



Fagen Friedman & Fulfroft 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
- Other Recent Developments Affecting Special Education in California
- Breaking COVID-19 Legal News



I. New OAH Decisions



Assessments



Assessments

Monterey Peninsula Unified School Dist.

Facts:

- District assessed 16-year-old Student with OHI to determine if he met criteria for SLD
- Special education teacher was designated to conduct pre-academic and academic performance assessments
- Following assessment, school psychologist's report concluded Student did not meet SLD criteria
- Parents disputed assessment results and sought IEE



Assessments

Monterey Peninsula Unified School Dist.

Decision:

- ALJ determined that school psychologist followed all appropriate procedures for her portion of assessment and in preparing assessment report
- But District failed to present evidence of academic test's validity or of special ed teacher's training and experience in conducting standardized testing
- Accordingly, reliance on teacher's test results cast doubts on assessment; ALJ awarded IEE

(Monterey Peninsula Unified School Dist. v. Student (OAH 2020) Case No. 2019120845)



Assessments



Why Does This Case Matter to Us?

- This case illustrates that, when seeking to demonstrate sufficiency of assessment at due process, districts should make sure to present evidence of test reliability and of competency of each individual selected to perform any component of assessment



Behavioral Interventions



Behavioral Interventions

Santa Monica-Malibu Unified School Dist.

Facts:

- District developed several positive behavioral support plans for 9-year-old with autism to address aggressive and self-injurious behaviors
 - Plans did not provide for holds, restraints or any aversive behavioral techniques
- During four-month period, Student's paraprofessional aide used restraints and aversive techniques on bus (physical contact, harnessing), as well as in classroom (hand sanitizer to cause pain)



Behavioral Interventions

Santa Monica-Malibu Unified School Dist.

Decision:

- ALJ: District denied Student FAPE by materially failing to implement Student's positive behavior support plans
- Aide did not follow any plan protocols and used "pain, trauma and fear to gain compliance"
- Aide also did not file required behavioral emergency reports, and, therefore, none of her actions were valid emergency interventions

(Student v. Santa Monica-Malibu Unified School Dist. (OAH 2020) Case No. 2019090404)



Behavioral Interventions



Why Does This Case Matter to Us?

- Law provides that emergency interventions must only be used to control unpredictable, spontaneous behavior that poses clear and present danger
- Emergency interventions also must not be used to substitute student's "systematic behavioral intervention plan that is designed to change, replace, modify or eliminate a targeted behavior" (Ed. Code, § 56521.1, subd. (b).)



Eligibility



Eligibility

Garvey School Dist.

Facts:

- 6-year-old was found eligible for special ed as preschooler under autism and SLI categories
- Assessments conducted prior to kindergarten concluded Student was no longer eligible
 - No longer exhibiting characteristics of autism
 - Would be successful in gen ed without S/L services
- Parents disagreed with IEP team's conclusions
- District filed for due process to exit Student



Eligibility

Garvey School Dist.

Decision:

- ALJ determined that District successfully demonstrated that Student was no longer eligible for special education
- Student met grade-level expectations and was progressing in general ed environment
- Teacher stated that Student had a “very strong ability to express himself and amazing skills to incorporate new knowledge”

(Garvey School Dist. v. Student (OAH 2020) Case No. 2019101075)



Eligibility



Why Does This Case Matter to Us?

- This case illustrates that even when it is established that student has met (or might still meet) definition of one or more disabilities under IDEA, student may be exited if IEP team finds he or she no longer requires special education and related services as a result of such disability



Least Restrictive Environment ("LRE")



LRE

Redondo Beach Unified School Dist.

Facts:

- 11-year-old with autism required very structured, small classroom due to behavioral issues
- Originally spent 75 percent of school day in SDC; IEP team proposed increasing SDC time to 80 percent, with 20 percent in general ed for recess, lunch, art, music, P.E., field trips, etc.
- Parents believed SDC was not Student's LRE
 - Believed he would make more progress in gen ed classroom with his 1:1 aide



LRE

Redondo Beach Unified School Dist.

Decision:

- ALJ upheld District's SDC placement
- Special ed coordinator testified persuasively that Student required small class size and restrictive environment
- Student could not access academic subjects in general ed curriculum, even when modified
- SDC also addressed Student's safety issues

(Student v. Redondo Beach Unified School Dist. (OAH 2020) Case No. 2019100810)



LRE



Why Does This Case Matter to Us?

- IEP teams are becoming increasingly aware of importance of documenting Rachel H. factors when making determination that proposed setting is LRE
 - Educational benefits of full-time placement in general education classroom
 - Non-academic benefits of full-time placement in general education classroom
 - Effects on teacher and children in general education
 - Cost factor (rarely used)



Manifestation Determinations



Manifestation Determinations

Fortuna Union High School Dist.

Facts:

- High-school Student with autism experienced sudden deterioration of mental state
- Attacked classmate and was subsequently placed on “5150 hold”; later allegedly sent text messages planning school shooting
- MD team concluded that Student’s conduct was not related to autism
 - Psychologist opined that his threats to students and school, and fight incident, were not related to his impairment in social interaction as identified by IEP



Manifestation Determinations

Fortuna Union High School Dist.

Decision:

- ALJ ordered FBA and Student's return to high school
- Not reasonable for MD team to narrow its analysis by defining Student's disability to only autism or to narrow manifestation of Student's autism, based only on express language of IEP
- MD review team ignored evidence that Student was experiencing abrupt decline in his mental state and that he was being medicated for depression

(Student v. Fortuna Union High School Dist. (OAH 2020) Case No. 2019120123)



Manifestation Determinations



Why Does This Case Matter to Us?

- Based on available information known to district, MD review team should consider possible existence of disabilities other than student's disability category that might have been cause of the conduct at issue
- In this case, ALJ rejected District's assertion that it was incumbent on Parents to present any such information



Residential Placement



Residential Placement

Paso Robles Joint Unified School Dist.

Facts:

- Series of traumatic events during 10th grade resulted in out-of-state RTC placement of Student with intellectual disability
- Once Student turned 18, it became difficult to locate RTC that would accept her
- District offered placement in its Adult Transition Program, requiring Student to live at home
- Student later overdosed, eloped from ATP and from group home, and became missing person



Residential Placement

Paso Robles Joint Unified School Dist.

Decision:

- ALJ concluded that Student could not be satisfactorily educated in ATP
- Rejected District's argument that mental and behavioral challenges were not educationally related
- ALJ ordered District to employ private investigator to locate Student and attempt to persuade her to return to safer surroundings
 - District also was ordered to search for RTC, to cooperate with psychiatric interventions and to provide comp ed

(Student v. Paso Robles Joint Unified School Dist. (OAH 2020) Case No. 2019120387)



Residential Placement



Why Does This Case Matter to Us?

- As this case demonstrates, ALJs have broad latitude to fashion appropriate equitable remedies for denials of FAPE
 - “Appropriate relief” means “relief designed to ensure that the student is appropriately educated within the meaning of the IDEA”
- ALJ found “practical limit” to available relief here since it was uncertain whether Student would be amenable to RTC or any other placement



II. Noteworthy Decisions from the Courts



“Clear Written Offer” of FAPE

E.M. v. Poway Unified School Dist. (S.D. Cal.)

Facts:

- IEP team recommended NPS placement for elementary school Student with autism to address his behaviors
- Team recommended two NPSs and team members provided Parents with general information regarding NPSs
 - No specifics, such as program details, class size, student-adult ratio, or venue of the offered nonpublic schools, were discussed
- Parents filed for due process based on disagreement with need for NPS placement; District also filed to defend its FAPE offer
- Issues were appealed to District Court



“Clear Written Offer” of FAPE

E.M. v. Poway Unified School Dist. (S.D. Cal.)

Decision:

- Court ruled that Parents were not prejudiced by District’s six-month delay in filing for due process to defend IEP
- But District failed to offer Student FAPE by not providing specific information about its proposed NPS placement
 - No NPS personnel or knowledgeable District staff were present at IEP team meetings
 - Team members only spoke in generalities about NPS placements
- Parents’ opportunity to participate in decision-making process was significantly impeded because they were unaware of specifics of services being offered to their child

(E.M. v. Poway Unified School Dist. (S.D. Cal. 2020) 75 IDELR 244)



“Clear Written Offer” of FAPE



Why Does This Case Matter to Us?

- Court: “The requirement of a formal, written offer creates a clear record that will do much to eliminate troublesome factual disputes many years later about when placements were offered, what placements were offered, and what additional educational assistance was offered to supplement a placement, if any”
 - Such formal requirement “has an important purpose that is not merely technical, and we therefore believe it should be enforced rigorously”



Residential Placements

G.R. v. Del Mar Union School Dist. (S.D. Cal.)

Facts:

- 12-year-old Student with autism was diagnosed with extreme anxiety, exhibiting significant behavioral issues at school
- Student was placed at therapeutic and behavioral public school, but, in April 2017, Parents asked District to assess Student for potential placement RTC
- In June 2017, District determined that placement in RTC was unnecessary and did not change Student's program
- Parents privately placed Student at various RTCs
- District's 2018 IEP again offered public school placement



Residential Placements

G.R. v. Del Mar Union School Dist. (S.D. Cal.)

Decision:

- Student was not denied FAPE in either 2017 or 2018 IEPs
- Court agreed with ALJ that Student was making progress in public school as of June 2017 IEP meeting
 - Student's behavior at home, rather than problems at school, prompted Parents' request for residential placement
- Court also concluded that, by 2018, Student's regression in academics at his RTCs belied Parents' assertion that RTC was necessary for education purposes
 - Student also regressed behaviorally, exhibiting issues at RTC that he never did while in public school

(G.R. v. Del Mar Union School Dist. (S.D. Cal. 2020) 76 IDELR 152)



Residential Placements



Why Does This Case Matter to Us?

- Reimbursement under IDEA for a residential placement depends on “whether [the child's] placement may be considered necessary for educational purposes or whether the placement is a response to medical, social, or emotional problems that is necessary quite apart from the learning process”

(Clovis Unified School Dist. v. Office of Administrative Hearings (9th Cir. 1990) 903 F.2d 635)



III. Latest Federal Guidance



USDOE, OSERS, OSEP and OCR

So far during 2020, all substantive guidance documents issued by USDOE and its OSEP, OSERS and OCR divisions have related to providing services to children with disabilities under IDEA/Section 504 during COVID-19 outbreak



USDOE, OSERS, OSEP and OCR

- Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak (USDOE 3/12/2020)
 - If educational opportunities are available to all students, special ed students must receive equal access and FAPE, to greatest extent possible
 - “Compensatory services” are discussed in the context of: students who are absent for an extended period while schools remain open; and students who do not receive services during closures.
- Fact Sheet: Addressing the Risk of COVID-19 in Schools While Protecting the Civil Rights of Students (OCR 3/16/2020)
 - If feasible, IEP/Section 504 team can be used to determine if some, or all, of identified services can be provided through alternate or additional methods
 - IEP/Section 504 teams are not required to meet in person while schools are closed; face-to-face assessment or observation should be delayed until students return to school



USDOE, OSERS, OSEP and OCR

- Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary, and Secondary Schools While Serving Children with Disabilities (OSERS/OCR 3/21/2020)
 - While it may not be feasible or safe to provide hands-on PT, OT or tactile sign language, many other services may be effectively provided online
- Questions and Answers on IDEA Part B and Part C Dispute Resolution Procedures During COVID-19 (OSEP 6/22/2020)
 - Nothing in IDEA would prevent parent and public agency from mutually agreeing to extend timeline for resolution meeting and resolution period
 - State educational agencies may extend 60-day limit for resolving a compliance complaint based on exceptional circumstances
 - Part C dispute resolution timeframes may also be extended by mutual agreement, or parties can use conference calls or video conferencing



USDOE, OSERS, OSEP and OCR

- Questions and Answers on Implementing IDEA Part B and Part C Procedural Safeguards During COVID-19 (OSEP 6/30/2020)
 - Public agency may accept electronic or digital signature to indicate parental consent, so long as agency ensures there are appropriate safeguards in place to protect integrity of process
 - Parents and public agencies may identify a mutually agreeable timeframe and method to provide access to education records
 - It would be appropriate to consider factors such as the closure of public and school buildings and facilities, social distancing, and other health-related orders during the pandemic in determining what constitutes a reasonable time for issuing PWN under Part B

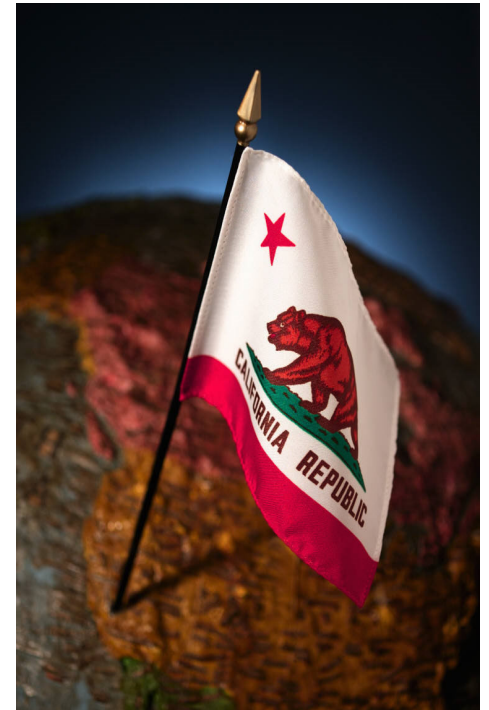


USDOE, OSERS, OSEP and OCR

- Questions and Answers on Part C Evaluation Timelines During COVID-19 (OSEP 7/6/2020)
 - Lead agencies and early intervention services providers may delay assessment, screening or IFSP meeting beyond the 45-day Part C deadline when necessary
 - Interim IFSP may be implemented for child before completing assessment, if child needs services
 - In some cases, when in-person assessment is not possible, agencies and providers may be able to use medical records to establish Part C eligibility



IV. Other Recent Developments Affecting Special Education in California



State Revamps Uniform Complaint Procedures

- Special education compliance complaints are no longer part of UCP regulations; moved to separate section of special ed regulations
- With a few exceptions, compliance complaint rules now mirror IDEA requirements
- New provisions regarding:
 - Investigation of complaints concerning settlement agreements
 - Investigation of complaints alleging failure to implement due process decisions
 - Reconsideration timelines and grounds for reconsideration

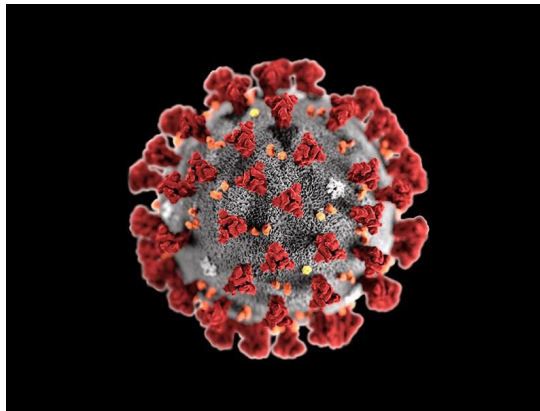


USDOE Issues New Title IX Regs

- Title IX is federal civil rights law that prohibits discrimination on the basis of sex in education programs or activities that receive federal funding
- New provisions include:
 - Revised definition of sexual harassment
 - Permit emergency removals of alleged harasser
 - Does not impact IDEA or Section 504 disciplinary protections
 - Updated/expanded duties of Title IX coordinator
 - Revamped grievance process and procedural requirements
 - Expanded training obligations



V. Breaking COVID-19 Legal News



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And thank you for all you do for
students!!





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