



Fagen Friedman & Fulfroost LLP



F3 Legal Update

Legislation and Legal Cases Affecting Public Education



Cases, Guidance and Other Developments

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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

Riverdale Joint Unified School Dist.

Facts:

- 13-year-old Student with OHI had not been assessed since 2015 and had not attended school since 2014
- Parents agreed to District's proposed triennial but only if Student was assessed at home and in their presence
- District filed to assess without Parents' consent



Assessments

Riverdale Joint Unified School Dist.

Decision:

- ALJ: District could reassess Student in accordance with its assessment plan
- Lack of current information about Student warranted reassessment
- No available medical information supported claim that Student could not attend school or that he needed to be assessed at home

(Riverdale Joint Unified School Dist. v. Student (OAH 2018) Case No. 2018030746)



Assessments



Why Does This Case Matter to Us?

- Selection of particular testing or assessment instruments is left to district's discretion
- Law does not allow parents to impose other conditions on assessments, including where those assessments must take place or that they must take place in parents' presence



Behavior Interventions



Behavior Interventions

Hermosa Beach City School Dist.

Facts:

- District placed 16-year-old Student in SDC at NPS
- Student left NPS due to fear/anxiety about attending school
- Parent later discovered NPS used physical transport holds on Student
- Alleged improper use of behavior interventions that caused emotional trauma



Behavior Interventions

Hermosa Beach City School Dist.

Decision:

- ALJ: NPS staff violated Ed Code by failing to report use of emergency interventions
- IEP team should have developed less intrusive and more effective techniques to address Student's predictable maladaptive behaviors
- But no direct evidence that emergency interventions caused Student trauma

(Student v. Hermosa Beach City School Dist. (OAH 2018) Case No. 2017060038)



Behavior Interventions



Why Does This Case Matter to Us?

- Even if NPS implements student's IEP, responsibility for compliance with applicable portions of Education Code and IDEA remains with district
- Consequently, NPS's acts and omissions were deemed to be District's acts and omissions in this case



Consent



Consent

Kern County Superintendent of Schools

Facts:

- County's IEP for RTC-placed Student offered \$5,000 monthly stipend for food, lodging and transportation, subject to receipts for expenses paid directly by Parents
- Father signed IEP, but imposed condition that payment be made in advance by first of month
- County did not agree and when it failed to make payment, Parents filed for due process



Consent

Kern County Superintendent of Schools

Decision:

- ALJ found lack of “meeting of the minds” on essential term of original IEP offer, specifically under what conditions County would pay \$5,000 monthly stipend
- Father’s unilaterally added language prevented County from fully implementing IEP, absent mutual consent to addendum

(Student v. Kern County Superintendent of Schools (OAH 2018) Case No. 2017110316)



Consent



Why Does This Case Matter to Us?

- Although IEP is technically not a “contract” for purposes of contract law enforcement, it contains many elements of a contract, including requirement for “meeting of the minds” between the parties



Discipline



Discipline

Vista Unified School Dist.

Facts:

- Student placed in group home by juvenile court
- Numerous instances of misconduct (inappropriate touching, profanity, cutting classes, fighting)
- District recommended expulsion
- Parents claimed District had basis of knowledge of disability and should have conducted MD



Discipline

Vista Unified School Dist.

Decision:

- ALJ found for District
- No evidence that any staff expressed concern about specific “pattern of behavior”
- Referral to general ed intervention program did not indicate basis of knowledge
- No indication that holder of parental rights specifically requested assessment

(Student v. Vista Unified School Dist. (OAH 2018) Case No. 2017111058)



Discipline



Why Does This Case Matter to Us?

- “Basis of knowledge” exists three ways:
 - Parent expresses concern in writing that child is in need of special education and related services
 - Parent has requested evaluation
 - Teacher or other district personnel expresses specific concerns about pattern of behavior directly to other supervisory personnel



FAPE Standard



FAPE Standard

Irvine Unified School Dist.

Facts:

- Parents disputed District's offer of FAPE for 11-year-old Student with autism and SLI
- Parents believed Student was behind her peers and that 1:1 aide was necessary to implement strategies that teacher could not
- Claimed District's offer of goals, services and interventions did not remediate Student's needs



FAPE Standard

Irvine Unified School Dist.

Decision:

- ALJ upheld District's offer of FAPE
- Testimony of private speech pathologist that Student needed "intensive remediation" was made in context of private services designed to "close the gap" and maximize progress
- Parent sought to expand FAPE obligations beyond legal requirements

(Student v. Irvine Unified School Dist. (OAH 2018) Case No. 2017100546)



FAPE Standard



Why Does This Case Matter to Us?

- ALJ commented on Antelope Valley decision: “Although remediation is a component of the IEP, . . . it is not required to overshadow student’s other educational needs or be provided in a program designed to maximize student’s progress”



IEP Team Composition



IEP Team Composition

Antioch Unified School Dist.

Facts:

- 12-year-old with SLD had been removed from gen ed in 2014 and placed in SDC, where he received services for 100 percent of his day
- Parent asked whether Student could participate in gen ed PE and recess and was told Student would need to show success with behaviors
- IEP meeting was convened without gen ed teacher or special ed teacher



IEP Team Composition

Antioch Unified School Dist.

Decision:

- ALJ found procedural violations denied FAPE
- Gen ed teacher required because Parents had inquired about participation with typical peers, which also was goal of SDC placement
- Evidence did not establish that Parents specifically asked special ed teacher be excluded or gen ed teacher was not needed

(Student v. Antioch Unified School Dist. (OAH 2018) Case No. 2017050795)



IEP Team Composition



Why Does This Case Matter to Us?

- 9th Circuit: “Without a general education teacher, [a reviewing court] has no means to determine whether the IEP team would have developed a different program after considering the [teacher’s] views . . . and a failure to include at least one general education teacher [is] a structural defect in the constitution of the IEP team” (M.L. v. Federal Way School Dist.)



Parent Participation



Parent Participation

John Swett Unified School Dist.

Facts:

- Parent and District disputed proposed placement for 11-year-old Student with ADHD and ED
- District convened IEP meeting without Parent and developed proposed IEP
- Parent refused to consent
- District filed for due process seeking order to implement IEP without parental consent



Parent Participation

John Swett Unified School Dist.

Decision:

- District's procedural violations defeated effort to show appropriateness of IEP
- No documents or records to support testimony that District attempted to contact Parent to schedule meeting
- No one called Parent on day of meeting to determine if she intended to participate

(John Swett Unified School Dist. v. Student (OAH 2018) Case No. 2018050384)



Parent Participation



Why Does This Case Matter to Us?

- OAH is increasingly requiring districts to show procedural compliance to prove that the proposed IEP offers FAPE
- Convening an IEP meeting without parent is legal only if district keeps accurate and complete records of its attempts to convince parent to attend



Placement and Least Restrictive Environment



Placement and LRE

Santa Monica-Malibu Unified School Dist.

Facts:

- District proposed NPS placement for 17-year-old transitioning from 18 months at Utah RTC
- Parents objected to placement offer because:
 - Student population was exclusively special education
 - It did not offer sufficiently rigorous academic challenges
 - It did not have resources to help Student meet her goal to complete all of class requirements she would need to attend four-year university
- Sought reimbursement for private placement



Placement and LRE

Santa Monica-Malibu Unified School Dist.

Decision:

- ALJ found NPS placement included rigorous curriculum on smaller campus to meet Student's academic potential
- Placement could provide mental health counseling and structure Student required
- District met the "more than de minimis" standard required by Andrew F.

(Student v. Santa Monica-Malibu Unified School Dist. (OAH 2018) Case No. 2017080121)



Placement and LRE



Why Does This Case Matter to Us?

- Due process decisions concerning reimbursement claims hinge on whether placement offered by district is appropriate to provide student with FAPE under Andrew F., not whether parents' selected unilateral placement might maximize student's potential



Predetermination



Predetermination

Los Angeles Unified School Dist.

Facts:

- District IEP team members and Parent disagreed about Student's primary eligibility category (autism vs. SLD)
- No resolution of issue after team discussion
- District sent Parent draft IEP prior to next meeting listing autism as primary eligibility
- Parent refused to attend meeting and claimed predetermination



Predetermination

Los Angeles Unified School Dist.

Decision:

- ALJ ruled in favor of District
- IEP team appropriately considered Parent's position and responded to Parent's attorney's arguments and questions
- "Tentative outcome" of draft IEP that did not reflect Parent's wishes was not result of any predetermination by District team members

(Student v. Los Angeles Unified School Dist. (OAH 2018) Case No. 2018030412)



Predetermination



Why Does This Case Matter to Us?

- District team members may form opinions prior to IEP meetings, provided they do not become “impermissibly and deeply wedded to a single course of action”
- Developing draft IEP that does not fully conform to parent’s wishes does not mean that district engaged in predetermination



II. Noteworthy Decisions from the Courts



Assistive Technology Assessments

E.F. v. Newport Mesa Unified School Dist.

Facts:

- Supreme Court required 9th Circuit to revisit its 2017 decision issued one day prior to Andrew F.
 - Held that District provided FAPE to kindergartner with autism despite not assessing him for high-tech assistive technology device
 - District's IEP enabled student to make "some progress" toward his speech and language goals
- 9th Circuit ordered to apply Andrew F. standard



Assistive Technology Assessments

E.F. v. Newport Mesa Unified School Dist.

Decision:

- 9th Circuit ruled that Andrew F. decision did not alter its prior ruling
- Student made progress toward his speech and language goals using non-electronic assistive technology devices
 - Evidence established that some foundational behavioral and communicative skills were necessary in order to use electronic AT devices successfully

(E.F. v. Newport Mesa Unified School Dist. (9th Cir. 2018, unpublished) 71 IDELR 161)



AT Assessments



Why Does This Case Matter to Us?

- 9th Circuit observed that Andrew F. “did not change, but simply clarified Rowley” and that its “some educational benefit” FAPE standard already “comports with Andrew’s clarification”



Eligibility

Burnett ex rel. SB v. San Mateo Foster City School Dist.

Facts:

- District was found to have procedurally violated IDEA (child find, failure to provide notice of procedural safeguards)
- Assessments determined Student was not eligible under SLD or OHI
- ALJ and District Court found no denial of FAPE
 - Also found no violation when District only provided Parents with emails that were printed and maintained in Student's physical file



Eligibility

Burnett ex rel. SB v. San Mateo Foster City School Dist.

Decision:

- 9th Circuit affirmed
- No evidence of faulty assessments
- Since Student was not eligible, no denial of FAPE could result from procedural violations
- District was not required to turn over emails that were not “maintained” in physical folder or secure electronic data base

(Burnett ex rel. SB v. San Mateo Foster City School Dist. (9th Cir. 2018, unpublished) 118 LRP 27117)



Eligibility



Why Does This Case Matter to Us?

- Procedural violation that does not result in loss of educational opportunity does not constitute denial of FAPE
- Court: “When a student is ineligible for special education there can be no loss of educational opportunities”



Hearing Impairment

S.P. v. East Whittier City School Dist.

Facts:

- 4-year-old was found eligible under speech and language disorder due to hearing loss
 - District concluded that Student did not meet eligibility requirement for hearing impairment because assessments did not indicate that permanent hearing loss “impairs her ability to process information through her hearing aids”
 - But District used IDEA definition for deafness, not for hearing impairment
- District Court found any classification error was harmless because District provided FAPE



Hearing Impairment

S.P. v. East Whittier City School Dist.

Decision:

- 9th Circuit reversed
- District considered only goals and programs that would address speech and language delay
 - Did not consider language and communication needs, opportunities for direct communications in the child's language and communication mode, academic level, and full range of needs as required by IDEA

(S.P. v. East Whittier City School Dist. (9th Cir. 2018, unpublished) 118 LRP 24041)



Hearing Impairment



Why Does This Case Matter to Us?

- Failure to find student eligible under particular IDEA disability category does not, per se, violate IDEA
- But if classification error results in failure to consider all of student's individual needs or leads to flawed IEP, it will result in denial of FAPE



III. Latest Federal Guidance



IEPs

Letter to Carroll

- OSEP provided example in which preschool child's IEP specified 1,500 minutes of specially designed instruction per week
- Parents' decision to remove child from preschool two days per week made it impossible to provide specified services
- Nonetheless, districts cannot unilaterally modify IEPs without discussion with parents

(Letter to Carroll (OSEP 2018) 118 LRP 17274)



IEP Meetings

Letter to Zirkel

- OSEP was asked whether it is permissible for teacher or other district IEP team member to enter dissenting opinion on IEP
- IDEA does not address this issue
- SEAs or LEAs may have policies and procedures regarding how or whether differences of opinion should be documented

(Letter to Zirkel (OSEP 2018) 118 LRP 17023)



Compliance Complaints

Letter to Lipsitt

- SEAs may order compensatory services to redress compliance complaint violations
- “There is nothing in the IDEA . . . that would limit an SEA’s authority in resolving a State complaint to award compensatory services, or require such an award, based on a specific set of facts and circumstances, or a particular finding of noncompliance”

(Letter to Lipsitt (OSEP 2018) 118 LRP 17281)



Special Education Services

Letter to Kane

- “Generally, a special education or related service missed due to participation in required scheduled assessments would not constitute a denial of FAPE and the [district] would not be required to make up the missed service”

(Letter to Kane (OSEP 2018) 118 LRP 17276)



IV. Recent Developments Affecting Special Education in California



Strengthening Career and Technical Education for the 21st Century Act

- 2018 federal law reauthorizing Carl D. Perkins Career and Technical Education Act
 - Requires states to develop programs to promote universal design for learning, multitiered systems of supports and positive behavioral interventions
 - Requires meaningful progress to improve the performance of all career and technical education students, including those with disabilities
 - Provides grants to improve transition from secondary to postsecondary education or employment



ASHA Discourages Use of FC and RPM

- American Speech-Language-Hearing Association (“ASHA”) issued position statement in August 2018 unanimously discouraging use of Facilitated Communication (“FC”), Rapid Prompting Method (“RPM”) and similar practices
 - ASHA states that facilitator, not the student, is actually doing the communicating
 - Encourages use of effective augmentative and alternative communication (“AAC”) systems



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