LEGAL RIGHTS OF PERSONS WITH DISABILITIES

DISABILITY RIGHTS IN K-12 EDUCATION

CALIFORNIA OFFICE OF THE ATTORNEY GENERAL

PUBLIC RIGHTS DIVISION

CIVIL RIGHTS ENFORCEMENT SECTION | *DISABILITY RIGHTS BUREAU*

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This publication discusses the rights of students with disabilities in pre-school, primary, and secondary education under California state and federal law.

This publication is for informational purposes only, and is based on the law at the time of publication. Laws regularly change and are subject to differing interpretations. The facts of each and every case may also result in differing applications of the law. Accordingly, the information in this publication must not be considered definitive, exhaustive, or legal advice for any purpose, and does not create an attorney-client relationship with the California Department of Justice. When consulting this publication, check for any updates in the law that may be applicable in any given situation.

I. LAWS THAT PROTECT STUDENTS WITH DISABILITIES

A. Federal Law

Federal law protects the rights of students with disabilities. Before 1975, many students with disabilities were denied an education. In 1975, Congress passed a law, the "Education of the Handicapped Act," which confirmed the right of a student with a disability to a free appropriate public education. The act was later amended and is now called the Individuals with Disabilities Education Act, or the IDEA. (20 U.S.C. § 1400 et seq.) Other federal statutes, such as Section 504 of the Rehabilitation Act of 1973 (Section 504) and Title II of the Americans with Disabilities Act (ADA), also protect the right of a student with a disability to an education free from discrimination based on a disability. (29 U.S.C. § 794 et seq.; 42 U.S.C. § 12131 et seq.; *Luna Perez v. Sturgis Public Schools* (2023) 143 S.Ct. 859, 865 (*Luna Perez*) [allowing a student with disabilities to seek compensatory damages under the ADA after having settled related non-damages claims under IDEA].)

1. Individuals with Disabilities Education Act

IDEA is the law that creates "special education." Under the IDEA, school districts in states like California that accept federal money for the education of students with disabilities must provide a "free appropriate public education" to all students with disabilities between the ages of 3 and 21. (20 U.S.C. §§ 1400(d), 1412(a)(1)(A).) By accepting federal money, a state assumes the duty to provide to every student with a disability within the state an appropriate primary and secondary education. (See *Board of Education of Hendrick Hudson Central School Dist., Westchester v. Rowley* (1982) 458 U.S. 176, 179-181.)

2. Section 504 of the Rehabilitation Act of 1973

Section 504 and its regulations are designed to protect the rights of individuals with disabilities in programs and activities that receive federal financial assistance from the United States. Section 504 provides: "No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of [their] 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 . . . ." (29 U.S.C. § 794(a).) This means that school districts must modify their programing through "504 Plans" for students with disabilities to ensure that such students can access an education. Similar to the IDEA, the Section 504 regulations require a free and appropriate public education consisting of special education and related services, though the two laws do not always completely overlap. (34 C.F.R. § 104.33.)

3. The Americans with Disabilities Act

The ADA was signed into law in 1990 and prohibits disability-based discrimination. Title II of the ADA applies to government entities and includes public school districts. (42 U.S.C. § 12131.)

Title III of the ADA applies to private entities and generally includes private schools. (42 U.S.C. § 12182.) The ADA does not generally cover religious schools if a court determines that the school is a "religious organization" under the ADA. (42 U.S.C. § 12187 [Title III's religious exemption]; *White v. Denver Seminary* (D.Colo. 2001) 157 F.Supp.2d 1171, 1173-1174 [a seminary having as its sole purpose training of persons for religious ministry was "religious organization"].)

B. California State Law

California itself has enacted statutes concerning the education of students with disabilities, and these statutes sometimes provide greater benefits than federal law. (See Ed. Code, § 56000 et seq.) Other California laws, such as Education Code section 220 and Government Code section 11135, also protect students with disabilities from discrimination on the basis of disability.

1. Education Code section 56000 et seq.

In response to the IDEA, California enacted a series of special education laws. (Ed. Code, § 56000 et seq.) Though it largely mirrors federal law, California law includes one statute in particular that provides the primary timelines affecting special education programs, whereas federal law provides these timelines across multiple sections of the law. (Ed. Code, § 56043.)

2. Education Code section 220

Section 220 of the Education Code prohibits discrimination based on a number of protected characteristics, including disability, in any program or activity conducted by an educational institution "that receives, or benefits from, state financial assistance, or enrolls pupils who receive state student financial aid."

3. Government Code section 11135

Section 11135 of the Government Code prohibits discrimination on the basis of protected characteristics, including disability, in programs and activities conducted, operated, or administered by the state, directly funded by the state, or that receive state financial assistance. (Gov. Code, § 11135, subd. (a).)

II. RIGHTS AND RESPONSIBILITIES

Most special education requirements are set forth in the IDEA, which broadly requires that:

- All students with a disability within the state are identified and located (20 U.S.C. § 1412(a)(3)(A).)
- All students with disabilities within the state are evaluated (20 U.S.C. § 1412(a)(3)(A).)
- An "Individualized Education Program" (IEP) is prepared for every student in need of special education (as discussed below) (20 U.S.C. §§ 1412(a)(4), 1414(d).)
- The services needed by a student are actually provided to the student (34 C.F.R. § 300.323.), and
- Parents/guardians are permitted to get both administrative and judicial review of any school district decision concerning their student (as discussed below) (20 U.S.C. § 1415(b)(7)(A), (f), (i)(2).)

A. Special Education

1. "Free Appropriate Public Education"

Students age 3 to 22 with disabilities have a right to a free public education appropriate to their needs, regardless of the nature or severity of their disability. This right is guaranteed by both federal and state

law. The phrase used to describe the education that must be provided to a student with a disability is a "free appropriate public education." (20 U.S.C. § 1412(a)(1); Ed. Code, § 56040, subd. (a).)

The parents/guardians of a student with a disability have a right to participate in any decision about the education of their student. Specifically, a school district must:

- Inform parents/guardians of any recommendation to evaluate their student for special education
- Obtain the permission of parents/guardians before evaluating their student
- Allow parents/guardians to attend and participate in all planning conferences
- Inform parents/guardians of any proposed changes in their student's special education and obtain their permission to implement them

(See 34 C.F.R. § 300.300.) In the following sections, the scope of the school district's duties are explained in detail.

(a) "Special Education" and "Related Services"

School districts in California must provide both special education and related services for students with disabilities.

(1) Special Education

"Special education" means instruction specially tailored to the needs of a student with a disability that is provided at no cost to the parents. (20 U.S.C. § 1401(29).) Special education may include speech-language pathology services, travel training, vocational education, or transition services. (Ed. Code, § 56031.)

Special education further includes physical education, either offered to students with disabilities along with other students or modified to meet the unique needs of the student with a disability. (See 20 U.S.C. § 1401(29)(B); see also 20 U.S.C. § 1414(d)(1)(A)(i)(IV) [including a description of any necessary program modifications in the definition of an IEP].)

(2) Related Services

"Related services" are supportive services other than instruction that enable students with disabilities to take advantage of their special education and that make the instruction meaningful. Examples of related services are transportation, occupational therapy, physical therapy, speech therapy, psychological services, and school nurse services. (See 20 U.S.C. § 1401(26)(A).)

Medical services provided by a doctor are not included, except for diagnostic and evaluation purposes (see *ibid*.), but school health services may administer drugs or services prescribed by a doctor. (See Ed. Code, § 49423.) Necessary services that a nurse or lay person could perform may be provided. (See *Irving Independent School Dist. v. Tatro* (1984) 468 U.S. 883, 891-895 (*Irving*).) For example, intermittent catheterization for a student with spina bifida must be provided, since the procedure can be accomplished by a trained nurse or lay person. (*Ibid.*) Supportive services are specific to a particular child's unique educational needs. If a student needs a particular service during the school day in order to attend or benefit from school, then the school district generally must provide it. (20 U.S.C. § 1401(26)(A); see also *Irving*, *supra*, 468 U.S. at p. 893 ["Congress plainly required schools to hire various specially trained personnel to help [students with disabilities], such as 'trained occupational therapists, speech therapists, psychologists, social workers and other appropriately trained personnel'"].)

(b) "Appropriate" Education

(1) Progress in Learning

A school district must provide a student with a disability with an "appropriate" education, which is "'specially designed' to meet a child's 'unique needs'. . . ." (*Endrew F. ex rel. Joseph F. v. Douglas County School Dist. RE-1* (2017) 580 U.S. 386, 400] (*Endrew F.*).) Under federal law, the school district must provide a student with a disability with an education that enables the student "to make progress appropriate in light of the child's circumstances." (*Id.* at p. 403.) The law requires more than just *"de minimis"* or bare minimum progress. (*Id.* at pp. 402-403.) Every student should have "the chance to meet challenging objectives." (*Id*. at p. 402.)

(2) Integration

School districts are required to educate students with disabilities together with students who do not have disabilities to the maximum extent feasible, so long as the co-education will meet the educational needs of the student with a disability. (20 U.S.C. § 1412(a)(5)(A).) This is sometimes called "mainstreaming" in education. (*See San Francisco Unified School Dist. v. State of California* (1982) 131 Cal.App.3d 54, 70.) The right of students with disabilities to be educated with students who do not have disabilities includes the right to participate in non-academic and extracurricular activities. In determining whether integration is appropriate for a student with a disability, several factors are considered:

- The educational benefits of placement full-time in a class with students without disabilities
- The non-academic benefits of such placement
- The effect the student will have on the teacher and other students
- The costs of mainstreaming the student

(*Baquerizo v. Garden Grove Unified School Dist.* (9th Cir. 2016) 826 F.3d 1179, 1187 (*Baquerizo*).)

(3) Private or Residential Schools

An appropriate education can include placement in a private school, including a residential school, if a student with a disability needs that placement in order to make progress in learning. A placement in a private day school or residential school is appropriate, however, only when it is not possible for the school district to provide a student with a disability with an adequate education in the public schools. (See *Burlington School Committee v. Dept. of Education of Massachusetts* (1985) 471 U.S. 359, 369.)

(c) Public School District Responsibility

The responsibility of providing an appropriate education to students with disabilities is a public responsibility. The immediate responsibility rests with the school district. (*B.H. v. Manhattan Beach Unified School Dist.* (2019) 35 Cal.App.5th 563, 584, 587 (*B.H*.) ["School districts must educate students if the student's parent resides within the district"].) In this publication, the local responsible agency is always called "the school district," but as used here, that may include local school districts, special education local plan agencies (SELPAs), county education offices, and charter schools that independently provide special education, as well as a combination of those agencies having shared responsibility.

When an IEP team decides to provide a student special education or related services by a private school or a private agency, the school district is responsible for planning, supervising, and paying for the private services. (See, e.g., Ed. Code § 56205, subd. (c) [school district must include in its local plan a description of its process for overseeing students in private programs]; *Forest Grove School Dist. v. T.A.* (2009) 557 U.S. 230, 246 [responsibility to pay for the services].) The school district cannot surrender its responsibility

to a private agency or even to another public agency. (*B.H.*, *supra*, 35 Cal.App.5th at p. 584-587; see also *Los Angeles Unified School Dist. v. Garcia* (2013) 58 Cal.4th 175, 186.)

(d) No Cost to the Parents/Guardians

Both special education and related services must be provided at public expense, meaning at no charge to the parents/guardians. (34 C.F.R. § 300.17.) The school district must provide speech therapy, physical therapy, and/or occupational therapy needed by a student with a disability in order to benefit from their special education. (20 U.S.C. § 1401(26)(A).) If the school district puts a student in a private school, then the school district must pay tuition and transportation. If the school district puts a student in a residential school, then the school district must pay for the student's room and board, in addition to the costs of tuition and transportation. (See 34 C.F.R. § 300.104; 34 C.F.R. § 300.107(b).)

There is one exception to the duty of the school district to pay for the education of a student with a disability. If the parents/guardians reject an appropriate education offered to their student by the school district (for example, because they want to send their student to a religious school), then the school district does not need to pay for that private placement unless ordered to do so by a hearing officer or judge. (20 U.S.C. § 1412(a)(10)(C).)

Parents/guardians who enroll their student in a private school may be entitled to reimbursement for some or all of the costs associated with the private school even if the decision to enroll the student was made unilaterally. However, to be entitled to reimbursement, the parents/guardians must show that: 1) the district failed to provide free appropriate public education and 2) the private school placement was appropriate. The parents/guardians may be entitled to compensation even if the private school placement does not meet one-hundred percent of the student's needs. (See *Baquerizo*, *supra*, 826 F.3d at pp. 1182, 1188.)

The court has broad discretion in deciding how much reimbursement is owed. (20 U.S.C. § 1412(a)(10)(C)(ii).) Reimbursement may be reduced or denied if proper notice is not given to the district that the parents/guardians are rejecting the placement proposed by the district, the parents/guardians did not make their student available for evaluation after the district indicated its intent to evaluate the student, or where a court finds the parents/guardians engaged in some other unreasonable action. (20 U.S.C. § 1412(a)(10)(C)(iii).) Proper notice is typically provided either at an IEP team meeting or in writing 10 business days before the parents/guardians remove the student from the district. (20 U.S.C. § 1412(a)(10)(C)(iii)(I)(aa)-(bb).)

2. Eligibility & Procedures

(a) Eligibility

(1) Qualifying Disability

The benefits of the IDEA are available only to those who have "disabilities," as the term is defined in the act itself. Disability is defined broadly and includes any disabling condition — organic, developmental, mental, or behavioral — that might affect a student's performance in school. This includes orthopedic disabilities (for example, spina bifida and muscular dystrophy), sensory disabilities (for example, visual and hearing impairments), neurological disabilities (for example, epilepsy and cerebral palsy), and developmental disabilities (for example, Autism and intellectual disabilities). (20 U.S.C. § 1401(3)(A).) The definition of "disability" specifically excludes students who are disadvantaged solely because of limited English proficiency, lack of instruction, or a temporary physical disability. (Ed. Code, § 56026, subd. (e).) Disability also excludes students who are disadvantaged solely because of environmental, cultural, or economic reasons, or because of a lack of social development. (*Ibid*.)

Students with mental health disabilities can be eligible for special education under the category "severe emotional disturbance." (20 U.S.C. § 1401(3)(A)(i).) Sometimes it is difficult to tell if a student's poor school work is caused by "severe emotional disturbance" or by social factors. The courts have decided that if a student is behaving in "emotionally disturbed" ways, then it does not matter what caused the student's behavior. If a student behaves in emotionally disturbed ways that interfere with their learning, then the school district is responsible for providing the student with special education and related services. (See *Christopher T. v. San Francisco Unified School Dist.* (N.D.Cal. 1982) 553 F.Supp. 1107, 1119-1120.)

(2) Generally Between Ages Three and Eighteen

All students with disabilities between the ages of 3 and 18 whose disability adversely affects their performance in school are entitled to special education and related services. (Ed. Code, § 56026; Cal. Code Regs., tit. 5, § 3030.) Students between the ages of 3 and 5 qualify for early childhood special education services if they have one or more enumerated disabilities or other established medical disabilities, need specially designed instruction or services, and their needs cannot be met by modifying the regular home or school environment. (Ed. Code, § 56441.11; Cal. Code Regs., tit. 5, § 3030.)

In addition, any person with a disability between the ages of 19 and 21 is entitled to special education and related services if the student was enrolled in or eligible for a special education program before they turned 19, and the student has not yet satisfied the graduation requirements applicable to them. (Ed. Code, § 56026(c)(4).) If an individual turns 22 while enrolled in a special education program, they may continue in that program until the end of the school year. (Ed. Code, § 56026(c)(4)(A).)

The processes and procedural rights for children ages birth to two are different from those of school-aged children and are not covered here. More information on those services, including how to request an evaluation, is available through local regional centers. The California Department of Developmental Services' webpage lists regional centers by name and by map.

(3) Educational Benefit

Having a disability or a health problem is not enough to make a student eligible for benefits under the IDEA. A student must have a disability that adversely affects the child's ability to achieve educational benefit. (See *Endrew F.*, *supra*, 580 U.S. at p. 390.) For example, a student with completely controlled epilepsy who is able to participate satisfactorily in a regular classroom would not be eligible for special education. Special education and related services are only available to those who need them. (See 20 U.S.C. § 1401(3)(A).)

(b) Evaluation

A student's eligibility for special education is determined by a process called "assessment" or "evaluation." The state and school districts are required to try and find all students who might be entitled to special education—an obligation known as "child find." (20 U.S.C. § 1412(a)(3).) However, parents/guardians, teachers, or service providers can also request the assessment of the student. (20 U.S.C. § 1414(a)(1)(B).) Requests for an assessment must be in writing. (Ed. Code, § 56029.) The school district must provide assistance to anyone making a spoken request for the assessment of a student. (Ed. Code, § 56343.5.)

After determining that a student should be evaluated for special education services, the school district must make reasonable efforts to obtain the parents/guardians' consent to evaluate the student. Within 15 days of receiving a referral, the school district must provide parents/guardians with a proposed assessment plan, explaining how the assessment will be done. (Ed. Code, § 56043, subd. (a).) The explanation must be in understandable writing and in the parents/guardians' primary language. (34 C.F.R. § 300.503(c)(1).) If the parents/guardians' primary method of communication is American Sign Language or another

non-written language, then the explanation must be given to the parent/guardian in their own non-written language, as well as in written English. (34 C.F.R. § 300.503(c)(2).) After receiving the plan, the parents/guardians have at least 15 days to decide whether they consent to the proposed assessment plan. (Ed. Code, § 56043, subd. (b).) However, this is only consent to the assessment, not to any services. (See 20 U.S.C. § 1414(a)(1)(D)(i) [separately describing consent for evaluation and consent for services].)

If the parents/guardians agree to an assessment of their student, then they must sign a consent form provided by the school district. If the district refuses to assess the student, the parents/guardians may request a due process hearing. If the parents/guardians refuse to consent to an assessment of their student, the school district may request a hearing to require the assessment. (Ed. Code, §§ 56321, 56501, subd. (a)(3), 56506, subd. (e).)

The persons actually conducting the assessment of a student must be trained professionals. The tests used to evaluate a student must be fair, accurate, appropriate, and free of racial, cultural, or sexual discrimination. The tests must be given so that the results are not distorted by a student's disability and must, if at all possible, be given in a student's own language or method of communication. Tests must be given in every area that might explain a student's poor school performance, including tests for hearing and vision. The persons who give the tests must make a written report on all tests given to a student. The parents/guardians are entitled to a copy of the report in their primary language or method of communication. (See 20 U.S.C. § 1412(a)(6)(B); Ed. Code, § 56320.)

If the parents/guardians disagree with the results of the evaluation, they may ask for an independent evaluation of their student at public expense. The school district may either agree to pay for an independent evaluation, or it can ask for a review of the results of its tests by an independent hearing officer. If the school district agrees to pay for an independent assessment, the persons who conduct the independent assessment must be as experienced as the persons who conducted the school district's assessment. The parents/guardians may obtain an independent assessment of their student at their own expense (and later seek reimbursement) at any time. (See 34 C.F.R. § 300.502(b), (e).) If the parents/guardians do receive an independent assessment, then the school district must consider it when deciding how to educate the student. (34 C.F.R. § 300.502(c).)

(c) Educational Planning

(1) "Individualized Education Program" or IEP

Once it has been decided that a student has a disability that makes special education and/or related services necessary, the school district must develop an IEP for the student. An IEP is a plan of action for the education of a student. It must contain, among other things, all of the following:

- A statement of the student's present educational performance
- A statement of the educational goals for the student, both for the immediate future and for the school year
- A statement about what type of special education and which related services the student will receive
- A statement about the beginning date and duration of the special education and related services
- A statement listing any needed transition services
- A statement of the standards by which the student's educational progress will be measured, and
- A statement about how much of the student's time will be spent in a regular classroom and how much of the student's time will be spent in a special education classroom

(For a complete list of IEP requirements, see 20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.324; Ed. Code, § 56345; Cal. Code Regs., tit. 5, §§ 3042, subd. (b), 3043; and see California Special Education Reference (CASER) (Jan. 22, 2015) California Department of Education [as of Sept. 12, 2023].)

(2) Development of the IEP

The plan is developed by a team of people, including the parents/guardians. The members of the team must include the student's regular education and special education teachers, and a representative from the school district knowledgeable in special and general education and the district's resources. The parents/guardians or the school district can also include experts, attorneys, advocates, or regional center case managers who have knowledge or special expertise regarding the student. The team may also include the student with a disability, if appropriate. (See Ed. Code, § 56341.)

The team reviews the results of the assessment, decides what the student's special education and related services needs are, decides how the student's needs can best be met, and writes the IEP. The first IEP written for a student with a disability generally must be developed within 60 days of the date on which the parents/guardians consented in writing to an assessment, and a meeting to develop an initial IEP must be conducted within 30 days of the determination that the student qualifies for special education and related services. (Ed. Code, § 56344; 34 C.F.R. § 300.323(c).)

(3) Parental Involvement

The school district must make it as easy as possible for the parents/guardians of a student with a disability to participate in the planning of their student's education. The school district must give the parents/guardians notice of the meetings of the IEP team in the parents/guardians' own language or primary method of communication, and must schedule the meetings at a time convenient for the parents/guardians.

Parents/guardians have the right to present information to the rest of the team and to have their opinions carefully considered. If the parents/guardians do not speak English or have a hearing disability, the school district must provide an interpreter for them at the IEP team meetings.

Parents/guardians are entitled to a copy of their student's records — including IEPs — at no cost to them and within five school days of the parents/guardians' oral or written request. If the parents/guardians request it, the school district must give them a copy of their student's IEP written in their own language. (See 20 U.S.C. § 1415(b); 34 C.F.R. §§ 300.322, 300.324; Ed. Code, §§ 56043, 56304, 56341.1, 56341.5; Cal. Code Regs., tit. 5, § 3040.)

(d) Parental/Guardian Consent

Once the evaluation and planning processes are completed, and the parents/guardians have given their consent, the school district must begin to provide the special education and the related services listed in the IEP as soon as possible. (34 C.F.R. § 300.323(c).)

No student may be placed in any special education program or provided with related services without the written consent of the student's parents/guardians. The parents/guardians may consent to only a part of the IEP and object to the rest. For example, the parents/guardians may consent to all or part of the related services listed in the IEP and refuse to consent to the proposed special education program. If the parents/guardians consent to some part of the IEP, then the school district must provide the services for which consent has been given as soon as possible. Parents/guardians may object to any part of the IEP, either on the ground that it is unnecessary or on the ground that it is inappropriate or inadequate. (Ed. Code, § 56346; 34 C.F.R. § 300.300.)

If the parents/guardians refuse to consent to any part of the IEP prepared for their student, then either the parents/guardians or the school district may request a hearing before an independent hearing officer provided by the California Office of Administrative Hearings (OAH). (Ed. Code, § 56500 et seq.)

(e) Changes in Placement or Education Program

(1) Periodic Reassessment

Every student with a disability who receives special education or related services must be reevaluated at least once every three years. A reevaluation must also take place if the circumstances make it appropriate or if a student's parents/guardians or teachers request it. Reevaluations are conducted under the same rules that apply to initial evaluations. (20 U.S.C. § 1414(a)(2).)

(2) Annual Review of the IEP

The IEP team must review and revise a student with a disability's IEP at least once a year, when requested to do so by a student's parents/guardians or teachers or whenever a student is not making educational progress. The procedures and protections applicable to the first IEP team meeting apply to later IEP team meetings. (34 C.F.R. § 300.324; Cal. Code Regs., tit. 5, § 3069; Ed. Code, §§ 56043, 56343.)

If a parent/guardian requests an IEP team meeting, the school district must hold the meeting within 30 days of receiving the written request. (Ed. Code, § 56043, subd. (l).) If a parent/guardian makes an oral request, the school district must direct the parent/guardian to make written request. (Ed. Code, § 56343.5).

(3) Notice Before Change of Placement

If the school district plans to change a student's placement, it must give the parents/guardians notice of its plans in writing and in the parents/guardians' own language or primary method of communication. If the parents/guardians object to the plan, they may request a hearing before an independent hearing officer provided by OAH. (Ed. Code, § 56500 et seq.; 20 U.S.C. § 1415(b)(3), (b)(4); 34 C.F.R. §§ 300.503, 300.509, 300.511.)

This kind of detailed advance notice is required not for every change, but rather for changes that constitute "a change in placement." For example, a change in the location at the same school district at which the special education and related services are to be provided would not generally be considered a change in placement. A change in placement is a fundamental change in the type of special education or related services provided to a student with a disability. For example, a change from a regular classroom to a special education classroom would be a change in placement, and a transfer of a student from a school that offers a year-round program to a school that does not offer a year-round program would be a change in placement. (See *Tilton v. Jefferson County Bd. of Education* (6th Cir. 1983) 705 F.2d 800, 804 [changing a child from a year-round school to a 180-day educational program was a change of placement]; *Concerned Parents & Citizens v. New York Bd. of Education* (2d Cir. 1980) 629 F.2d 751, 756 ["the term 'educational placement' refers only to the general educational program in which the [student with a disability] is placed and not to all the various adjustments in that program"].)

Students with disabilities, through their parents/guardians, are entitled to a hearing before an independent hearing officer provided by the OAH whenever the school proposes changes to a student's IEP or refuses to make changes to the IEP. (Ed. Code, § 56501; *Winkelman v. Parma City School Dist.* (2007) 550 U.S. 516, 526-527.) State hearings are discussed below.

(4) Suspensions and Expulsions

A short suspension of a student with a disability for misbehavior is not a change in placement requiring advance notice or procedures. Suspensions of longer than 10 consecutive school days or a pattern of

suspensions totaling more than 10 school days, however, are considered changes in placement. Expulsion is also a change in placement. (34 C.F.R. § 300.530(b).)

Students with disabilities are entitled to due process from their school district before any suspension of 10 days or longer under the United States Constitution. (*Goss v. Lopez* (1975) 419 U.S. 565, 583-584 [there must be "at least an informal give-and-take between student and disciplinarian, preferably prior to the suspension"].) Additionally, before a student with a disability is suspended for longer than 10 school days or expelled, the school district must first hold a manifestation determination meeting to determine whether the student's misbehavior was a manifestation of or substantially related to their disability or to the district's failure to implement the student's IEP. This meeting must be convened within 10 school days of the decision to change the student's placement and must include the members of the IEP team, including the parents/guardians. (20 U.S.C. §§ 1412(a)(1)(A), 1415(k).) A school district can only use the same procedures that it uses to discipline students without disabilities for more than 10 school days when the behavior is determined not to be a manifestation of the student's disability. (20 U.S.C. § 1415(k)(1)(C).)

If the misbehavior was the result of either their disability or the district's failure to implement the IEP, the school district cannot expel or suspend the student. Instead, the district must assess the student's behavior and implement a behavioral intervention plan or review and modify the existing plan, if any. The student must be returned to their original placement unless the student was disciplined for possessing a weapon at school or a school function, knowingly possessing or selling drugs while at school or a school function, or seriously injuring another person at school or a school function—these students may be placed in an alternate educational setting for no more than 45 school days. (20 U.S.C. § 1415(k)(1)(G).) However, even when a student with a disability may properly be suspended or expelled, the school district cannot refuse to offer some form of education to the student that allows the student to progress in the general education curriculum and toward the goals of their IEP. (20 U.S.C. §§ 1412(a)(1)(A), 1415(k)(1)(D); 34 C.F.R. § 300.530(d).)

(5) Graduation

Parents/guardians have a right to notice and an opportunity to object before a student with a disability graduates if the student has not met district graduation requirements and is under the program's age limit. (See section II.A.2.a.2 above.) Graduation is considered a change in placement because it means termination of special education and related services. (Ed. Code, § 56500.5.) An IEP team, including the parents/guardians, must set special graduation requirements for a student with a disability unable to meet the usual requirements. (Ed. Code, § 56390; Cal. Code Regs., tit. 5, § 3070.)

3. Transition Planning

Once a student is 16 years old, the IEP team must draft and annually update an Individual Transition Plan for the student's transition out of high school. (20 U.S.C. § 1414(d)(1)(A)(i)(VIII).) The Transition Plan must be reviewed annually. (Ed. Code, § 56043, subd. (g)(1).)

Rights are transferred from parents/guardians to students when the student turns 18. Students must be informed before they turn 17. (Ed. Code, § 56043, subd. (g)(3).)

B. Section 504

Students with disabilities may still be protected under Title II of the ADA, Section 504, California Government Code section 11135, and California Education Code section 200 et. seq., even if they do not qualify for special education under the IDEA. These statutes prohibit public schools from discriminating against students with disabilities and require public schools to provide students with disabilities with reasonable

modifications. (See *Fry v. Napoleon Community Schools* (2017) 580 U.S. 154, 171 (*Fry*) [discussing the ADA and Section 504].)

The definition of disability under these laws is broader than under the IDEA. To qualify, students must either: 1) have a physical, intellectual, or mental disability that substantially impairs one or more major life activities; 2) have a record of such impairment; or 3) be regarded as having such an impairment. (28 C.F.R. § 35.108 [ADA definition].) A student who does not qualify for special education services under the IDEA may still be entitled to reasonable modifications and other services at school. (See 42 U.S.C. §§ 12131-12134; 29 U.S.C. § 794; 28 C.F.R. § 35.101 et seq.) Plans for providing these accommodations and services are commonly known as "504 plans."

A 504 plan can address a variety of issues, both academic and non-academic. For example, a 504 plan may provide students with disabilities additional time to take tests or may modify a school policy regarding the permitted number of absences in a school year when the students' absences are disability-related. A 504 plan for a student with a food allergy may include implementation of allergen-safe food plans, administration of epinephrine, allowing the student to carry their medication, or providing the student with an allergen-safe environment to learn and eat. (See Disability Discrimination: Frequently Asked Questions, Office for Civil Rights [as of Sept. 12, 2023].) For more information on 504 plans, see Protecting Students with Disabilities: Frequently Asked Questions About Section 504 and the Education of Children with Disabilities.

The school district must have policies in place to conduct evaluations under Section 504. (34 C.F.R. § 104.35.) Anyone can refer a student for evaluation under Section 504. In general, parents/guardians who wish to request a 504 plan should do so in writing and state what their child's disability is (if it has already been diagnosed), how it substantially impairs one or more major life activities, and how this has been documented.

These other laws also prohibit discrimination including, but not limited to, refusing to admit a student because of their disability, refusing to allow a student to bring their service animal to school, denying a student the opportunity to participate in programs and activities or to receive benefits and services on an equal basis with students without disabilities, and failing to provide students with disabilities reasonable accommodations. (See 28 C.F.R. § 35.130; 34 C.F.R. § 104.4; *Fry*, *supra*, 580 U.S. at pp. 174-176.)

C. Effective Communication and Auxiliary Aids and Services

Under Title II of the ADA and its regulations, public entities including school districts must provide "auxiliary aids and services" if necessary to ensure effective communication for people with disabilities. Importantly, this right covers both students with disabilities and their parents/guardians. (28 C.F.R. § 35.160.)

Examples of auxiliary aids and services include live interpreters and real-time video captioning. They also include providing documents in accessible formats such as large print or Braille, documents compatible with screen-reading software, or audio recordings of printed information. School districts are not required to provide auxiliary aids and services if it would fundamentally alter the nature of the services they provide or impose an undue financial and administrative burden. (28 C.F.R. § 35.160; see also Frequently Asked Questions on Effective Communication for Students with Hearing, Vision, or Speech Disabilities in Public Elementary and Secondary Schools (Nov. 2014) U.S. Department of Education [as of Sept. 12, 2023].)

D. Harassment, Intimidation, and Bullying

California school districts are required to have policies to address harassment, intimidation, and bullying. (Ed. Code, § 234.1, subd. (a).) School districts may be engaging in unlawful discrimination where they fail to protect students from harassment, intimidation, and bullying based on disability (and other protected

categories) that is severe or pervasive enough to deny the student an education or access to a program or activity. (*Donovan v. Poway Unified School Dist.* (2008) 167 Cal.App.4th 567, 603.)

III. COMPLAINTS AND DISPUTE RESOLUTION

If a person believes their rights have been violated under any of the laws described above related to primary or secondary education, there are different types of complaints that can be filed against the school district before a government agency or in court. Below are descriptions of various government agency complaints. Filing complaints with any of the government agencies described below may be subject to strict deadlines. If a person wishes to file a lawsuit in court based on violations of any of the laws described in this publication, they should consult with a lawyer as soon as possible because their claims may also be subject to strict deadlines and other requirements.

A. IDEA

1. Informal Resolution

Parents/guardians may try to resolve any disagreement they have with their school district by starting with the school district. Parents/guardians can request an IEP meeting or seek mediation. (See Ed. Code, § 56343, subd. (c) [a school district shall convene an IEP team meeting upon parent/guardian request]; Ed. Code, § 56500.3 [mediation].)

Parents/guardians may request an IEP team meeting in writing. If the student already has an IEP, parents/guardians can request an IEP meeting to talk about any changes to the student's IEP. The school district must hold an IEP meeting within 30 days of receipt of the parent/guardian's written request. But this timeline pauses during days in between regular school sessions or school vacations that are more than five school days. (Ed. Code, § 56043, subd. (l).)

Parents/guardians may also seek mediation without a due process complaint. (Ed. Code, § 56500.3 [mediation].) The mediation conference shall be scheduled within 15 days of the filing of a request for mediation with OAH and the conference shall be completed within 30 days of the request. (Ed. Code, § 56500.3, subd. (e).) Neither party may bring an attorney to the mediation, but they may consult an attorney before or after the mediation conference. (Ed. Code, § 56500.3, subds. (a), (b).) A mediator from OAH, who is not on either side of the dispute, works with the parties to try to resolve their dispute. (Ed. Code, § 56500.3, subds. (d), (j)(2).) In a mediation conference, a disagreement is resolved only when both parties agree. If the parties cannot resolve all their disagreements, then the dispute must be resolved at an administrative hearing. If there is no complaint on file, then neither side may bring an attorney to the mediation. (Ed. Code, § 56500.3, subd. (a).) The state bears the cost of the mediation conference. (Ed. Code, § 56500.3, subd. (e).)

2. Due Process Complaint with OAH

The formal complaint process starts with an administrative due process complaint before OAH. (Ed. Code, § 56502, subd. (a).) Both parents/guardians and school districts have rights in these proceedings. (Ed. Code, § 56502, subd. (h).) OAH will then hold an informal meeting if the parties request it. (Ed. Code, § 56502, subd. (g).) If the case does not resolve, then it will proceed to an administrative hearing where evidence will be admitted and testimony will be taken. (Ed. Code, § 56505.) Throughout this process, the student has the right to "stay put" in their current educational placement; although the term "stay put" is not in the IDEA itself, that is the phrase courts use to describe this right. (See Ed. Code § 56505, subd. (d); 20 U.S.C. § 1415(j); *A.D. ex rel. L.D. v. Hawaii State Dept. of Education* (9th Cir. 2013) 727 F.3d 911, 912 ["In the argot of education law, this rule is known as 'stay put'."].)

(a) Parental/Guardian Rights to Administrative Review

The parents/guardians of a student with a disability have a right to administrative review whenever they are dissatisfied with a school district decision concerning their student. For example, the parents/guardians have a right to administrative review whenever they object to:

- The kinds of tests used by the school district to evaluate the student
- The conclusions reached by the persons doing the evaluation of the student
- The type of special education offered or denied to the student and/or the related services offered or denied to the student
- The specific placement proposed for the student
- The results of a manifestation determination review, or
- The denial of the parents/guardians' procedural rights (their rights to fair notice of all school district decisions concerning their student in their own language, their rights to participate in planning their student's education, etc.)

(Ed. Code, § 56500 et seq.; 20 U.S.C. § 1415(b); 34 C.F.R. § 300.507.)

OAH posts lists on its webpage of attorneys and advocates who have self-certified that they provide low-cost or free services to assist in preparation for special education cases.

(b) School District's Rights to Administrative Review

The school district also has the right to request administrative review. The school district can request administrative review whenever there is a disagreement between it and the parents/guardians. (34 C.F.R. § 300.507.)

(c) Filing a Complaint

Administrative review begins when a complaint/request for due process hearing is filed with the Superintendent of Public Instruction through OAH. (Ed. Code, § 56502, subd. (a).) A request from the parents/guardians must include the name of student, the address of the student (or other contact information if student is experiencing homelessness), the name of the school, a description of the problem, and the proposed resolution. (Ed. Code, § 56502, subd. (c).) The request must be sent to the other party and proof of service must be filed with the request. (*Ibid.*) For more information on how to request a due process hearing and to obtain a request form, please visit OAH's website. The website includes a sample form.

The other party then has 15 days to object that the request did not contain all the required information and the hearing officer has five days after receiving the objection to determine if the request is valid. (Ed. Code, § 56502, subd. (d)(1).)

A response from the other party is due within 10 days of receipt of the request. A response from the district must include an explanation for their action, other options considered and why they were rejected, and a description of how the decision was made, including the assessment procedures, assessments, reports, other records and factors considered. (Ed. Code, § 56502, subd. (d)(2).)

Prior to holding an administrative hearing, the school district must meet with the parents/guardians and other relevant members of the IEP team to see if an informal resolution is possible unless both sides agree to waive the requirement. This meeting must take place within 15 days of the due process hearing request. If no resolution is reached within 30 days of the request, a due process hearing may occur. (Ed. Code, § 56501.5.)

(d) Dispute Resolution

Within 15 days of receiving notice of the parents/guardians' complaint, the school district must convene a meeting with the parents/guardians and other relevant members of the IEP team to discuss the dispute. (20 U.S.C § 1415(f)(1)(B).) Neither party may bring an attorney to this meeting. (*Ibid.*) The parents/guardians and the school district may agree in writing to waive the meeting to use the mediation process described next instead. (*Ibid*.)

(e) Holding a Mediation Conference as Part of a Due Process Proceeding

Either party may request a voluntary mediation conference as part of a due process proceeding. (Ed. Code, § 56503.) Mediation "must be scheduled in a timely manner and must be held in a location that is convenient to the parties." (34 C.F.R. § 300.506(b)(5).) There is no bar on either side to bringing an attorney to a mediation that is part of a due process complaint. A mediator from OAH, who is not on either side of the dispute, works with the parties to try to resolve their dispute. (34 C.F.R. § 300.506(c).) In a mediation conference, a disagreement is resolved only when both parties agree. If the parties cannot resolve all their disagreements, then the dispute must be resolved at an administrative hearing. The state is responsible for the cost of the mediation conference. (34 C.F.R. § 300.506(b)(4).)

(f) The Parents/Guardians Have the Right to Inspect All Their Student's Records

The parents/guardians of a student with a disability have the right to inspect and make copies of any and all records maintained by the school district concerning their student. The school district must make the records available for inspection and copying within five days of the parents/guardians' request to see them. The school district must also give the parents/guardians an opportunity to inspect and copy their student's records before a meeting of the IEP team, a mediation conference, or an administrative hearing. The school district may ask the parents/guardians to pay the actual costs of the copying of the records, but if the parents/guardians cannot afford the costs of copying, then the school district must give them free copies. (Ed. Code, § 56504; 34 C.F.R. § 300.501.)

(g) Administrative Hearing

The hearing must take place within 45 days of receipt of the request. (Ed. Code, § 56502, subd. (f).) The hearing must take place at a time and place that is convenient to the parents/guardians and the student. It must be conducted by a person knowledgeable in special education law and standard legal practices. At the hearing, the parties will be able to present evidence and arguments and call and cross-examine witnesses. Any party may choose to be accompanied and advised by a lawyer. OAH must give the parties information on any free or low-cost representation available in the area whenever requested or when the complaint is filed. (Ed. Code, §§ 56502, subd. (h), 56505, 56507; 20 U.S.C § 1415(h); 34 C.F.R. § 300.507.) As noted above, OAH posts on its webpage lists of attorneys and advocates who have self-certified that they provide low-cost or free services to assist in preparation for a special education case before OAH.

(h) The Student's Placement Remains the Same During Administrative Review

The filing of a complaint preserves things as they are — this is called "stay put." (See Ed. Code, § 56505, subd. (d).) If the dispute between the parents/guardians and the school district concerns the assessment or placement of the student, the assessment or placement cannot be carried out during the administrative review. If the dispute between the parents/guardians and the school district concerns the type of special education or related services needed by the student, the student's program must remain the same until the dispute is resolved. If the student was not in school at all, they must be allowed to enroll in a regular public school program during the administrative review. However, the parents/guardians and the school

district can negotiate a temporary agreement about special education, related services, or placement. (20 U.S.C. § 1415(j).)

Although parents/guardians must send their students to school, they need not leave their students in a school where the students are denied the education they have a right to or the services they need. If the school district refuses to provide needed special education, needed related services, or an appropriate placement, then the parents/guardians can send their student to a school that does provide the appropriate education, services, or placement. However, if the hearing officer or the courts ultimately decide in favor of the school district, then the parents/guardians must pay for the school they choose. (See *L.M. v. Capistrano Unified School Dist.* (9th Cir. 2009) 556 F.3d 900, 904 [denying reimbursement for a private placement where it had never been determined to be the appropriate placement].)

3. Judicial Review

(a) General

Any party dissatisfied with the hearing officer's decision can file a lawsuit. The lawsuit can be filed in either federal district court or California superior court in the county in which they are located. Generally, if parents/guardians or the student seek enforcement of their right to a free appropriate public education, they must exhaust the administrative remedies available before filing a lawsuit. In other words, a parent/guardian must file a complaint with OAH and use the hearing process before filing a lawsuit in federal or state court. (20 U.S.C. § 1415(l); *Luna Perez, supra,* 143 S.Ct. at pp. 863-864.) In some rare cases a court will hear the lawsuit without use of the administrative process first, but this is generally only allowed where the hearing would be futile (as where a student with a similar problem was already denied relief) or inadequate or where the school district has failed in its statutory duty to inform the parents/guardians of the complaint procedures and other safeguards. (*Honig v. Doe* (1988) 484 U.S. 305, 327; *Doe v. Maher* (9th Cir. 1986) 793 F.2d 1470, 1490-1491.)

(b) The Student's Placement During Judicial Review

If the hearing officer decides in favor of the parents/guardians of a student with a disability, then the school district must immediately obey the hearing officer's order. The school district is responsible for the costs of the student's placement during the court review process, even if the school district ultimately wins their appeal. (*Joshua A. v. Rocklin Unified School Dist.* (9th Cir. 2009) 559 F.3d 1036, 1040.)

Generally, when an administrative law judge or lower court finds a placement to be the child's appropriate placement, that placement becomes the child's "stay put" unless a court later changes it. (*Anchorage School Dist. v. M.G.* (9th Cir. 2018) 735 Fed.Appx. 441, 441-442.)

If it is impossible for the school district to implement a child's "stay put" placement — for example, if the program has closed or the child has aged out of it — then the school district must replicate the "stay put" placement "as closely as possible under the circumstances." (*Ms. S. ex rel. G. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1135.)

(c) Court Proceedings

The trial judge makes an independent decision on the basis of both the hearing officer's decision and any additional evidence that is admitted while giving "due weight" to the hearing officer's findings of fact. (*M.C. v. Antelope Valley Union High School Dist.* (9th Cir. 2017) 858 F.3d 1189, 1194 ["We can accord some deference to the ALJ's factual findings, but only where they are 'thorough and careful,' and 'the extent of deference to be given is within our discretion.'" (citations omitted in original)].)

B. Section 504 and the ADA

The U.S. Department of Education's Office for Civil Rights (OCR) has detailed instructions on its webpage, including a sample form, for filing a disability complaint under Section 504 or the ADA. (See How the Office for Civil Rights Handles Complaints (Jul. 18, 2022) Office for Civil Rights [as of Sept. 12, 2023].)

In general, parents/guardians who wish to file a lawsuit under Section 504 or the ADA may do so directly. But if their claims overlap with claims under the IDEA, then they may still need to exhaust administrative remedies. (See *Luna Perez, supra,* 143 S.Ct. at pp. 863-864.)

C. Intimidation, Harassment, and Bullying

School district policies must describe the process for filing complaints — including those about intimidation, harassment, and bullying — and how complaints will be investigated and resolved; they must also provide appropriate protections for the identity of the person filing the complaint and protect the person from retaliation. (Ed. Code, § 234.1, subds. (a),(b); Cal. Code Regs., tit. 5, § 4621.) Districts must notify students, parents/guardians, and other appropriate parties of these policies annually and publish them on the district's website. (Cal. Code Regs., tit. 5, § 4622.)

If a student has been harassed or bullied, parents/guardians may notify an appropriate person, such as the school principal. (*Donovan, supra,* 167 Cal.App. at 609.) The school is required to investigate and take appropriate action in accordance with its policies. A person who has experienced bullying, harassment, or discrimination, their representative, or anybody who believes a class of individuals have been subjected to bullying, harassment, or discrimination can file a formal complaint with the district through the Uniform Complaint Procedure. The California Department of Education (CDE) publishes information about the Uniform Complaint Procedure on its website. Uniform Complaints must be filed within six months of the incident, but this timeline may be extended for up to 90 days with good cause. Each district may have its own procedure for filing complaints. (Cal. Code Regs., tit. 5, § 4630.)

After the complaint is filed, the district will have 60 days to investigate and respond to the complainant in writing, unless the parties agree to extend the time. The complainant and/or their representative must be able to provide information and evidence to support their allegations. If the complainant or their representative refuses to cooperate, however, the complaint may be dismissed for lack of evidence. Likewise, if the district fails to cooperate with or obstructs the investigation, the investigator may find in favor of and impose remedies for the complainant based on the evidence collected. The district's written report must contain findings of fact, conclusions for each allegation whether the district complied with the law, actions the district will take to remedy the issues if the complaints are meritorious, notice of the right to appeal, and the procedures for the appeal. (Cal. Code Regs., tit. 5, § 4631.)

If the complainant disagrees with the district's conclusions, they may file an appeal with the CDE. Complaints must be filed with the district before the CDE has jurisdiction to act. (Cal. Code Regs., tit. 5, 4640.) The appeal must be filed within 30 days of receiving the report and must explain why the decision is being appealed. Bases for an appeal include that the district failed to follow its own procedures, the report did not make sufficient findings of fact, the evidence does not support the findings, the conclusion is not consistent with the law, or the corrective actions do not remedy the problem. The complainant must also include a copy of the complaint and the district's report. Any new issues raised in the appeal will be referred back to the district for investigation. If the district did not address an allegation in the complaint, the CDE will direct the district to investigate and submit an amended report within 20 days. (Cal. Code Regs., tit. 5, § 4632.)

After receiving an appeal, the CDE will direct the district to send the complaint, investigation report, investigation file, report of action taken, the district's complaint procedures, and anything else the CDE

may request. The district must send these materials to the CDE within 10 days. If the district does not provide the requested information, the CDE may rule against it without considering information from the district. Generally, the CDE will only consider the evidence submitted to the district's investigator. The CDE will protect confidential information. In its review, the CDE will assess the issues raised by the appeal and provide a written response within 60 days of receiving the appeal. The CDE's decision must include findings about whether the district complied with its complaint procedures, the CDE's assessment of the district's findings of fact and conclusions of law, and appropriate corrective actions and remedies. (Cal. Code Regs., tit. 5, § 4633.)

The district or the complainant may appeal the CDE's decision to the Superintendent of Public Instruction. The appeal must be filed within 30 days and explain the basis for the appeal. The Superintendent or their designee must respond in writing within 60 days. (Cal. Code Regs., tit. 5, § 4635.)

For more information on the Uniform Complaint process, please visit CDE's website.

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For questions or comments about this publication, please contact the California Department of Justice's Disability Rights Bureau within the Civil Rights Enforcement Section at DisabilityRights@doj.ca.gov.

For individual complaints and inquiries, please contact the California Civil Rights Department (CRD), formerly known as the Department of Fair Employment and Housing. Please note that the California Department of Justice, unlike CRD, only pursues systemic violations by local governmental entities or companies directly impacting the general public or large groups of individuals. It does not handle individual complaints or inquiries. It also does not represent individuals, provide legal advice, or provide updates about its investigations and/or litigation, even to individuals who provided information about those matters. It also does not handle cases involving isolated violations of law, matters against state-level public entities, or out-of-state conduct.

To report a complaint to the California Department of Justice, please contact the Public Inquiry Unit (PIU). PIU staff may not respond to every inquiry, cannot answer legal questions or give legal advice, and cannot act as a personal lawyer for individuals who report a complaint. Complaints may be referred to a more appropriate agency.

For more information about reporting a complaint against a business or company to PIU, visit the Consumer Complaint webpage.

For more information about reporting a complaint against another entity to PIU, visit the General Comment, Question or Complaint webpage.