



**Reopening Schools in a COVID Environment -
Issues on Special Education Services Districts Will Need to Address
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***OAH Actions, New Legal Challenges, State Guidance on Small Cohort Services, and
What To Make of it All***

As school districts strive to meet the needs of all students by providing education services for the start of the 2020-21 school year, some new hurdles may be on the horizon for school districts with the recent release of three special education decisions by the Office of Administrative Hearings (OAH) linked to educational services provided during the COVID-19 pandemic.

OAH Actions

On August 24, 2020, the OAH awarded two special education decisions to students/families that challenged the sufficiency of the distance learning plans provided to them and it was determined that the students were educationally underserved during the COVID-19 pandemic.

In OAH Case No 2020070970, the Office of Administrative Hearings (OAH) issued an order granting a Motion for Stay Put in the Matter of: ***Parent on Behalf of Student v. Pleasanton Unified School District and Contra Costa County Office of Education (CCCOE)***. The student sought a stay put order with respect to what she deemed “essential related services” in her Individualized Education Program (IEP). The decision acknowledged that the Student established that the distance learning plan offered to her was not a comparable program to the program set forth in her IEP given her need for intensive services to access her education.

OAH ordered Pleasanton USD and CCCOE to provide in-person services to Student, in the duration and intensity described in her IEP, including her 1:1 LVN, speech therapy, physical therapy, and vision services. The Order did allow that the District and CCCOE could use qualified staff from a non-public agency to provide the services, that the services could be provided in Student’s home, and that they were not required to provide the services on school sites or with school staff.

Additional details about this case can be found in the Atkinson, Andelson, Loya, Ruud & Romo – AALRR alert <https://www.aalrr.com/newsroom-alerts-3767>

In the second OAH decision, Case No 2020050465, OAH issued an order granting denial of FAPE in the Matter of: ***Parent on Behalf of Student v. Los Angeles Unified School District***. The student successfully established that LAUSD denied her FAPE by materially failing to implement her IEP and the Administrative Law Judge awarded her compensatory education for eight school weeks of distance learning, including 40

hours of postsecondary transition counseling by an appropriately-credentialed counselor of Parent's choice, to assist Parent with coordinating with Westside Regional Center, the Department of Rehabilitation, and other agencies and programs, as appropriate; and one hour of group speech and language services.

Additional details about this case can be found in the Atkinson, Andelson, Loya, Ruud & Romo – AALRR alert <https://www.aalrr.com/newsroom-alerts-3770>

In the third OAH case which was issued on September 2, 2020, the Administrative Law Judge issued an order granting denial of FAPE in the Matter of: **Parent on Behalf of Student v. Norris School District**, OAH CASE NO 2020010423/2020060184. This case is a little different as it was initiated to address FAPE during the timeframe of November 2018 through January 2020 but was expanded to include services denied during the 2020 COVID-19 school closure through May 7, 2020. The student successfully established that Norris SD denied Student a FAFE during the COVID-19 school closure on March 18, 2020, through May 7, 2020, by failing to provide Student appropriate special education or related services, including appropriately tailored alternative service delivery options, and by significantly impeding Parents ability to materially participate in alternative delivery options for student IEP. The remedy was compensatory academic instruction and related services.

New Legal Challenges on In-person Special Education Services

In other, legal matters, there are now two special education Class Action Complaints that have been filed, one in New York and the other in California. The National Class Action complaint filed in New York (which includes some CA school Districts) seeks to Reopen Class for students with disabilities. The "ReOpen Class" action lawsuit seeks the following relief:

1. (A) Either ReOpen Class immediately and provide the in-person instruction and other services as outlined in each students' IEP, or (B) Issue a Pendency Voucher to allow parents to self-cure;
2. Order the school districts to conduct independent evaluations of each student with a disability to determine: (A) what compensatory services the students need to make up for all of the missed services and (B) make any updates to the students' IEPs;
3. Order the school districts to reimburse parents for any expenses or loss of employment due to the failure of the school districts; AND
4. Award parents punitive damages based on the intentional and willful violations of the federal rights of parents and students.

The complaint was filed in federal district court in the Southern District of New York. [Click here to read the entire complaint.](#)

The second Class Action Complaint, **MARTINEZ, et al. v. NEWSOM, et al., PLAINTIFF'S COMPLAINT** was filed on August 31, 2020 against Governor Newsom, Superintendent Thurmond, CDE, SBE, CDPH and many more state agencies and school districts. The plaintiffs are a "group of California special needs students and their parents, who are representative of all special needs students and their parents in

California and who have found their most fundamental rights under IDEA and related statutes taken away by the State of California when the state reassigned them to distance learning / online learning without determining what changes needed to be made to their individualized education programs (IEP) to account for the differences in distance learning compared to in-person instruction.”

Continued Confusion Over Implementation of Small Cohort Services

On August 25, 2020, the California Department of Public Health (CDPH) issued new guidance on an LEAs ability to provide in-person services to students that need special services, including services for special education, that sets minimum safety guidelines across a variety of sectors serving California youth, including both public and private schools. That same day, the State released companion FAQs to supplement the CDPH guidance with responses specific to school-based services and support. The guidance allows for in-person "specialized services, targeted services and support" for students. This applies to both elementary and secondary schools.

There are several things that are confusing about this recent small cohort guidance. Primarily, the Guidance does not expressly allow for in-person instruction contrary to the conditions set forth in the July 17 Framework. Schools are authorized to provide "in-person child supervision and limited instruction, targeted support and services, and facilitation of distance learning." The FAQ refers directly to providing "specialized services" rather than to "instruction."

The FAQ refers to school-based targeted, specialized support and services, include and are not limited to occupational therapy, speech and language, medical, and behavioral services, along with educational support services as a part of targeted intervention strategy or assessment, including those related to English learner status, IEPs, Rtl, and other required assessments. So, under this guidance can LEAs address the concerns brought on by the array of legal challenges by bringing special education students back to campus, with their certificated teachers and classroom aids or are districts merely able to provide specific non-instructional services per the specific guidance and FAQ on small cohorts?

There has been a great deal of private discussion in the last week with members of the Newsom administration about what their real intent is with this guidance. Clearly, representatives of the state's labor unions remain concerned about having their members return to a school site that they are not sure will be safe. These employee organizations continue to weigh in on this guidance as well. Over the last several months, as new guidance has come out from both CDE and CDPH, there have continued to be refinements as new information arises or additional questions are brought up. Given the Governor's expressed desire to get school reopened as long as it is safe to do so, it would not be surprising to see additional clarifications on this small cohort language come forward very soon from the State Department of Public Health.

One good sign is that on September 2, 2020, the Los Angeles Times reported that schools in Los Angeles County will be allowed to reopen small classes beginning on Sept. 14 for students with disabilities and English-language learners. These small cohort reopenings have been authorized by the County Department of Public Health if they comply with all reopening protocols. So, it seems that the confusing guidance is now being interpreted as allowing actual instruction for students and providing schools with the best chance to meet the requirements of each student's IEP.

What Should We Make of this Flurry of Activity?

With the closure of schools last March and the quick shift to distance learning, LEAs have always realized that the most difficult part would be addressing the needs of special needs students in an online only format. Because of this concern the lawsuits and the findings from the OAH should not be a surprise. It is likely that other challenges will follow there. But there is some good news. Based on discussions with school attorneys that work on special education, the class action lawsuits have an uphill fight to be granted “class” because of their size and the need to seek administrative remedies prior to going to court. The consensus seems to be that the very broad New York case will be significantly narrowed, and if not dismissed altogether, will become a New York only case.

As for the recent rulings by OAH, it seems clear that the hearing officers have determined that districts are not meeting the obligation required under the federal IDEA because of the lack of personal teacher-student contact. Given these findings, what actions can districts take to provide appropriate FAPE for students? Because it is unclear how long California will be utilizing distance learning, it seems there is added urgency for districts that have been challenged to open the recently state-approved small cohorts for students that have special needs. These small cohort options will enable districts to achieve several key goals: 1) provide one on one in-person student assessments, 2) provide in-person attention for the highest need students, and 3) provide specialized services such as speech and language therapies, occupational therapy, or medical or behavioral therapies. All these strategies would go a long way to addressing the required elements in the IEP and assuring that special needs students receive FAPE.

We will continue to monitor these legal challenges related to learning loss and the failure to provide FAPE and keep you informed of all new developments. There will also be a joint webinar from both CDE and CDPH entitled a "*Webinar for School Leaders: A Review of the State's Public Health Guidance*" on Wednesday, 9/9 at 9:30 a.m., at <http://Facebook.com/CAEducation> where you can get more information on the guidance.

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