SAYING "NO" OR SAYING "YES"
THE ART OF THE PRIOR WRITTEN NOTICE

Presentation by DARREN J. BOGIé
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I. INTRODUCTION

"Prior Written Notice is a Powerful Tool When Skillfully Used"
— Jeff Martin, Esq. – Parents' Attorney

The Prior Written Notice ("PWN") is a vital component of the procedural safeguards that schools make available to special education students and their parents. Providing a timely and correct PWN is essential not just to protecting the rights of special education students and their parents, but also essential to protecting the district should the parents bring a complaint with the California Department of Education ("CDE") or Office of Administrative Hearings ("OAH").

As conceded to by Mr. Martin, a PWN is a powerful tool if skillfully used. If appropriately drafted, a PWN provides a clear administrative record of and justification for the decisions made by a LEA. If poorly drafted, the PWN can act to undermine the district should the parent elect to challenge the district's position.

A PWN which declines a parent's request can be the triggering event causing them to seek legal counsel. When drafting a PWN, district administrators should bear in mind that the potential audience is not just the parent, but can include the parent's advocate/attorney, officials with CDE, and potentially an administrative law Judge. Therefore, with this expanded audience in mind, the PWN should provide a clear justification showing that the district's position is supported by the needs of the student.

The PWN is the first chance a district has to advocate and show parent and parents' counsel that its position is justified, supported by sufficient information, and contributes to the student's provision of FAPE. I have had parent's counsel indicate to me that when assessing whether to take a case, they will examine the district's PWN closely in order to gauge the potential likelihood of success at a due process hearing. As such, I cannot over emphasize the importance of mastering the PWN.

It is our hope that you find these materials useful in assisting you in knowing when and how to draft an effective prior written notice.

II. PURPOSE OF PROVIDING PRIOR WRITTEN NOTICE

There are many purposes for providing PWN to a parent - these include:

- provide comprehensive documentation of the proposed and refused actions made;
- make sure the LEA and the parents are "on the same page" about a child's educational program;
- provide the parents with an opportunity to voice any concerns or suggestions;
- provide sufficient information to ensure that the parent understands the rationale behind a LEA's decision making regarding a particular proposed or refused action;
- ensure that informed parental consent is obtained, as necessary;
- assist the parent in determining the basis for any disagreement(s) with the proposed and/or refused actions addressed in the prior written notice and whether to seek resolution of any dispute through local dispute resolution procedures, a state complaint, mediation or due process hearing.

Additionally, the U.S. Department of Education ("USED") Office of Special Education Programs ("OSEP") opined that the purpose for providing PWN is "to ensure that a parent understands the special education and related services which an LEA has proposed or refused to provide to a student. If a parent does not understand the services being proposed, it follows that the parent could not have agreed to the proposed services. (Letter to Boswell, 49 IDELR 196, (OSEP 2007).)

III. LEGAL REQUIREMENTS REGARDING THE PROVISIONS OF THE PRIOR WRITTEN NOTICE

A. General Legal Requirement

(1) District must provide PWN prior to initiating a change in the identification, evaluation, or educational placement of a child. (34 CFR 300.503(a) & Cal. Ed. Code § 56500.4(a).)

(2) District must also provide PWN when the district refuses to initiate a change in the identification, evaluation, or educational placement of a child. (34 CFR 300.503(a) & Cal. Ed. Code § 56500.4(a).)

B. Examples of When Prior Written Notice is Required[1]

(1) Evaluation/Reevaluation

- Consent for evaluation (the consent for assessment form can be sufficient)

[1] This list should not be considered exhaustive, but rather as a guide that addresses the most common circumstances that a LEA may encounter regarding the provision of PWN. When in doubt, if a PWN is required, we advise that you consult legal counsel.

- Student is found to be ineligible
- Refusal to evaluate
- Refusal to provide an independent educational evaluation ("IEE")

(2) Identification

- Initial categorical identification
- Change in categorical identification
- Termination of categorical identification

(3) Placement

- Initial placement determination
- Change in least restrictive environment along the continuum of placement alternatives
- Change in "private" placement location, even when not in dispute
- Refusal to change placement as requested by the parent
- Change in placement due to parental placement of a student with a disability in a residential facility for non-educational reasons
- When the "brick and mortar" placement location is in dispute
- Change in placement due to disciplinary reasons, including when initiating a 45-day placement to an interim alternative educational setting ("IAES") for special disciplinary circumstances

(4) Provision of FAPE

- After IEP has been proposed by the LEA
- After IEP addendum without a meeting
- Refusal to provide a specific instructional methodology requested by the parent (e.g., Lindamood-Bell)
- Change in services
- Change in accommodations/modifications
- Change in transportation arrangements that are required for provision of FAPE
- Change in method of assessment
- Provision of "comparable services" when a student transfers into an LEA
- Graduation with Standard or Advanced Diploma (specifically required under Cal. Ed. Code § 56500.5)
- Termination of services

(5) Other

- Refusal to convene IEP team meeting after parental request
- Revocation of parental consent (see 34 CFR 300.300)
- Refusal to provide services to a student who is parentally placed in a private school

- Transfer of rights at age of student's majority

C. Examples of When Prior Written Notice is Not Required

(1) Generally

- Child study activities
- General screenings required under the Education Code such as hearing screens
- Observations conducted for instructional purposes as part of daily activities and related service provider interactions
- Administration of state level assessments given to all students
- Evaluating progress on annual goals
- Use of intervention strategies
- Granting of an independent educational evaluation ("IEE")
- After each IEP meeting in a series of meetings
- Change in course schedule
- Change in classroom assignment
- Change in teacher assignment
- Change in school assignment that does not constitute a change in placement
- Disciplinary removal for not more than 10 days, which does not constitute a pattern
- Short-term removals that do not result in change in placement or require the provision of IEP services
- Following meetings with parents that do not result in proposals/refusals related to evaluation/reevaluation, identification, placement, provision of FAPE (i.e., general meeting associated with discipline, academic performance, other school activities)
- Refusal to provide documentation of research-based methods (see 71 Fed. Reg. 46665, Aug. 14, 2006.)

D. Timing of the Prior Written Notice

(1) What does "prior" really mean? How much time? Before, during, or after IEP?

1. Letter to Chandler (59 IDELR 110)

- Districts should wait until the conclusion of an IEP meeting to avoid any appearance of **predetermination.** (Remember: the rule against predetermination still applies, puzzling to PWN.)

- There is no specific requirement regarding time before the change takes place, but the district should give the parents enough time to assess the change and voice their objections or respond before the change takes effect. (Practice Tip: this creates a fact specific inquiry into the circumstances surrounding the student's case. If the parents are new to special education and lack a background in this area, give them more time.

2. The "prior" part of PWN can become confusing when there are IEP meetings and when the district is refusing to initiate a change. (Practice Tip: NEVER send PWN prior to an IEP meeting.)

E. The Requirements of the Prior Written Notice

(1) Generally

A PWN which is not adequate in content, even if the notice is timely, is insufficient and can result in a finding that a LEA denied student a FAPE.

The PWN should be comprehensive enough to address each of the LEA's proposed and/or refused actions. When properly written, the PWN eliminates all doubts and/or misunderstandings. What would constitute comprehensive in a PWN is dependent upon the unique circumstances triggering the document. It is important to provide support for decisions communicated within the notice. Do not be tempted to write a brief PWN to save time, it is important to specify the reasoning behind any proposed and/or refused action.

For example, the IEP team may have proposed changing the placement of a behaviorally challenged student because of disruptive behaviors in the general classroom and on the PWN document list certain behavior rating scales that led to its proposal. However, the PWN should also note additional sources of information that helped form the basis for the team's proposal, such as teacher input and observation. Otherwise, should the parent decide to pursue a due process hearing to dispute the proposed change in placement and the team's rejection of alternative placements, the parent's attorney may be able to argue that the rating scales (listed in the PWN as the only basis the district considered for changing student's placement) were conducted inappropriately, incorrectly scored, or otherwise not designed to evaluate the specific behavior problem exhibited by the child.

The PWN provided to the parent does not have to capture every word uttered by the meeting participants. However, it must include and describe the facts of the meeting in a neutral tone and should be void of emotional, judgmental, or speculative statements. It should also avoid the use of acronyms, such as IDEA, LRE, and IEE, without proper explanation. While there are many acronyms used in special education, it may be some parents' first exposure to these terms and could lead to uncertainty and/or misunderstanding of the information being provided. Also, the use of terms and phrases that could potentially confuse parents and raise more questions should be avoided. For parents to make an informed decision, they must know what was proposed and/or refused. Additionally, the names of any assessments, such as WISC IV, WJ III, BASC, etc., that are mentioned in the PWN should be spelled out so that the parent knows precisely to which assessment the IEP team is referring.

Additionally, there is no state or federal requirements limiting who can prepare the PWN and/or provide it to the parent. Therefore, PWN can be prepared and provided by: (i) the child's case

manager; (ii) the IEP team facilitator; or (iii) an administrator (conceivably even the superintendent who may have never met the child). However, it is recommended that someone who has "firsthand" knowledge of what was discussed during the decision-making process prepare the prior written notice associated with any proposed and/or refused actions.

(2) The Seven Elements of Prior Written Notice

1. A description of the action proposed or refused by the district. (Cal. Ed. Code § 56500.4(b)(1).)

   Remember there is nothing in the federal and/or state special education laws which would prohibit an LEA from including all of its proposed and refused actions into a single PWN, as long as there is a description of each action that was proposed or refused. The description provided should be written as a statement that is factually grounded or informative, rather than being written in a vague, generic, and normative format.

2. An explanation of why the district proposes or refuses to take the action. (Cal. Ed. Code § 56500.4(b)(2).)

   This section of the PWN should detail the LEA's rationale for its proposed and/or refused actions. It is from this section that the parent should understand how the LEA reached its decision on a specific action.

   If the LEA is rejecting the opinions of private assessors or in-home providers, the reason these opinions were rejected should be stated. Alerting parents that the child's IEP team has decided not to adopt the parents' private provider's recommendations may not be enough to guard the school district in a due process hearing. In many cases, the IEP team may believe it has considered all of the parents' requests at an IEP team meeting, but because it did not document its consideration and rationale for rejecting the private provider's recommendations in the PWN document, the IEP team is not able to effectively prove that they considered the recommendations if the issue is challenged in a due process hearing.

   Additionally, if there was more than one reason for each decision, the IEP team should include each reason why it is proposing and/or refusing a specific action. While including the "main" reason for the proposed and/or refused action may technically satisfy the requirements for the provision of a PWN, it may prove insufficient when defending the IEP team's decision during a due process hearing.

3. A description of each evaluation procedure, assessment, record, or report the district used as a basis for the proposed or refused action. (Cal. Ed. Code § 56500.4(b)(3).)

Each and every evaluation procedure, assessment, record or report used as a basis for the proposed or refused action need to be identified. This information is critical information that the parents need in order to form the basis for providing their consent for a proposed action requiring their consent and/or filing a complaint, seeking mediation and/or a due process hearing to dispute the rationale for the proposed and/or refused action.

4. A statement that the parents have protection under the procedural safeguards and if the notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained. (Ed. Code § 56500.4(b)(4).)

   If PWN is being provided as the result of an initial referral for evaluation, an LEA must, in addition to advising the parent that they have rights under the procedural safeguards, provide the parent with a copy of the procedural safeguards document. Otherwise, the regulations only require that the parent be advised as to how they can obtain a copy of the procedural safeguards document.

5. Sources for parents to contact to obtain assistance in understanding the provisions of Part B. (Cal. Ed. Code § 56500.4(b)(5).)

   Each PWN provided to the parent must include sources for the parent to contact in order to obtain assistance in understanding the provisions of the notice requirements.

6. A description of other options that the IEP team considered and the reasons why those options were rejected. (Ed. Code § 56500.4(b)(6).)

   In this section, the LEA must describe in "detail" any other options which were considered and "why" they were rejected.

   There may be instances in which no other options were considered. If so, avoid using the phrases "no other options considered," "none," or "not applicable" without an explanation. Instead, use the following as an example, "Given the unique and specific nature of your request, there were no other options available for consideration that would address this issue."

7. A description of other factors relevant to the district's proposal or refusal. (Cal. Ed. Code § 56500.4(b)(7).)

   Other factors that may affect an LEA's proposed and/or refused action include, but are not limited to, language and/or cultural issues, communication concerns, health concerns, behavior concerns, consideration of the harmful effects of the program or placement proposed and/or refused, and assistive technology.

Similar to the "description of any other options the IEP team considered and the reasons for the rejection of those options" of the PWN discussed in No. 6 above, must describe in "detail" any other relevant factors that were used by the IEP team in formulating its decision to propose and/or refuse an action. There may be instances, however, in which no other factors were relevant to the proposed and/or refused action that were not already addressed in the other elements of the PWN. If so, avoid simply writing "not applicable." The use of a complete statement will provide the parent with strong documentation that this question was reviewed in completing the PWN and, if there were no other relevant factors considered, remove any doubt.

(3) In a Language That is Understandable to the General Public

Not in a language used by specialists - have to work to translate the rationale provided by the assessors into language that a typical parent can understand. For example:

a. Do This: It is the opinion of the school psychologist that the student's current classroom is overstimulating your student. Overstimulation occurs when a student is overwhelmed by sounds, light, and movement in the classroom. The school psychologist believes that this overstimulation may be the reason for some of the behavior your student is exhibiting, like leaving the classroom.

b. Not This: Results of data obtained during observations conducted pursuant to the FBA indicate that several environmental factors, including sensory overstimulation, are antecedents to maladaptive behaviors (eloping) exhibited by the student.

PWN must be provided in the native language of the parent(s) or other mode of communication used by the parent(s), unless it is clearly not feasible to do so. (34 CFR 300.503(c)(1).)

If the native language or other mode of communication used by the parent(s) is not a written language, the LEA shall take steps to ensure that:

- the notice is translated orally or by other means to the parent(s) in their native language or other mode of communication;
- the parent(s) understands the content of the notice; and
- there is written evidence that the preceding two requirements have been met. (34 CFR 300.503(c)(2).)

(4) What Does Prior Written Notice Look Like?

Except for requiring that the notice be in writing, neither Education Code section 56500.4 nor federal regulations or state special education regulations specify the format in which

PWN must be provided.

Therefore, any of the following formats are permissible: (i) formal letter on letterhead; (ii) form letter; (iii) fill in the blank form; or (iv) the use of an IEP.

1. The 7-Point Letter.

The "7-points" of the 7-point letter are taken directly from 34 CFR 300.503(a) and Education Code section 56500.4(b) as those are the seven items that the law requires the district to address.

2. An IEP.

Can be considered PWN if the notes contain all seven of the elements that are identified above.

OSEP opined that "[t]here is nothing in the Act or these regulations that would prohibit a public agency from using the IEP as part of the prior written notice so long as the document(s) the parent receives meet all the requirements in 34 CFR 300.503." (i.e., contain all seven of the elements that are identified above.)

3. An Assessment Plan/Consent for Assessment.

Yes - if it follows county form.

III. UNPACKING THE LAW: HYPOTHETICALS

A. Hypothetical No. 1

District has a child that is currently in a mild/moderate special day class. District believes student would be better served in a moderate/severe special day class based on student's needs and present levels of performance. District informs parent that the IEP team would like to discuss moving the student to the moderate/severe program. District calls an IEP team meeting. The IEP team discusses the proposed change in placement. Parent does not make a decision one way or the other at the IEP meeting, but signs in attendance only. A copy of the IEP, with notes, is sent home to the parent. The parent, after two weeks, agrees with the decision and signs the IEP. Did the school comply with PWN?

1. Maybe. If the IEP addressed all seven of the points, then yes. PWN was accomplished. A meeting was held, the draft IEP was sent home, the parent had time to consider the proposed change and agreed. Then the change happened. If the IEP notes did not have the seven required elements, then the District did not PWN.

2. Assuming the district did not send PWN and the IEP notes are bad now, the parent has filed for due process. Will the district lose on that issue?

   Not necessarily because a PWN is a procedural violation student will have to prove that not sending the PWN was a denial of FAPE in that failure to provide the PWN impeded parents a meaningful opportunity to participate in the decision-making process. So long as there was a full discussion of the reasons for the district's decision at the IEP team meeting so that the parents are aware of the bases for the district's decision, failure to provide a PWN is not a denial of FAPE. (See *Student v. Tehachapi Unified School District*, OAH Case No. 201050839 dated December 22, 2015.)

B. Hypothetical No. 2

Parent sends a 10-day notice of intent to make a unilateral private placement and seek reimbursement. Parent requests that district pay for the private placement. District contacts the parent and asks to have an IEP meeting to discuss the parent's concerns with the current placement. Parent does not attend the IEP meeting. After investigating the proposed placement and reviewing student's IEP, District prepares a 7-point letter indicating the reasons why it is denying parent's request to fund the private placement and denies the request. District sends the 7-point letter prior to the start date of the private placement. Did district comply with prior written notice?

Yes. A refusal to initiate a change is more confusing than when a district requests a change itself. A refusal is addressed in the 7-point letter, and the timing is odd. The "prior" part of a PWN in a refusal does not really apply. Arguably, if the district can do it, a 7-point letter sent after the request, but before the unilateral private placement started, provides the parent the opportunity to change their minds. But, what is a district to do if it does not know the date that the parent is looking to take action? Make an informed decision as early as practicable and document the decision in a 7-point letter.

U.S. Department of Education

Protecting Students With Disabilities

This document is a revised version of a document originally developed by the Chicago Office of the Office for Civil Rights (OCR) in the U.S. Department of Education (ED) to clarify the requirements of Section 504 of the Rehabilitation Act of 1973, as amended (Section 504) in the area of public elementary and secondary education. The primary purpose of these revisions is to incorporate information about the Americans with Disabilities Act Amendments Act of 2008 (Amendments Act), effective January 1, 2009, which amended the Americans with Disabilities Act of 1990 (ADA) and included a conforming amendment to the Rehabilitation Act of 1973 that affects the meaning of disability in Section 504. The Amendments Act broadens the interpretation of disability. The Amendments Act does not require ED to amend its Section 504 regulations. ED's Section 504 regulations as currently written are valid and OCR is enforcing them consistent with the Amendments Act. In addition, OCR is currently evaluating the impact of the Amendments Act on OCR's enforcement responsibilities under Section 504 and Title II of the ADA, including whether any changes in regulations, guidance, or other publications are appropriate. The revisions to this Frequently Asked Questions document do not address the effects, if any, on Section 504 and Title II of the amendments to the regulations implementing the Individuals with Disabilities Education Act (IDEA) that were published in the Federal Register at 73 Fed. Reg. 73006 (December 1, 2008).

INTRODUCTION

An important responsibility of the Office for Civil Rights (OCR) is to eliminate discrimination on the basis of disability against students with disabilities. OCR receives numerous complaints and inquiries in the area of elementary and secondary education involving Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794 (Section 504). Most of these concern identification of students who are protected by Section 504 and the means to obtain an appropriate education for such students.

Section 504 is a federal law designed to protect the rights of individuals with disabilities in programs and activities that receive Federal financial assistance from the U.S. Department of Education (ED). Section 504 provides: "No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ."

OCR enforces Section 504 in programs and activities that receive Federal financial assistance from ED. Recipients of this Federal financial assistance include public school districts, institutions of higher education, and other state and local education agencies. The regulations implementing Section 504 in the context of educational institutions appear at 34 C.F.R. Part 104.

The Section 504 regulations require a school district to provide a "free appropriate public education" (FAPE) to each qualified student with a disability who is in the school district's jurisdiction, regardless of the nature or severity of the disability. Under Section 504, FAPE consists of the provision of regular or special education and related aids and services designed to meet the student's individual educational needs as adequately as the needs of nondisabled students are met.

This resource document clarifies pertinent requirements of Section 504. For additional information, please contact the Office for Civil Rights.

INTERRELATIONSHIP OF IDEA AND SECTION 504

1. What is the jurisdiction of the Office for Civil Rights (OCR), the Office of Special Education and Rehabilitative Services (OSERS) and state departments of education/instruction regarding educational services to students with disabilities?

OCR, a component of the U.S. Department of Education, enforces Section 504 of the Rehabilitation Act of 1973, as amended, (Section 504) a civil rights statute which prohibits discrimination against individuals with disabilities. OCR also enforces Title II of the Americans with Disabilities Act of 1990 (Title II), which extends this prohibition against discrimination to the full range of state and local government services, programs, and activities (including public schools) regardless of whether they receive any Federal financial assistance. The Americans with Disabilities Act Amendments Act of 2008 (Amendments Act), effective January 1, 2009, amended the Americans with Disabilities Act of 1990 (ADA) and included a conforming amendment to the Rehabilitation Act of 1973 (Rehabilitation Act) that affects the meaning of disability in Section 504. The standards adopted by the ADA were designed not to restrict the rights or remedies available under Section 504. The Title II regulations applicable to free appropriate public education issues do not provide greater protection than applicable Section 504 regulations. This guidance focuses primarily on Section 504.

Section 504 prohibits discrimination on the basis of disability in programs or activities that receive Federal financial assistance from the U.S. Department of Education. Title II prohibits discrimination on the basis of disability by state and local governments. The Office of Special Education and Rehabilitative Services (OSERS), also a component of the U.S. Department of Education, administers the Individuals with Disabilities Education Act (IDEA), a statute which funds special education programs. Each state educational agency is responsible for administering IDEA within the state and distributing the funds for special education programs. IDEA is a grant statute and attaches many specific conditions to the receipt of Federal IDEA funds. Section 504 and the ADA are antidiscrimination laws and do not provide any type of funding.

2. How does OCR get involved in disability issues within a school district?

OCR receives complaints from parents, students or advocates, conducts agency initiated compliance reviews, and provides technical assistance to school districts, parents or advocates.

3. Where can a school district, parent, or student get information on Section 504 or find out information about OCR's interpretation of Section 504 and Title II?

OCR provides technical assistance to school districts, parents, and students upon request. Additionally, regulations and publicly issued policy guidance is available on OCR's website, at http://www.ed.gov/policy/rights/guid/ocr/disability.html.

4. What services are available for students with disabilities under Section 504?

Section 504 requires recipients to provide to students with disabilities appropriate educational services designed to meet the individual needs of such students to the same extent as the needs of students without disabilities are met. An appropriate education for a student with a disability under the Section 504 regulations could consist of education in regular classrooms, education in regular classes with supplementary services, and/or special education and related services.

5. Does OCR examine individual placement or other educational decisions for students with disabilities?

Except in extraordinary circumstances, OCR does not review the result of individual placement or other educational decisions so long as the school district complies with the procedural requirements of Section 504 relating to identification and location of students with disabilities, evaluation of such students, and due process. Accordingly, OCR generally will not evaluate the content of a Section 504 plan or of an individualized education program (IEP); rather, any disagreement can be resolved through a due process hearing. The hearing would be conducted under Section 504 or the IDEA, whichever is applicable.

OCR will examine procedures by which school districts identify and evaluate students with disabilities and the procedural safeguards which those school districts provide students. OCR will also examine incidents in which students with disabilities are allegedly subjected to treatment which is different from the treatment to which similarly situated students without disabilities are subjected. Such incidents may involve the unwarranted exclusion of disabled students from educational programs and services.

6. What protections does OCR provide against retaliation?

Retaliatory acts are prohibited. A recipient is prohibited from intimidating, threatening, coercing, or discriminating against any individual for the purpose of interfering with any right or privilege secured by Section 504.

7. Does OCR mediate complaints?

OCR does not engage in formal mediation. However, OCR may offer to facilitate mediation, referred to as "Early Complaint Resolution," to resolve a complaint filed under Section 504. This approach brings the parties together so that they may discuss possible resolution of the complaint immediately. If both parties are willing to utilize this approach, OCR will work with the parties to facilitate resolution by providing each an understanding of pertinent legal standards and possible remedies. An agreement reached between the parties is not monitored by OCR.

8. What are the appeal rights with OCR?

OCR affords an opportunity to the complainant for appeal of OCR's letters of finding issued pursuant to Section 303(a) of the OCR Case Processing Manual. OCR also affords an opportunity to the complainant for appeal of OCR's dismissals or administrative closures of complaints issued pursuant to Sections 108, 110 and 111 of the Manual. The appeal process provides an opportunity for complainants to bring information to OCR's attention that would change OCR's decision, but it does not involve a de novo review of OCR's decision. The complainant may send a written appeal to the Director of the regional Enforcement Office that issued the determination within 60 days of the date of the determination letter being appealed from. In an appeal, the complainant must explain why he or she believes the factual information was incomplete, the analysis of the facts was incorrect, and/or the appropriate legal standard was not applied, and how this would change OCR's determination in the case. More information about appeals is found in Section 306 of the Manual.

9. What does noncompliance with Section 504 mean?

A school district is out of compliance when it is violating any provision of the Section 504 statute or regulations.

10. What sanctions can OCR impose on a school district that is out of compliance?

OCR initially attempts to bring the school district into voluntary compliance through negotiation of a corrective action agreement. If OCR is unable to achieve voluntary compliance, OCR will initiate enforcement action. OCR may: (1) initiate administrative proceedings to terminate Department of Education financial assistance to the recipient; or (2) refer the case to the Department of Justice for judicial proceedings.

11. Who has ultimate authority to enforce Section 504?

In the educational context, OCR has been given administrative authority to enforce Section 504. Section 504 is a Federal statute that may be enforced through the Department's administrative process or through the Federal court system. In addition, a person may at any time file a private lawsuit against a school district. The Section 504 regulations do not contain a requirement that a person file a complaint with OCR and exhaust his or her administrative remedies before filing a private lawsuit.

STUDENTS PROTECTED UNDER SECTION 504

Section 504 covers qualified students with disabilities who attend schools receiving Federal financial assistance. To be protected under Section 504, a student must be determined to: (1) have a physical or mental impairment that substantially limits one or more major life activities; or (2) have a record of such an impairment; or (3) be regarded as having such an impairment. Section 504 requires that school districts provide a free appropriate public education (FAPE) to qualified students in their jurisdictions who have a physical or mental impairment that substantially limits one or more major life activities.

12. What is a physical or mental impairment that substantially limits a major life activity?

The determination of whether a student has a physical or mental impairment that substantially limits a major life activity must be made on the basis of an individual inquiry. The Section 504 regulatory provision at 34 C.F.R. 104.3(j)(2)(i) defines a physical or mental impairment as any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The regulatory provision does not set forth an exhaustive list of specific diseases and conditions that may constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of such a list.

Major life activities, as defined in the Section 504 regulations at 34 C.F.R. 104.3(j)(2)(ii), include functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. This list is not exhaustive. Other functions can be major life activities for purposes of Section 504. In the Amendments Act (see FAQ 1), Congress provided additional examples of general activities that are major life activities, including eating, sleeping, standing, lifting, bending, reading, concentrating, thinking, and communicating. Congress also provided a non-exhaustive list of examples of “major bodily functions” that are major life activities, such as the functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. The Section 504 regulatory provision, though not as comprehensive as the Amendments Act, is still valid – the Section 504 regulatory provision’s list of examples of major life activities is not exclusive, and an activity or function not specifically listed in the Section 504 regulatory provision can nonetheless be a major life activity.

13. Does the meaning of the phrase "qualified student with a disability" differ on the basis of a student's educational level, i.e., elementary and secondary versus postsecondary?

Yes. At the elementary and secondary educational level, a "qualified student with a disability" is a student with a disability who is: of an age at which students without disabilities are provided elementary and secondary educational services; of an age at which it is mandatory under state law to provide elementary and secondary educational services to students with disabilities; or a student to whom a state is required to provide a free appropriate public education under the Individuals with Disabilities Education Act (IDEA).

At the postsecondary educational level, a qualified student with a disability is a student with a disability who meets the academic and technical standards requisite for admission or participation in the institution's educational program or activity.

14. Does the nature of services to which a student is entitled under Section 504 differ by educational level?

Yes. Public elementary and secondary recipients are required to provide a free appropriate public education to qualified students with disabilities. Such an education consists of regular or special education and related aids and services designed to meet the individual educational needs of students with disabilities as adequately as the needs of students without disabilities are met.

At the postsecondary level, the recipient is required to provide students with appropriate academic adjustments and auxiliary aids and services that are necessary to afford an individual with a disability an equal opportunity to participate in a school's program. Recipients are not required to make adjustments or provide aids or services that would result in a fundamental alteration of a recipient's program or impose an undue burden.

15. Once a student is identified as eligible for services under Section 504, is that student always entitled to such services?

Yes, as long as the student remains eligible. The protections of Section 504 extend only to individuals who meet the regulatory definition of a person with a disability. If a recipient school district re-evaluates a student in accordance with the Section 504 regulatory provision at 34 C.F.R. 104.35 and determines that the student's mental or physical impairment no longer substantially limits his/her ability to learn or any other major life activity, the student is no longer eligible for services under Section 504.

16. Are current illegal users of drugs excluded from protection under Section 504?

Generally, yes. Section 504 excludes from the definition of a student with a disability, and from Section 504 protection, any student who is currently engaging in the illegal use of drugs when a covered entity acts on the basis of such use. (There are exceptions for persons in rehabilitation programs who are no longer engaging in the illegal use of drugs).

17. Are current users of alcohol excluded from protection under Section 504?

No. Section 504's definition of a student with a disability does not exclude users of alcohol. However, Section 504 allows schools to take disciplinary action against students with disabilities using drugs or alcohol to the same extent as students without disabilities.

EVALUATION

At the elementary and secondary school level, determining whether a child is a qualified disabled student under Section 504 begins with the evaluation process. Section 504 requires the use of

evaluation procedures that ensure that children are not misclassified, unnecessarily labeled as having a disability, or incorrectly placed, based on inappropriate selection, administration, or interpretation of evaluation materials.

18. What is an appropriate evaluation under Section 504?

Recipient school districts must establish standards and procedures for initial evaluations and periodic re-evaluations of students who need or are believed to need special education and/or related services because of disability. The Section 504 regulatory provision at 34 C.F.R. 104.35(b) requires school districts to individually evaluate a student before classifying the student as having a disability or providing the student with special education. Tests used for this purpose must be selected and administered so as best to ensure that the test results accurately reflect the student's aptitude or achievement or other factor being measured rather than reflect the student's disability, except where those are the factors being measured. Section 504 also requires that tests and other evaluation materials include those tailored to evaluate the specific areas of educational need and not merely those designed to provide a single intelligence quotient. The tests and other evaluation materials must be validated for the specific purpose for which they are used and appropriately administered by trained personnel.

19. How much is enough information to document that a student has a disability?

At the elementary and secondary education level, the amount of information required is determined by the multi-disciplinary committee gathered to evaluate the student. The committee should include persons knowledgeable about the student, the meaning of the evaluation data, and the placement options. The committee members must determine if they have enough information to make a knowledgeable decision as to whether or not the student has a disability. The Section 504 regulatory provision at 34 C.F.R. 104.35(c) requires that school districts draw from a variety of sources in the evaluation process so that the possibility of error is minimized. The information obtained from all such sources must be documented and all significant factors related to the student's learning process must be considered. These sources and factors may include aptitude and achievement tests, teacher recommendations, physical condition, social and cultural background, and adaptive behavior. In evaluating a student suspected of having a disability, it is unacceptable to rely on presumptions and stereotypes regarding persons with disabilities or classes of such persons. Compliance with the IDEA regarding the group of persons present when an evaluation or placement decision is made is satisfactory under Section 504.

20. What process should a school district use to identify students eligible for services under Section 504? Is it the same process as that employed in identifying students eligible for services under the IDEA?

School districts may use the same process to evaluate the needs of students under Section 504 as they use to evaluate the needs of students under the IDEA. If school districts choose to adopt a separate process for evaluating the needs of students under Section 504, they must follow the requirements for evaluation specified in the Section 504 regulatory provision at 34 C.F.R. 104.35.

21. May school districts consider "mitigating measures" used by a student in determining whether the student has a disability under Section 504?

No. As of January 1, 2009, school districts, in determining whether a student has a physical or mental impairment that substantially limits that student in a major life activity, must ***not*** consider the ameliorating effects of any mitigating measures that student is using. This is a change from prior law. Before January 1, 2009, school districts had to consider a student's use of mitigating measures in determining whether that student had a physical or mental impairment that substantially limited that

student in a major life activity. In the Amendments Act (see FAQ 1), however, Congress specified that the ameliorative effects of mitigating measures must not be considered in determining if a person is an individual with a disability.

Congress did not define the term "mitigating measures" but rather provided a non-exhaustive list of "mitigating measures." The mitigating measures are as follows: medication; medical supplies, equipment or appliances; low-vision devices (which do not include ordinary eyeglasses or contact lenses); prosthetics (including limbs and devices); hearing aids and cochlear implants or other implantable hearing devices; mobility devices; oxygen therapy equipment and supplies; use of assistive technology; reasonable accommodations or auxiliary aids or services; and learned behavioral or adaptive neurological modifications.

Congress created one exception to the mitigating measures analysis. The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining if an impairment substantially limits a major life activity. "Ordinary eyeglasses or contact lenses" are lenses that are intended to fully correct visual acuity or eliminate refractive error, whereas "low-vision devices" (listed above) are devices that magnify, enhance, or otherwise augment a visual image.

22. Does OCR endorse a single formula or scale that measures substantial limitation?

No. The determination of substantial limitation must be made on a case-by-case basis with respect to each individual student. The Section 504 regulatory provision at 34 C.F.R. 104.35 (c) requires that a group of knowledgeable persons draw upon information from a variety of sources in making this determination.

23. Are there any impairments which automatically mean that a student has a disability under Section 504?

No. An impairment in and of itself is not a disability. The impairment must substantially limit one or more major life activities in order to be considered a disability under Section 504.

24. Can a medical diagnosis suffice as an evaluation for the purpose of providing FAPE?

No. A physician's medical diagnosis may be considered among other sources in evaluating a student with an impairment or believed to have an impairment which substantially limits a major life activity. Other sources to be considered, along with the medical diagnosis, include aptitude and achievement tests, teacher recommendations, physical condition, social and cultural background, and adaptive behavior. As noted in FAQ 22, the Section 504 regulations require school districts to draw upon a variety of sources in interpreting evaluation data and making placement decisions.

25. Does a medical diagnosis of an illness automatically mean a student can receive services under Section 504?

No. A medical diagnosis of an illness does not automatically mean a student can receive services under Section 504. The illness must cause a substantial limitation on the student's ability to learn or another major life activity. For example, a student who has a physical or mental impairment would not be considered a student in need of services under Section 504 if the impairment does not in any way limit the student's ability to learn or other major life activity, or only results in some minor limitation in that regard.

26. How should a recipient school district handle an outside independent evaluation? Do all data brought to a multi-disciplinary committee need to be considered and given equal weight?

The results of an outside independent evaluation may be one of many sources to consider. Multi-disciplinary committees must draw from a variety of sources in the evaluation process so that the possibility of error is minimized. All significant factors related to the subject student's learning process must be considered. These sources and factors include aptitude and achievement tests, teacher recommendations, physical condition, social and cultural background, and adaptive behavior, among others. Information from all sources must be documented and considered by knowledgeable committee members. The weight of the information is determined by the committee given the student's individual circumstances.

27. What should a recipient school district do if a parent refuses to consent to an initial evaluation under the Individuals with Disabilities Education Act (IDEA), but demands a Section 504 plan for a student without further evaluation?

A school district must evaluate a student prior to providing services under Section 504. Section 504 requires informed parental permission for initial evaluations. If a parent refuses consent for an initial evaluation and a recipient school district suspects a student has a disability, the IDEA and Section 504 provide that school districts may use due process hearing procedures to seek to override the parents' denial of consent.

28. Who in the evaluation process makes the ultimate decision regarding a student's eligibility for services under Section 504?

The Section 504 regulatory provision at 34 C.F.R.104.35 (c) (3) requires that school districts ensure that the determination that a student is eligible for special education and/or related aids and services be made by a group of persons, including persons knowledgeable about the meaning of the evaluation data and knowledgeable about the placement options. If a parent disagrees with the determination, he or she may request a due process hearing.

29. Once a student is identified as eligible for services under Section 504, is there an annual or triennial review requirement? If so, what is the appropriate process to be used? Or is it appropriate to keep the same Section 504 plan in place indefinitely after a student has been identified?

Periodic re-evaluation is required. This may be conducted in accordance with the IDEA regulations, which require re-evaluation at three-year intervals (unless the parent and public agency agree that re-evaluation is unnecessary) or more frequently if conditions warrant, or if the child's parent or teacher requests a re-evaluation, but not more than once a year (unless the parent and public agency agree otherwise).

30. Is a Section 504 re-evaluation similar to an IDEA re-evaluation? How often should it be done?

Yes. Section 504 specifies that re-evaluations in accordance with the IDEA is one means of compliance with Section 504. The Section 504 regulations require that re-evaluations be conducted periodically. Section 504 also requires a school district to conduct a re-evaluation prior to a significant change of placement. OCR considers an exclusion from the educational program of more than 10 school days a significant change of placement. OCR would also consider transferring a student from one type of program to another or terminating or significantly reducing a related service a significant change in placement.

31. What is reasonable justification for referring a student for evaluation for services under Section 504?

School districts may always use regular education intervention strategies to assist students with difficulties in school. Section 504 requires recipient school districts to refer a student for an evaluation for possible special education or related aids and services or modification to regular education if the student, because of disability, needs or is believed to need such services.

32. A student is receiving services that the school district maintains are necessary under Section 504 in order to provide the student with an appropriate education. The student's parent no longer wants the student to receive those services. If the parent wishes to withdraw the student from a Section 504 plan, what can the school district do to ensure continuation of services?

The school district may initiate a Section 504 due process hearing to resolve the dispute if the district believes the student needs the services in order to receive an appropriate education.

33. A student has a disability referenced in the IDEA, but does not require special education services. Is such a student eligible for services under Section 504?

The student may be eligible for services under Section 504. The school district must determine whether the student has an impairment which substantially limits his or her ability to learn or another major life activity and, if so, make an individualized determination of the child's educational needs for regular or special education or related aids or services. For example, such a student may receive adjustments in the regular classroom.

34. How should a recipient school district view a temporary impairment?

A temporary impairment does not constitute a disability for purposes of Section 504 unless its severity is such that it results in a substantial limitation of one or more major life activities for an extended period of time. The issue of whether a temporary impairment is substantial enough to be a disability must be resolved on a case-by-case basis, taking into consideration both the duration (or expected duration) of the impairment and the extent to which it actually limits a major life activity of the affected individual.

In the Amendments Act (see FAQ 1), Congress clarified that an individual is not “regarded as” an individual with a disability if the impairment is transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.

35. Is an impairment that is episodic or in remission a disability under Section 504?

Yes, under certain circumstances. In the Amendments Act (see FAQ 1), Congress clarified that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. A student with such an impairment is entitled to a free appropriate public education under Section 504.

PLACEMENT

Once a student is identified as being eligible for regular or special education and related aids or services, a decision must be made regarding the type of services the student needs.

36. If a student is eligible for services under both the IDEA and Section 504, must a school district develop both an individualized education program (IEP) under the IDEA and a Section 504 plan under Section 504?

No. If a student is eligible under IDEA, he or she must have an IEP. Under the Section 504 regulations, one way to meet Section 504 requirements for a free appropriate public education is to implement an IEP.

37. Must a school district develop a Section 504 plan for a student who either "has a record of disability" or is "regarded as disabled"?

No. In public elementary and secondary schools, unless a student actually has an impairment that substantially limits a major life activity, the mere fact that a student has a "record of" or is "regarded as" disabled is insufficient, in itself, to trigger those Section 504 protections that require the provision of a free appropriate public education (FAPE). This is consistent with the Amendments Act (see FAQ 1), in which Congress clarified that an individual who meets the definition of disability solely by virtue of being "regarded as" disabled is not entitled to reasonable accommodations or the reasonable modification of policies, practices or procedures. The phrases "has a record of disability" and "is regarded as disabled" are meant to reach the situation in which a student either does not currently have or never had a disability, but is treated by others as such.

As noted in FAQ 34, in the Amendments Act (see FAQ 1), Congress clarified that an individual is not "regarded as" an individual with a disability if the impairment is transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.

38. What is the receiving school district's responsibility under Section 504 toward a student with a Section 504 plan who transfers from another district?

If a student with a disability transfers to a district from another school district with a Section 504 plan, the receiving district should review the plan and supporting documentation. If a group of persons at the receiving school district, including persons knowledgeable about the meaning of the evaluation data and knowledgeable about the placement options determines that the plan is appropriate, the district is required to implement the plan. If the district determines that the plan is inappropriate, the district is to evaluate the student consistent with the Section 504 procedures at 34 C.F.R. 104.35 and determine which educational program is appropriate for the student. There is no Section 504 bar to the receiving school district honoring the previous IEP during the interim period. Information about IDEA requirements when a student transfers is available from the Office of Special Education and Rehabilitative Services at:

http://idea.ed.gov/explore/view/p/%2Croot%2Cdynamic%2CQaCorner%2C3%2C

39. What are the responsibilities of regular education teachers with respect to implementation of Section 504 plans? What are the consequences if the district fails to implement the plans?

Regular education teachers must implement the provisions of Section 504 plans when those plans govern the teachers' treatment of students for whom they are responsible. If the teachers fail to implement the plans, such failure can cause the school district to be in noncompliance with Section 504.

40. What is the difference between a regular education intervention plan and a Section 504 plan?

A regular education intervention plan is appropriate for a student who does not have a disability or is not suspected of having a disability but may be facing challenges in school. School districts vary in how they address performance problems of regular education students. Some districts employ teams at individual schools, commonly referred to as "building teams." These teams are designed to provide regular education classroom teachers with instructional support and strategies for helping students in need of assistance. These teams are typically composed of regular and special education teachers who provide ideas to classroom teachers on methods for helping students experiencing academic or

behavioral problems. The team usually records its ideas in a written regular education intervention plan. The team meets with an affected student's classroom teacher(s) and recommends strategies to address the student's problems within the regular education environment. The team then follows the responsible teacher(s) to determine whether the student's performance or behavior has improved. In addition to building teams, districts may utilize other regular education intervention methods, including before-school and after-school programs, tutoring programs, and mentoring programs.

PROCEDURAL SAFEGUARDS

Public elementary and secondary schools must employ procedural safeguards regarding the identification, evaluation, or educational placement of persons who, because of disability, need or are believed to need special instruction or related services.

41. Must a recipient school district obtain parental consent prior to conducting an initial evaluation?

Yes. OCR has interpreted Section 504 to require districts to obtain parental permission for initial evaluations. If a district suspects a student needs or is believed to need special instruction or related services and parental consent is withheld, the IDEA and Section 504 provide that districts may use due process hearing procedures to seek to override the parents' denial of consent for an initial evaluation.

42. If so, in what form is consent required?

Section 504 is silent on the form of parental consent required. OCR has accepted written consent as compliance. IDEA as well as many state laws also require written consent prior to initiating an evaluation.

43. What can a recipient school district do if a parent withholds consent for a student to secure services under Section 504 after a student is determined eligible for services?

Section 504 neither prohibits nor requires a school district to initiate a due process hearing to override a parental refusal to consent with respect to the initial provision of special education and related services. Nonetheless, school districts should consider that IDEA no longer permits school districts to initiate a due process hearing to override a parental refusal to consent to the initial provision of services.

44. What procedural safeguards are required under Section 504?

Recipient school districts are required to establish and implement procedural safeguards that include notice, an opportunity for parents to review relevant records, an impartial hearing with opportunity for participation by the student's parents or guardian, representation by counsel and a review procedure.

45. What is a recipient school district's responsibility under Section 504 to provide information to parents and students about its evaluation and placement process?

Section 504 requires districts to provide notice to parents explaining any evaluation and placement decisions affecting their children and explaining the parents' right to review educational records and appeal any decision regarding evaluation and placement through an impartial hearing.

46. Is there a mediation requirement under Section 504?

No.

TERMINOLOGY

The following terms may be confusing and/or are frequently used incorrectly in the elementary and secondary school context.

Equal access: equal opportunity of a qualified person with a disability to participate in or benefit from educational aid, benefits, or services

Free appropriate public education (FAPE): a term used in the elementary and secondary school context; for purposes of Section 504, refers to the provision of regular or special education and related aids and services that are designed to meet individual educational needs of students with disabilities as adequately as the needs of students without disabilities are met and is based upon adherence to procedures that satisfy the Section 504 requirements pertaining to educational setting, evaluation and placement, and procedural safeguards

Placement: a term used in the elementary and secondary school context; refers to regular and/or special educational program in which a student receives educational and/or related services

Reasonable accommodation: a term used in the employment context to refer to modifications or adjustments employers make to a job application process, the work environment, the manner or circumstances under which the position held or desired is customarily performed, or that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment; this term is sometimes used incorrectly to refer to related aids and services in the elementary and secondary school context or to refer to academic adjustments, reasonable modifications, and auxiliary aids and services in the postsecondary school context

Reasonable modifications: under a regulatory provision implementing Title II of the ADA, public entities are required to make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity

Related services: a term used in the elementary and secondary school context to refer to developmental, corrective, and other supportive services, including psychological, counseling and medical diagnostic services and transportation

C. L. v. Lucia Mar Unified Sch. Dist.

United States Court of Appeals for the Ninth Circuit

February 10, 2016; March 25, 2016, Filed

No. 14-55119

Reporter
2016 U.S. App. LEXIS 5642; 2016 WL 1169960

C. L., a minor by and through his parent and guardian ad litem V.L, Plaintiff - Appellant, v. LUCIA MAR UNIFIED SCHOOL DISTRICT, Defendant - Appellee.

Notice: PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Prior History: **[*1]** Appeal from the United States District Court for the Central District of California. D.C. No. 2:12-cv-09713-CAS-PJW. Christina A. Snyder, District Judge, Presiding.
C.L. v. Lucia Mar Unified Sch. Dist., 2014 U.S. Dist. LEXIS 3266 (C.D. Cal., Jan. 9, 2014)

Disposition: AFFIRMED.

Core Terms

services, appeals, appropriate public education, school district, district court, Individuals, implemented, moot

Counsel: For C. L., a minor by and through his parent and guardian ad litem V.L, Plaintiff - Appellant: Andrea Moore Marcus, Attorney, Law Offices of Andrea Marcus, Santa Barbara, CA.

For LUCIA MAR UNIFIED SCHOOL DISTRICT, Defendant - Appellee: Clayton U. Hall, Molly E. Thurmond, Counsel, Hall, Hieatt & Connely, LLP, San Luis Obispo, CA; Peter Sansom, Esquire, Attorney, Law Office of Peter Sansom, Oceanside, CA.

Judges: Before: KLEINFELD, McKEOWN, and IKUTA, Circuit Judges.

Opinion

MEMORANDUM*

C.L., an autistic child, appeals the district court decision affirming an Administrative Law Judge's ("ALJ") findings that (1) his school district, Lucia Mar Unified School District ("Lucia Mar"), properly implemented an individualized education plan ("IEP") that went into effect in January 2011, and (2) an IEP offered by Lucia Mar to C.L. in February 2012 was an offer of free and appropriate public education under the Individuals with Disabilities Education **[*2]** Act, *20 U.S.C. § 1415 et seq.* We have jurisdiction under *28 U.S.C. § 1291*. We affirm.

Lucia Mar argues that the district court should have dismissed C.L.'s appeal of the ALJ's decision as untimely. The IDEA imposes a 90-day statute of limitations for appealing an administrative decision, *20 U.S.C. § 1415(i)(2)(B)*, and California adopts this same 90-day time frame for such appeals. *Cal. Educ. Code § 56505(k)*. Due to the

* This disposition is not appropriate for publication and is not precedent except as provided by *9th Cir. R. 36-3*.

ambiguity surrounding the effect of two corrected decisions following the first decision on August 10, 2014, we assume without deciding that the appeal was timely filed.

We adopt the district court's very careful and well-reasoned decision as to the January 2011 IEP. Lucia Mar properly implemented the January 2011 IEP in the school setting, because there were no major discrepancies between the behavioral services required by C.L.'s IEP and those provided by Lucia Mar. *See* *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 818-25 (9th Cir. 2007)*. Neither the January 2011 IEP, nor any subsequent amendment, required Lucia Mar to provide C.L. with behavioral services in the home setting, and C.L. introduced no evidence to establish that Lucia Mar had any obligation to provide such services in the home.

The question of whether the February 2012 IEP was an offer of free and appropriate public **[*3]** education is moot, because C.L.'s mother consented to all parts of that IEP in August 2015. *See* *Murphy v. Hunt, 455 U.S. 478, 481, 102 S. Ct. 1181, 71 L. Ed. 2d 353 (1982)* ("[A] case becomes moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." (quotations omitted)).

AFFIRMED.

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

February 17, 2016

Mr. David Andel
Illinois State Board of Education
100 North First Street
Springfield, Illinois 62777-0001

Dear Mr. Andel:

This letter responds to your September 18, 2015 correspondence to Dr. Melody Musgrove, former Director, Office of Special Education Programs (OSEP), U.S. Department of Education (Department). In that letter you request guidance regarding the Individuals with Disabilities Education Act (IDEA) requirements related to individualized education program (IEP) Team membership contained in 34 CFR §300.321.

You ask that if a parent is accompanied to an IEP meeting by an individual/attorney without notifying the public agency of this fact prior to the meeting, would it be appropriate or allowable for the public agency to: (1) inform the parent that the IEP meeting could proceed without the attorney; and/or (2) postpone the IEP meeting specifically because the individual invited was an attorney so that the meeting could be rescheduled for a time and date when the public agency could also have legal representation. You also ask whether a parent's right to invite an individual of his or her choosing is hindered if the public agency cancels and reschedules an IEP meeting because an attorney accompanies the parent to the meeting without giving advance notice to the public agency.

In accordance with 34 CFR §300.321(a)(6), at the discretion of the parent or public agency, other individuals who have knowledge or special expertise regarding the child may attend the IEP meeting. The determination of the knowledge or special expertise of these individuals must be made by the party (parent or public agency) who invited the individual to be a member of the IEP Team. 34 CFR §300.321(c).

Under 34 CFR §300.322(b), the public agency must inform parents in advance of the IEP meeting, including the purpose, time, and location of the meeting and who will be in attendance. There is no similar requirement in the IDEA for the parent to inform the public agency, in advance, if he or she intends to be accompanied by an individual with knowledge or special expertise regarding the child, including an attorney.

We believe that in the spirit of cooperation and working together as partners in the child's education, a parent should provide advance notice to the public agency if he or she intends to bring an attorney to the IEP meeting. However, there is nothing in the IDEA or its implementing regulations that would permit the public agency to conduct the IEP meeting on the condition that the parent's attorney not participate, and to do so would interfere with the parent's right under 34

CFR §§300.321(a) and 300.322(a). It would be permissible for the public agency to reschedule the meeting to another date and time if the parent agrees so long as the postponement does not result in a delay or denial of a free appropriate public education to the child.

Finally, we would like to note that, even if an attorney possessed knowledge or special expertise regarding the child, an attorney's presence could have the potential for creating an adversarial atmosphere that would not necessarily be in the best interest of the child. Therefore, OSEP's longstanding position is that the attendance of attorneys at IEP meetings should be strongly discouraged. See Assistance to States for the Education of Children with Disabilities and Early Intervention Programs for Infants and Toddlers with Disabilities, Final Regulations, *Analysis of Comments and Changes*, 64 FR 12478 (Mar. 12, 1999).

Based on section 607(e) of the IDEA, we are informing you that our response is provided as informal guidance and is not legally binding, but represents an interpretation by the Department of the IDEA in the context of the specific facts presented.

If you have any further questions, please do not hesitate to contact Lisa Pagano of my staff, at 202-245-7413 or by email at Lisa.Pagano@ed.gov.

Sincerely,

/s/
Ruth E. Ryder
Acting Director
Office of Special Education Programs

OAH Case No. 2016030220

Parent v. William S. Hart Union High School District

I. Issues

Whether district denied student a FAPE in the 2014-2015 & 2015-2016 school years by:

1. Failing to find student eligible for special education at the October 27, 2014 IEP meeting.

2. Failing to consider the continuum of placement options at the December 9, 2014 IEP meeting.

3. Failing to offer student appropriate placement at the December 9, 2014 IEP meeting, specifically a residential treatment center.

II. Factual Background

At the time of hearing, student was a 16-year-old female. The issues arose when student had transitioned from 8th grade to high school. Student had a history of atypical behaviors that dated back to the 2nd grade – school anxiety, pulling out her hair and eyelashes. In middle school she returned to pulling out her hair, started drinking, cutting herself, and using drugs. She began attending high school in late August 2014 after having spent some time at a residential drug treatment facility.

At the first IEP meeting on October 27, 2014, Ms. Harris, the school psychologist, prepared a report which was the centerpiece of this IEP meeting. Ms. Harris found that although student had presented with inappropriate types of behaviors or feelings, as well as depressive symptomology, student did not meet the criteria for emotional disturbance because she believed student's symptoms were neither sufficiently severe nor long-standing. Ms. Harris also found that student did not meet the eligibility criteria as a student with a specific learning disability. Despite the report not having any information from parent, middle school teachers, or from student's private therapist, the team found that student was not eligible for special education. After the meeting, Ms. Harris sent parent information on the Action Academy and Action Ranch Programs, outpatient and inpatient drug treatment programs, respectively, that were "free public sober schools" for students within the district. The programs were not run by the district, the district could not place students at either program, but the district did supply instructors to work there.

Parent disagreed with the team's decision and believed student was still cutting herself, that she had stopped doing her homework, that she was cutting classes, and using drugs. On November 25, 2014, parent saw student put a knife in her backpack. Parent reported it to the school and student was arrested. Student was suspended for five days on November 26, 2014.

The second IEP meeting was held on December 9, 2014. No general education teacher was present, and despite parent having signed an excusal, there was no input provided by a general education teacher. There were no present levels of academic achievement and functional performance in the report. This time, the team found student was eligible for special education under emotional disturbance based on student's therapist's diagnosis of major depressive disorder, recurrent, moderate; generalized anxiety disorder; trichotillomania; cannabis abuse; amphetamine abuse rule out bipolar disorder. The team also took into consideration that student's grades had recently declined prior to taking the knife to school. Despite parent's request to have student placed in a residential placement, the team made an offer which included placement in a non-residential program. There was no discussion of a residential

placement center as a placement option during this IEP meeting and there were also no goals. Parent decided to keep student at Action Academy.

Between December 2014 and February 2015, student would go to and from Action Academy (outpatient) to Action Ranch (inpatient) when she had relapses into drug use. Parent continued to believe a residential program was necessary.

The third IEP meeting was held February 11, 2015. There were no general education or special education teachers or waivers of their presence during this meeting, there was no one from Action Academy, and as before, there were no present levels of academic achievement and functional performance. In response to parent's request for residential placement, the team agreed that an updated review of student's social and emotional issues was necessary before discussing residential placement. The team reviewed programs available within the district, and while they recommended placement in a classroom for emotionally disturbed students, the notes did not reflect that residential placements were considered. Parent disagreed with the placement and requested an IEE by a licensed psychologist.

Prior to the IEE being completed, parent removed student from Action Academy because she continued to relapse into methamphetamine use and placed her at Sovereign Health in San Diego, a 45-day residential mental health and drug treatment program. Student was assessed while at Sovereign Health and the IEE recommended student be placed in a "lockdown type facility" because she had a worsening history of escaping from treatment centers to return to risky situations conducive to drug use. Student escaped from Sovereign Health and was unaccounted for from June 2, 2015 to June 5, 2015. Student was released from Juvenile Hall to parent on the condition that she agreed to be immediately transported to Falcon Ridge in Utah, a residential treatment center. Falcon Ridge is an educational and therapeutic facility for women between the ages of 12 and 18 who have dual diagnoses of mental health issues and addiction. The cost was $5,000 per month plus enrollment costs. Because parent's insurance did not cover Falcon Ridge, parent had to sell her home in order to pay the costs.

Parent filed for due process on February 26, 2016.

III. Outcome

Issue 1: Parent did not meet her burden to show the IEP team failed to find student eligible for special education under ED. Parent's position was that student's grades, attendance, and behavior were adversely affected by her emotional disturbance and that student's grades did not match her superior potential. However, the ALJ pointed out that student's potential is not a relevant factor, as the emotional disturbance must impede student's ability to make meaningful educational progress and is not measured against potential. The information before the IEP team did not indicate their decision was unreasonable. Student had only been enrolled in school for a few months prior to the first IEP, and there was testimony that it was not uncommon to see some grade fluctuation in students transitioning from middle school to high school. Also, student's behaviors were not clear evidence of a disability. The district prevailed on Issue 1.

Issue 2: Despite the IEP team knowing that parent had been requesting residential placement at the December IEP meeting, the team would not discuss that option as a placement for student, and the team was unwilling to consider other possibly appropriate placements for student other than the placement they offered. At the February IEP meeting when parent again asked for residential placement, the district rebuffed the suggestion by stating that a new assessment would have to be conducted before it could be discussed, and the team proceeded to discuss only programs available

within the district. The team was unwilling to consider a residential treatment center placement for student. The ALJ noted that district was even unwilling to discuss home/hospital despite the fact that Action Academy was considered to be home/hospital and student had been attending. The ALJ noted that the school did not have adequate present levels of academic achievement and functional performance which were needed to make decisions regarding student's educational programming. The district asserted that there was no basis to suggest that residential treatment center placement would be necessary for student, thus there was no reason to consider that option in the continuum of placements. The ALJ disagreed and held that the district's failure to consider a continuum of placement options is a procedural violation which deprived student of a FAPE. This significantly prevented parent from being able to participate in student's educational decision-making process as district would not discuss residential or home/hospital placements, even though there were relevant options based on the information district should have had. Also, district denied student an education benefit by failing to consider the residential continuum options to meet student's needs.

Parent prevailed on this issue and was awarded $58,010 for tuition and fees at Falcon Ridge for 10 months. District made three arguments as to why parent's recovery of tuition and costs should be reduced. First, district argued that parent no longer lived within the district, as she had sold her house. The ALJ found that parent was effectively homeless and that district remained liable because parent's last residence was within the district. Second, district argued that it did not receive written notice of student's placement at Falcon Ridge within 10 days of said placement. The ALJ found that district knew in December that parent had rejected the placement offer by the team and that district was advised of student's placement at Falcon Ridge within 19 days of the placement. The District did not show how the delay caused it prejudice. Finally, despite district's argument that they were not liable for the costs of the placement because the program was court ordered, the district did not present any evidence showing the Court had in fact ordered the program. While prospective placement at Falcon Ridge could not be ordered because the facility was not certified for placement by the State of California, district had to reimburse parent for all additional monthly expenses until appropriate assessments were conducted, an IEP meeting had taken place to review those results as well as the IEE report, and an offer of FAPE had been made; or until student was discharged from the program and district had made an IEP placement; or until student received a diploma or its equivalent.

Issue 3: Because of the procedural violation resulting in a denial of FAPE, the ALJ did not have to make a finding regarding this issue.

OAH Case No. 2016040351

Evergreen School District v. Parent

I. Issue

Did the IEP offer student a FAPE in the LRE?

II. Factual Background

The district was represented by counsel and parent, non-English speaking, represented herself with the aid of a Vietnamese interpreter.

Student was a seven and a half-year-old boy who was eligible for special education and related services under the category of other health impairment. Student was found eligible for special education in June 2009, and he received home instruction, occupational therapy, and nursing services during preschool and kindergarten because of his complicated medical condition (student had chromosomal anomalies, a G-tube was surgically placed in in his stomach in 2008, and in 2009, a left-sided shunt was inserted to drain excess cerebrospinal fluid from the brain. By 2011, student was able to cough effectively to clear secretions through his tracheotomy but required suctioning.) Student transitioned from early start services when he turned three. Student was two in May 2011 when the first multidisciplinary psychoeducational report was prepared. The second psychoeducational report, which was used to prepare the June 2015 IEP (the IEP at issue), was prepared in April 2014. The ALJ found that there was no evidence that student's performance in April 2014 was materially different than in June 2015.

The evidence at the hearing, based on the two psychoeducational reports, the 2015 testing conducted just prior to the IEP meeting, and testimony from witnesses, established that student's needs were in the areas of feeding, suctioning, toileting, reading, writing, math, communication including both receptive and expressive language, gross and fine motor skills, social skills, and mobility. The IEP listed the areas of need for the student to be in expressive language, fine motor skills, math, reading, and social skills. The IEP did not state whether the team considered student's needs in the areas of feeding, suctioning, toileting, mobility, receptive language, and writing, and because these areas of need were not identified, goals were not developed in these areas. The evidence also showed that some of the goals which were developed were based on present levels of performance that were not shown to be accurate or clear at the hearing and some of the goals themselves were not specific or measurable.

The ALJ noted issues with the tests that were conducted and pointed out the many areas of contradicting evidence. Student's primary language was Vietnamese, yet the tests were administered in English. There was no indication if the scores would have differed had the tests been administered in Vietnamese or if the student even understood what was being asked of him. The special day class teacher reported the test she administered was inaccurate, yet she concluded that student could identify upper and lowercase letters and that he understood simple sentences that she read to him without explaining how she arrived at those conclusions. There was evidence that in 2014 student's communication needs were found to be average for his age group, yet other evidence established that in June 2015, student was unable to speak and had

no reliable communication system in English, Vietnamese, or sign language. While the speech therapist reported that student was able to respond to her during her assessment, the special day class teacher reported that student did not have an established functional communication system to provide responses to the assessments she administered. Further, while the district stated that student's baseline in the expressive language goal was that student used 1,000 signs and gestures to communicate, the speech therapist reported that she did not observe student use signs to initiate requests or indicate needs during her session and she did not indicate which signs student knew.

The placement offer was unclear as there were multiple placements in the IEP, including both a full-time special day class and home hospital placement. The IEP did not indicate the grade level of the students in the day class. The ESY placement was also unclear as the IEP indicated student would be in a special day class for 240 minutes per day and during that same day student would receive 300 minutes of nursing specialized physical care. The IEP did not have an offer of transportation and it did not indicate that the team discussed transportation despite student having severe mobility problems and being unable to speak or write.

III. Outcome

The ALJ held the district had not met its burden on the sole issue. The ALJ found that the procedural and substantive violations were so significant and resulted in a denial of FAPE that it did not make a determination as to the appropriateness of placement. As such, student prevailed.

The procedural violations that denied FAPE were found to be: An unclear offer in the IEP, this prevented the parent from reasonably evaluating and deciding whether to accept or appeal the offer; the IEP did not indicate whether the team considered mainstreaming (if student could receive some education with his typically developing peers) and this prevented parent the right to meaningfully participate in the IEP development process; there was no offer of transportation or mobility services or any evidence that the team considered transportation or mobility services, thus, preventing parent from evaluating the offer.

The substantive violations that denied FAPE were found to be: No indication that the team considered student's needs in the areas of feeding, suctioning, toileting, mobility, receptive language, and writing and, thus, the IEP did not address those areas of need; the IEP did not accurately and completely list the student's present levels of performance as they existed in June 2015 and, thus, the team used inaccurate present levels to form goals; the proposed goals for the areas of need identified by the district were incomplete, not measureable, and did not address some of the student's most significant needs.

OAH Case No. 2016040803

Carlsbad Unified School District v. Parent

I. Issue

May the district assess student pursuant to district's assessment plan without parents' written consent?

II. Factual Background

Student was a 13-year-old boy who was first found eligible for special education in June 2013. As of the date of the DPH, Student's handicapping conditions were autism (primary) and speech and language impairment (secondary). Student's last IEP meeting was held on September 22, 2015, and the triennial reassessment was set for June 10, 2016. The district convened an IEP team meeting on March 16, 2016 to discuss student's progress on his IEP goals, the upcoming triennial reassessment, and mother's concerns. During the meeting, mother was provided with a copy of parent rights and procedural safeguards and also a copy of the assessment plan which proposed to reassess student in the areas of academic achievement, intellectual development, language/speech, fine and gross motor skills and perceptual development, social/emotional development, other (interview, observation, and records review), and all areas of suspected disability. At the hearing, mother testified she did not provide written consent to the assessments because she did not understand that it needed to be signed before June 10, 2016; she did not think that student needed to be assessed in the areas of speech/language and motor development because there had been an assessment in that area in July 2015; she wanted the assessment plan to include adaptive behavior and alternative assessments; the parents did not want the triennial reassessment to be conducted during student's home hospital instruction (student's physician ordered home hospital after an incident where student lost emotion control during a threat assessment and hit a school psychologist 6-7 times) because of their concern that the assessors would not obtain representative, valid results, and finally, because the parents wanted a new IEP altogether.

On March 24, 2016, the director of pupil services sent a prior written notice letter to parents regarding the requests made at the March 16, 2016 IEP team meeting, the status of the triennial reassessment, and he also included another copy of the request for assessment and the parent rights and procedural safeguards.

The district credibly proved that a reassessment was warranted pursuant to its assessment plan, considering that it was student's first triennial reassessment, his social-emotional functioning had deteriorated, he was no longer attending school, and the IEP team needed to determine if he needed additional or different related services, supports, and accommodations.

III. Applicable Law

Reassessments require parental consent. (20 U.S.C. § 1414(c)(3); Ed. Code § 56381(f)(1).) To start the process for obtaining parental consent for a reassessment, the school district must provide proper notice to the student and his parents. (20 U.S.C. §§ 1414(b)(1), 1415(b)(3) and

(c)(1); Ed. Code §§ 56321(a), 56381(a).) If parents do not consent to a reassessment plan, a school district may conduct the reassessment by showing at a due process hearing that it needs to reassess the student and it is lawfully entitled to do so. (20 U.S.C. § 1414(c)(3); 34 C.F.R. § 300.300(c)(ii)(2006); Ed. Code §§ 56381(f)(3), 56501(a)(3).) "If a student's parents want him to receive special education under IDEA, they must allow the school itself to reevaluate the student...." (*M.T.V. v. DeKalb County School Dist.* (11th Cir. 2006) 446 F.3d. 1153, 1160, quoting *Andress v. Cleveland Indep. Sch. Dist.* (5th Cir.1995) 64 F.3d. 176, 178-179.)

IV. Outcome

The Court held the district met its burden on the sole issue – the district may assess student over parent objection.

The ALJ found that the district had demonstrated it needed current, specific information on student's present levels of performance and unique needs to review and revise his annual/triennial IEP, and develop strategies to work with student to help him transition back to school, and develop skills to cope with the demands of school; that the district's triennial assessment plan complied with all applicable statutory requirements regarding form, function, and notice; and that the assessments were warranted and its assessors were competent to perform them.