



F3 Law



# 6<sup>th</sup> Annual Mental Health Symposium

## Legal Update Through the Lens of Anxiety and Depression

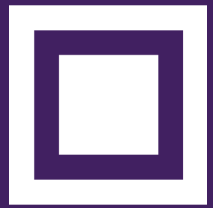
Presented by Cynthia D. Vargas

# What We'll Cover . . .

- Background and Definitions
- Legal Overview of Eligibility for Students with Anxiety and/or Depression
- OAH Case Examples
- Practical Compliance Pointers

# Introduction

- Studies have shown that students with disabilities are more likely than their nondisabled peers to experience anxiety, depression, and other mental health issues
- Contributing factors can include behavioral issues, academic struggles, and social difficulties.
- Due process filings involving students with anxiety and/or depression have increased significantly over the past 10 years



# Background and Definitions

# Overview

- Common types of mental illness that may affect students include anxiety disorders, depression, bipolar disorder, schizophrenia, and eating disorders
- Not uncommon for children to be diagnosed with both depression and anxiety disorder, or depression and general anxiety
- If eligible, usually under ED or OHI category

# Anxiety

- Students might exhibit one or more of the following types of anxiety disorders
  - Generalized anxiety disorder (worrying excessively about many things, such as going to school, upcoming tests or the future in general; students also may have physical symptoms, such as headaches, stomachaches, muscle tension, or tiredness)
  - Phobias (marked and persistent fear and avoidance of a particular object or situation, such as insects, dogs or an enclosed space)
  - Social phobia or social anxiety (persistent, intense and chronic fear of being watched and judged by others and feeling embarrassed or humiliated by their actions, which often interferes with school attendance)

# Anxiety

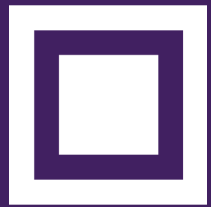
- Students might exhibit one or more of the following types of anxiety disorders (cont'd)
  - Obsessive compulsive disorder (characterized by intrusive thoughts that produce anxiety (obsessions), repetitive behaviors that are an attempt to reduce anxiety (compulsions), or a combination of both)
  - Panic disorder (characterized by unexpected and repeated episodes of intense fear accompanied by physical symptoms that may include chest pain, heart palpitations, shortness of breath, dizziness, or abdominal distress)
  - Post-traumatic stress disorder (developed following exposure to a terrifying event or ordeal in which there was the potential for—or actual occurrence of—serious physical harm)

# Depression

- Depression is one of the most common yet under-identified mental health problems of childhood and adolescence
- Depression in preadolescent children is relatively rare and is more likely to be displayed as high levels of stress, noncompliance and irritability, rather than the symptoms shown in late childhood and adolescence, which are more similar to those of adults.
- Most often, the approximate onset of depressive disorders is at about 11 to 14 years

# Depression

- Two main categories
  - Major depressive disorder (two weeks or longer)
  - Dysthymia (less severe but lasts for 2+ years)
- Students may display one or more of:
  - Irritability/mood swings
  - Physical complaints
  - Difficulty concentrating/short-term memory issues
  - Hypersensitivity
  - Lack of interest/boredom
  - Impulsivity/risky behaviors



# **Eligibility for Students with Anxiety and/or Depression**

# In General

Special education eligibility for students exhibiting anxiety and/or depression issues in school setting is most often in one of two categories: emotional disability or disturbance (“ED”) or other health impairment (“OHI”) . . .

Note: Beginning January 1, 2025, AB 2173 was signed into law and permits California local educational agencies to use the term “emotional disability” interchangeably with the term “emotional disturbance”

# Emotional Disability or Disturbance (“ED”)

IDEA and California’s special education regulations define ED as “a condition exhibiting one or more of [five] characteristics over a long period of time and to a marked degree that adversely affects a child’s educational performance”

(34 C.F.R. § 300.8(c)(4); Cal. Code Regs., tit. 5, § 3030(b)(4))

# ED: The Five Eligibility Factors

## 1. Inability to Learn That Cannot be Explained by Intellectual, Sensory or Health Factors

- Designed to rule out other possible reasons that student suspected of having ED might not be making satisfactory educational progress

## 2. Inability to Build or Maintain Satisfactory Interpersonal Relationships with Peers and Teachers

- May manifest in several ways and across settings (e.g., lack of sympathy/empathy toward others, inability to maintain friendships, excessive verbal/physical aggression, or withdrawal from social interactions)

## 3. Inappropriate Types of Behavior or Feelings Under Normal Circumstances

- Behaviors or feelings that are strange or unusual (in comparison with others in same circumstances)

# ED: The Five Eligibility Factors

## 4. General Pervasive Mood of Unhappiness or Depression

- Observable in school setting

## 5. Tendency to Develop Physical Symptoms or Fears Associated with Personal or School Problems

- Symptoms may include severe anxiety, phobias, panic attacks, headaches, stomachaches and eating disorders

**Note:** ED does not apply to children who are “socially maladjusted,” unless it is determined that they also meet one or more of five criteria above

(34 C.F.R. § 300.8(c)(4); Cal. Code Regs., tit. 5, § 3030(b)(4))

# What Is a “Long Period of Time”?

- Not defined in federal or state law
- OAH:
  - Minimum of six months following extensive and comprehensive efforts at behavioral intervention, but shorter duration may be appropriate for certain conditions, such as major depressive episode
- OSEP:
  - Generally within range from two to nine months

(Letter to Anonymous (OSEP 1989) 213 IDELR 247; Student v. Anaheim Union High School Dist. (OAH 2013) Case No. 2012031076, 113 LRP 13659)

# What Is a “to a Marked Degree”?

- Also not defined in federal or state law
- OAH:
  - Must be “pervasive and intense”
- OSEP:
  - Look to “frequency, duration and/or intensity of the behavior in comparison to the student’s peers and/or school and community norms”

(Letter to Anonymous (OSEP 1989) 213 IDELR 247; Student v. Anaheim Union High School Dist. (OAH 2013) Case No. 2012031076, 113 LRP 13659)

# What Is “Adverse Effect”?

- Decided by courts and ALJs on case-by-case basis
- “Adverse effect” has been interpreted to mean something more than minimal negative impact on educational performance and can include extracurriculars and socialization (i.e., “more than just school work”)

(Student v. Irvine Unified School Dist. (OAH 2009) Case No 2009050088, 109 LRP 63258)

# Other Health Impairment (“OHI”)

IDEA and California’s special education regulations define OHI as “having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment”

(34 C.F.R. § 300.8(c)(9); Cal. Code Regs., tit. 5, § 3030(b)(9))

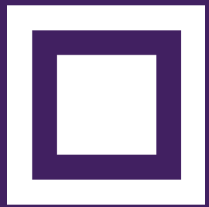
# Other Health Impairment (“OHI”)

- Must be due to chronic or acute health problems
  - “. . . such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome”
  - List is not exhaustive (anxiety, depression and other mental illnesses can meet qualification criteria)

(34 C.F.R. § 300.8(c)(9); Cal. Code Regs., tit. 5, § 3030(b)(9); Student v. Placer County Mental Health Dep’t (OAH 2010) Case No. 2010020003, 110 LRP 41039)

# Diagnosed Mental Illness and Eligibility

- Medical diagnosis (anxiety, depression post-traumatic stress disorder, etc.) is not prerequisite to finding student eligible for special education and related services under ED or OHI categories
- Nor does diagnosis automatically qualify student for special education
  - Criteria regarding emotional disorders in medical field (i.e., DSM-5) are different than educational (i.e., IDEA) criteria for ED
- But symptoms of any mental illness may trigger child find obligations



# OAH Case Examples

# Case Example #1

## Sequoia Unified School District

### Facts:

- Tenth-grade Student maintained “A” grades in all classes
- In May 2020, Parent emailed three teachers indicating Student had significant mental health issues and that Parents were considering residential facility
- In addition to contacting Student’s teachers, Parent also emailed Student’s counselor, stating that Student was suffering severely from major depressive disorder and generalized anxiety.
- Teachers excused Student from assignments but did not refer for assessment
- After returning to school for 11th-grade, Student attempted suicide and was hospitalized
- Parent placed Student at inpatient treatment facility
- District provided assessment plan in October 2020

# Case Example #1

## Sequoia Unified School District

### Decision:

- ALJ agreed with District's contention that District had no reason to suspect disability before May 2020
- But Parent's emails to teachers and counselor about Student's depression and other mental health issues in May 2020 placed District on notice that Student was exhibiting symptoms of disability covered under IDEA
- Delay in assessment referral until October 2020 violated child find obligation and denied FAPE
- Parents were "left on their own to find a placement suitable to address Student's severe mental health needs at their expense"

(Student v. Sequoia Union High School Dist. (OAH 2022) Case No. 2021110212, 122 LRP 14964)

# Case Example #2

## Los Angeles Unified School District

### Facts:

- Student participated in “gifted and talented” program, but Parents withdrew him due to anxiety issues
- Anxiety continued to increase, manifesting in school refusal and task avoidance
- District amended Section 504 plan in March 2016 in response to increased absences and inability to focus, but attendance and behavior worsened
- District found no eligibility under either ED or OHI
- Determining factor in decision was District’s determination that Student’s anxiety did not have adverse effect on educational performance

# Case Example #2

## Los Angeles Unified School District

### Decision:

- ALJ determined that Student met eligibility criteria under ED and OHI
- Section 504 plan was ineffective
- While Student received good grades, overall educational performance was affected by anxiety-related absences and behaviors
- “District is required to broadly construe a pupil’s educational needs as including his or her social, health, emotional, behavior, communicative, physical, and vocational needs, in addition to his or her academic needs”
- Student missed between 20 and 25 percent of classes primarily because of his school refusal rooted to his anxiety

(Student v. Los Angeles Unified School Dist. (OAH 2017) Case No. 2017041138, 117 LRP 47485)

# Case Example #3

## Castro Valley Unified School District

### Facts:

- Student with ADHD had superior cognitive abilities, but was disorganized and exhibited some minor maladaptive behaviors at school, while exhibiting severe behavior issues at home
- District initially found Student did not qualify as ED, OHI or SLD
- After grades plummeted during first semester of high school, Student exhibited significant anxiety and depression; IEP team found Student eligible as ED
- November 2013 IEP goals focused primarily on attendance, completing assignments and developing relationship with trusted adult
- When Student showed no improvement, IEP team reconvened in January 2014
- Added two 30-minute counseling sessions per month and counseling goal
- Parents revoked consent to IEP

# Case Example #3

## Castro Valley Unified School District

### Decision:

- ALJ ruled in favor of Parents, finding goals did not adequately address Student's socio-emotional needs rooted in anxiety
- Goals addressed how anxiety manifested itself (i.e., work completion issues), but did not specifically address anxiety itself
- Team members believed that by addressing individual manifestations of anxiety (such as work completion and organization goals), it would address underlying cause
- But evidence established that manifestations would change given situation
- To meet Student's underlying anxiety needs, goals would need to address anxiety directly; without addressing "root cause," anxiety would manifest itself in other ways

# Case Example #3

## Castro Valley Unified School District

### Decision:

- Example: District’s goal related to developing relationship with trusted adult to whom Student could go for help if he began to fall behind did not meet its intended purpose, which was to create “safety net” for Student with person with whom he felt comfortable enough to share his anxiety issues
- Goal, which designated RSP teacher as trusted adult, did not permit Student any discretion to self-select adult and included no information regarding when or how relationship would be formed and fostered
- “Therefore, this goal was not designed to meet his unique need or reasonably calculated to confer educational benefit. . . . District should have offered Student the services of meeting with an adult for a fixed frequency and duration and allowed Student to have some choice in the specific adult identified”

(Student v. Castro Valley Unified School Dist. and Castro Valley Unified School Dist. v. Student (OAH 2015) Case Nos. 2015010039 and 2015020202, 115 LRP 43179)

# Case Example #4

## Palo Alto Unified School District

### Facts:

- High school Student, diagnosed with autism and ADHD, experienced severe anxiety that frequently undermined executive functioning
- District's IEP offered numerous accommodations to address anxiety, including counseling services, stress-reduction lessons and, following ERMHS assessment, ERMHS therapy
- IEP also referred Student to Adolescent Counseling Services for emotional support; Student attended services twice and then left program
- Student also participated in the stress-reduction lessons of "YES" program, which was operated by the athletic department and taught stress reduction methods such as breathing exercises
- Parent claimed District's program failed to reduce Student's anxiety

# Case Example #4

## Palo Alto Unified School District

### Decision:

- ALJ upheld District's proposed IEP
- Anxiety stemmed primarily from home, where Student spent 40-50 hours per week on homework
- ALJ: "His anxiety was centered in the home, which limited [District's] ability to address it. The many measures [District] took to ameliorate his anxiety were not particularly successful, but that was not the fault of its educational programming."
- Fact that Parent and Student were resistant to ERMHS therapy did not undermine District's reasonableness in making it available, "nor did the fact that Student's anxiety did not significantly decrease indicate a failure in District's approach"

(Student v. Palo Alto Unified School Dist. (OAH 2018) Case No. 017110106, 118 LRP 21969)

# Case Example #5

## Grossmont Union High School District

### Facts:

- ERMHS assessment concluded that 9th-grade Student, who was diagnosed with anxiety disorder, was not benefiting from her educational program at District's charter school
- Due to her anxiety issues, Student had difficulty attending school, completing work and interacting with her teachers and peers.
- Assessment report indicated that Student required more structured setting with embedded behavior supports, crisis intervention services, safety plan and family coordination services
- District offered placement at MERIT academy, which offered high degree of social-emotional and behavioral supports, along with academic instruction in small group setting
- District's IEP offered an extensive array of accommodations, supports and related services that consisted of individual, group, and Parent counseling
- Parent disputed IEP offer, believing Student required wraparound services to assist Student in getting to school

# Case Example #5

## Grossmont Union High School District

### Decision:

- ALJ upheld District's proposed IEP as appropriate in light of Student's circumstances
- Wraparound services requested by Parent were not necessary for FAPE
- Evidence proved Student was able to get ready for school and drive to school with Parent but sometimes refused to get out of the car; no evidence was offered that IEP team, including Parent or Student's mental health services provider, discussed need for wraparound services
- Offer of behavior intervention services, absent any wraparound services, delivered through therapeutic program at MERIT would address Student's school attendance issues
- Staff at MERIT could implement all services listed in Student's IEP

(Grossmont Union High School Dist. v. Student (OAH 2022) Case No. 2021100504, 122 LRP 14960, aff'd, (S.D. Cal. 2023) 123 LRP 27633)

# Case Example #6

## Mill Valley School District

### Facts:

- While in first grade at private school, Student witnessed his friend killed while on playground
- Student was diagnosed with generalized anxiety disorder, other specified trauma and stressor related disorder due to persistent complex bereavement
- Student's behavior continued to deteriorate through sixth grade, exhibiting school refusal and extreme anxiety
- District believed that comprehensive school setting was not appropriate for Student
- Parent desired that Student continue at his private school, which did not meet state standards
- After considering Parent's concerns, IEP team offered small therapeutic placement (Compass), which offered mental health and trauma supports
- Parent claimed that District failed to consider all options on placement continuum, that it offered only one placement, and that Compass program was too restrictive

# Case Example #6

## Mill Valley School District

### Decision:

- ALJ ruled in favor of District on both claims
- District did not need to review less restrictive placements options already deemed inappropriate for Student
- No evidence supported Parent's claim that District only considered one placement option
- Compass program proposed by District was LRE for Student, as specialized therapeutic setting could assist with his severe anxiety, school refusal and other educationally related mental health needs

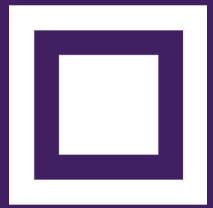
# Case Example #6

## Mill Valley School District

### Decision (cont'd):

- Two of three factors analyzed under Rachel H. test supported more restrictive placement than general education classroom
  - Student's academic progress would not have been satisfactory at comprehensive school site, even with supplementary aids and supports
  - Student's emotional dysregulation and ongoing mental health issues made it unlikely he could meaningfully engage with typical peers in comprehensive general education school environment
  - Student, however, was not disruptive, nor did he have any negative impact with teachers and peers while at comprehensive private school placements.

(Student v. Mill Valley School Dist. and Mill Valley School Dist. v. Student (OAH 2025) Case Nos. 2025020730 and 2025030785, 125 LRP 25408)



# Practical Compliance Pointers

# Child Find and Eligibility

- Actions of district with respect to whether it had knowledge of—or reason to suspect—disability and should refer student for a special education assessment, must be evaluated in light of information that district knew, or had reason to know, at relevant time.
- How districts respond when academic or behavior issue first arises is often key factor in the success or failure of a subsequent child find claim. Involve Student Study Team or other intervention personnel at first sign of problem so that interventions can be implemented, student's progress monitored, and referral made if interventions are not succeeding.

# Child Find and Eligibility

- Be on lookout for circumstances or behavior that signals the need for evaluation, even when no one has requested one. These red flags might include: dramatically declining grades; excessive absenteeism in tandem with a recent medical diagnosis; sudden withdrawal from peers in combination with declining school performance; etc.
- When making eligibility determinations, look to whether there is nexus between student's anxiety and/or depression and overall educational performance. Remember that “educational benefit” is not limited to addressing student's academic needs, but also social and emotional needs that affect academic progress, school behavior and socialization.

# Child Find and Eligibility

- How do you differentiate behaviors: (1) exclusively due to situational stress and/or social maladjustment and (2) behaviors evidencing ED? Look for the purpose of conduct—is this purposeful behavior (rebellious, deliberate), which might evidence social maladjustment? Do not, however, be single-mindedly focused on inappropriate behavior at issue.
- Remember that potential ED or OHI eligibility may change over time. Some anxiety or depression issues develop as student matures. Watch behavioral issues that continue to escalate and/or fail to respond to interventions. Reassessment for ED and/or OHI eligibility may be necessary

# Assessments

- If district is on notice that student may have a particular disorder, it must assess the student for that disorder, regardless of the subjective views of its staff members concerning the likely outcome of such an assessment.
- Remember that districts are only required to assess student in particular areas related to student's suspected disability. Neither IDEA nor California law provides parents with right to dictate specific areas that district must assess as part of its comprehensive evaluation.
- When assessing, do not forget to review past medical and psychological records. Consider requesting parent consent to exchange student's records with doctors and private therapists.

# Assessments

- Conduct interviews with parents and student: Does the student express anxiety in home setting? Are there family issues (i.e., loss of family member, relocation, student required to take a full-time job)? Knowing whether student exhibits same behavior across environments can be helpful.
- In assessment reports examining ED eligibility, clearly indicate which assessment results address each of five criteria. School psychologists should make recommendations regarding whether each criterion is met and why (or why not). Be sure to address every behavior assessed or observed and explain why it does or does not meet appropriate criterion.

# Assessments

- Consider following strategies:
  - Observations: Observations of student's functioning at school and whether anxiety and/or depression manifests itself in that setting is essential component of assessment.
  - Record Review: It is important for district to review all of student's records, including, but not limited to, the results of any previous assessments.
  - Psychosocial Interviews: Where appropriate and relevant, counseling provider, which could include a school psychologist, should conduct an interview with the student, parents and/or teachers to review student's social and emotional functioning across environments.
  - Psychological Evaluation: Consider including psychological testing, which may include standardized inventories, questionnaires and projective assessments.
  - Psychiatric Evaluation: Consider whether psychiatric evaluation is warranted based on student's individual history. Such an evaluation may be needed if student has significant medical history or if student has been taking psychiatric medications.

# Goals

- Manifestations of anxiety or depression can change depending on the situation. Therefore, to meet student's underlying needs, IEP team should draft goals that directly address condition itself.
- Remember components of well-written goals:
  - Timeframe is usually specified in number of weeks or certain date for completion
  - Conditions specify circumstances that prompt student's performance of observable behavior
  - Behavior identifies performance being monitored, and is measurable
  - Criterion identifies how much, how often, or to what standards behavior must occur in order to demonstrate that goal has been reached

# Services

- If student's depression and/or anxiety is impacting student's educational progress, IEP team must take steps to itemize those issues as areas of need in student's IEP, and it must design services to target and address those needs.
- IDEA does not require that IEP identify specific methodology that district will use for student. Methodology used to implement IEP is left to district's discretion so long as it meets student's needs and is reasonably calculated to enable student to make progress appropriate in light of circumstances.
- If district learns that student is receiving private counseling or psychiatric services, it should consider techniques to draw upon expertise and resources of private provider(s), including exploring ways in which they can serve as link between school psychologists, parents and teachers.

# Services

- Often students with anxiety and/or depression do not require substantial amount of SAI to meet their needs in classroom. But consider whether one or more of following types of related services listed in IDEA is appropriate:
  - Psychological services
  - Counseling and guidance services, including rehabilitation counseling
  - Social work services
  - Parent counseling
- New information and changed circumstances should prompt IEP teams to reexamine student's services as soon as possible. Involve all needed individuals to obtain clear understanding of whether student's current services are adequate.

# Services

- Consider if student might need “wraparound” services to provide comprehensive support in home and/or in school to address social, behavior and/or mental health needs
  - Wraparound services directly involve various relevant parties (e.g., parent, family facilitator, therapist, behavior specialist) in identification, development and implementation of intervention strategies and plans
  - Since many students with IEPs receive wraparound services, IEP teams should be aware that some services provided through wraparound plans may be beyond scope of IDEA, but could still be provided by other entities
  - Potentially, IEP-based services can be coordinated with non-IEP based services through voluntary cooperative process between all service providers

# Placement and LRE

- In many cases, student's anxiety and/or depression is triggered or exacerbated by being in school. When condition is so severe that it inhibits student from attending school, a therapeutic placement or home-hospital instruction might be appropriate. Keep in mind, however, that these placements are two of the most restrictive on continuum and should only be considered after it is determined that student cannot receive FAPE in other less restrictive placements.
- Because ultimate goal should be to reintegrate students into their home school after therapeutic placement or homebound instruction, consider including transition planning/services in IEP of students returning from such placement. Often, transitioning back to home school is, in itself, anxiety-provoking event.

# Placement and LRE

- Frequent changes in placement can result in increased anxiety. IEP teams should attempt to minimize unnecessary moves if student is making progress in student's current placement. For example, one due process ruling held that student with anxiety should not be transitioned from one private program to another as proposed by district, even though new placement was appropriate. Proposed change in placement would increase student's anxiety and result in broad regression of skills. (Wallingford Bd. of Educ. (SEA CT 2008) 51 IDELR 173)
- Remember that all placement decisions should be made based on student's IEP. In other words, the IEP goals and services drive placement.

# Take Aways . . .

- Anxiety and depression can be rooted in biology, genetics and personality and can also be complicated by environmental factors
- It is important to keep in mind that all students are unique with differing needs and coping mechanisms
- By appropriately identifying and then providing needed services to address anxiety and/or depression, special education personnel and IEP teams can be instrumental in helping student achieve positive social, emotional and educational outcomes



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