



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

Menifee Union School Dist.

Facts:

- 9-year-old Student, diagnosed as medically fragile, received all services at home
- Parent refused to consent to triennial assessment in 2017, claiming new assessments were unnecessary
- District held IEP meetings and developed IEP based on available information
- District filed for due process, seeking order allowing it to assess Student and implement IEP



Assessments

Menifee Union School Dist.

Decision:

- ALJ found for District, citing lack of recent assessment data and IEP team's difficulty sharing information given Student's circumstances
- District obtained sufficient information to construct IEP without current assessments
- IEP developed after "thorough, detailed and exhaustive process" provided Student with FAPE

(Menifee Union School Dist. v. Student (OAH 2018) Case No. 2018041172)



Assessments



Why Does This Case Matter to Us?

- IDEA does not require districts to seek to override lack of parental consent for assessment before holding IEP meetings
- Here, District carefully documented its good faith effort to obtain parental consent
- Decision to proceed with IEP, and to file for due process to override Parent's lack of consent for triennial assessment, complied with IDEA



Assessments

Campbell Union High School Dist.

Facts:

- 16-year-old Student with SLD was assessed by District after returning from private boarding school in Vermont following eighth-grade year
- Assessment found continued SLD eligibility based on severe discrepancy between intellectual ability and academic achievement
- Parent objected to assessment and asked for IEE
- District denied IEE and filed for due process



Assessments

Campbell Union High School Dist.

Decision:

- ALJ awarded publicly funded IEE, finding numerous flaws in District's assessment and assessment report
 - Failure to follow publisher's instructions
 - Use of outdated academic information
 - Failure to explain what data or scores supported its finding of special education eligibility
 - Failure to observe Student in general education setting or include classroom observations in report

(Campbell Union School Dist. v. Student (OAH 2018) Case No. 2018041172)



Assessments



Why Does This Case Matter to Us?

- Observation is essential in all assessments
- In determining whether a student is eligible under SLD category, law requires that student must be observed in his or her learning environment to document academic performance and behavior in areas of difficulty, including in general classroom setting



Child Find



Child Find

Burbank Unified School Dist.

Facts:

- Student attended school in Mexico for sixth grade, re-enrolling in District for seventh grade
- District identified Student as English learner (“EL”)
- Student struggled academically and teachers expressed concern; District did not convene Student Study Team or refer for assessment
- Parent requested assessment near end of Student’s eighth grade year, but District did not respond



Child Find

Burbank Unified School Dist.

Decision:

- ALJ found multiple child find violations
 - District's belief that Student would not qualify as SLD due to cultural factors and limited English proficiency did not excuse duty to assess after staff expressed concerns
 - District had duty to respond to Parent's request for assessment even though less than 60 days remained in school year and it was aware Student was relocating to another District
- ALJ ordered staff training on child find duties
(Student v. Burbank Unified School Dist. (OAH 2018) Case No. 2018030791)



Child Find



Why Does This Case Matter to Us?

- Threshold for suspecting that child has a disability is relatively low
- District's appropriate inquiry is whether child should be referred for assessment, not whether child actually will qualify for services
- Here, staff concerns and parental requests satisfied low threshold for referral



Independent Educational Evaluations (“IEEs”)



IEEs

Bellflower Unified School Dist.

Facts:

- Parent objected to District's triennial assessments discussed at IEP meetings during Fall 2017
- November 28, 2017: Parent requested IEEs
- December 5-7, 2017: Parent disenrolled Student from District and enrolled in another district
- December 12, 2017: District sent PWN denying IEEs
- Parent claimed District should have filed for due process to defend assessments



IEEs

Bellflower Unified School Dist.

Decision:

- ALJ ruled that District had no obligation to file for due process after Student disenrolled and moved out of District on December 5, 2017
- One week period (between November 28 and December 5) that District did not file to defend assessments did not constitute unreasonable delay
- PWN sent after Student disenrolled was “courtesy”

(Student v. Bellflower Unified School Dist. (OAH 2018) Case No. 2018070037)



IEEs



Why Does This Case Matter to Us?

- ALJ: Requiring District to file for due process to defend assessments after Student was no longer enrolled is not in accord with IDEA and would “have the unintended consequence of increasing litigation and causing unnecessary stress to a family in having to defend litigation from its former [LEA], which no longer had any legal obligation to provide a FAPE”



IEPs



IEPs

Santa Monica-Malibu Unified School Dist.

Facts:

- Elementary school Student with visual processing disorder and severe dyslexia was below grade level in reading and writing
- Parent removed Student to private school, believing District failed to close reading gap
- Parents sought reimbursement for costs of private placement, challenging District's IEPs developed during 2016 and 2017



IEPs

Santa Monica-Malibu Unified School Dist.

Decision:

- ALJ rejected reimbursement claim
- Although Student was not reading at grade level, he had made sufficient progress over two years and met many goals faster than expected
- “IDEA did not require [District] to achieve any particular outcome”
- District’s IEPs satisfied Endrew F. FAPE standard

(Student v. Santa Monica-Malibu Unified School Dist. (OAH 2018) Case No. 2018020479)



IEPs



Why Does This Case Matter to Us?

- ALJ: “A student may derive educational benefit . . . if some of his goals and objectives are not fully met, or if he makes no progress toward some of them, as long as he makes progress toward others. A student's failure to perform at grade level is not necessarily indicative of a denial of a FAPE, as long as the student is making progress commensurate with his abilities”



Least Restrictive Environment ("LRE")



LRE

Rincon Valley Union Elementary School Dist.

Facts:

- THC oil successfully controlled severe seizures experienced by 5-year-old with Dravet syndrome
- Licensed nurse administered THC at Student's private preschool
- When Student transitioned to kindergarten, District offered home placement based on concerns that possession of THC oil on public school campus and on bus violated state and federal law



LRE

Rincon Valley Union Elementary School Dist.

Decision:

- ALJ ruled that home placement was not LRE
- California law allowed possession of THC oil on campus and enforcement of federal law was an unresolved issue
- Proposed placement that effectively barred Student from District's campus and school bus was not based on educational needs
- Socialization was important factor for Student

(Student v. Rincon Valley Union Elem. School Dist. (OAH 2018) Case No. 2018050651)



LRE



Why Does This Case Matter to Us?

- Biggest impact on outcome of case likely was that needing THC oil was life-or-death issue for student
- Remember that decision is unique to its facts and that federal law still prohibits possession or administration of marijuana at school
- When medical marijuana situation arises, districts should discuss with counsel as to what steps should be taken



LRE

Chaffey Joint Union School Dist.

Facts:

- High-schooler with autism and SLI had two severe behavior incidents in Spring 2018
- Threw furniture and rocks, hit staff and eloped into busy street
- IEP team determined Student required NPS placement to address behavioral and safety issues
- Parents believed Student could remain at his high school if he were assigned a second aide



LRE

Chaffey Joint Union School Dist.

Decision:

- ALJ found District's proposed placement was LRE and ruled that District could implement IEP
- IEP team considered all four Rachel H. factors before recommending more restrictive setting
- Parents' two-aide concept was not solution to addressing Student's behaviors
- NPS offered small, structured and safe environment

(Chaffey Joint Union School Dist. v. Student (OAH 2018) Case No. 2018050543)



LRE



Why Does This Case Matter to Us?

- IEP team should document that it balanced four factors in making any determination that a more restrictive setting than gen ed is LRE for student:
 - Educational benefits of full-time placement in general ed classroom
 - Non-academic benefits of full-time placement in general ed classroom
 - Effects on teacher and children in general ed classroom
 - Cost concerns, if any



Residential Placement



Residential Placement

Santa Monica-Malibu Unified School Dist.

Facts:

- High school Student required psychiatric hospitalization on several occasions
- Diagnosed with major depressive disorder, conduct disorder, oppositional defiance disorder, ADHD, and bipolar disorder, manic episode, substance-induced mood disturbance
- Parent rejected District's offered placement at Off Campus Learning Center and sought payment for two years of RTC placements



Residential Placement

Santa Monica-Malibu Unified School Dist.

Decision:

- ALJ awarded reimbursement for RTC placements
- Rejected District's argument that Student's behaviors were merely "maladjusted" as result of drug use and adolescent conflicts at home
- District's proposed placement was unable to provide Student with academic support and mental health services she required to access her education
- RTC could offer intense therapy Student needed

(Student v. Santa Monica-Malibu Unified School Dist. (OAH 2018) Case No. 2018050306)



Residential Placement



Why Does This Case Matter to Us?

- Testimony from mental health providers can be extremely important in residential placement cases
- Here, Parent's expert witnesses convinced ALJ that Student's behaviors outside classroom significantly affected her education
- ALJ credited testimony from Student's therapist, who stated that RTC setting had "immensely helped Student academically"



Transportation



Transportation

Eastside Union School Dist.

Facts:

- Preschooler with autism, ID and SLI received home-to-school transportation to moderate-severe program per District policy
- IEP team changed placement to mild-moderate SDC and advised Parent that Student no longer qualified for transportation
- Parent believed Student could not safely walk to school and claimed it was inconvenient for her to transport Student



Transportation

Eastside Union School Dist.

Decision:

- ALJ upheld IEP team's decision
- Parent did not demonstrate that Student's disabilities created unique need for transportation
- District did not provide transportation to nondisabled preschool students and could apply that policy to Student
- Although inconvenient, Parent was able to transport Student to and from school

(Student v. Eastside Union School Dist. (OAH 2018) Case No. 2018040246)



Transportation



Why Does This Case Matter to Us?

- When student needs assistance traveling to school, inconvenience to parent in providing such assistance is not grounds for requiring district to provide transportation
- District may apply facially neutral transportation policy to student with a disability when request for deviation from policy is not based on educational needs, but on parents' convenience or preference



II. Noteworthy Decisions from the Courts



Assessments and Child Find

D.O. v. Escondido Union School Dist.

Facts:

- Therapist advised District at IEP meeting that she had diagnosed Student with autism, which was not previously suspected
 - Parent did not deliver therapist's report to IEP team
- District waited four months before beginning assessment process
- ALJ: District was justified in waiting to see what tests therapist used to avoid duplication



Assessments and Child Find

D.O. v. Escondido Union School Dist.

Decision:

- Court reversed ALJ decision
- Four-month delay was not reasonable
 - Delay was partially due to staff skepticism of diagnosis
 - Parent's failure to provide therapist's report was insufficient reason to delay assessment process
- Procedural violation amounted to denial of FAPE because autism eligibility might warrant different goals, services and/or placement

(D.O. v. Escondido Union School Dist. (S.D. Cal. 2018) 118 LRP 51059)



Assessments and Child Find



Why Does This Case Matter to Us?

- When district is on notice that student might have a disability, it has obligation to assess student, regardless of the subjective views of its staff members concerning likely outcome of such assessment



Placement

A.C. and A.B.C. v. Capistrano Unified School Dist.

Facts:

- Adoptive Parents of Student with traumatic brain injury sought reimbursement for private placement
- District believed that its proposed program would have provided FAPE to Student
- ALJ: District offered “highly structured therapeutic program that could provide the small, structured classroom environment and emotional support . . . Student required”



Placement

A.C. and A.B.C. v. Capistrano Unified School Dist.

Decision:

- Court upheld ALJ's denial of reimbursement
- District's IEP offered Student FAPE
 - Court rejected claim that IEP was "too vague," finding it adequately described anticipated frequency, location and duration of each service
 - Private placement director criticized proposed placement due to lack of social skills classes, but she was not aware that social skills were embedded in daily program

(A.C. and A.B.C. v. Capistrano Unified School Dist. (C.D. Cal. 2018) 118 LRP 45275)



Placement



Why Does This Case Matter to Us?

- If student's IEP is procedurally and substantively appropriate, as it was in this case, parents are not entitled to reimbursement, even though they might believe their private placement offers better or more extensive program for their child



Residential Placement

N.G. v. Placentia-Yorba Linda Unified School Dist.

Facts:

- In May 2016, Parents removed Student with autism and ID from NPS placement and unilaterally enrolled him at RTC in Kansas
- District offered another NPS in April 2017, but discovered that NPS did not have room for Student
- District offered yet another NPS placement in June 2017, but Parents filed for due process seeking reimbursement for RTC costs



Residential Placement

N.G. v. Placentia-Yorba Linda Unified School Dist.

Decision:

- Court upheld ALJ's decision, awarding reimbursement only for two-month period in which District offered NPS that could not accommodate Student; otherwise District's NPS provided FAPE
- Limiting reimbursement to educational expense (excluding residential and transportation fees) incurred during two-month period in which District denied FAPE was appropriate because Parents failed to show RTC was necessary to address Student's educational needs

(N.G. v. Placentia-Yorba Linda Unified School Dist. (C.D. Cal. 2018) 73 IDELR 39)



Residential Placement



Why Does This Case Matter to Us?

- 9th Circuit: Residential placement is justified only where “necessary to meet [a student’s] educational needs” rather than “a response to medical, social, or emotional problems . . . quite apart from the learning process”

(Ashland School Dist. v. R.J. (9th Cir. 2009))



III. Latest Federal Guidance



Child Find

Letter to Siegel

- No specific provisions in federal law that require LEAs to provide information about IDEA to all parents, regardless of whether their child is suspected of having a disability
- States may have public awareness requirements as part of their child find policies and procedures
 - California law obligates each SELPA to establish written child find policies and procedures for use by its LEAs

(Letter to Siegel (OSEP 2018) 72 IDELR 221)



Discipline

Letter to Mason

- OSEP does not consider use of exclusionary disciplinary measures to be disciplinary removals, so long as student is:
 - Afforded opportunity to continue to be involved in, and make progress in, general education curriculum
 - Receive instruction and services specified on IEP
 - Participate with nondisabled children to the extent he/she would have in current placement
- Use of short-term disciplinary measures, if implemented repeatedly, could constitute removal

(Letter to Mason (OSEP 2018) 72 IDELR 192)



Due Process Hearings

Letter to Fletcher

- Expedited due process hearings must be completed no later than 20th school day from when complaint is filed – even if the complaint was filed during previous school year or during summer, and due date falls during following school year

(Letter to Fletcher (OSEP 2018) 72 IDELR 275)



IEEs

Letter to Anonymous

- Independent educational evaluators may need to have access to classrooms if parents invoke their right to IEE
- OSEP opinion is consistent with California law
 - If district observed student during assessment (or if it has procedures permitting in-class observation), equivalent opportunity must be given to independent assessors (Education Code section 56329)

(Letter to Anonymous (OSEP 2018) 72 IDELR 251)



Related Services

Letter to McDowell

- IEP teams “may consider interveners as an appropriate related service for children who are deaf-blind, even though interveners are not specifically identified in the list of examples of related services in the IDEA”
- Team decides whether service not specifically listed in IDEA, such as an intervener, is required to enable student to receive FAPE

(Letter to McDowell (OSEP 2018) 72 IDELR 252)



Transfer Students

Letter to Anonymous

- If new district does not require new data to determine eligibility or to develop IEP for student transferring from another state, it may decide that, under the circumstances, evaluation is not required
- School psychologist is not solely responsible for conducting review of existing evaluation data “because this is a determination to be made by the child’s IEP team”

(Letter to Anonymous (OSEP 2018) 72 IDELR 222)



IV. Recent Developments Affecting Special Education in California



Students in Adult County Jails

- New CDE memo regarding identifying/serving adults in county jails who remain eligible for special ed
 - Students age 18-21 entitled to FAPE only if, in educational placement prior to incarceration, Student
 - Was identified as being student with disability; or
 - Had an IEP
 - SELPAs must develop policies to locate such students
 - District of residence (“DOR”) must provide services
 - DOR is district in which student’s parents resided when student turned 18, unless/until parents move to new DOR



OCR Revises Case Processing Manual

- New procedures for investigating Section 504 claims
 - Restores appeal process for complainants
 - OCR no longer able to dismiss complaints that “place unreasonable burden on OCR resources”
 - Expands Rapid Resolution Process
 - Post-closure Quality Assurance Reviews will be conducted
 - OCR will examine First Amendment rights
 - Statistical data alone are not sufficient to open investigations





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