



Fagen Friedman & Fulfroost LLP



F3 Legal Update

Legislation and Legal Cases Affecting Public Education

Cases, Guidance, Legislation and Other Developments



Legal Update Overview . . .

- New OAH Decisions
- Noteworthy Decisions from Courts
- Latest Federal Guidance
- Recent Developments Affecting Special Education in California



I. New OAH Decisions



Assessments



Assessments

San Dieguito Union High School Dist.

Facts:

- Parents placed various conditions on social-emotional and mental health reassessment
- Limited access and prohibited disclosures
- District claimed conditions amounted to refusal to consent and filed for due process



Assessments

San Dieguito Union High School Dist.

Decision:

- ALJ ruled that District could reassess in accordance with its plan
- Parents' conditions restricted assessors by limiting testing instruments
- Conditions would result in partial and incomplete evaluation

(Student v. San Dieguito Union High School District and San Dieguito Union High School Dist. v. Student (OAH 2017) Case Nos. 2016101051 and 2016120475)



Assessments



Why Does This Case Matter to Us?

- Parents cannot place conditions or restrictions on assessments
- Testing instruments/procedures left to district discretion
- Conditions can = refusal to consent



Assessments

Riverside Unified School Dist.

Facts:

- Parents signed assessment plan for preschool Student on December 5, 2015
- Parent had not yet received speech/language pathologist's report (in Spanish) by April 2016
- Report provided at IEP meeting on June 3, 2016, at which team determined no eligibility
- District filed to defend assessment



Assessments

Riverside Unified School Dist.

Decision:

- Assessment found substantively appropriate
- But 156 days between time assessment plan signed and delivery of report was too long
- Delay made assessment non-compliant
- ALJ awarded speech/language IEE

(Riverside Unified School Dist. v. Student (OAH 2017) Case No. 2017020006)



Assessments



Why Does This Case Matter to Us?

- Parents entitled to IEE if district fails to demonstrate appropriateness of assessment
- Even though assessment might meet all substantive requirements, it still might not be “appropriate” if it is not timely completed



Behavior



Behavior

Lodi Unified School Dist.

Facts:

- Second-grader with autism had received individual behavior aide services since age 3
- District developed “fade” plan after Student had successful year in first grade
- Parents wanted aide to continue
- District filed to defend offer of FAPE



Behavior

Lodi Unified School Dist.

Decision:

- ALJ ruled that District's IEP offered FAPE
- Continuing intensive level of intervention would "restrict rather than support" Student
- Student was succeeding in general ed classroom, but aide prevented independence

(Student v. Lodi Unified School Dist. (OAH 2017) Case No. 2016100923)



Behavior



Why Does This Case Matter to Us?

- Districts often face resistance when attempting to reduce 1:1 intensive behavior services
- Important to discuss “fading” level of assistance as Student demonstrates increasing competence



Child Find



Child Find

Capistrano Unified School Dist.

Facts:

- District found Student eligible as TBI, SLD and OHI in 2013
- In 2014, Parent returned Student to private school outside of District boundaries
- Parent sought IEP from District in 2016
- Alleged child find violation



Child Find

Capistrano Unified School Dist.

Decision:

- ALJ ruled for Parents
- District should have made inquiries during two-year period when Student was attending private school
- Breach of general child find obligation to “search and seek” denied FAPE

(Student v. Capistrano Unified School Dist. (OAH 2017) Case No. 2016110441)



Child Find



Why Does This Case Matter to Us?

- Even if Student is attending private school within jurisdiction of another district, district of residence still has ongoing general child find obligation
- As ALJ noted, this is “especially true” when district has knowledge of student’s disability



Discipline/Manifestation Determinations



Discipline

Morgan Hill Unified School Dist.

Facts:

- Student with SLD had been suspended for 11 total days for various acts (profanity, defiance, truancy)
- Parents challenged MD finding of no relation between misconduct and disability
- Claimed District should have identified Student's depression and anxiety



Discipline

Morgan Hill Unified School Dist.

Decision:

- ALJ upheld MD team's findings
- Merely "attenuated relationship" between possible anxiety/depression and misconduct
- Neither Student's doctors nor his counselors ever diagnosed depression or anxiety
- Parents never previously expressed concerns

Student v. Morgan Hill Unified School Dist. (OAH 2017) Case No. 2017011169)



Discipline



Why Does This Case Matter to Us?

- MD teams are required to consider “all relevant information”
- But districts are not required to look for particular condition/disability if they have no reason to suspect that it exists



Discipline

Sequoia Union High School Dist.

Facts:

- 15-year-old Student with Moyamoya disease took Keppra antiseizure medication
- Student assaulted another student after dispute on social media
- Parent claimed Keppra was primary cause of outburst, but MD team found no relation between disability and misconduct



Discipline

Sequoia Union High School Dist.

Decision:

- ALJ upheld MD team's findings
- Expert testimony indicated Keppra could not contribute to Student's planned assault
- Student had been taking Keppra for four years without engaging in any similar conduct

(Student v. Sequoia Union High School Dist. (OAH 2017) Case No. 2017020648)



Discipline



Why Does This Case Matter to Us?

- ALJ stated that “effects of necessary medications should be considered part of the disability for disciplinary purposes”
- Expert medical testimony can be critical factor in determining outcome in these cases



Placement and LRE



Placement and LRE

Big Pine Unified School Dist.

Facts:

- Sixth-grader with ADHD engaged in severe disruptive behaviors up to 10 times per day
- IEP team proposed out-of-state RTC with cultural component that could provide daily mental health support
- Parents claimed general ed class was LRE



Placement and LRE

Big Pine Unified School Dist.

Decision:

- ALJ upheld District's proposed placement
- RTC could provide daily support from trained mental health professionals, along with intensive counseling and group therapy
- Student could not benefit academically or nonacademically in general ed setting

(Big Pine Unified School Dist. v. Student (OAH 2017) Case No. 2017030727)



Placement and LRE



Why Does This Case Matter to Us?

- Restrictive setting is appropriate if it is the only placement at which student can make educational progress
- Here, out-of-state RTC was LRE because nearest in-state day class program that could meet Student's needs required 8-12 hour car ride each day



Placement and LRE

Pleasant Valley School Dist.

Facts:

- District proposed moderate-to-severe SDC for Student with Fragile X
- Parents sought mild-to-moderate SDC at different school than that proposed by District
- Parents believed elementary school offered by District was unsafe because Student had injured himself there three times



Placement and LRE

Pleasant Valley School Dist.

Decision:

- ALJ ruled in District's favor
- Moderate-to-severe SDC would allow Student to participate with others at his developmental level and would help him with daily living skills
- Student's injuries were minor and accidental and could occur at any location

(Student v. Pleasant Valley School Dist. and Pleasant Valley School Dist. v. Student (OAH 2017) Case Nos. 2016110597 and 2016100473)



Placement and LRE



Why Does This Case Matter to Us?

- Districts have IDEA obligation to address safety concerns
- But “although districts must take steps to ensure student safety, they cannot guarantee that accidents will never occur”



Predetermination



Predetermination

Tehachapi Unified School Dist.

Facts:

- Parent obtained insurance approval for funding of 40-hours-per-week ABA aide
- Asked for IEP meeting to discuss permission for aide to provide services at school
- District decided prior to meeting that aide could not accompany Student at school



Predetermination

Tehachapi Unified School Dist.

Decision:

- ALJ found District's actions amounted to predetermination and denial of FAPE
- Despite history of prior disputes with Parent, District should have discussed and considered request during IEP meeting
- ALJ ordered IEP meeting and staff training

(Student v. Tehachapi Unified School Dist. (OAH 2017) Case No. 2016110289)



Predetermination



Why Does This Case Matter to Us?

- While predetermination most frequently occurs in the context of district actions at an IEP meeting, it can also occur when decisions are made outside of the IEP process without parental input



Transition Services



Transition

Bellflower Unified School Dist.

Facts:

- Postsecondary transition plan for Student with autism and ID addressed education and employment, but not adaptive living skills
- Teachers believed Student could function adequately in community
- But no observation of Student's adaptive capabilities outside of school setting



Transition

Bellflower Unified School Dist.

Decision:

- Failure to provide goals/services to enable Student to function in community denied FAPE
- Student lacked adaptive skills to pursue postsecondary employment
- District practice was not to provide services for living skills to students on diploma track

(Student v. Bellflower Unified School Dist. (OAH 2017) Case No. 2016090310)



Transition



Why Does This Case Matter to Us?

- Transition goals/services must be designed to address unique needs
- Student who performs well in school setting may still have difficulty using public transportation, communicating with others or performing daily living activities



II. Noteworthy Decisions from the Courts



IEEs

A.A. v. Goleta Union School Dist.

Facts:

- SELPA guidelines imposed \$4,500 cap on psychoeducational IEEs
- Parents asked for \$6,000 reimbursement when assessor refused to accept \$4,500
- District believed no unique circumstances existed that would justify exceeding cap



IEEs

A.A. v. Goleta Union School Dist.

Decision:

- Court upheld District's refusal to pay \$6,000
- SELPA cost criteria was reasonable
- Parents' attempt to show unique circumstances (Student's alleged history of seizures) was not credible

(A.A. v. Goleta Union School Dist. (C.D. Cal. 2017) 69 IDELR 156)



IEEs



Why Does This Case Matter to Us?

- District must weigh any unique circumstances that exist when presented with request to fund IEE that exceeds cap
- But district does not have to waive cap simply because parent wishes to use assessor who charges higher rate



Predetermination

A.V. v. Lemon Grove School Dist.

Facts:

- IEP team agreed that Student with dyslexia required NPS placement
- After discussing various options, team decided on NPS that differed from NPS preferred by Parents
- Parents claimed District gave them “take it or leave it” offer of placement



Predetermination

A.V. v. Lemon Grove School Dist.

Decision:

- Court found no evidence of predetermination
- District's offer of placement was made after meeting where other options were considered, including Parents' preference
- Subsequent meeting was convened to address Parents' concerns

(A.V. v. Lemon Grove School Dist. (S.D. Cal. 2017) 69 IDELR 155)



Predetermination



Why Does This Case Matter to Us?

- Unlike previous case where decision was made outside of IEP process, team here thoroughly discussed NPS and Parents were aware that NPS could implement IEP
- Thorough discussion and consideration of options can defeat predetermination charge



Placement

Rachel H. v. Dep't of Educ., State of Hawaii

Facts:

- District's proposed IEP for Student attending private school indicated program could be "implemented on a public school campus"
- Parent claimed IDEA violation for not identifying specific school in placement offer



Placement

Rachel H. v. Dep't of Educ., State of Hawaii

Decision:

- Ninth Circuit found no procedural violation
- Relied on USDOE guidance
- “Location” refers to type of environment that is appropriate place for provision of service

(Rachel H. v. Dep't of Educ., State of Hawaii (9th Cir. 2017) 117 LRP 36134)



Placement



Why Does This Case Matter to Us?

- Ninth Circuit cautioned that child's circumstances might demand that IEP identify specific location in order to offer FAPE
- But IDEA does not require that every IEP identify anticipated school where services will be delivered



III. Latest Federal Guidance



Postsecondary Transition

Letter to Anonymous

- Reasonable to expect that transition-age students will develop new interests and changed preferences
- IEP teams must take this into account and review/update postsecondary goals and transition services at least annually

(Letter to Anonymous (OSEP 2017) 69 IDELR 223)



Progress Reporting

Letter to Pugh

- IDEA regulations do not identify postsecondary goals as area in which districts must report progress
- But OSEP equates academic/functional goals with postsecondary goals
- Therefore, student's progress in meeting postsecondary goals must be reported

(Letter to Pugh (OSEP 2017) 69 IDELR 135)



Preschool Students

Dear Colleague Letter

- Districts must ensure eligible preschoolers receive FAPE in LRE even if they do not operate public preschool programs
- May look to other public agencies; enroll student in private preschool; locate other public preschool programs; or provide home-based services

(Dear Colleague Letter (OSEP 2017) 69 IDELR 106)



Visual Impairment

Letter to State Directors of Special Education

- Evaluation for eligibility based on visual impairment must be “thorough and rigorous”
- Assessment of student’s vision status must include nature/extent of impairment; effect on ability to learn, read, write, do math and use computers; ability to make progress in general curriculum

(Letter to State Directors of Special Education (OSEP 2017) 70 IDELR 23)



IV. Recent Developments Affecting Special Education in California



Amended IDEA Regulations

- Regulations amended to comply with ESSA
- Deleted definition of “highly qualified special education teacher”
- Updated rules regarding modified and alternate academic achievement standards
- Adopted ESSA definition of “regular high school diploma”



Revised OCR Procedures

- Memo provided internal guidance to OCR investigators
- More deference to regional offices
- Individual cases will no longer lead to automatic systemic investigations
- Investigations expanded only when allegations of systemic violations or when “warranted” by regional office



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