about qualifications of staff assigned to work with student

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## Case Example #2



E.E. v. Norris School Dist. (E.D. Cal. 2023)

### Decision:

- Although acknowledging methodology decisions are generally left to district's discretion, court reversed ALJ and found in favor of Parents
- In this case, need for using ABA services was "well documented;" there was consensus that ABA be used in providing services to Student and that it was necessary to provide FAPE
  - School psychologist acknowledged that Student required explicit instruction and systematic teaching using ABA from appropriately trained aide
- Accordingly, court determined that Student's IEP needed to specify that personnel be trained in use of ABA

(E.E. v. Norris School Dist. (E.D. Cal. 2023) 123 LRP 13907)

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## Other Notable Decisions



### Fremont Unif. School Dist. (9th Cir. 2011)

- Ninth Circuit rejected claim that District's IEP violated IDEA because proposed program was not based on ABA therapy techniques
  - In addition to deferring to District on methodology decisions, court found that Student made "meaningful progress" in achieving his educational and occupational goals

### G.D. v. Torrance Unif. School Dist. (C.D. Cal. 2012)

- Parents failed to show that Student needed dedicated aide and ABA services in order to receive FAPE
  - Student's aides rarely interacted or intervened, and District's behavior supports included appropriate group and consultative behavior services

(K.S. v. Fremont Unif. School Dist. (9th Cir. 2011, unpublished) 56 IDELR 190; G.D. v. Torrance Unif. School Dist. (C.D. Cal. 2012) 58 IDELR 156)

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## Reading Methodology and FAPE



- Similar to methodology disputes involving students with autism, due process claims can arise when parents request that district employ specific reading program(s) to be used with their child that is contrary to methodology selected by district
  - Dyslexia—the most common learning disability—remains one of hottest topics in special education law, not only in California but across the country—and methodology disputes comprise large portion of litigation in this area
  - Also, as with autism methodology disputes, case law and hearing decisions support district's unilateral right to select reading methodology to be used, provided such methodology can provide FAPE

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# Case Example #1



Crofts v. Issaquah School Dist. (9th Cir. 2022)

## Facts:

- Parents of elementary school Student identified as SLD (and suspected by Parents of having dyslexia) contended that District's proposed IEP denied Student FAPE
  - Claim was made despite fact that Student began progressing quickly in her special education instruction and in general education classroom
  - Student also progressed multiple levels in reading assessment program
- Parents believed Student would have made additional progress had she been taught using Orton-Gillingham approach
- ALJ and district court found that District's IEP crafted for Student did not deny her FAPE

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# Case Example #1



Crofts v. Issaquah School Dist. (9th Cir. 2022)

## Decision:

- 9th Circuit: "Districts need not specify an instructional method unless that method is necessary to enable a student to receive a FAPE"
- Parents did not demonstrate that Orton-Gillingham approach was necessary for Student to receive appropriate, individualized instruction
- Student's IEPs were reasonably calculated to enable her to make progress in light of her circumstances without that methodology
  - Teachers used reading programs appropriately designed to improve Student's reading comprehension and fluency, including multi-sensory, kinesthetic reading programs adapted from Orton-Gillingham approach

(Crofts v. Issaquah School Dist. No. 411 (9th Cir. 2022) 80 IDELR 61)

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## Case Example #2



Centralia Elementary School Dist. (OAH 2022)

### Facts:

- At IEP team meeting for 9-year-old Student, Parent's advocate recommended Orton-Gillingham program ("Rainbow Structured Literacy") and Parent also asked about Lindamood Bell program
- District's special education teacher stated that her intention was to use "Reading Mastery" (which focused on sounds and phonemic awareness) for three 40-minute sessions per week
  - Intent to use "Reading Mastery" methodology was also stated in the IEP notes
- Parent asserted that District denied Student FAPE by offering inadequate reading intervention services in Student's initial IEP

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## Case Example #2



Centralia Elementary School Dist. (OAH 2022)

### Decision:

- ALJ rejected Parent's claim, finding that she failed to establish that District's chosen reading methodology would not meet Student's needs and was not reasonably calculated to provide educational benefit
  - Parents advocate and expert witness had only minimal knowledge of District's proposed "Reading Mastery" methodology
- ALJ: "The sole complaint was that it was not Parent's preferred Orton-Gillingham or Lindamood Bell program"
  - "In evaluating whether an IEP offered FAPE, the focus is on the District's offer, not on the alternative that the family preferred"

(Student v. Centralia Elem. School Dist. (OAH 2022) Case No. 2021100727, 122 LRP 18611)

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## Other Notable Decisions



### Laguna Beach Unif. School Dist. (OAH 2016)

- District was not required to identify its methodologies in its placement offer, nor was it required to use the Orton-Gillingham or Slingerland reading methodologies in order to offer Student a FAPE
  - District's special education teacher credibly testified that there were many effective reading intervention programs that could address student's needs

### Las Virgenes Unif. School Dist. (OAH 2020)

- ALJ deferred to District's selection of methodologies in dispute between Orton-Gillingham and "Read 180" programs
  - ALJ also rejected claim that District aides were not equipped to provide services because they did not adhere to CDE's recommended dyslexia guidelines

(Student v. Laguna Beach Unif. School Dist. (OAH 2016) Case No. 2016030723, 116 LRP 39101;  
Student v. Las Virgenes Unif. School Dist. (OAH 2020) Case No. 2019100451, 120 LRP 8400)

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## Other Methodology Disputes



While autism and reading methodology issues dominate legal landscape in this area, other methodology issues can be equally contentious, as following case example demonstrates . . .

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# Case Example



Capistrano Unif. 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
- Received “dialectical behavior therapy” from Harbor UCLA hospital
- Upon return from hospital, Student had difficulties coping at school
- Student was found eligible as ED
- Parents disputed District’s proposed counseling services, insisting on continuation of therapy Student received at Harbor UCLA

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# Case Example



Capistrano Unif. School Dist. (OAH 2017)

## Decision:

- ALJ: “[C]rux of this issue is . . . [whether] District was required to fund and/or support Parent’s choice of counseling methodology for Student”
  - “[A]ssuming for the sake of argument that dialectical behavior therapy is the ‘gold standard’ for treating people with Student’s mental health challenges, [Parent] presented no evidence that dialectical behavior therapy is the only therapy that could address [Student’s] issues and permit her to make progress on her goals”
- Parent failed to demonstrate that Student required dialectical behavior therapy to receive FAPE, or that District’s counseling methodology could not meet her unique needs

(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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# Methodology and Parent Participation

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## What Is (and What Is Not) an IEP Team Meeting?

- Any meeting that addresses
  - Identification;
  - Evaluation;
  - Placement; or
  - Provision of FAPE
- is likely to be deemed an IEP meeting requiring parental participation, even if not officially designated as such

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# What Is (and What Is Not) an IEP Team Meeting?



- Three situations that do not require parental participation:
  - Informal, unscheduled conversations among staff
  - Staff discussions on issues such as teaching methodology, lesson plans or coordination of services
  - Preparatory activities to develop proposal or response to parent proposal that will be discussed at later meeting

(34 C.F.R. § 300.501(b)(3))

# Preparatory Meetings



- Districts may engage in preparatory activities to develop a proposal or response to parent proposal that will be discussed at later meeting
- Example: Staff may review assessment recommendations or placement options in advance of meeting, but must discuss those options with parents and make decisions at the IEP meeting
- Courts and ALJs have acknowledged that difference between preparation and predetermination is sometimes hazy

(34 C.F.R. § 300.501(b))

# Draft IEPs



- Permissible to develop draft IEP
  - Share with parents before or during meeting
  - Must be used for discussion purposes only
  - Cannot be presented as completed document
- USDOE: If draft IEP is developed, district should:
  - Make clear to parents at outset of meeting that it is preliminary recommendation for review and discussion
  - Provide parents with copy

([Letter to Helmuth](#) (OSEP 1990) 16 IDELR 503; 71 Fed. Reg. 46678 (Aug. 14, 2006))

# Predetermination



- Occurs when districts decide on IEP content/issues prior to IEP team meeting precluding meaningful parental participation
- Allegations of predetermination frequently arise with respect to:
  - Preparatory meetings
  - Draft IEPs
  - (Lack of) meaningful discussion at IEP meeting

# Predetermination



- Parents' presence at meeting is not enough
  - Must have opportunity to voice concerns
  - Must have their input considered by the team
  - Must have opportunity to ask questions and be provided with meaningful answers
- "Take it or leave it approach" evidences predetermination
  - Frequent topic of litigation as the following case examples illustrate . . .

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## Case Example #1



Deal v. Hamilton Co. Bd. of Educ. (6th Cir. 2004)

Progenitor of virtually all subsequent predetermination claims

### **Facts:**

- IEP team discussed IEP for Student with autism with Parents without mentioning the Lovaas-style ABA as possible methodology
- District had consistently rejected providing Lovaas-based ABA services all students, rejecting validity of Lovaas
- District staff told Parents that they could not ask questions during IEP team meeting at which methodology was discussed
- District's proposed IEP included teaching methods that would encompass one-to-one discrete trial teaching

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## Case Example #1



Deal v. Hamilton Co. Bd. of Educ. (6th Cir. 2004)

### Decision:

- Sixth Circuit found that District denied Parents opportunity to meaningfully participate in IEP process
- Parents' involvement was merely "matter of form" and "after the fact," because district had pre-decided student's program and services
- District had unofficial policy of refusing to provide 1:1 ABA programs because it had previously invested in another methodology program
- District's predetermination violation caused student substantive harm and therefore denied him FAPE

(Deal v. Hamilton Co. Bd. of Educ. (6th Cir. 2004) 42 IDELR 109, cert. denied, (2005) 546 U.S. 936)

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## Case Example #2



Tehachapi Unif. School Dist. (OAH 2017)

### Facts:

- Parent obtained insurance approval for funding of 40-hours-per-week ABA aide
- Parent requested IEP team meeting to discuss permission for aide to provide services at school
- Before IEP team meeting was held, District's Director of Programs conferred with other District administrators and determined District would not honor ABA prescription and would refuse to allow Student's ABA aide to accompany Student at school
- District advised Parent of decision at IEP team meeting

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## Case Example #2



Tehachapi Unif. School Dist. (OAH 2017)

### Decision:

- ALJ found District's actions amounted to predetermination and denial of FAPE
- Despite history of prior disputes with Parent, District should have discussed and considered request during IEP meeting
- By rejecting Parent's request for implementation of methodology without "open and earnest discussion" by entire IEP team, District interfered with Parent's right to participate in IEP process
- ALJ ordered new IEP team meeting and staff training

(Student v. Tehachapi Unified School Dist. (OAH 2017) Case No. 2016110289, 117 LRP 17194)

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## Practice Pointers: Avoiding Predetermination Claims When Parents Request Specific Methodology



- Districts should do their "due diligence" by conducting research when parents ask for new (or unfamiliar) methodology or request specific instructor who has particular certification
  - Having written information about requested program also shows that IEP team took parents' preferences seriously and investigated their request.
- Assist parents in understanding that methodologies are based on student's educational needs (as opposed to underlying disability)

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## Practice Pointers: Avoiding Predetermination Claims When Parents Request Specific Methodology



- Do not reject or accept methodology request summarily
  - Rather, listen carefully and ask relevant questions
- If IEP team selects methodology different from that requested, document and justify decision by explaining specifically how methodology will meet student's unique needs
- Generally, there is no requirement to identify specific classroom teacher, aide, or other district staff who will be responsible for implementing selected methodology for student
  - Do not feel compelled to commit to the services of specific staff member.

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## Conclusion



- Understanding complex legal requirements surrounding methodologies is challenging task
- Educators need ability to use professional discretion to educate students
- Equally as important is developing collaborative relationship with parents, making sure IEP team and other staff are accessible and responsive to their concerns about their child's needs
- Even though methodology decisions are generally left to IEP team's discretion, parents must be able to voice their concerns and have their input considered by IEP team
  - Districts should continue to emphasize meaningful parent participation as standard for all IEP team meetings and entire IEP development and implementation process

Information in this presentation, included but not limited to PowerPoint handouts and the presenters' comments, is summary only and not legal advice. We advise you to consult with legal counsel to determine how this information may apply to your specific facts and circumstances.

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# Spotlight on Practice:

## Addressing Severe Behaviors by Students with Disabilities

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# What We'll Cover . . .



- Identifying Severe Behaviors
  - Threat Assessments
  - Child Find Obligations
- Responding to Severe Behaviors
  - Behavioral Interventions
  - Disciplinary Actions
  - Removals to Interim Alternative Educational Settings ("IAES")
  - Reporting Crimes to Law Enforcement
  - Use of Aversive Interventions, Including Seclusion and Restraint
  - Placement Issues for Students Exhibiting Severe Behaviors
- Balancing Student Confidentiality with School Safety

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# Identifying Severe Behaviors

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# Threat Assessments



- Structured group process used to evaluate risk posed by student, typically as response to actual or perceived threat or concerning behavior
  - When warranted, threat assessments should be conducted regardless of special education status
  - Safety of students and staff is top priority
  - Primary purpose is to prevent targeted violence

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# Threats and Types of Threats



- Threat = expression of intent to do harm or act out violently against someone or something
- Threat can be spoken, written or symbolic – for example, motioning with one's hands as though shooting at another person
  - Direct threat - Identifies a specific act against a specific target and is delivered in a straightforward, explicit manner
  - Indirect threat - Vague, unclear, and ambiguous
  - Veiled threat - One that strongly implies but does not explicitly threaten violence
  - Conditional threat - Warns that violent act will happen unless certain terms are met

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## Factors Used in Determining Whether Threat Exists



- Age of student
- Capability of student
- Student's discipline history
- Credibility of student and willingness to acknowledge student's behavior
- Credibility of witness accounts

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## Threat Assessment Inquiry



- When district establishes that threat has been made or threatening behavior exhibited, school officials should initiate threat assessment inquiry per established policy
  - Inquiry should be conducted by multi-disciplinary team:
    - School counselor or school psychologist;
    - Student's teacher(s);
    - School administrator;
    - Student's parent(s); and
    - School resource officer, if appropriate
  - Team should collectively gather information and determine what constitutes appropriate response(s)

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## Threat Assessment Follow-Up



- District's obligations following threat assessment inquiry include:
  - Notify others – as needed and if warranted to maintain school safety
    - Don't forget FERPA requirements
  - Elicit assistance of skilled professionals to determine whether findings warrant further investigation
  - Develop plan of involvement and support when necessary
  - Consider referral for possible special education eligibility (child find obligation)

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## Practical Essentials: Threat Assessments



- Establish policy: Sound and up-to-date district-wide threat assessment policy is essential to avoid potential liability and ensure that personnel know when and how to determine if threat exists and what steps to take in response
- Ensure complete process: Make sure to established thorough threat assessment and management process, including assessment of risk factors and warning signs, identification of concerns, and follow-up interventions and monitoring

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# Child Find



- 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 the severity of disabilities
- Triggered when district has knowledge of – or reason to suspect – student has disability

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

# Child Find



- For any student who is engaging in behaviors that are – or could be – significant or severe, districts should be alert for possible signs of a disability that would warrant special education assessment
- When at-home behavior impacts educational performance, child find may be implicated
- But disruptive or severe behavior occurring exclusively at home that does not affect student at school typically does not give rise to duty to assess

## Child Find Case Example

Sequoia Union High School District (OAH 2022)



### Facts and Decision:

- Tenth-grade Student maintained "A" grades in all classes
- In May 2020, Parent emailed three teachers indicating Student had significant mental health issues and that Parents were considering residential facility
- Teachers excused Student from assignments but did not refer for assessment
- District claimed the student was not displaying any academic or behavior concerns to trigger its child find duty, and ALJ agreed that District had no reason to suspect disability before May 2020
- But District was on notice of notice of Student's severe behaviors and need for assessment in May 2020 once Parent informed teachers
- Delay in assessment referral violated child find obligation and denied FAPE

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

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## Practical Essentials: Child Find



- Conduct frequent staff training: Hold child find training sessions and workshops—with periodic review—that includes both district and campus child find coordinators and contacts, assessment personnel, instructional personnel, and office and professional support staff
- Clarify responsibilities: Many child find violations arise from confusion over process and respective roles and responsibilities of personnel
  - To avoid problem, ensure that everyone has copy of and understands SELPA's child find policies and procedures

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# Responding to Severe Behaviors

## When Must Behavior Be Addressed?

- When behavior “impedes” learning — that of student’s or others’
  - If behavior impedes learning, IEP team must consider positive behavioral interventions, supports and other strategies to address that behavior
  - IEP team decides what constitutes “behavior that impedes learning”
- For certain disciplinary actions resulting from student’s misconduct

(34 C.F.R. § 300.324(a)(2))

# What Types of Interventions Must Be Considered?



- Law is silent
  - Except for “positive”
- Up to the IEP team to decide
- But . . . LRE obligation applies
  - Consider more restrictive options only when lesser ones fail to adequately address the problem behavior

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# Functional Behavioral Assessment



- Process that searches for explanation of purpose behind student’s behavior
- IDEA does not require that FBAs precede all behavioral interventions
  - Regulations focus on interventions and strategies, not assessments, although FBA “typically precedes” developing positive behavioral intervention strategies
- No formal IDEA requirements for specific process of how to conduct FBA

(71 Fed. Reg. 46683 (Aug. 14, 2006))

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# Behavioral Intervention Plan



- Positive “support or strategy” that IEP team might consider
- Written document addressing how IEP team will improve difficult/challenging behaviors
- Proactive, not reactive
- Generally, BIPs are based on assessment of student’s behaviors
  - Converts observations in FBA into plan of action for managing student’s behavior
  - But, except in discipline context, no specific IDEA requirement to conduct FBA before developing BIP

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# Manifestation Determinations



- Note: MDs covered in depth in Spring 2023 SES
- Legal Recap
  - Required within 10 school days after proposed removal that would be change of placement
  - Behavior is manifestation of disability if: (1) caused by, or had direct and substantial relation to, student’s disability; OR (2) was direct result of district’s failure to implement IEP
  - If behavior is manifestation of disability: Conduct FBA; develop and implement BIP; return student to prior placement unless parties agree otherwise
  - If behavior is not manifestation of disability: Student subject to same sanctions as general ed students, but must continue to receive FAPE; Student must receive appropriate behavior services and modifications

(34 C.F.R. § 300.530(c)-(d); 34 C.F.R. § 300.532(c))

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# Unilateral Removals to IAES



- Legal Recap
  - Districts may remove student to IAES for not more than 45 school days if student:
    - Carries weapon to or possesses weapon at school, on school premises or to or at school function
    - Knowingly possesses/uses illegal drugs or sells/solicits sale of controlled substances at school, on school premises or at school function
    - Inflicts serious bodily injury upon another person while at school, on school premises or at school function
  - Removal can be made whether or not behavior is manifestation of student's disability

(34 C.F.R. § 300.530(g))

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# Placement for IAES



- IAES students must continue to participate in general curriculum (although in another setting) and progress toward meeting IEP goals
- IEP team makes ultimate determination of setting
- "Participate" does not require district to replicate all services of student's normal classroom
- If above criteria can be met, student's home can be IAES, although it is highly restrictive

(34 C.F.R. § 300.530(d); 71 Fed. Reg. 46,716 (Aug. 14, 2006))

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# Weapons



- “Device, instrument, material or substance, animate or inanimate, that is used for, or is readily capable of causing death or serious bodily injury”
  - Exclusion for pocket knife with blade less than 2½ inches
- Cases:
  - “Adult size” scissors – weapon
  - “Safety” scissors – not a weapon
  - Cigarette lighter with retractable blade – weapon
  - Paper clip – not a weapon
  - Pencil – not a weapon
  - Pulling on principal’s necktie – not a weapon

(34 C.F.R. § 300.530(i)(4); G.D. and R.D. v. Utica Cmty. Schs. (E.D. Mich. 2023) 83 IDELR 12)

# Drugs



- Important difference between illegal drugs and controlled substances (i.e., prescription medication possessed by individual for whom it is prescribed)
- Removal allowed for:
  - Knowingly possessing illegal drugs
  - Knowingly using illegal drugs
  - Selling, or soliciting sale of, controlled substances
- Student who purchases and uses another student’s medication becomes a user of an “illegal drug”

(34 C.F.R. § 300.530(i)(2))

# Practical Essentials: Unilateral Removals to IAES



- Understand what constitutes weapon: Look to personnel who are not connected with incident for objective opinion on surrounding conduct and also as to whether instrument was “capable of causing death or serious bodily injury”
- Know standard for removals based on infliction of serious bodily injury: Pushing and slapping likely will not qualify, nor will violations for fighting under student conduct code, nor even simple assaults on another student or on staff
  - Remember test is not whether student “intended” to inflict serious bodily injury; test is whether serious bodily injury actually occurred

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# ALJ Removals to IAES



- Legal Recap
  - ALJ may remove student to IAES for not more than 45 school days if:
    - District successfully demonstrates that maintaining student in current placement is substantially likely to result in injury to student or to others
    - Burden of proof on district at expedited due process
    - Unlike unilateral removals, district can ask for additional 45 days

(34 C.F.R. § 300.532(b)(2))

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# IAES Case Example #1

Escondido Union School District (2023)



## Facts and Decision:

- 13-year-old Student with autism was involved in several incidents during 2021-2022 and 2022-2023 school years
- IEP team offered Student residential treatment facility based on his escalated behaviors and need for more intensive mental health services
- District proved that Student's continued placement at his middle school was substantially likely to cause injury to Student and others
- District, however, failed to propose an appropriate IAES for Student
  - School psychologist and special education coordinator believed that residential treatment center was appropriate IAES, but they did not name any facility; instead, they merely set forth general criteria that such facility should provide

(Escondido Union School Dist. v. Student (OAH 2023) Case No. 2022090699, 123 LRP 6987)

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# IAES Case Example #2

Grossmont Union High School District (2023)



## Facts and Decision:

- Middle-school Student with ED had many mental health and behavior related psychiatric hospitalizations
- District placed Student at MERIT Academy, which offered a higher level of mental health and behavioral supports
- Student's behaviors escalated, culminating in physical attacks and attempted suicide
- ALJ authorized removal to RTC as IAES
- Continued attendance at MERIT posed danger to Student and others; RTC offered intensive therapeutic supports Student required

(Grossmont Union High School Dist. v. Student (OAH 2023) Case No. 2023020875, 123 LRP 14678)

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# Court Removals to IAES



- Legal Recap
  - District may be able to apply to court for “Honig injunction” to temporarily remove student exhibiting severe behaviors from his or her current placement to IAES
  - Similar to ALJ removals, District must demonstrate to court that maintaining student in his or her current placement is substantially likely to result in injury to student or to others

(Honig v. Doe (U.S. 1988) 559 IDELR 231)

# Reporting Crimes to Police



- Nothing in IDEA prohibits districts from reporting crime committed by student with disabilities to appropriate authorities (see Education Code section 48902 for required notifications)
  - District that reports crime must ensure that copies of student’s special education and disciplinary records are transmitted for consideration by authorities
    - But copies may be transmitted only to the extent that FERPA permits the disclosure

(34 C.F.R. § 300.535)



# Aversive Interventions



- IDEA emphasizes positive behavioral interventions
- But “[it] does not flatly prohibit the use of mechanical restraints or other aversive behavioral techniques,” including seclusion and restraint
- Whether to allow IEP teams to consider use of aversive interventions is “a decision left to each state”
- California law specifically prohibits mechanical restraints and numerous aversive interventions

([Letter to Anonymous](#) (OSEP 2008) 50 IDELR 228; [Letter to Trader](#) (OSEP 2006) 48 IDELR 47; Ed. Code, § 56521.2)

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# Emergency Interventions



- Only in extremely limited circumstances
- May be used only to control unpredictable, spontaneous behavior that poses:
  - A clear and present danger of serious physical harm to student or others, and
  - Cannot be immediately prevented by response that is less restrictive
- May not be used as substitute for BIP
- Limited duration and force

(Ed. Code, § 56521.1)

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# Prohibited Emergency Interventions



- Locked seclusion, unless it is in facility licensed or permitted to use locked room
- Intervention employing device that immobilizes all four extremities (except that prone containment may be used by trained personnel as limited emergency intervention)
- An amount of force that exceeds that which is reasonable and necessary under the circumstances

(Ed. Code, § 56521.1)

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# Emergency Interventions: Notice and Reporting



- Districts must notify parents within one school day if emergency intervention is used or if serious property damage occurs
- Behavioral emergency report ("BER") should be completed immediately, reviewed by designated administrator and maintained in student's file
- If BER is written for student without a BIP, IEP meeting must be scheduled within two days to determine need for FBA and interim BIP

(Ed. Code, § 56521.1)

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# AB 2657



- Became effective January 1, 2019
- Applies to all students
  - But does not change any requirements, limitations or protections contained in existing law pertaining to students with disabilities
- Prohibits:
  - Seclusion or a behavioral restraint for the purpose of coercion, discipline, convenience or retaliation
  - Any technique that may restrain student's airway or breathing
  - Placing student in facedown position with hands held or restrained behind back
  - Locked seclusion, unless in facility otherwise licensed or permitted by state law, and educational provider can make constant, direct eye contact with student

(Ed. Code, § 49005.8)

# Aversives Case Example #1



Santa Monica-Malibu Unif. School Dist. (OAH 2020)

## Facts and Decision:

- District developed several positive behavioral support plans for 9-year-old with autism to address aggressive and self-injurious behaviors
  - Plans did not provide for holds, restraints or any aversive behavioral techniques
- Student's paraprofessional aide used restraints and aversive techniques on bus (physical contact, harnessing), as well as in classroom
- ALJ: District denied Student FAPE by materially failing to implement Student's positive behavior support plans
- Aide did not follow any plan protocols and used "pain, trauma and fear to gain compliance"

(Student v. Santa Monica-Malibu Unif. School Dist. (OAH 2020) Case No. 2019090404, 120 LRP 8398)

## Aversives Case Example #2

Hermosa Beach City School Dist. (OAH 2018)



### Facts and Decision:

- District placed 16-year-old Student in SDC at NPS
- Student left NPS due to fear/anxiety about attending school
- Parent later discovered NPS used physical transport holds on Student
  - Parent alleged improper use of behavior interventions that caused emotional trauma
- ALJ: NPS staff violated Ed Code by failing to report use of emergency interventions
- District's IEP team should have developed less intrusive and more effective techniques to address Student's predictable maladaptive behaviors
- But no direct evidence that emergency interventions caused Student trauma

(Student v. Hermosa Beach City School Dist. (OAH 2018) Case No. 2017060038, 118 LRP 12982)

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## Practical Essentials: Aversive Interventions



- Ensure proper staff training: Provide training on what actions constitute methods of restraint and seclusion under California law and district policy
  - Make sure NPS staff are trained and familiar with district policies
- Know "red flags" to review/revise behavior strategies: Use of restraint or seclusion—particularly when there is repeated use for individual student—should trigger a review and, if appropriate, revision of strategies currently in place to address severe behavior
- Ensure IEP specificity: If IEP team anticipates that aversive interventions will be used with student, clearly state this in IEP and explain under what conditions these interventions would be used so that parents and staff are fully informed

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# Placement for Students Exhibiting Severe Behaviors



- LRE Overview
  - Districts are required to provide each special education student with program in LRE, with removal from general education environment occurring only when the nature or severity of student's disabilities is such that education in regular classes with use of supplementary aids and services cannot not be achieved satisfactorily

(34 C.F.R. § 300.114(a)(2)(ii); Ed. Code, § 56031)

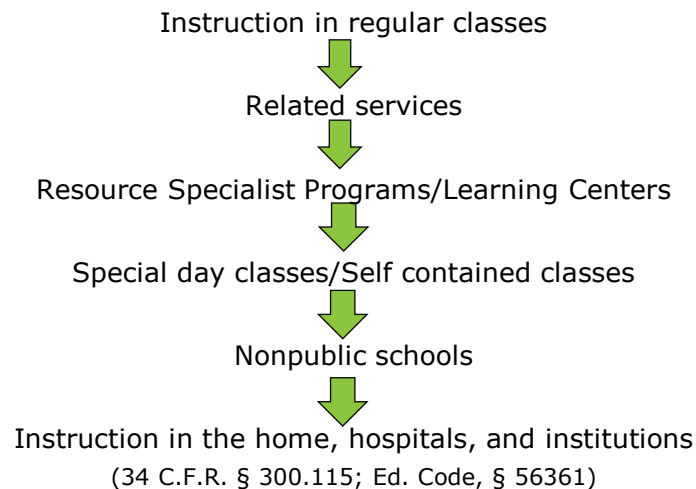
# Continuum of Alternative Placements



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

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

# The Continuum



# Residential Placement



- Continuum of alternative placements also may include “placement in a public or private residential program,” in event such program “is necessary to provide special education and related services to a child with a disability”
- Given highly restrictive nature of residential placement on continuum, removal of student to residential setting complies with LRE mandate in very limited situations for students who are unable to receive FAPE in less restrictive environment
  - Generally, analysis for determining whether residential placement is appropriate hinges on whether it is necessary for educational purposes

(34 C.F.R. § 300.115; Ed. Code, § 56031; Clovis Unified School Dist. v. California Office of Administrative Hearings (9th Cir. 1990) 16 IDELR 944)

## Placement Case Example #1

G.R. v. Del Mar Union School Dist. (S.D. Cal. 2020)



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### Facts and Decision:

- 12-year-old Student with autism, also diagnosed with extreme anxiety, exhibited significant behavioral issues at school
- In June 2017, District determined that placement in RTC requested by Parents was unnecessary and did not change Student's program
- Parents privately placed Student at various RTCs
- District's 2018 IEP again offered public school placement
- Court: Student was not denied FAPE in either 2017 or 2018 IEPs
- It was Student's behavior at home, rather than problems at school, that prompted Parents' request for residential placement

(G.R. v. Del Mar Union School Dist. (S.D. Cal. 2020) 76 IDELR 152)

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## Placement Case Example #2

J.B. v. Tuolumne Cty Sup't of Schools. (E.D. Cal. 2021)



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### Facts and Decision:

- Student with ED exhibited severe behaviors in District's placement throughout 2017-2018, ultimately resulting in twice-daily "pocket and sock check" to ensure Student was not carrying any contraband he could turn into weapon
- Court: Student required residential placement to receive FAPE
- "Intrusive" behavior management adopted by District was sufficient notice of Student's increasing volatility
- Adjustments made by IEP team were insufficient to meet needs

(J.B. v. Tuolumne County Sup't of Schools (E.D. Cal. 2021) 78 IDELR 188)

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## Practical Essentials: Placement



- Discuss options: Be prepared to discuss various other placement possibilities on continuum
  - This is especially true when parents want student to go from instruction in general education setting directly to residential setting
  - There are many options in between those placements on the continuum that IEP team must consider
- Determine appropriate residential placement:
  - If IEP team determines that residential placement is necessary for FAPE, team should look for appropriate placement as close to student's home as possible
  - Residential placements that allow the most contact with family are less restrictive than those located far from student's usual environment

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## Balancing Student Confidentiality with School Safety

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# FERPA Confidentiality Protections



- District disclosure of information to third parties about student in circumstances surrounding threats, potential threats and/or dangerous activity implicates FERPA considerations
- FERPA shields “education records” from disclosures to third parties without prior written parental consent
- “Education records” are those records, in whatever form, that:
  - Are directly related to student; and
  - Are maintained by education agency or institution or by party acting for agency or institution

(34 C.F.R. § 99.3; 34 C.F.R. § 300.611)

# Confidentiality Has Limits



- FERPA contains numerous specific exceptions under which districts may disclose personally identifiable information about student without prior consent
- Many exceptions can apply to disclosures from student’s records pertaining to – or in response to – threats, potential threats or severe behavior
  - Includes disclosures to school officials with legitimate educational interests, disclosures to juvenile justice agencies, disclosure in response to subpoenas, and importantly, in connection with health or safety emergencies

# Health and Safety Emergencies



- Districts may disclose personally identifiable information from education records without parental consent if:
  - “Articulable and significant threat” to health or safety of student or others
  - Requirement that there must be “articulable and significant threat” does not mean that threat must be verbal; district simply must be able to articulate what the threat when it makes the disclosure
  - “Protect” means “to keep from harm, attack or injury”
  - Information may be disclosed to appropriate parties whose knowledge of information is necessary

(34 C.F.R. § 99.31(a)(10); 34 C.F.R. § 99.36; 73 Fed. Reg. 74,838 (2008))

# FERPA Case Example

Letter to Anonymous (FPCO 2015)



## Facts and Decision:

- Parent claimed District violated FERPA when it disclosed to police department, as well as other schools, information from threat assessment relating to Student, who was described as “high level of risk”
- FPCO found no FERPA violation
- In making determination of whether disclosure of information is necessary to protect health or safety of student or others, districts may “take into account the totality of the circumstances”
  - FPCO stated that it will not substitute its judgment for that of district in evaluating the circumstances and making its determination provided there is rational basis for disclosure

(Letter to Anonymous (FPCO 2015) 115 LRP 33141)

# Law Enforcement Unit Records



- Specifically excluded from definition of “education record”
- These records are not protected and may be disclosed to third parties – including police – without parental consent
- To qualify as a “law enforcement unit record,” record must be:
  - Created by a school’s “law enforcement unit”;
  - Created for a “law enforcement purpose”; and
  - Maintained by the law enforcement unit
- Note: Student disciplinary records generally are not created by law enforcement unit or for law enforcement purposes and, therefore, are “education records” protected by FERPA

(34 C.F.R. § 99.8)

# Take Aways



- School safety is essential concern for all parties—administrators, teachers, parents and students—and everyone must accept responsibility for ensuring schools provide safe learning environment
- It is our hope that by assisting school personnel in becoming more familiar with intersecting laws and rules concerning identifying and addressing severe or potentially severe behavior by students with disabilities, they are in better position to take appropriate steps to:
  - Prevent violence and other troubling behaviors
  - Intervene and get help for troubled students
  - Respond to school violence when it occurs

Information in this presentation, included but not limited to PowerPoint handouts and the presenters' comments, is summary only and not legal advice. We advise you to consult with legal counsel to determine how this information may apply to your specific facts and circumstances.



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# Legal Update

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# Recent OAH Decisions

## Assessments and Eligibility

### Temecula Valley Unified School District

#### **Facts:**

- Per settlement agreement, District agreed to conduct assessments for Student with diabetes, who received accommodations under Section 504
- Parent objected to several aspects of assessments, seeking IEEs
- Allegations included:
  - Assessments referred to Student by incorrect name
  - Outcome of assessments was predetermined, in particular, by District's selection of primary psychoeducational assessor
  - Assessments failed to address Student's intermittently low grades
- District denied IEEs and filed for due process to defend assessments

# Assessments and Eligibility

Temecula Valley Unified School District



## Decision:

- ALJ found in District's favor
- Assessments and reports, which determined Student was not eligible for special education, met all legal requirements
  - Infrequent error of use of another student's name did not diminish report's credibility
  - District's selected psychoeducational assessor was often chosen for complex assessments where there has been disagreement between parents; there was no "sinister motive or agenda" for selection
  - Student's academic records showed a pattern of successful grades; mental health issues did not impact Student's ability to receive appropriate education; Section 504 plan provided sufficient and effective interventions

(Student v. Temecula Valley Unified School Dist. and Temecula Valley Unified School Dist. v. Student (OAH 2023) Case Nos. 2023020014 and 2023030211, 123 LRP 17897)

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# Assessments and Eligibility



## Why Does This Case Matter to Us?

- ALJ: Student can only be denied FAPE by district's action or omission if student is eligible for special education at time of district's conduct, or would be eligible for special education but for district's conduct
- In this case, District established that its assessments produced reliable and valid information for Student's educational, behavioral and mental health needs
  - ALJ stressed importance of credible witnesses and thorough assessments reports, all of which were present here, demonstrating that although Student experienced impacts from his diabetes, they were not significant enough to warrant special education services

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# Consent

San Jose Unified School District



## Facts:

- District sent assessment plan in English to Parent of Student with speech and language impairment
- Parent's native language is Spanish, which was acknowledged in prior assessments reports
- Parent signed new assessment plan without understanding it, believing it would be similar assessment to that conducted in 2019
- Months later, after Parent received translated documents of IEP team meeting, she realized Student would not be assessed for adaptive functioning, which was area of concern
- Parent sought IEE and District filed for due process to defend assessment

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# Consent

San Jose Unified School District



## Decision:

- District violated IDEA and California law it when failed to provide parent with assessment plan in Parent's native language
  - "Parent did not understand either the words on the English assessment plan, or the specific nature of the various assessments listed"
- Although Parent communicated with District in English, she used Google Translate to do so
- ALJ rejected District's claim of harmless error
  - By providing assessment plan Parent did not understand, District denied Parent opportunity to accept or reject omission of adaptive functioning as area of assessment

(San Jose Unified School District v. Student (OAH 2023) Case No. 2023020689, 123 LRP 14676)

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# Consent



## Why Does This Case Matter to Us?

- To obtain parental consent for assessment, district must provide proper notice via assessment plan
- Assessment plan must be in language easily understood by public and in native language of parent; must explain assessments that district proposes to conduct; and must provide that district will not implement IEP without parent's consent
- Lack of compliance with any of these requirements can, as in this case, result in finding that district's subsequent assessments did not meet legal standards

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# LRE



## Simi Valley Unified School District

### Facts:

- Middle-school Student with ED engaged in engaged in risky, unhealthy and occasionally criminal behavior
- IEP team placed Student in RTC in Provo, Utah, later changing his placement to less restrictive RTC (New Haven) in Vista, Calif.
- Student continued to display impulsive behaviors, but made progress
- During Student's ninth-grade year (2022-2023), District proposed changing placement from RTC to Phoenix School day program
- Parent believed Student continued to require RTC placement
- District filed for due process to implement IEP

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# LRE



Simi Valley Unified School District

## Decision:

- ALJ determined that District's proposed IEP were procedurally and substantively appropriate
  - "Student had received maximum benefit from the residential setting. Further placement in a residential setting carried risks that Student would regress and become institutionalized."
  - Phoenix School, which was designed for students with intensive social emotional and behavioral needs, was designed to replicate day program of an RTC
  - ALJ took into account that Student badly wanted to return home and was excited that Phoenix School had male and female students

(Simi Valley Unified School Dist. v. Student (OAH 2023) Case No. 2023010221, 123 LRP 11827)

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# LRE



## Why Does This Case Matter to Us?

- As discussed in previous presentations, placement in RTC is highly restrictive and is appropriate only if it necessary to provide student with special education and related services, and if student is not capable of deriving educational benefit outside of residential placement
- 9th Circuit: Risky behaviors outside of school, including defiance in the home, sneaking out, dishonesty, and inappropriate relationships do not necessarily mean RTC will be appropriate as student's LRE, especially if student is able to attend school, turn in assignments and earn good grades (Ashland School Dist. v. R.J. (9th Cir. 2009))

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# Manifestation Determinations



Bella Mente Montessori Charter School

## Facts:

- 8th-grade Student with ADHD was overheard saying he was going to “bring a gun to school and kill everyone and shoot the teacher's head off”
- Charter School police conducted search of Student's home and found dozens of weapons, list of student names, school’s address, and drawings of people with weapons
- Student was suspended and recommended for expulsion
- MD team based its conclusion on school psychologist's report that behavior was not manifestation of disabilities
- Parents contended that Charter School predetermined MD team’s findings

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# Manifestation Determinations



Bella Mente Montessori Charter School

## Decision:

- ALJ agreed with Parents
- Student had only attended Charter School for 41 school days before making threat; Charter School staff had not had time to become familiar with Student's behaviors and how his disabilities might influence them
- School psychologist was not available at MD review to discuss report
- Parents did not have time to offer their information explaining Student’s conduct in the single hour reserved for MD review
- ALJ: Advocate’s sense that meeting was “kind of a fait accompli” [sic] was correct

(Student v. Bella Mente Montessori Charter School (OAH 2023) Case No. 2022110710, 123 LRP 6989)

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# Manifestation Determinations



## Why Does This Case Matter to Us?

- This case re-enforces IDEA's requirement that MD review team must review all relevant information in student's file, and use that information to arrive at determination as to whether student's conduct was caused by, or had direct and substantial relationship to student's disability, or was the direct result of district's failure to implement student's IEP
- In its review of all relevant information, MD team should analyze student's behavior as demonstrated across settings and across times and should also consider information submitted by parents

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# Private School Students



## San Diego Unified School District

### Facts:

- In December 2019, District held initial IEP team meeting for Student, who was then 12 years old, and found him eligible for special education under category of ED
- Parents placed Student in wilderness therapy program in October 2020, but did not express disagreement with IEP, request reimbursement, or request IEP team meeting
- District IEP team met during private placement and proposed IEPs
- Parents re-enrolled Student in District in January 2022 and subsequently filed for due process challenging District's IEPs

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# Private School Students

San Diego Unified School District



## Decision:

- District was not required to provide in-person learning at beginning of 2020-2021 and met Student’s educational needs during period in which it was forced to offer distance learning due to COVID-19 closures
- During period when Student was privately placed, District was not obligated to develop IEP for Student until requested to do so by Parents
- District was not at fault for delay in conducting assessments prior to Student’s return to public school
  - ALJ: Parents unwillingness to make Student available for assessments in California eliminated duty to complete assessments within 60 days

(*Student v. San Diego Unified School Dist.* (OAH 2023) Case No. 2022090021, 123 LRP 11821)

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# Private School Students



## Why Does This Case Matter to Us?

- There are several notable issues arising from this case
  - ALJ applied Capistrano throughout—perhaps even to imply that Capistrano might now provide the basis for further defense against reimbursement claims in residential placement cases, when parents have not requested return to IEP process
  - ALJ rejected previous OAH opinion in Orcutt (where the ALJ found that district could/should have served student in-person in Fall 2020), stating that FAPE could not have compelled violating stay-at-home orders and putting lives at risk during height of global pandemic when millions died
  - ALJ also noted that CDE orders do not have force of law

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# Transfer Students

Gateway College and Career Academy



## Facts:

- Student with autism attended Corona-Norco USD
- Dispute between Corona-Norco and Parents led to settlement agreement in which district agreed to fund private school placement for two years
- Student enrolled in Davidson Learning Center as parentally placed private school student
- Parents notified Corona-Norco of intent to re-enroll Student for 2021-2022, but reached another impasse regarding assessments
- Parents instead enrolled Student in Charter School, which provided direct SAI without developing IEP
- Parent claimed transfer statutes applied and that Charter School denied FAPE

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# Transfer Students

Gateway College and Career Academy



## Decision:

- ALJ: Intrastate transfer statutes (requiring provision of comparable services to most-recent IEP and convening meeting within 30 days to adopt/develop IEP) did not apply in this case
  - Student was not transferring between public schools and was not transferring during academic year
  - In any event, there was confusion about Student's last agreed-upon IEP
- But Charter School denied FAPE by not developing IEP
  - Provided SAI without knowing Student's needs
  - Regardless of Parents' lack of cooperation, Charter School was required to hold IEP team meeting and make formal offer of FAPE

(Student v. Gateway College and Career Academy (OAH 2023) Case No. 2022080821, 123 LRP 11819)

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# Transfer Students



## Why Does This Case Matter to Us?

- This case serves as reminder that IDEA and California intrastate transfer requirements (obligation to provide comparable services, etc.) only apply in situations where student with a disability transfers between public school districts within same academic year
- IDEA, its implementing regulations, and California Education Code are silent on specific procedure by which district is to provide FAPE to student with a disability who transfers between school years, except that new school district must have IEP in place for each eligible student at beginning of each school year

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# Transportation



## Capistrano Unified School District

### Facts:

- 16-year-old Student with cerebral palsy and spastic quadriplegia had IEP calling for transportation
- Student participated in community outings and Parent asked District if Student could attend mall trip with class
- Teacher advised that Student could ride bus to mall, but Parent would need to pick her up early
- Parent alleged District denied Student FAPE because it inappropriately conditioned Student's trip participation on Parent providing Student's return transportation

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# Transportation

Capistrano Unified School District



## Decision:

- ALJ: District materially failed to implement Student’s IEP by not providing round-trip transportation to community-based instruction
- Community-based opportunities were important contributors to Student’s daily living skill development and quality of life
- Parent’s willingness to provide transportation to allow Student’s participation did not relieve District of its responsibility
- ALJ, finding it “concerning” that staff advised Parent that Student could not participate unless Parent picked her up, ordered staff training

(Student v. Capistrano Unif. School Dist. (OAH 2022) Case No. 2022040671, 123 LRP 1313)

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# Transportation



## Why Does This Case Matter to Us?

- Once it has been determined that student requires transportation as part of IEP team’s offer of FAPE, it is up to team to describe—as part of IEP—specifics of transportation offer
- District staff must be prepared to implement IEP-required transportation, including any specialized accommodations, equipment and medical protocols that are determined to be necessary
- Staff training is essential for students with limited mobility and/or significant medical needs, including reminders about activities for which transportation is required and that relying on parent to drop off or pick up the student is not appropriate

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# Noteworthy Decisions from the Courts

## Assessments

### D.O. v. Escondido Union School District

#### **Facts:**

- Therapist advised District at IEP meeting that she had diagnosed Student with autism, which was not previously suspected
- Parent did not deliver therapist's report to IEP team
- Awaiting report, District did not begin assessment plan process for four months
- ALJ: District was justified in waiting to see what tests private therapist used in order to avoid duplication
- District Court overturned ALJ: Four-month delay was not reasonable; delay was partially due to staff skepticism of diagnosis



# Assessments



D.O. v. Escondido Union School District

## Decision:

- 9th Circuit reversed district court, finding no violation of IDEA or California assessment requirements and concluding District's delay was reasonable
- District court's finding that District's "delay was due, at least in part, to skepticism of its staff" was materially incorrect
- District could not appropriately conduct autism assessment of Student without reviewing private report, and any assessment it conducted without such report might have been invalid
- Even if delay was procedural violation, there was no denial of FAPE as it did not hinder parent participation or deprive Student of educational benefit

(D.O. v. Escondido Union School Dist. (9th Cir. 2023) 82 IDELR 125)

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# Assessments



## Why Does This Case Matter to Us?

- 9th Circuit in this case acknowledged that circumstances can exist where district cannot conduct appropriate evaluation for a specific disability without access to private assessment report
- Due to test-retest effect, publishers of assessment instruments may restrict how frequently any particular assessment can be re-administered and still be considered valid and reliable
  - Here, District's expert testimony to this effect, along with its carefully documented attempts to obtain private assessment report, justified its four-month delay in proposing assessment plan

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# Exhaustion of Remedies



Perez v. Sturgis Public Schools

## Facts:

- Student, who was deaf, attended District schools from ages 9 through 20
- When District announced that it would not permit Student to graduate, he and his family filed IDEA administrative complaint (i.e., compliance complaint) alleging that District failed to provide Student FAPE
- Parties settled IDEA FAPE claim
- Student then sued in federal district court seeking compensatory damages under ADA
- District court and Sixth Circuit dismissed claim for failure to exhaust IDEA administrative remedies

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# Exhaustion of Remedies



Perez v. Sturgis Public Schools

## Decision:

- Supreme Court reversed lower courts' rulings
- "Nothing [in the IDEA] shall be construed to restrict" the ability to seek "remedies" under "other Federal laws"
- Because exhaustion requirement applies only to lawsuits that "seek relief . . . also available under" IDEA, Court found that such requirement posed no bar where non-IDEA plaintiff sues for remedy unavailable under IDEA, such as compensatory damages
- Prior ruling in Fry v. Napoleon Community Schools "went out of its way to reserve rather than decide this question"

(Perez v. Sturgis Pub. Schools (2023) 82 IDELR 213)

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# Exhaustion of Remedies



## Why Does This Case Matter to Us?

- This decision may provide parents with additional incentive to proceed with lawsuits for compensatory damages under ADA, or perhaps Section 504, even when they have settled their IDEA claims
- If only remedy sought is money damages, IDEA's exhaustion requirement will not apply, even if the underlying claim might be based on an alleged denial of FAPE
- But while this decision allows parents to bypass IDEA's exhaustion requirement when seeking damages, they will still need to establish some form of intentional discrimination to move forward with their case and secure monetary relief

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# Residential Placement



## N.N. v. Mountain View-Los Altos Union HSD

### Facts:

- Parents believed District failed to identify Student as eligible for special education in her sophomore year in high school (2017-2018), leading to her enrollment in out-of-state private residential programs in Utah and Montana, with concurrent enrollment in public school in Montana during 2018-2019 and 2019-2020
- Court determined District denied FAPE during 2017-2018 by delaying assessment, but did not deny FAPE during 2018-2019 and 2019-2020 because Student did not need special education services
- Parent then sought reimbursement for residential placement tuition

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# Residential Placement



N.N. v. Mountain View-Los Altos Union HSD

## Decision:

- Court: No reimbursement of expenses incurred in years for which court had previously found no violation of IDEA
- Additionally, services obtained for Student addressed only mental health needs, and did not support provision of specially designed educational instruction
  - Utah wilderness program was primarily in response to mental health issues
  - Montana program was recommended to internalize tools Student learned in Utah; it was not licensed RTC; and it did not address academic issues
  - Student did well in Montana public schools with Section 504 accommodations

(N.N. v. Mountain View-Los Altos Union High School District (N.D. Cal. 2023) 83 IDELR 7)

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# Residential Placement



## Why Does This Case Matter to Us?

- Ninth Circuit identified three possible tests for when to impose responsibility on district for residential placement costs
  - Where the placement is “supportive” of student’s education
  - Where medical, social or emotional problems that require residential placement are intertwined with educational problems
  - When placement is primarily to aid student to benefit from special education
- Cases instruct that, in general, courts must focus their analysis on whether student’s placement may be considered necessary for educational purposes, or whether placement is response to other problems that are distinct and apart from learning process

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# Latest Federal Guidance

## Compliance Complaints

### Letter to Oettinger

- Even if student who is subject of compliance complaint has already graduated, SEA still must investigate and resolve matter, regardless of whether complaint focuses on individual student or on systemic IDEA violations
  - But complaint still must meet all requirements of IDEA and state law, including time limitations
- Regarding possible remedies for violations, OSEP noted that “[b]ecause the purpose of compensatory services is to remedy a failure to provide [FAPE] in order to address the needs of the child, for children who are beyond the period of eligibility for IDEA services, compensatory services could take the form of an additional period of eligibility”

([Letter to Oettinger](#) (OSEP 2023) 83 IDELR 47)

# Transition (Part B to Part C)



## Letter to Nix

- Districts must participate in transition planning conference arranged by EIS provider, since failure to attend such conference makes it difficult for district to meet all of its Part B responsibilities, including ensuring that IEP is developed and implemented by child's third birthday
- Upon receipt of Part C referral, district must provide parents with copy of procedural safeguards and either conduct initial evaluation, or, if it does not suspect disability, provide parents with PWN explaining basis for decision not to evaluate
- IDEA's 60-day evaluation timeline and 30-day IEP meeting timeline are subject to requirement that child who transitions from Part C to Part B has IEP developed and implemented by time child reaches age 3

(Letter to Nix (OSEP 2023) 83 IDELR 46)



# New Developments Affecting Special Education

# Proposed Change to IDEA Regulation



- USDOE sought public comments through August 1, 2023 to proposed revision to IDEA regulation at 34 C.F.R. § 300.154
- Current regulation requires districts to obtain consent from parents and provide written notification before they can access student's/parent's public benefits or insurance for first time to pay for special ed services
- Proposed change eliminates consent obligation and only requires districts to provide written notification to parents before accessing those services
- USDOE inquired as to whether written notification must include statement that district has obligation to provide FAPE "at no cost" to parents
- Final regulation changes, if any, likely to be published in late Fall 2023

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# Proposed Legislation



## **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 438—Postsecondary Transition Goals and Services**

- Requires IEPs, as of July 1, 2025, to include measurable postsecondary goals and transition services beginning when student enters grade 9
  - Current law requires such goals and services beginning not later than first IEP to be in effect when student is 16 years of age (or younger if determined appropriate by the IEP team)

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# Proposed Legislation



## 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 723—Foster Children

- Requires, beginning with 2024–25 school year, any nonpublic, nonsectarian school or agency seeking certification (or already certified) to agree, for any foster child it serves, to be designated as school of origin of foster child and to allow foster child to continue education at such location
  - “School of origin” is school that foster child attended when permanently housed or school in which foster child was last enrolled

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# Proposed Legislation



## SB 445—Parent Participation (Translation Services)

- Requires LEAs to take any action necessary to ensure that parent understands IEP team meeting and planning process
  - Action would include, as applicable, communicating in parent’s native language, or in another mode of communication used by parent, arranging for interpreter, providing translation services, and providing alternative communication services
- Requires LEA, upon parental request, to translate into native language of parent, or into another mode of communication used by parent, student’s completed IEP and certain other documents discussed at team meeting
  - Translation must be completed within 30 days for parent whose native language is one of eight most commonly spoken languages (excluding English)
- Revises definition of parent to include educational rights holder and conservator

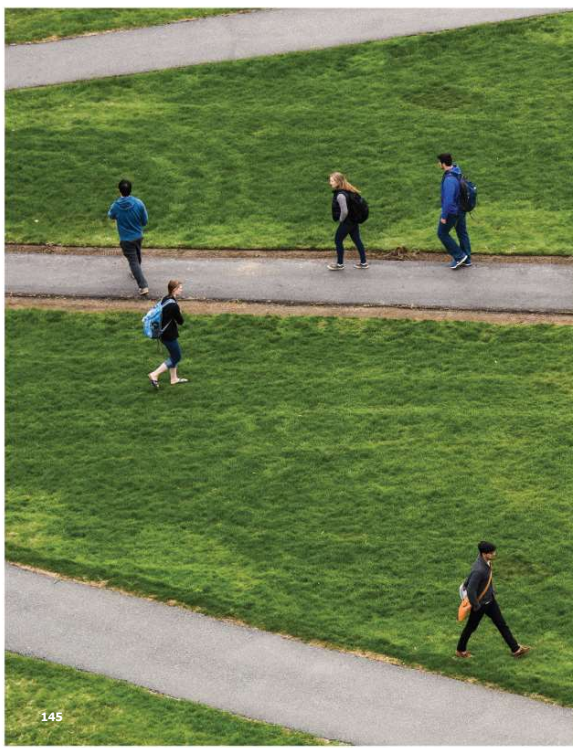
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**Thank you for attending!**

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

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Next Level Client Services**

**Special Projects**

- Study emerging and converging issues
- Strategize and support district leadership:
  - Supplement/fill key staff positions
  - Charter petition review
  - Transportation studies
  - Facilities Master Plan RFPs

**Governance Support**

- Build strong governance teams:
  - Conduct governance workshops
  - Develop board self evaluations
  - Prepare for challenging topics/meetings
  - Draft accountability calendar
  - Create governance handbook from bylaws

**Policy, Advocacy, Legislative Needs**

- Monitor state and federal legislation
- Forecast emerging issues to anticipate policy
- Advise governance teams with advocacy efforts

**Mentoring/Coaching**

- Coach leadership teams
- Mentor incoming Superintendents:
  - Executive transition plans
  - Goal setting
  - Cabinet development



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