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## Ninth Circuit Holds Four-Month Delay in Autism Assessment Plan was not a Violation of IDEA

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In its recent opinion in *D.O. v. Escondido Union School District* (9th Cir. Jan. 31, 2023, No. 21-55498), the Ninth Circuit Court of Appeals reversed a federal district court and determined a four-month delay in proposing to assess a student for autism was neither a procedural nor substantive violation of the federal Individuals with Disabilities Education Act (IDEA).

### Background

This case contained an extensive factual and procedural history about a student “experiencing symptoms of psychosis, including paranoia and hallucinations.” At an Individualized Education Program (IEP) meeting the school district was informed that, based on the assessment of a private psychologist retained by the student’s parent, the student “appeared to meet criteria for Autism Spectrum Disorder.” Although the school district requested a copy of the private psychologist’s report during the IEP meeting, the parent did not provide it until six months later.

Before providing a copy of the report, the parent filed a due process complaint alleging the school district failed to timely assess the student in all areas of suspected disability in light of the suspected autism diagnosis. In response, the school district provided an assessment plan proposing to assess the student in the area of autism. The assessment plan was provided four months after the IEP meeting. The parent did not immediately consent to the assessment plan.

The school district followed up with the parent on the outstanding assessment plan and eventually gained parental consent. The assessment determined the child did not meet eligibility for autism, which left his placement unchanged.

The parties proceeded to due process where an Administrative Law Judge (ALJ) determined that the school district’s delay in referring the student for an assessment was neither a procedural nor substantive violation of the IDEA because the four-month delay was “not unreasonable,” and the parent failed to establish “how [the student’s] educational program should have been different if he had autism.” The parent sought review of the ALJ’s decision by a federal district court. The District Court reversed the decision, in part, holding that the four-month delay in referring the student for the assessment constituted a procedural violation of the

IDEA and such a violation denied the student a free appropriate public education (FAPE) by depriving him of educational benefits. The school district appealed the District Court decision.

## Legal Standard

Generally, a procedural violation occurs when a school district fails to comply with the procedural requirements of the IDEA. In due process matters alleging a procedural violation, an ALJ may find that a student did not receive a FAPE only if the procedural violation: (1) impeded the right of the student to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE; or (3) caused a deprivation of educational benefits.

## Ninth Circuit Decision

The Ninth Circuit Court of Appeals reversed the District Court's determination that the delay in proposing to assess was a procedural violation because the school district's delay did not violate any state or federal statutory timelines as there was no referral for an assessment. The Ninth Circuit did acknowledge a duty to propose an assessment plan after the school district first learned that the student's private psychologist suspected the student might have autism. This duty to assess was hampered, however, because the school district was waiting for the private psychologist's report, which it needed in order to appropriately craft an autism assessment plan.

Further, the Appeals Court determined that the alleged procedural violation did not amount to a substantive violation of the IDEA. Although the school district's assessment plan was delayed, the court noted that the IEP team maintained the student's placement following a review of the autism assessment report. The court also noted that if the parent "was impeded in her ability to participate in educational decision-making, it was due to her own delay."

## Takeaways

While the Ninth Circuit Court of Appeals provided some leniency regarding reasonable timelines (i.e., where there is a duty but not a statutorily defined timeline to fulfil it) under the IDEA, school districts should continue to utilize best practices with regard to assessment plans and avoid any delay in proposing assessments. Notably, the Ninth Circuit's dissenting opinion reminds us of the "independent legal obligation to promptly assess a [student] for a suspected disability, even when the parent does not cooperate in full or makes promises they do not keep." When put on notice of a suspected disability, school districts should provide an assessment plan as soon as possible to comply with their child find obligations.

If you have any questions about this decision, or about any special education matters, please contact the authors of this Client News Brief or an attorney at one of our [eight offices](#) located statewide. You can also subscribe to our [podcasts](#), follow us on [Facebook](#), [Twitter](#) and [LinkedIn](#) or download our [mobile app](#).

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