



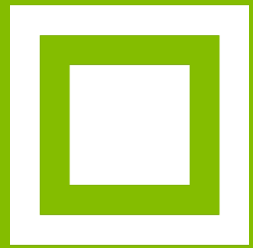
F3 Law

Here and Now:

Another Look at IEEs

What We'll Cover . . .

- What Is an IEE?
- District Obligations When Parents Request an IEE
- Other Legal Requirements for IEE Requests
- Criteria for IEEs and the IEE Process
- Obligation to “Consider” an IEE
- Funding by ALJ Order



What Is an IEE?

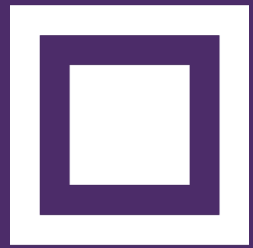
What Is an IEE?

Legal Definition: IEE is “[a]n evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child”

(34 C.F.R. § 300.502(a)(3)(i); Ed. Code, § 56329)

What Is an IEE?

- Availability of publicly funded IEE is important IDEA procedural safeguard
- Allows parents opportunity to collect additional information from independent source for consideration by IEP team
- Note that parents can obtain and pay for their own independent evaluation at any time and IEP team must consider results



District Obligations When Parents Request Funding of IEE

District Obligations When Parents Request Funding of IEE

- Provide parents with:
 - Procedural safeguards notice
 - Information about where IEE may be obtained
 - Criteria applicable to IEEs
- May ask parents why they object to district's evaluation, but cannot require explanation or written statement of objection

(34 C.F.R. § 300.502(a)-(b); Letter to Anonymous (OSEP 2010) 55 IDELR 106)

District Obligations When Parents Request Funding of IEE

- “Without unnecessary delay” either:
 - File due process complaint to show appropriateness of assessment(s); or
 - Ensure that IEE is provided (unless it does not meet district criteria)
- Only legal options available (e.g., cannot propose to reassess instead)
- District must “fund or file” if parents seek IEE to dispute eligibility determination
- OAH: No obligation to “fund or file” in circumstances where district is not otherwise obligated to provide FAPE

(34 C.F.R. § 300.502(a)-(b); Letter to Anonymous (OSEP 2010) 55 IDELR 106; Letter to Zirke (OSEP 2019) 74 IDELR 142; Student v. Bellflower Unified School Dist. (OAH 2018) Case No. 2018070037, 74 IDELR 274)

“Without Unnecessary Delay”

- No IDEA definition
- Fact-specific inquiry depending on circumstances of events

(34 C.F.R. § 300.502(a)-(b))

Case Example #1

Bellflower Unified School District

Facts:

- Parent objected to District's triennial assessments discussed at IEP meetings during Fall 2017
- November 28, 2017: Parent requested IEEs
- December 5-7, 2017: Parent disenrolled Student from District and enrolled in another district
- December 12, 2017: District sent PWN denying IEEs
- Parent claimed District should have filed for due process to defend assessments

Case Example #1

Bellflower Unified School District

Decision:

- ALJ ruled that District had no obligation to file for due process after Student disenrolled and moved out of District on December 5, 2017
- One week period (between November 28 and December 5) that District did not file to defend assessments did not constitute unreasonable delay
- PWN sent after Student disenrolled was “courtesy”
- ALJ: Requiring District to file for due process to defend assessments after Student was no longer enrolled is not in accord with IDEA and would “have the unintended consequence of increasing litigation and causing unnecessary stress to a family in having to defend litigation from its former [LEA], which no longer had any legal obligation to provide a FAPE”

(Student v. Bellflower Unified School Dist. (OAH 2018) Case No. 2018070037, 74 IDELR 274)

Case Example #2

Poway Unified School District

Facts:

- June 4, 2018: After IEP team determined 11-year-old Student did not qualify for special education, Parents requested psychoeducational IEE
- June 12, 2018: Last day of school
- July 19, 2018: District provided PWN denying IEE
- August 22, 2018: First day of school
- August 23, 2018: District filed for due process hearing to defend assessment
- Was this an “unnecessary delay”?

Case Example #2

Poway Unified School District

Decision:

- ALJ denied IEE request
- Reasonable to suspend timelines during vacations
- 82 days elapsed between IEE request and filing
- But District was on vacation for 68 of those days
- Only 35 days elapsed from time PWN was provided to Parents and date complaint was filed
- District demonstrated appropriateness of its psychoeducational assessment

(Poway Unified School Dist. v. Student (OAH 2019) Case No. 2018080568, 119 LRP 7798)

Case Example #3

L.C. v. Alta Loma School District

Facts:

- August 10, 2017: District agreed to fund vision therapy IEE for Student
- District informed Parents that assessor did not meet cost criteria identified in its IEE policy, and repeatedly provided Parents with opportunity to petition District to allow exception
- December 5, 2017: District filed for due process hearing after being informed by advocate that parties were at impasse
- ALJ found no unnecessary delay, but District Court reversed, finding that District should have advised Parents as to amount of excess cost

Case Example #3

L.C. v. Alta Loma School District

Decision:

- 9th Circuit: No legal basis for district court's decision
- Ongoing communication existed between parties from August until December
- Longest delay in communication was during Thanksgiving break
- Impasse reached on November 30; District filed only 5 days later
- “[W]hen parties ‘continued to discuss provision of an IEE,’ there was no unnecessary delay in the school district waiting to file for a due process hearing until the parties reached ‘a final impasse.’ When a school district’s delay is ‘unexplained,’ however, that weighs in favor of finding unnecessary delay.”

(L.C. v. Alta Loma School Dist., (9th Cir. 2021, unpublished) 78 IDELR 271)

Other Noteworthy Decisions

- Colton Joint Unified School Dist. (OAH 2017): Three-month delay was not unreasonable when parties were in “continuous and active contact”
- Tracy Unified School Dist. (OAH 2017): Communications with Parent over 43 days prior to filing to help her understand IEE requests was not undue delay
- Los Angeles Unified School Dist. (OAH 2016): 53 days to review entire assessment before filing was reasonable; Parent did not identify any assessment procedure or conclusion she believed was inappropriate
- River Springs Charter School v. Student (OAH 2016): “[T]he passage of more than half a year after [Charter School] was no longer in active communication and negotiation with [Parent] about who would conduct an independent evaluation was [an] unnecessary delay”

Denying IEE Request

- Send parents prior written notice advising them of decision
- File for due process to show appropriateness of assessment
 - If assessment is found appropriate, district is not required to pay for IEE
 - If assessment is found inadequate (or even untimely), district must fund IEE

(34 C.F.R. § 300.502(b)(3); Ed. Code, § 56329; 34 C.F.R. § 300.503; Riverside Unified School Dist. v. Student (OAH 2017) Case No. 2017020006, 70 IDELR 82)

Case Example #1

San Jose Unified School District

Facts:

- Parent requested District conduct FBA for Student based on list of behavioral issues that included lack of social skills and difficulty focusing
- District's behavior specialist conducted FBA, but was not provided with information from Parent and was told not to communicate with Parent after Parent did not respond to initial contact
- Parent disagreed with draft FBA, which identified only one area of concern
- After revisions to FBA did not address Parent's concerns, Parent requested independent FBA; District denied request and filed for due process hearing

Case Example #1

San Jose Unified School District

Decision:

- ALJ: District did not conduct its FBA appropriately because it unreasonably failed to obtain Parent’s input in conducting assessment
- District “was responsible for using reasonable efforts to secure Parent’s participation in the assessment process”
- ALJ ordered District to fund independent FBA; but found no denial of FAPE
- ALJ explicitly rejected District’s contention that FBAs are not “evaluations” under IDEA for which parents may seek IEEs at public expense, finding District’s reliance on D.S. v. Trumbull Board of Education (2d Cir. 2020) was “misplaced” and stated that D.S. conflicted with numerous OSEP guidance letters and text of IDEA statute

(Student v. San Jose Unified School District and San Jose Unified School District v. Student (OAH 2021) Case Nos. 2020090906 and 2020060078, 121 LRP 8093, aff’d, (N.D. Cal. 2022) 82 IDELR 37)

FBA as “Assessments”?

- D.S. v. Trumbull Board of Education (2d Cir. 2020) held that FBA does not qualify as evaluation under IDEA because FBA is not designed or intended to be used for purpose of comprehensively determining whether student has a disability, or to determine content of student’s IEP
- OSEP’s longstanding view has been that if FBA focuses on educational and behavioral needs of specific student, it is “evaluation” under IDEA and triggers all accompanying IDEA procedural safeguards, including right to IEE
- Following D.S. decision disagreeing with OSEP’s prior guidance, USDOE stated that it intends to review its “previously stated positions on this matter including whether and when an LEA must seek parental consent before conducting an FBA for an eligible child with a disability”

(D.S. v. Trumbull Board of Education (2d Cir. 2020) 77 IDELR 122; Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA's Discipline Provisions (OSERS 2022) 81 IDELR 138)

Case Example #2

Alhambra Unified School District

Facts:

- District conducted triennial assessments for 15-year-old with autism and ID
- Parents disputed District's speech and language assessment and OT assessment
- Parents requested IEEs in both areas
- Parents claimed that assessment report reached erroneous conclusion that Student's speech services should be decreased and that Student did not require OT to receive FAPE
- District filed for due process to defend both assessments

Case Example #2

Alhambra Unified School District

Decision:

- District was not required to fund IEEs
- S/L assessment was appropriate
 - No legal requirement for parental interview
 - S/L assessor not required to determine why Student was not progressing on his goals
 - No iPad assessment required as part of S/L
- OT assessment was appropriate
 - No evidence that specific handwriting assessment existed that was normed for Student's age
 - “It is illogical to blame [the assessor] or District for not administering an assessment that may not even exist”

(Alhambra Unified School Dist. v. Student and Student v. Alhambra Unified School Dist. (OAH 2017) Case Nos. 2017010013 and 2016090921, 117 LRP 30488)

Case Example #3

San Jose Unified School District

Facts:

- High school Student was eligible for special education under autism and speech and language impairment, and was classified as English learner
- Parents' native language was Spanish
- Student's special education teacher sent assessment plan to Parents for 2021 triennial evaluation; assessment plan was in English with no Spanish translation
- Parents signed assessment plan, using Google Translate for English translation
- After Parents received translated documents, they recognized that assessment plan did not contain checked box for assessment of adaptive functioning
- Parents then sought IEE

Case Example #3

San Jose Unified School District

Decision:

- Ordering District to provide requested IEE, ALJ determined that District violated IDEA and California law when it failed to provide Parent with assessment plan in Parent's native language
- ALJ stated that District's error was particularly significant in this case because Parent was unaware when she signed assessment plan that Student's adaptive functioning was not proposed area of assessment, as Parent had specific concerns regarding Student's adaptive functioning
- District, in providing English-only assessment plan, denied Parent opportunity to accept or reject the omission of adaptive functioning as area of assessment

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

Agreeing to Fund IEE

- Notify parents as soon as decision is made
- Exchange information
- Contact evaluator
- Schedule IEP meeting (but cannot require examiner's presence)

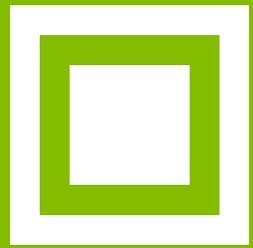
(34 C.F.R. § 300.502(b)(2); Ed. Code, § 56329; Letter to Anonymous (OSEP 2010) 55 IDELR 206)

Practice Pointers: Deciding Whether to Fund or File

- Avoid Lengthy Delays: What district believes are ongoing good-faith negotiations on structuring IEE might not be seen as such by parents or by ALJ. Of course, doing nothing for weeks at a time is not an option.
- Contact Administrators: IEP team leaders should bring IEE requests to attention of special education director or other administrator as soon as possible following conclusion of meeting. Even short delay can be significant.
- Avoid Immediate Responses: Mistakes also are made when IEP teams give parents answer “on the spot,” as they sometimes feel pressured to tell parents “Yes” or “No” before meeting concludes. Inform teams that IDEA requirement to respond “without necessary delay” does not mean immediately.

Practice Pointers: Deciding Whether to Fund or File

- Examine Assessment Reports: Choosing to deny a request for an IEE requires thorough analysis of district's assessment report. Before making any decision, all assessments in question should be reviewed thoroughly and determination should be made as to their defensibility. In addition to checking for substantive accuracy, review of assessments should include whether they meet all legal requirements as to how tests were administered, as well as whether individual(s) who administered them was appropriately qualified.
- Make Sure Assessment Was Completed Timely: Remember that even though assessment might meet all substantive legal requirements, ALJ can still find assessment was not “appropriate” if it is not completed in timely manner.



Other Legal Requirements for IEE Requests

Must Dispute Completed Assessment

- If district has not completed its assessment (or has yet to conduct one), parents are not entitled to request IEE at public expense
- “A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency” [Emphasis added]

(34 C.F.R. § 300.502(b)(1))

IEEs and RTI

- If parents ask for IEE because they disagree with district's RTI approach, they do not have right to obtain IEE at public expense before district completes its initial assessment for special education eligibility

(Letter to Zirkel (OSEP 2008) 52 IDELR 77; 71 Fed. Reg. 46689 (August 14, 2006))

Areas Not Assessed by District

- Letter to Baus (OSEP 2015)
 - If parent disagrees with district assessment because student was not assessed in a particular area, parent has right to request IEE to assess student in that area
 - As with all IEEs, district then must either fund or file
- Letter to Carroll (OSEP 2016)
 - “Inconsistent with [IDEA] to allow the public agency to conduct an assessment in an area that was not part of the initial evaluation or reevaluation before either granting the parents’ request for an IEE at public expense or filing a due process complaint to show that its evaluation was appropriate”
 - IDEA does not condition right of parents to request IEE on district’s ability to cure defects of evaluation it conducted prior to responding to parents’ IEE request

(Letter to Baus (OSEP 2015) 65 IDELR 81; Letter to Carroll (OSEP 2016) 116 LRP 46076)

Areas Not Assessed by District

But several OAH decisions subsequent to Letter to Baus and Letter to Carroll have concluded that OSEP did not expand obligation of districts . . .

Areas Not Assessed by District

- Torrance USD (OAH 2016)
 - Letter to Baus merely “clarified that a parent may seek a publicly funded [IEE] in the same field assessed by the school district, if a particular area within that field was not appropriately included in the district’s assessment” [Emphasis added]
- Capistrano USD (OAH 2017)
 - “An evaluation in a different professional field, by assessors with different credentials and licenses and looking at different information, is not a second opinion”

(Student v. Torrance Unified School Dist. (OAH 2016) Case No. 2015100570, 116 LRP 20201; Student v. Capistrano Unified School Dist. (OAH 2017) Case Nos. 2016100466 and 2017030402, 117 LRP 24357)

Case Example

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

Case Example

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

Case Example

T.S. v. Long Beach Unified School District

Decision (cont'd):

- 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

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

Limit on Number of Parent Requests

- Parents are entitled to only one IEE at public expense each time district conducts evaluation with which they disagree
- Alex W. v. Poudre School District (10th Cir. 2024) 124 LRP 7692
 - Parents disagreed with conclusions made in District’s triennial evaluation report concerning Student’s speech-language and occupational therapy needs
 - Parents sought, and received, publicly funded IEEs for speech-language and occupational therapy
 - Later, after District funded the IEEs, Parents requested that District fund independent neuropsychological evaluation
 - 10th Cir: Parents’ request for neuropsychological IEE stemmed from same evaluation, and, because District had already funded IEEs relating to that evaluation, it had no obligation to fund another IEE or request a due process hearing to defend its own assessments

(34 C.F.R. § 300.502(b)(5); Ed. Code, § 56329, subd. (b))

IEEs and Stay-Put

- After IEP team provides PWN to exit student, parent's request for IEE alone would not require district to continue current educational placement
- Due process filing by either party triggers stay-put
- OSEP: If district agrees to parent's IEE request it may:
 - Delay the issuance of PWN concerning IEP team's determination of ineligibility until the IEE has been completed and reviewed by team; or
 - Issue PWN within a reasonable time and discontinue special education services, pending completion and review of IEE

(Letter to Anonymous (OSEP 2018) 118 LRP 28134)

Advance Funding, Direct Payment or Reimbursement?

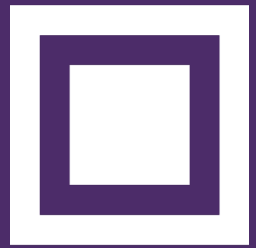
- “Public expense” means that district “either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent”
- Law does not address whether IEE funding should be paid as reimbursement, direct funding to assessor or as cash advance
- Requiring parents to pay in advance is not prohibited as long as it does not effectively deny them right to publicly funded IEE

(34 C.F.R. § 300.502(a)(3); Letter to Heldman (OSEP 1993) 20 IDELR 621)

Timing of Parents' IEE Request

- Law does not set time limit for how long parents have to ask for IEE once district has completed its own evaluation
- OSEP: “It would not seem unreasonable for the public agency to deny a parent reimbursement for an IEE that was conducted more than two years after the public agency’s evaluation”
- OAH has stated that barring an exception, parent must request IEE no later than two years following district’s assessment of student

(Letter to Thorne (OSEP 1990) 16 IDELR 606; Placentia-Yorba Linda Unified School Dist. v. Student (OAH 2012) Case No. 2012051153, 112 LRP 41903)



Criteria for IEEs and IEE Process

Criteria for IEE Assessors

- Districts cannot establish stricter rules than those it applies to its own assessors
 - Cannot prohibit association with private schools
 - Cannot require experience in public schools
 - May set licensing rules, provided same licensure required for district assessors

(Letter to Petska (OSEP 2001) 35 IDELR 191)

List of IEE Assessors

- If list exhausts availability of qualified people within geographic area specified, then district can restrict parents to selecting from among those on list
- If list does not encompass all evaluators with specified area, parents are not limited to names on list

(Letter to Parker (OSEP 2004) 41 IDELR 155; Letter to Young (OSEP 2003) 39 IDELR 98)

Criteria for IEE Location

- Geographic area must be same as that used for district's own assessments
- Parents must be given opportunity to show that evaluator from outside area is required for appropriate IEE

(Letter to Anonymous (OSEP 2010) 56 IDELR 175)

Criteria for IEE Cost

- Districts cannot establish stricter rules than those it applies to its own assessors
 - Maximum cost must be established so that it allows parents to choose from among qualified professionals in the area and only eliminates unreasonably excessive fees
- Parents must have chance to justify selection of evaluator who will charge more than district's established maximum cost
- If costs exceed criteria, consider due process

(Letter to Kirby (OSEP 1989) 213 IDELR 233; 71 Fed. Reg. 46690 (August 14, 2006); Letter to Petska (OSEP 2001) 35 IDELR 191)

Case Example

Long Beach Unified School District

Facts:

- Parents disagreed with an October 2021 psychoeducational assessment conducted by District and requested an independent psychoeducational evaluation
- District granted Parents' request, but denied Parents' requested evaluator because her fee exceeded District's cost cap of \$5,500
- District requested that Parents provide information regarding any unique circumstance that would warrant exception to cost cap, but Parents did not do so
- At due process hearing, District did not attempt to defend its October 2021 psychoeducational assessment as basis for denying funding IEE; rather, District sought to demonstrate that its cost cap was reasonable and there was no justification for selecting assessor that exceeded cap

Case Example

Long Beach Unified School District

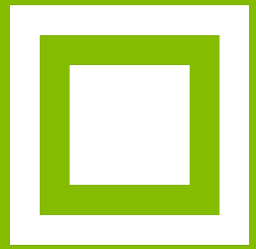
Decision:

- Denying Parents' requested IEE, ALJ determined that District's cost cap criterion was reasonable and that Parents' selected evaluator's fee far exceeded such cost
- District justified its process of surveying 120 professionals to determine prevailing rates in community for independent psychoeducational evaluations
- Evidence also showed there was no lack of qualified assessors who were willing to conduct independent psychoeducational evaluations at or below \$5,500
- Mother testified that she selected Parents' proposed assessor because of recommendation she received in online chatroom, not because Student exhibited unique need that would justify more expensive IEE

(Long Beach Unified School Dist. v. Student (OAH 2023) Case No. 2022110700, 123 LRP 17895)

Practice Pointers: IEE Criteria

- Keep Staff Updated on IEE Criteria: Ensure that all staff who are responsible to respond to IEE requests know exactly what information they need to provide to parents.
- Make Sure Criteria Are Current: Up-to-date information on IEE criteria and notices should be distributed to all relevant personnel. Criteria should be reviewed periodically to ensure that everything is still current (e.g., to take into account retirement or relocation of assessors).
- Inform Parents of Right to Request Waiver: Even if all criteria are in place and are current, inform parents that they can request waiver of existing criteria if they can show unique circumstances justifying IEE that does not meet district guidelines.



Obligation to “Consider” IEEs

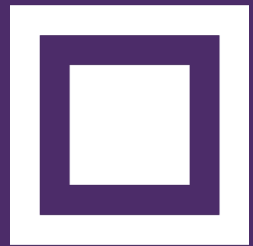
Obligation to “Consider” IEEs

- IEP team must “consider” results of IEE, including IEE privately funded by parents, provided it meets district criteria
- Law does not define meaning of “consider”
- Cases have held that “consider” does not require all team members read IEE, nor does it always require substantive discussion
- OSEP: Obligation of IEP team to “consider” IEE extends to IEEs obtained following district’s determination that student at issue is not eligible for special education

(34 C.F.R. § 300.502(c)(1); T.S. v. Board of Educ. of the Town of Ridgefield (2d Cir. 1993) 20 IDELR 889; G.D. v. Westmoreland School Dist. (1st Cir. 1991) 17 IDELR 751); Letter to Zirkel (OSEP 2019) 74 IDELR 142

Practice Pointers: Considering the IEE

- Document IEP Team Discussions: Because issue of what it means to “consider” results of IEE is decided on case-by-case basis, documentation of IEP team meetings, with accurate minutes, are essential when IEE is being reviewed.
- Inform Staff of Legal Requirements: Inform relevant staff on provisions of law requiring that all IEEs be “considered,” including those privately obtained by parents as well as those funded by district.
- Do Not Ignore IEE Reports: Do not ignore IEE report. Cases do not require lengthy discussion of IEEs in all cases, but they do demand that report be read, preferably by several, if not all, IEP team members.
- “Consider” Does Not Mean “Accept”: Remember that obligation to “consider” IEE does not require that IEP team accept IEE, in whole or in part, or incorporate any of its recommendations into the IEP.



Funding by ALJ Order

Funding of IEE By ALJ Order

- ALJ may order district to pay for IEE as equitable remedy for various FAPE violations
 - Child find
 - Failure to conduct timely assessment
 - Others
- Example: Bellflower USD (OAH 2017)
 - Flawed postsecondary transition plan
 - Remedy included order to fund IEE to determine Student's level of living and vocational skills

(Student v. Bellflower Unified School Dist. (OAH 2017) Case No. 2016090310, 69 IDELR 196)

Conclusion

Many factors to consider when parents ask for an IEE

- Advise IEP team of proper way to respond
- Thoroughly review all assessments in question before making decision
- Keep lines of communication with parents open throughout IEE process

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



F3 Law

Business
Communications & Media Relations
Education Technology
Employment Law
Facilities & Construction
Governance & Leadership
Government Affairs & Public Policy
Interscholastic Activities
Investigations

Labor Relations & Negotiations
Litigation
Next Level Client Services
Real Estate & Property
Special Education
Student Rights & Discipline
Title IX
Virtual Learning

Inland Empire
Fresno
Los Angeles
Midwest
Oakland
Pacific Northwest
Sacramento
San Diego



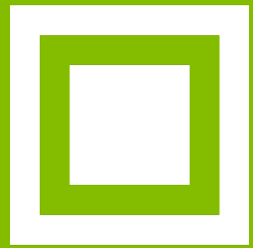
Spotlight on Practice:

Avoiding Common IEP Team Mistakes



What We'll Cover . . .

- Procedural Errors
 - Failing to Provide Parents a Full Opportunity to Participate in the IEP Process
 - Failing to Ensure a Complete and Comprehensive Assessment
 - Failing to Write Appropriate and Measurable Goals
 - Failing to Follow Required Procedures in Conducting a Manifestation Determination (“MD”) Review
- Substantive Errors
 - Failing to Ensure Full Implementation of the IEP
 - Failing to Adequately Address Behavioral Issues
 - Failing to Adequately Address Postsecondary Transition
 - Failing to Offer (or Provide) Appropriate Extended School Year (“ESY”) Services



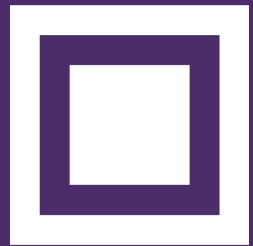
IEP Team Procedural Errors

Remember . . .

- Procedural errors do not automatically require finding that FAPE was denied
- Procedural violation results in denial of FAPE only if it:
 - Impedes student's right to FAPE
 - Significantly impedes parent's opportunity to participate in decision-making process; or
 - Causes deprivation of educational benefits

(W.G. v. Board of Trustees of Target Range School Dist. No. 23 (9th Cir. 1992) 960 F.2d 1479; 20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2))

Procedural Error #1:



**Failing to Provide Parents Full
Opportunity to Participate in
IEP Process**

Parent Participation – Legal Overview

- Law requires parent participation at meetings as well as “meaningful discussion”
 - No “take it or leave it” approach (predetermination)
 - Preparatory meetings are okay
 - Draft IEPs permissible (but officially discouraged by USDOE)
- Parents have absolute and unqualified right to attend all IEP team meetings as member of team
 - IEP team meetings may be conducted without parent in attendance only if district “is unable to convince the parents that they should attend”
 - Districts must make every attempt to secure presence of parents at IEP team meeting

(34 C.F.R. § 300.327, 34 C.F.R. § 300.501; 71 Fed. Reg. 46678 (Aug. 14, 2006))

Case Example

Los Alamitos Unified School District

Facts:

- Divorced Parents with joint custody of Student attended triennial IEP meetings in March and May 2018
 - Occupational therapist did not attend
- Meeting resumed in July
 - District told Parents it needed to complete triennial IEP and offered three dates; Father could not attend; Mother said she was on vacation and wanted to hold meeting in fall
 - IEP team members met without Parents and developed IEP
- District held another meeting in August
 - Father attended; no indication that notice was sent to Mother

Case Example

Los Alamitos Unified School District

Decision:

- ALJ found multiple procedural violations that significantly impeded Parents' participation rights
- Holding March meetings to discuss OT assessment without presence of therapist was improper
- Proceeding with July meeting without Parents was “unreasonable”; postponing meeting to fall semester as Mother requested would have been appropriate course of action
- District also should have given notice to both Parents for August meeting

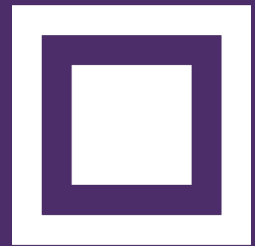
(Los Alamitos Unified School Dist. v. Student (OAH 2019) Case No. 2018081156, 119 LRP 7804)

Avoiding Parent Participation Mistakes

- If all efforts to convince parents to attend meeting have been exhausted and it is in student's best interest that meeting be held without them, it is important to take following steps:
 - Keep copies of every written communication (IEP meeting notices, emails and letters) advising parents of meeting and explaining importance of attending; keep phone logs of calls and voice mails; document date and time of any visits to home or workplace
 - Send parents copy of IEP developed in their absence
 - Offer to reconvene IEP team when Parents are available
- Cases evaluating sufficiency of IEP team meeting notices generally have focused on following issues:
 - Providing notice within sufficient time in advance of meeting
 - Listing parties who are being invited to attend
 - Stating purpose of meeting and identifying (accurately) time, date and location

Avoiding Parent Participation Mistakes

- Stress that no decisions will be made during preparatory meetings
- Emphasize to parents that all options are open for discussion
- Give parents sufficient information about all possible placements
- Ensure there is enough time for questions
- Consider/document all information that parents bring to meeting
- Ensure team follows up on any commitments and any unanswered questions



Procedural Error #2:

Failing to Conduct Complete and Comprehensive Assessment

Assessments – Legal Overview

- Numerous IDEA and state requirements for comprehensive eligibility assessments and reassessments
 - (See handout materials for full description of legal requirements)
- Must assess all areas of suspected disability
- No single measure or assessment can be sole criterion for determining eligibility
- Review existing data, including information from parent and classroom observations

(34 C.F.R. § 300.304(b)(1); Ed. Code, § 56320)

Case Example

William S. Hart Union High School District

Facts:

- 21-year-old residentially placed Student was eligible for special education services under category of “multiple disabilities” due to autism, microcephaly, impulse control disorder, anxiety and PDD
- District conducted triennial assessment in November 2019
- Parent challenged assessment, claiming:
 - District should have conducted FBA and ERMHS assessment
 - District’s psychoeducational assessment failed to appropriately assess Student’s cognition, academics and needs in areas of language and speech

Case Example

William S. Hart Union High School District

Decision:

- ALJ rejected Parent’s claim that District was required to conduct FBA and ERMHS assessments as part of its triennial assessment
- But District’s assessments failed to appropriately assess cognition, academic and speech/language needs
 - School psychologist did not investigate Student’s current cognitive levels, other than to review prior assessment tool that had been administered to Student in 2016
 - Speech/language records review was “cursory in the extreme” and assessment report only recounted information as to what other speech language pathologists had stated at Student’s prior IEP team meeting
 - Speech language pathologist concluded that “receptive and expressive language skills are not an area of concern at this time,” but there was no information stated in report, and “none elucidated via testimony at hearing, explaining what this conclusion may have been based on”

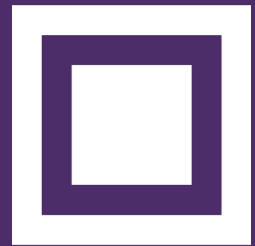
(Student v. William S. Hart Union High School Dist. (OAH 2022) Case No. 2021110193, 122 LRP 22179)

Avoiding Assessment Mistakes

- Student must be assessed regardless of subjective views about likely outcome
- Observation in multiple settings (classroom, playground, etc.) can yield valuable assessment information
- Plan ahead to ensure student will be comfortable enough to complete testing
- Ensure students provide input about their needs when they are capable of doing so

Avoiding Assessment Mistakes

- Seek parents' input from beginning of assessment process
- Consider all independent assessments presented by parents
- Do not rely solely on assessments previously conducted by district, other districts or independent assessors
- Good assessment information is foundation for “connect the dots” approach



Procedural Error #3:

Failing to Write Appropriate and Measurable Goals

Goals – Legal Overview

- Must be measurable, designed to meet educational needs and enable involvement/progress in general education curriculum
- Describe what student can reasonably be expected to accomplish within 12 months
- Amount and type of goals depends on student's identified needs
- If student is not making expected progress toward annual goals, IEP team must examine IEP to address lack of progress
- IEP teams should use periodic progress reporting required by IDEA to inform parents of their child's progress on goals

(34 C.F.R. § 300.320; Ed. Code, § 5634571; Letter to Butler (OSERS 1988) 213 IDELR 118; Questions and Answers on Endrew F. v. Douglas County School District RE-1 (USDOE 2017) 71 IDELR 68)

Case Example

Stockton Unified School District

Facts:

- High school student with autism had difficulty with academics, pragmatic language, interaction and off-task behaviors
- IEP team met in October 2021 to develop new IEP
- Evidence of Student's progress towards his goals was limited, as Student met only one of seven prior goals
- IEP team developed seven new goals in areas of pragmatic language, social skills, reading, writing and transition
- Parents challenged adequacy of goals at due process hearing

Case Example

Stockton Unified School District

Decision:

- ALJ: District denied Student FAPE by failing to develop appropriate annual goals
 - Pragmatic language goal was largely identical to prior year's goal and IEP team did not consider any new information collected on Student's speech and language needs
 - Social skills goal failed to establish direct relationship between present levels of performance and goal, nor did it state which inappropriate behaviors were targeted
 - Student's reading baseline did not correlate to reading goal
 - Transition goals did not indicate how they would be measured or which general education teacher or special education staff was responsible for implementing
 - “Inexplicably, . . . IEP team did not determine mathematics was an area of need for Student and did not develop a new math goal, notwithstanding Student's failure to meet [prior] goal”
 - Despite having determined that Student's behaviors impeded his learning and that of others, IEP team neglected to create behavior goal in this know area of need

(Student v. Stockton Unified School Dist. (OAH 2022) Case No. 2022080176, 122 LRP 47814)

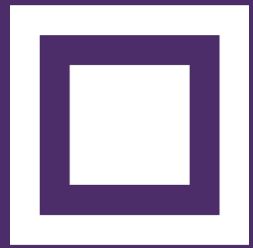
Avoiding Goals Mistakes

- Baselines are starting point for annual goals; they should relate specifically to each goal
- Formula for drafting measurable goal:
 - By when . . . (Typically one year or later)
 - When given . . . (Name the task)
 - Student . . . (Use his/her name)
 - Will do what . . . (Target behavior or skill)
 - At what level of proficiency . . . (e.g., with 80 percent accuracy)
 - At what frequency . . . (e.g., in four out of five trials)
 - As measured by what . . . (e.g., teacher observations, data, etc.)

Avoiding Goals Mistakes

- Consider these items when drafting goals:
 - What is student able to do at the time the goal is written (baseline)?
 - When is the student expected to achieve the goal?
 - What are the conditions for achieving the goal?
 - What are the mastery criteria for achieving the goal?
 - Who will implement the goal?
 - How is the goal measured?
- Remember the “stranger test”

Procedural Error #4:



**Failing to Follow Required
Procedures in Conducting
MD Review**

MD Review – Legal Overview

- MDs are conducted by district, parent and “relevant members of the child’s IEP team” (essentially the IEP team) no later than 10 school days of decision to change student's placement
- District must notify parents early enough to ensure opportunity to attend and prepare for meeting (IDEA’s IEP notice requirement generally applicable to MDs)
- MD meeting notice must inform parent of decision to change student’s placement and must be accompanied by copy of procedural safeguards
- Team conducting the MD consider all “relevant information,” including:
 - Information in student’s file, such as evaluations and diagnostics; Student’s IEP and placement; teacher observations; any relevant information provided by parent
- OAH has stated “it makes sense to apply the [Adams snapshot] rule” to MDs

(34 C.F.R. § 300.530(e)(1); 34 C.F.R. § 300.322(a); Student v. High Tech Middle North County (OAH 2014) Case No. 2014080899, 114 LRP 53441)

Case Example

Bella Mente Montessori Charter Academy

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

Case Example

Bella Mente Montessori Charter Academy

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

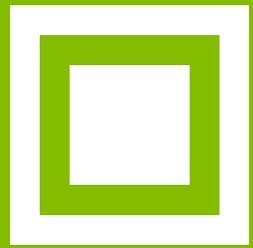
(Student v. Bella Mente Montessori Charter Academy (OAH 2023) Case No. 2022110710, 123 LRP 6989)

Avoiding MD Mistakes

- As with IEP team meetings in general, if essential member of team does not participate in MD review, IDEA procedural violation occurs; accordingly, take all necessary steps to secure attendance of all relevant staff
- Provide parents with adequate notice (time and content) to allow parents to be to attend—and to prepare for—MD review; but remember that law requires meeting be held within 10 school days of removal
- Consider possible existence of other disabilities that might have been cause of conduct at issue

Avoiding MD Mistakes

- Relying on statement of only one witness about incident at issue, without corroboration, can sometimes be problematic
- Failure to document following key items can lead to due process order requiring MD be repeated
 - When team convened
 - Who was present and whether parents attended
 - What conduct was at issue
 - What decision was made
 - What information team relied upon in making its decision

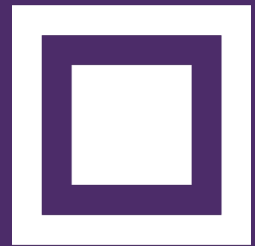


IEP Team Substantive Errors

Remember . . .

- Substantive error occurs when court or ALJ finds that IEP is not reasonably calculated to enable student to make progress appropriate in light of student's circumstances
 - Errors can occur as result of improper IEP implementation or failure to address/provide for needed services

(Endrew F. v. Douglas County School Dist. RE-1 (2017) 137 S. Ct. 988, 69 IDELR 174)



Substantive Error #1:

**Failing to Ensure Full
Implementation of IEP**

IEP Implementation – Legal Overview

- Required components must be implemented as soon as possible following meeting
- All persons responsible for implementation must have access to IEP and be informed of specific responsibilities
- Teacher cannot refuse to provide service agreed to in IEP
- No requirement that district must adhere perfectly to IEP; minor implementation failures will not be deemed to be denial of FAPE
- Educational progress, or lack of it, may be probative of whether there has been more than minor shortfall in services provided

(34 C.F.R. § 300.323(c); Ed. Code, § 56043.71; Letter to Williams (OSEP 1994) 21 IDELR 73; Van Duyn v. Baker School Dist. 5J (9th Cir. 2007) 502 F.3d 811)

Case Example

Rocklin Unified School District

Facts:

- 12-year-old Student with multiple disabilities, including congenital hydrocephalus, cerebral palsy and epilepsy with history of seizures
- District developed IEP that included individualized health care plan requiring specific responses to seizures that included timing frequency of seizures and contacting “911” if Student was not responsive
- Student experienced seizures while in school bathroom
- Student was relocated to classroom, but seizures were not timed nor did staff call “911”
- Parent arrived after 34 minutes and took Student to ER

Case Example

Rocklin Unified School District

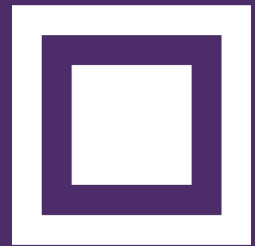
Decision:

- ALJ determined District materially failed to implement IEP and denied Student FAPE by not following procedures outlined in health care plan
- Classroom teacher, who was responsible for implementing plan, did not reference it because the plan was not readily available
- District did not recognize symptoms of Student's seizure activity even though he exhibited all signs described in health care plan
- Student missed 11 days of school following incident and was awarded compensatory education for those days; ALJ also ordered staff training

(Student v. Rocklin Unified School Dist. (OAH 2022) Case No. 2021120714, 122 LRP 14970)

Avoiding IEP Implementation Mistakes

- If interruption in services occurs:
 - Ensure services are resumed as soon as possible
 - Closely monitor student during gap
 - Provide additional services if necessary to compensate for lapse
- Provide copy of IEP as soon as possible after development to all those responsible for its implementation
- Follow up periodically to make sure IEP is being faithfully implemented
- Hold staff meeting one to two weeks after IEP is developed to get report on what is or what is not being properly implemented
- Stay in touch with parents and be prepared to address questions
- Inform staff of potential consequences of IEP implementation failures



Substantive Error #2:

**Failing to Adequately Address
Behavior Issues**

Behavior – Legal Overview

- Positive behavior interventions/supports required when behavior impedes learning of student and/or others
- IDEA does not specify any particular behavior interventions, supports or strategies that must be employed
- FBAs and BIPs must be used proactively if team determines appropriate
- IEP teams should consider “continuum” of options in addressing behavior
- IDEA emphasizes participation of general education teacher, who must assist in “determinations regarding appropriate positive behavioral interventions and strategies”

(34 C.F.R. § 300.324; Ed. Code, §§ 56520, 56521.2; Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA’s Discipline Provisions (OSEP 2022) 81 IDELR 138.)

Case Example

Santa Monica-Malibu Unified School District

Facts:

- District developed several positive behavioral support plans for 9-year-old with autism to address aggressive and self-injurious behaviors
- Plans provided for application of ABA intervention techniques to target unwanted behavior and replace it with desired behavior, using positive modalities such as encouraging requests, providing choices and earning tokens for completing tasks
- Plans did not provide for holds, restraints or any aversive behavioral techniques
- During four-month period, Student's paraprofessional aide used restraints and aversive techniques on bus (physical contact, harnessing), as well as in classroom (hand sanitizer to cause pain)

Case Example

Santa Monica-Malibu Unified School District

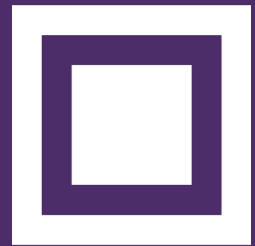
Decision:

- ALJ: District denied Student FAPE by materially failing to implement Student's positive behavior support plans as provided by IEP
- Aide did not follow plan protocols, using “pain, trauma and fear to gain compliance”
- Aide applied aversive behavioral techniques that were not contemplated by IEP team when it developed positive behavior support plans; techniques should have been used only as crisis intervention plan and not during times when there were no behavioral emergencies
- Aide also did not file required behavioral emergency reports, and, therefore, none of her actions were valid emergency interventions

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

Avoiding Behavior Mistakes

- Resorting to ad hoc disciplinary measures not tailored to student's needs can lead to denial of FAPE; behavior techniques that emphasize negative rather than positive approaches are frequently found to be inappropriate by ALJs
- Provide copy of IEP as soon as possible to all those responsible for its implementation, provide training if needed, and follow up periodically to make sure IEP is being faithfully implemented
- When deciding if FBA is needed, IEP teams should look to whether student's behavior is impeding learning and whether behavior is not readily explainable
- Include all IEP team members in any discussion about student's behavior, as parents, teachers and service providers can provide vital information about frequency of behavior, successful strategies and impact of behavior on learning



Substantive Error #3:

**Failing to Adequately Address
Postsecondary Transition**

Postsecondary Transition – Legal Overview

- Address postsecondary transition for students not later than the first IEP to be in effect when student turns 16 (or earlier if appropriate)
- Transition plan must include:
 - Measurable postsecondary goals based upon age-appropriate transition assessments
 - Transition services needed to assist in reaching those goals
- Plan must be based on individual needs and take into account student's interests
- For students requiring transition services, IEP must identify:
 - Date the student will begin receiving the service
 - Frequency with which the service will be provided
 - Location at which the student will receive service
 - How long district will continue providing service

(34 C.F.R. §§ 300.43, 300.320; Ed. Code, §§ 56043, 56345)

Postsecondary Transition – Legal Overview

Note:

- At time of the preparation of these materials, Assembly Bill 438 (“AB 438”) was pending in the California legislature.
- AB 438 would require IEPs, commencing July 1, 2025, to include measurable postsecondary goals and transition services, if determined appropriate by student’s IEP team, “beginning when the student is starting their high school experience” and not later than first IEP to be in effect when student is 16 years of age

Case Example

Bellflower Unified School District

Facts:

- Postsecondary transition plan for Student with autism and ID addressed education and employment, but not adaptive living skills
- Teachers believed Student could function adequately in community
- But there was no observation of Student's adaptive capabilities outside of school setting
- Parents contended that District denied Student FAPE by failing to provide transition goals and services that would enable him to function in community to achieve his postsecondary goals of schooling and employment

Case Example

Bellflower Unified School District

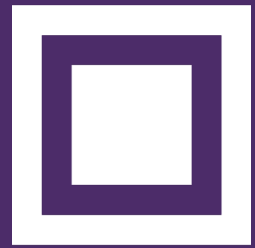
Decision:

- Failure to provide goals/services to enable Student to function in community denied FAPE
- Student lacked adaptive skills to pursue postsecondary employment
- “If he could not make purchases in a store, know how to buy a meal, evaluate unsafe situations, use public transportation, communicate with strangers, and otherwise function with a degree of independence, he could not attend community college or maintain a job”
- District practice was not to provide services for living skills to students on diploma track, even though “diploma-bound students can also be deficient in adaptive, functional living skills that hamper them from pursuing a transition plan’s post-secondary goals”

(Student v. Bellflower Unified School Dist. (OAH 2017) Case No. 2016090310, 69 IDELR 196)

Avoiding Transition Mistakes

- Ensure staff and IEP team are aware of responsibilities during planning process
- Help families sort through all available agencies and options for transition services
- Communicate with parents and students regarding postsecondary expectations and discuss whether expectations are reasonable
- Be very specific in identifying needs for student to transition to post-secondary life
- State transition goals completely and carefully, but realistically
- Describe with detail on IEP any progress student has made toward achieving his/her goals



Substantive Error #4:

**Failing to Offer (or Provide)
Appropriate ESY Services**

ESY – Legal Overview

- Law requires services be available beyond normal school year in accordance with IEP
- Team determines if student needs ESY to meet individual needs and receive FAPE
- Districts must provide ESY services that meet student’s individual needs and provide FAPE, just as they are required to do during regular academic school year
- Criteria for determining whether student is entitled to ESY services in order to receive FAPE are different from standards pertaining to FAPE in regular school year, since purpose of ESY is to prevent regression and allow for recoupment of lost skills
- ESY services cannot be limited to particular categories of disabilities
- District “must meet LRE requirement by alternative means, such as private placements, when it is determined that a child with a [disabling] condition must have interaction with [nondisabled] children”

(34 C.F.R. § 300.106; Ed. Code, § 56345; Cal. Code Regs., tit. 5, § 3043; Letter to Anonymous (OSEP 1995) 22 IDELR 980; Letter to Myers (OSEP 1989) 213 IDELR 255)

Case Example

Oroville City ESD and Thermalito ESD

Facts:

- District developed IEP for Student with autism in February 2020, shortly before Student's third birthday
- Student's IEP team met again in March 2020 to discuss the effects of COVID-19 pandemic and to update Student's services
- Amended IEP was not signed until June 2020
- Parent contended that Student was denied FAPE because District did not offer him ESY program for summer 2020, and that lack of ESY program caused Student to regress
- District asserted that it lacked sufficient information to offer ESY

Case Example

Oroville City ESD and Thermalito ESD

Decision:

- ALJ ruled that District was not required to offer Student ESY services in February 2020 IEP, because District had not yet had opportunity to determine Student required services
- But by June 2020, District staff had the opportunity to observe whether Student experienced regression during two extended breaks
- Parent, Grandparent and Great Aunt testified “consistently and persuasively” that Student regressed during his breaks in education, exhibiting less eye contact and engagement
- By June 2020, Student “had regressed, and was unlikely to quickly recoup lost skills without an [ESY] program, making it clear he required [ESY] services over Summer 2020 to receive a FAPE”

(Student v. Oroville City Elementary School Dist. and Thermalito Elementary School Dist. (OAH 2021) Case No. 2021030708 121 LRP 26258)

Avoiding ESY Mistakes

- Make sure IEP team members understand what ESY services are and what they are not
- Any decision refusing ESY services should be supported by appropriate data
- Always focus team discussions on student's unique needs, not on availability of district resources
- Tips to help make certain that student receives FAPE during ESY:
 - Make sure that ESY services providers have copy of IEP
 - Ensure providers understand IEP goals
 - Ensure providers understand regression/recoupment issues
 - Explain data that providers should collect

Conclusion

- Even with best of intentions, mistakes or oversights can easily happen due to complexity of laws
- In order to better serve students, be aware of various errors procedural and substantive errors that IEP teams can make, and know how to avoid them when possible

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



F3 Law

Business
Communications & Media Relations
Education Technology
Employment Law
Facilities & Construction
Governance & Leadership
Government Affairs & Public Policy
Interscholastic Activities
Investigations

Labor Relations & Negotiations
Litigation
Next Level Client Services
Real Estate & Property
Special Education
Student Rights & Discipline
Title IX
Virtual Learning

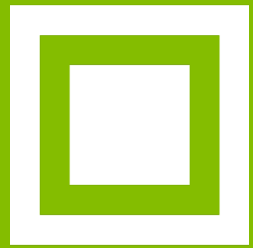
Inland Empire
Fresno
Los Angeles
Midwest
Oakland
Pacific Northwest
Sacramento
San Diego



F3 Law

Legal Update





Recent OAH Decisions

Exit from Special Education

Manteca Unified School District

Facts:

- Eighth-grade Student with autism began receiving speech and language services in 2017
- District's 2020 assessment found Student was able to fully participate in general education and no longer required services
 - After IEP team recommended exiting Student, Parents obtained speech and language IEE, results of which supported District's finding
- At Parents' request, District assessed Student to determine eligibility under autism, SLD, OHI and/or ED categories
 - After District found Student did not meet eligibility requirements under any category, Parents obtained psychoeducational IEE, which again supported District's findings

Exit from Special Education

Manteca Unified School District

Decision:

- ALJ granted District's request to exit Student from special education, despite Parents' claim that alleged bullying resulted in anxiety and depression
- Data upon which District relied was current, based upon appropriate recent district assessments and independent assessments by qualified professionals
 - In particular, ALJ found that reasoning and analyses provided by independent psychoeducational assessor were "thorough and convincing"
 - Teachers and administrators credibly testified, based upon their knowledge, experience, and assessment results, that Student did not need special education
 - Parents did not show that information relied upon from assessments, observations and performance of Student was inaccurate or improper

(Manteca Unified School Dist. v. Student (OAH 2024) Case No. 2023080401, 124 LRP 7253)

Exit from Special Education

Why Does This Case Matter to Us?

- If a student with a disability shows signs of no longer needing special education or related services to obtain educational benefit, IEP team should make prompt determination as to whether to exit student from special education after reassessing student in all areas of suspected disability
- In making its exiting decision, IEP team, as it did in this case, should review diverse forms of data (including assessment reports and observations), seek staff input, seek parental input, and consider all independent assessments

IEP Development

Ukiah Unified School District

Facts:

- Student with autism and SLI, initially assessed at age 3, was seriously delayed in all academic areas and did not communicate with peers or adults
- Student required iPad with language program to communicate in one-to-two-word phrases and required constant adult prompting to complete any task
- District developed annual IEPs for Student in February 2022 and December 2023
- Among the numerous issues at due process hearing were Parents' claims that District denied Student FAPE during the 2022-2023 and 2023-2024 school years by failing to make clear IEP offer and by failing to implement IEPs that were ultimately developed

IEP Development

Ukiah Unified School District

Decision:

- ALJ found that District denied Student FAPE due to numerous IEP development errors (and subsequent resulting implementation failures)
 - February 2022 IEP failed to acknowledge existence or necessity iPad and, as result, device was only provided sporadically
 - Both IEPs failed to specify type of group/individual instruction; no one from District could describe duration and frequency of services, what the service was, or who was responsible for implementation
 - Duration and frequency of speech and language services were also unclear and vague, resulting in significant number of missed sessions
 - IEPs did not explain extent Student would participate with nondisabled students
 - District pulled Student out of his general education classroom and placed him in a moderate-to-severe special day class, without Parent's consent

(Student v. Ukiah Unified School District and Ukiah Unified School District v. Student (OAH 2024) Case Nos. 2024010195 and 2023100750, 124 LRP 17159)

IEP Development

Why Does This Case Matter to Us?

- District must offer single, specific program, in form of a clear, coherent offer which parents can reasonably evaluate and decide whether to accept or reject
- In this case, Student's IEPs were written unclearly to extent that neither Parents nor District's IEP team members understood FAPE offers, resulting in essential services not being implemented and services that were not part of Student's IEP being provided without Parents' consent
 - ALJ: “This mismanagement of Student's educational program was the direct result of poorly written IEPs and a systemic misunderstanding of special education law by [District's] special education administrators”

IEP Goals

Chula Vista Elementary School District

Facts:

- May 2022 IEP for elementary school Student with autism contained five goals: communication, communication advocacy, writing and math (two goals)
 - By 2023, Student had met math goals but not any of the others, despite making progress
- April 2023 IEP also contained five goals: math, writing, reading comprehension, self-advocacy and expressive/receptive language
 - By June 2023, Student was making substantial progress toward meeting math and writing goals, with limited progress on other goals
- Parents claimed District denied Student FAPE by failing to offer goals to appropriately challenge Student and that Student only made de minimis educational progress as a result

IEP Goals

Chula Vista Elementary School District

Decision:

- ALJ determined that District offered legally sufficient and appropriate goals
 - ALJ found testimony of Parents' expert witnesses not to be credible, noting that experts contradicted each other with one arguing goals were not ambitious and challenging enough and other opining the goals were too ambitious
 - District's staff provided more credible evidence as to substantive nature of Student's goals, as special education teacher, school psychologist and classroom teacher testified goals were sufficiently ambitious and Student was making progress, despite not having achieved all goals
 - Parents agreed that proposed goals were sufficient at May 2022 IEP team meeting
 - During April 2023 IEP team meeting, District team members listened to Parents' concerns and incorporated those concerns into revising and updating goals and services; Parents agreed with changes and did not request any additional goals

(Student v. Chula Vista Elementary School Dist. (OAH 2024) Case No. 2023100984, 124 LRP 7257)

IEP Goals

Why Does This Case Matter to Us?

- Annual goals in IEPs are a projection, not a guarantee
- There is no legal requirement that student meet every IEP goal to show academic progress or that every IEP goal have a one-to-one correspondence with specific needs
- “So long as the goals, as a whole, address the student’s needs and enable progress appropriate in light of the student's circumstances, the IEP is appropriate [in that respect].” (K.M. v. Tehachapi Unified School Dist. (E.D. Cal. 2017) 69 IDELR 241)

IAES

Mountain View-Whisman School District

Facts:

- First-grader with OHI (PTSD) exhibited severe behavior issues upon enrollment in District
- Incidents included elopement to community park, striking his teacher, and throwing classroom furniture
- Student was suspended after he punched his principal in eye, pulled her hair, and punched her several times in torso and arm; Student was also suspended for hitting behavior technician
- District obtained workplace violence prevention restraining order and filed for due process seeking ALJ order removing Student to 45-day IAES

IAES

Mountain View-Whisman School District

Decision:

- ALJ agreed that maintaining Student's placement at District's elementary school was substantially likely to result in injury to Student or others
 - Modifying Student's BIP would not alleviate Student's problem behaviors
 - Assaultive behaviors were violent and unpredictable
- ALJ also determined NPS proposed by District was appropriate IAES
 - NPS had small classroom size, calming spaces, with behavior specialists and mental health professionals available onsite
 - NPS also had credentialed staff to implement Student's IEP goals and accommodations, and to deliver instruction, services, and supports offered in Student's IEP to ensure Student continued to receive FAPE

(Mountain View-Whisman School Dist. v Student (OAH 2024) Case No. 2024010738, 124 LRP 11402)

IAES

Why Does This Case Matter to Us?

- Student who is removed from Student's current placement to IAES must continue to receive a FAPE, so as to enable student to continue to participate in general education curriculum, although in another setting, and to make progress toward meeting goals set forth in student's IEP
- Additionally, IDEA requires that student who has been removed to IAES must receive, as appropriate, behavioral intervention services and modifications designed to address behavior violation so that it does not recur
- In this case, District witnesses were extremely knowledgeable about Student's needs and were sufficiently prepared to demonstrate to ALJ why District's proposed NPS setting could satisfy those IDEA requirements

LRE

Garden Grove Unified School District

Facts:

- Parent of Student with autism and ADHD refused to consent to any modification of Student's IEP since 2018 and did not participate in IEP process
- 2018 IEP placed Student in District's "STRIVE" program, which was SDC for students with mild-to-moderate disabilities
- By 2023, District believed that goals and services contained in 2018 IEP were outdated, and that continuing Student's placement in STRIVE SDC could no longer support Student's educational needs
- District's proposed IEP offered placement in moderate-to-severe SDC
- District filed for due process hearing seeking order allowing it to implement IEP

LRE

Garden Grove Unified School District

Decision:

- ALJ granted District's request, finding IEP appropriate in all respects—procedurally and substantively
 - District successfully established that it attempted to obtain Parent's cooperation
- Difference in SDCs was in IEP program offered, such as modified curriculum, not in placement
- Student was far behind others in STRIVE SDC and his modified educational program could not be implemented in that setting
 - ALJ: “Content of Student's IEP drives his placement” and SDC for students with moderate-to-severe disabilities comported with Student's IEP goals, services and accommodations

(Garden Grove Unified School Dist. v. Student (OAH 2024) Case No. 2023070868, 124 LRP 4295)

LRE

Why Does This Case Matter to Us?

- If it is determined that, as in this case, student cannot be educated in general education environment, then LRE analysis requires determining whether student has been mainstreamed to maximum extent appropriate in light of continuum of program options
- Continuum of program options includes but is not limited to general education, resource specialist programs, designated instruction and services, special classes, nonpublic and nonsectarian schools, state special schools, specially designed instruction in settings other than classrooms, itinerant instruction in settings other than classrooms, and instruction using telecommunication instruction in home, or instruction in hospitals or institutions

Postsecondary Transition

Perris Union High School District

Facts:

- District conducted transition assessment in November 2021 for 15-year-old Student with chromosomal abnormality
 - Student expressed interest in career in digital media arts, particularly career in anime production
- In February 2022, IEP team developed annual IEP and ITP
 - ITP contained two postsecondary goals (researching careers in the digital media industry and working on interviewing skills) that were based on assessment and linked to annual IEP goal in area of career interest
- February 2023 ITP was similar to that of February 2022 with slight modifications in postsecondary goals

Postsecondary Transition

Perris Union High School District

Decision:

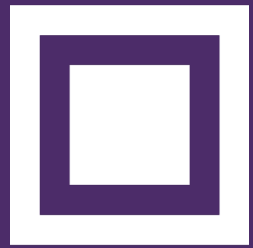
- ALJ rejected Parent’s challenges to ITPs and to IEP career interest goal
 - Annual IEP goal in career interest was measurable, appropriate and achievable in 12-month period, requiring Student to understand qualifications, duties, education, market outlook, and salaries of careers in digital media industry
 - ITPs were based on Student’s career interests, developed with Student’s participation, and properly aligned with annual career interest goal in IEP
 - ITP also offered Student sufficient time and services to work on her postsecondary goals under teacher supervision
 - Testimony of Parent’s expert who objected to ITPs was “disjointed and confusing” and was not based on legally mandated requisites for ITPs

(Student v. Perris Union High School Dist. (OAH 2024) Case No. 2023100314, 124 LRP 7255)

Postsecondary Transition

Why Does This Case Matter to Us?

- Transition goals differ from other annual goals
- Transition goals reflect desires and plans of student; in contrast, other annual goals state measurable standards by which district's program for student will be measured by end of next 12 months
- Transition goals also address student's career or postsecondary education after graduation
- Of course, full progress on postsecondary goals cannot be measured while student is still in high school



Noteworthy Decisions from the Courts

Educational Rights

In re: D.L. v. C.T.

Facts:

- Student with autism and ADD was “severely behind” his grade level in learning
- Mother had lost physical custody of Student after alleged abuse, but retained educational rights
- Mother was resistant to Student obtaining support at school
- Proceedings began in juvenile court to request transfer of educational rights from Mother to court-appointed special advocate (“CASA”) representative
- Mother then consented to special ed assessment, but later changed her mind
- Juvenile court ordered transfer of educational rights to CASA
- Mother appealed, claiming fraud and that she endorsed Section 504 plan as substitute for IEP

Educational Rights

In re: D.L. v. C.T.

Decision:

- Court upheld juvenile court's ruling transferring Student's educational rights
- Nothing in the record supported Mother's fraud-based claim
- Section 504 plan proposed by Mother was not appropriate substitute for IEP
- Reasonable basis in record that supported juvenile court's decision that IEP was in Student's best interest
- According to testimony from representative of Orange County DOE, "in not accepting the IEP, the concern is that [Student] will continue to struggle academically and not receive the appropriate services that he should be receiving . . . through his educational plan as proposed by the District"

(In re: D.L. v. C.T. (Cal. Ct. App. 2024, unpublished) 124 LRP 3461)

Educational Rights

Why Does This Case Matter to Us?

- Although this case involved dispute over transfer of educational rights, court provided cogent reminder of distinction between Section 504 services and those provided under IDEA
- “Section 504’s regulations gauge the adequacy of services provided to individuals with disabilities by comparing them to the level of services provided to individuals who are not disabled.”
- On the other hand, court observed that IEP is prescribed by the IDEA, which “guarantees disabled children a free appropriate education, commonly referred to as a FAPE. This requires schools to provide special education that is specifically tailored to the unique needs of the disabled child.”

IEP Team Meetings

Etiwanda School District v. D.P.

Facts:

- District made numerous attempts to schedule annual IEP team meeting for elementary school Student with multiple disabilities
- Several notices were sent to Parents and their representative, with no response
- On October 14, 2021, Parents' representative informed District that Parents were available on October 21 or 22, 2021
- District informed Parents that they could not schedule the meeting for either date provided because its team members could not attend
- District convened meeting without Parents on December 8, 2021
 - Mother was emailed Zoom link for meeting and responded that she would check with her advocate, but District convened meeting without receiving her response

IEP Team Meetings

Etiwanda School District v. D.P.

Decision:

- Court upheld ALJ's findings that District prevented Parents from meaningfully participating in development of IEP by holding meeting without them
- Court applied Doug C. v. Hawaii Department of Education, noting that Parents made attempts to reschedule meeting, and, for two of the dates suggested, District could not gather the required attendees
- When Parents had expressed interest in participating and offered dates for potential meeting, District "must do more than present an ultimatum and proceed"
- Had District engaged in "similarly persistent but less unilateral method of proposing potential meeting dates" or waited to hear from Mother regarding December 8 date after receiving her response to Zoom invitation, court said it might have reached different result

(Etiwanda School Dist. v. D.P. (C.D. Cal. 2024) 124 LRP 1299)

IEP Team Meetings

Why Does This Case Matter to Us?

- Doug C. and this decision instruct that although it might have been frustrating to schedule meetings with parents who are difficult to work with, such fact does not excuse failing to include parents in IEP team meeting when they have expressed a willingness to participate
- Districts must prioritize parent involvement in IEP team meetings because “[a]n IEP which addresses the unique needs of the child cannot be developed if those people who are most familiar with the child's needs are not involved”
- Attendance of parents at IEP team meeting “must take priority over other [team] members’ attendance”

Manifestation Determinations

C.D. v. Atascadero Unified School District

Facts:

- 16-year-old Student eligible as SLI and OHI had needed support of BCBA since middle school and had BIP that addressed physical and verbal aggression, off-task behavior, and elopement
- In May 2022, Student would not return to class after lunch because he was watching construction workers
- Despite aide's attempt to use calming strategies, Student allegedly twice pushed case manager against wall and cursed at principal
- MD team decided that Student's conduct was not manifestation of Student's disabilities and that District did not fail to implement IEP

Manifestation Determinations

C.D. v. Atascadero Unified School District

Decision:

- ALJ determined that Student's conduct was not direct result of any failures by District to implement Student's IEP and upheld finding that Student's conduct of pushing case manager was not impulsive and that Student understood situation
- District court and, subsequently, Ninth Circuit, affirmed ALJ's decision
 - Ninth Circuit: "While all IEP team members acknowledged that [Student's] disabilities sometimes manifest in difficulties with focus, attention, or compliance, [District] team members distinguished the conduct at issue, which was particularly inappropriate, violent, and targeted"
 - Ninth Circuit also denied Parent's claim of procedural errors regarding conduct of MDR reviews, noting "the robust process before the ALJ, during which the ALJ considered additional evidence and testimony over the course of seven days"

(C.D. v. Atascadero Unified School Dist. (9th Cir. 2024, unpublished) 124 LRP 11529)

Manifestation Determinations

Why Does This Case Matter to Us?

- Ninth Circuit observed that its review in IDEA cases “is far less deferential than judicial review of other agency actions, but requires this court to refrain from substituting its own notions of educational policy for those of the school authority it reviews”
- Court added that it accords administrative rulings in IDEA cases due weight, with particular deference where the ALJ’s findings are “thorough and careful,” as was the case here

Offer of FAPE

Newport-Mesa Unified School District v. D.A.

Facts:

- District provided IEP to Student with SLD, OHI, autism and ADHD when Student enrolled in District in 2017
 - IEP called for 95-percent gen ed placement
 - District reconvened IEP team in late 2017 to address social strategies
- Parents disagreed with updated 2017 IEP and privately placed Student
- District did not convene IEP team in 2018
- District reassessed Student in late 2018 and offered IEP in 2019, while Student continued private placement
- Parents did not consent to proposed 2019 IEP and filed for due process, alleging substantive and procedural denials of FAPE

Offer of FAPE

Newport-Mesa Unified School District v. D.A.

Decision:

- 9th Circuit upheld district court's denial of reimbursement
 - District's 2017 and 2019 IEPs provided appropriate goals for Student to be involved in and make progress in general education curriculum, contained appropriate services and accommodations in furtherance of its annual goals, and offered appropriate placement in LRE
 - District was not required to conduct an annual IEP review in April 2018, as Parents enrolled Student in private school in January 2018 and did not request an IEP review after that point
 - District sent Parents letter expressly requesting that they notify District if they “would like [District] to hold [Student’s] 2018 Annual IEP,” and Parents never responded
 - Five-week delay in reassessment did not deny FAPE
 - District was not required to initiate due process hearing after Parents rejected its offered 2019 IEP because Parents consented to no part of 2019 IEP and were seeking completely different program than what District considered sufficient to provide FAPE

(Newport-Mesa Unified School Dist. v. D.A. (9th Cir. 2024, unpublished) 124 LRP 10386)

Offer of FAPE

Why Does This Case Matter to Us?

- 9th Circuit, in Capistrano Unified School District v. S.W. and C.W. (2021), noted that IDEA at 20 U.S.C. § 1412(a)(10)(A) is titled “[c]hildren enrolled in private schools by their parents,” and provides that such children need not be given IEPs
- 9th Circuit recognized that there are not three classes of private school students – student is either placed in private school by IEP team or student is not, regardless of any parental claim for reimbursement
- Nonetheless, court stated that districts still need to prepare IEP if parents ask, so districts should be on high alert to monitor correspondence from parents of private school students

Predetermination

K.O v. San Dieguito Union High School District

Facts:

- Student with anxiety, communication delays, ADHD, and epilepsy had received services at small NPS (four classrooms)
- Parents believed Student was ready to move to NPS with larger campus
- At IEP team meeting, Student's case manager/special ed program supervisor stated Student required NPS with therapeutic program, which NPS preferred by Parents did not provide
- Other team members did not believe Student required therapeutic setting
- Parents privately placed Student and claimed District made “take it or leave it” offer of placement at San Diego Center for Children (“SDCC”) over objections of all other members of IEP team

Predetermination

K.O v. San Dieguito Union High School District

Decision:

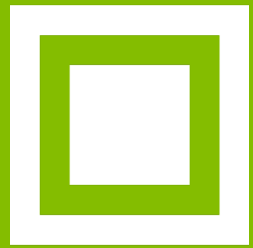
- District court affirmed ALJ's determination that District engaged in predetermination resulting in denial of FAPE and awarded Parents reimbursement
- District's "implacable position on its placement offer" of SDCC was contrary to IEP team collaborative process central to IDEA
- Case manager/program supervisor "failed to cogently respond" to specific information and reasons expressed by Parents and other IEP members that SDCC was inappropriate NPS placement
- Court: District's "implacable position on its placement offer" of SDCC was contrary to the IEP team collaborative process central to the IDEA

(K.O v. San Dieguito Union High School Dist. (S.D. Cal. 2024) 124 LRP 13134)

Predetermination

Why Does This Case Matter to Us?

- For IEP team meetings, predetermination occurs when district has decided on its offer prior to meeting and is unwilling to consider other alternatives
- Although district is not required to accede to parents' desired placement, it must maintain open mind about placement decisions and be willing to consider placement proposed by parents, as well as its own proposed placement
- District must make it clear to parents at outset of IEP team meeting that its proposals are only recommendations for review and discussion



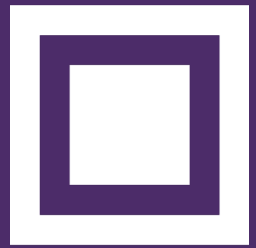
Latest Federal Guidance

Assistive Technology

Dear Colleague Letter

- OSERS reminded that beyond ensuring equitable access to technology and educational materials, children with IFSPs or IEPs may also need AT devices and services for meaningful access and engagement in education
- Each time IEP team develops, reviews, or revises IEP, team must consider whether child requires AT devices and services
- AT services ensure that families, teachers and related service providers receive training on how to use and implement device(s) selected by IEP team, as well as ensure coordination so that the AT device can be used correctly and consistently in school and home
- OSERS also stressed importance of AT during postsecondary transition
 - AT needs should be shared with participating adult agency, so that AT devices and services can be provided when student exits LEA

(Dear Colleague Letter on the Provision of Assistive Technology Devices and Services for Children with Disabilities Under the Individuals with Disabilities Education Act (OSERS 2024) 124 LRP 1839)



New Developments Affecting Special Education

Pending Legislation During 2024

AB 438—Postsecondary Transition

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

AB 2173—Emotional Disability

- Term “emotional disturbance” may also be known as “emotional disability” under state law
- **Note:** AB 2173 was signed by Governor Newsom on July 18, 2024

AB 2268—English Learners

- Would expressly state that requirement for students in kindergarten to be assessed in English listening and speaking does not include students in transitional kindergarten
- **Note:** AB 2268 was signed by Governor Newsom on June 14, 2024

Pending Legislation During 2024

SB 483—Restraints

- Would prohibit use of prone restraint, defined to include prone containment, by educational provider
- Would also prohibit use of prone restraint, including prone containment, on student with disabilities in a public school program

SB 939—Neurodivergent Students

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

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



F3 Law



Thank you for attending!

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



F3 Law

Business
Communications & Media Relations
Education Technology
Employment Law
Facilities & Construction
Governance & Leadership
Government Affairs & Public Policy
Interscholastic Activities
Investigations

Labor Relations & Negotiations
Litigation
Next Level Client Services
Real Estate & Property
Special Education
Student Rights & Discipline
Title IX
Virtual Learning

Inland Empire
Fresno
Los Angeles
Midwest
Oakland
Pacific Northwest
Sacramento
San Diego