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### Welcome Back to School!

The Idaho Department of Education, Special Education Section, issued its previous newsletter on January 15, 2020. As you know, so much has happened since that date with the Covid-19 pandemic. In order to address the issues presented by the pandemic, the SDE focused its resources on providing guidance addressing school closure and the provision of services. The SDE is pleased to again be able to provide this informational newsletter.

This issue reviews a Ninth Circuit Court of Appeals case that discusses the provision of education during the COVID-19 pandemic, as well as several Idaho administrative due process hearings and complaint investigation decisions that were issued by the Idaho State Department of Education during the 2020-2021 school year.

### Recent Ninth Circuit Court of Appeals Decision

**Brach v. Newsom, 121 LRP 25641 (9th Cir. 7/23/21)** – Did the requirement issued by California officials for distance learning and the subsequent restrictive phase-in plan for re-opening schools for in-person learning due to the Covid-19 pandemic violate substantive due process and equal protection under the 14th Amendment for public school and private school students?

**Summary of Facts:** On March 19, 2020, the California governor issued an executive order which directed all California residents “to stay home or at their place of residence except as needed to maintain continuity of operations of the federal critical infrastructure sectors.” On March 22, 2020, a list of designated “essential” workers was issued who were allowed to leave their homes to support critical infrastructure sectors. The list included workers teaching at “public and private ... K-12 schools,’ but only for ‘distance learning.’” In August 2020, guidance was issued which allowed a “specified subset of children and youth’ to meet in ‘controlled, supervised and indoor environments,’ but only in small ‘cohorts’ of no more than 14 children, and with no more than two supervising adults.” The guidance was not intended to allow in-person instruction of all students.



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On July 12, 2021, guidance was issued for the 2021-22 school year with the stated aim of maximizing opportunities for in-person instruction. While the objective is to enable in-person instruction “even if pandemic dynamics shift,” the guidance does not prohibit the possibility that school closures could be required in the future.

Public and private school parents sued and asserted that their children have been harmed both emotionally and academically by distance learning. The parents argued that California’s school closure mandate violated the Equal Protection Clause by “arbitrarily treat[ing] Plaintiffs’ children (and other minors attending public and private schools) differently from those in nearby school districts; from those in childcare; and from those attending summer camps, even though all such children and their families are similarly situated.”

**Ninth Circuit Court of Appeals Findings:** With regard to the public-school students, the 9th Circuit held that California provided an ample basis for its refusal to allow in-person public school instruction. The U.S. Supreme Court has held, in several cases, that “[p]ublic education is not a ‘right’ granted to individuals by the Constitution.” The only possible exceptions were the allegations that certain children did not receive FAPE guaranteed to them by the IDEA. However, those parents failed to exhaust their administrative remedies under the IDEA.

However, with regard to private-school students, the 9th Circuit found parents have a fundamental right to choose private education and the state’s restrictions were not sufficiently narrowly tailored to advance the compelling interest in safety.

## Idaho Due Process Hearing Decisions

### RTI and the Initial Evaluation Process

**General Requirements:** “The [IDEA] regulations... allow a parent to request an initial evaluation at any time to determine if a child is a child with a disability. The use of RTI strategies cannot be used to delay or deny the provision of a full and

individual evaluation...to a child suspected of having a disability....It would be inconsistent with the evaluation provisions...for an LEA to reject a referral and delay provision of an initial evaluation on the basis that a child has not participated in an RTI framework.” *Memorandum to State Directors of Special Education*, 56 IDELR 50 (OSEP 1/12/11).

**H-21-02-08a & H-21-02-08b** – Can a school district deny a parent’s request for an initial evaluation because RTI has not been completed?

**Summary of Facts:** When school resumed in-person in August 2020 the parent requested an IEP on behalf of two children (Student A and Student B). When the parent’s requests on behalf of both students were denied, the parent filed due process hearing requests.

**Student A:** Student A had been on an IEP while attending a school in Oregon but was exited before attending an Idaho school. The parent informed the school that Student A had a possible autism diagnosis and Student A exhibited behavioral issues at school. Student A’s scores on Idaho standardized tests for reading and math were above grade level. Grades were average to above average, although Student A needed improvement with some social development skills. The general education teacher used behavioral intervention techniques with Student A which were successful in helping Student A work through behavioral issues experienced at school.

Meetings were held at the school to discuss interventions used to assist Student A. The school provided the parent with Written Notice regarding the parent’s request for an IEP. The parent was informed that the parent’s request for a special education evaluation was considered, but the team determined intervention strategies would be utilized in the areas of concern as part of the pre-referral process and data would be collected.

The intervention team's goal was to provide support and strategies to be utilized as part of the RTI process. The option of considering an evaluation was considered but rejected due to the need for additional information to determine present levels of performance and specific needs. Interventions in the areas of concern would be implemented and documentation of Student A's response to the interventions would be reviewed.

**Student B:** Student B had not previously had an IEP. Shortly after the 2020-2021 school year began, the school assessed Student B using the STAR Diagnostic Report. Results from this assessment indicated Student B needed improvement in both academic and personal development areas. Student B was also assessed individually, and the assessment showed that Student B was performing below grade level in math.

At the beginning of the school year, the school determined that it would not evaluate Student B for an IEP until after the first six to eight weeks of school so that Student B could be observed to identify academic and educational needs. During this period of time the school used RTI interventions and Title 1 program services to assist Student B in the general education classroom.

The school provided the parent with Written Notice regarding the parent's request for an IEP. The parent was informed that the parent's request for a special education evaluation was considered, but the team determined intervention strategies would be utilized in the areas of concern as part of the intervention team process. The intervention team's goal was to provide support and strategies to be utilized as part of the RTI process.



The option of considering an evaluation was considered but rejected due to the need for additional information to determine present levels of performance and specific needs. Interventions in the areas of concern would be implemented and documentation of Student B's response to the interventions would be reviewed.

### Hearing Officer Findings:

**Student A:** The parent's request for an IEP inferred a request for an initial evaluation. The school was on notice that Student A had a possible autism diagnosis and displayed behavioral issues at school. This information from the parent, together with student's behavioral issues at school gave rise to the school's obligation to provide an initial evaluation of Student A. Although the school was using interventions in the general education classroom, this did not excuse or negate the school's obligations to provide an initial evaluation as there was a reasonable basis for suspecting a disability.

Although the school should have conducted an initial evaluation, this procedural violation did not deny Student A a free appropriate public education (FAPE), as no evidence was presented indicating that Student A needed special education.

**Student B:** The parent's request for an IEP inferred a request for an initial evaluation. The school received information from the parent that identified possible diagnosis of ODD and ADHD. The universal and individual assessments showed that Student B needed improvement in several academic and social development areas. Those same areas needing improvement were again identified two months later in Student B's progress report. The school had an obligation to provide an initial evaluation when it had notice of Student B's suspected disability and the obligation cannot be avoided or delayed by the provision of interventions as part of an RTI program.

In this case, the evidence presented at the due process hearing indicated that Student B was in need of special education and the school's procedural violation resulted in a denial of FAPE. The hearing officer order compensatory education to be provided by the school.

## Noncustodial Parent Access to Student Records

### General Requirements:

The Family Educational Rights and Privacy Act (FERPA) provides that a school district shall give full rights to access a child's education records to either parent, unless the district has been provided with evidence that there is a court order, State Statute, or legally binding document that specifically revokes those rights. 34 CFR 99.4.

Idaho law provides that, "[n]otwithstanding any other provision of law, access to records and information pertaining to a minor child including, but not limited to, medical, dental, health, and school or educational records, shall not be denied a parent because the parent is not the child's custodial parent. However, information concerning the minor child's address shall be deleted from such records to a parent, if the custodial parent has advised the records custodian in writing to do so." Idaho Code 32-717A.

### C-20-08-24a

**Summary of Facts:** A student was suspended from school for making threats against other students and staff. At the time of the suspension the student's mother had physical custody. The parents shared joint legal and physical custody of the student. The father requested the student's records in November, and a copy of the records was provided to the father. After the records were provided, the father made three different inquiries as to whether another school, district or other entity had requested the student's transcripts and records. In each

case, the district informed the father that there had been no other requests. However, after the records were provided to the parent, the district did receive a written request for the student's records and transferred the records to an out-of-state school district. This request was placed in the student's file, but the father was not informed of this record nor was he provided access to this record.



**Complaint Investigator Findings:** The father should have been provided access to the additional record consisting of a request to transfer the student's records. The district was required to review its policies and procedures to ensure consistency with the requirements of the IDEA, FERPA and Idaho statutes.

### C-20-09-28a

**Summary of Facts:** The parents of a student were divorced in Nevada and the mother was given sole legal and physical custody of the student; however, the father was entitled to access the student's medical and educational information. The mother consented to the student's three-year reevaluation and the team determined the student no longer met the eligibility criteria for Developmental Delay or any other disability and was exited from special education. The father lived in Nevada and when the student visited the father at the end of March 2020, the father noticed that the student's reading skills had significantly regressed. According to the father, the mother removed his name from the student's records. After the father requested the student's education records, he was informed by email that the mother had full legal custody and the district would not provide the father access to the student's education record unless the district received updated legal papers or the mother's permission.

**Complaint Investigator Findings:** The district was



found out of compliance. While the court document provided that the mother had sole legal and physical custody of the student, there was nothing in the document that took away the father's right to access the student's education information. Both parents, custodial and noncustodial, have equal access to student information unless the district has evidence of a court order or state law revoking those rights.

The district was required to provide training to all staff that responds to parent requests for information regarding FERPA rights and procedural safeguards.



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