

In New Ruling, the Federal Appeals Court Demands Specificity in Anticipated Frequency and Duration of Services

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The 9th Circuit Court of Appeals issued a decision last week that underscored the importance of providing clarity in IEP documents, particularly with regard to the frequency and duration of services. In *LAUSD v. AO*, the Court criticized LAUSD for listing a frequency range for services in the Student's IEP rather than a specific frequency. The IEP provided that the student would receive speech therapy one to ten times per week for a total of thirty minutes per week and audiology services one to five times per month for a total of twenty minutes per month.

The IDEA requires LEAs to provide parents with a formal, written, and specific offer of placement. (20 U.S.C. § 1414(d)(1)(A)(i).) The IDEA regulations further provide that the IEP must include the “**anticipated frequency, location, and duration of services and modifications.**” (34 C.F.R. § 300.320(a)(7).) The Court noted, “[t]his requirement is ‘enforced rigorously’ because it provides a clear record if disputes arise and because the written offer helps parents decide whether to accept or reject a proposed program.”

In reviewing the student's IEP, the Court noted that the broad frequency range rendered the proposed program unclear as it would have permitted the student to receive speech therapy of a single thirty-minute session each week, in ten sessions averaging just three minutes each, or anything in between. LAUSD argued that the range of frequency was necessary to allow the provider's flexibility to handle unanticipated issues, such as a student being unable to sit still for a specified length of time during a session. However, the Court found that failure to specify the frequency seriously impaired the parents' opportunity to participate in the IEP formulation process because it prevented them from understanding and assessing LAUSD's offer. The Court further noted that the needed flexibility already exists under the IDEA as the regulations require the IEP to specify only the “anticipated” duration and frequency of services, and while implementation of the IEP as written should be the aim, a violation of the IDEA only occurs when a “material failure” to implement the IEP occurs.

The Court similarly criticized LAUSD's offer of speech services, listed as “Direct Service (Collaborative),” without identifying whether that term described an individual or group service. The Court found that the student required individual speech services and found that the IEP service offer was unclear. By failing to specify whether the speech therapy would be delivered to

students individually or in a group, the Court explained that the offer did not allow the Parents to evaluate what the school district was proposing.

The court decision reinforces the importance of clarity of the IEP offer. IEPs should be written with a specific anticipated frequency, location, and duration of each service. If your school is struggling to specify the anticipated frequency, location, or duration of services or the type of service due to a limitation of a drop-down menu or other aspects of the IEP form, it is a good practice to utilize the “notes” section of the IEP to define any terms that are otherwise unclear and document discussions of the IEP team, including parents, during which those terms were clarified during the IEP meeting. We would suggest utilizing multiple readers of the IEP document to check the IEP for clarity to ensure:

1. the IEP is clear enough that parents can make an informed decision when accepting or rejecting the IEP;
2. the IEP is clear enough that a parent can determine whether the IEP is being implemented as proposed, and
3. the IEP is clear enough that the school’s providers can ensure the implementation of the IEP as written.

If your school has any questions about this Legal Alert or determining whether an IEP is written with the clarity needed to be defensible, YMC is ready to assist you.

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Should you have any questions about this Legal Alert, please get in touch with Lisa Corr, Esq. at 916.646.1400.

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