



Fagen Friedman & Fulfroft LLP



F3 Legal Update

Legislation and Legal Cases Affecting Public Education

Cases, Guidance and Other Developments



Legal Update Overview . . .

- New OAH Decisions
- Noteworthy Decisions from Courts
- Latest Federal Guidance
- Breaking COVID-19 Legal News



I. New OAH Decisions



Assessments



Assessments

Westminster School District

Facts:

- District's reassessment of kindergartner with SLI included FBA conducted by school psychologist
- FBA concluded that Student did not require BIP
- Parent sought IEEs, disagreeing with FBA and several other components of triennial reassessment
- In June 2020, Parent obtained independent FBA from Student's in-home ABA provider, which did not include observations at school due to COVID



Assessments

Westminster School District

Decision:

- ALJ determined that school psychologist's testimony and her FBA conclusions were more persuasive than independent assessor's, noting particularly that FBA was completed in school environment
- Independent assessment was completed after Student had been in distance learning for 2½ months and occurred solely in home setting
- ALJ upheld all other aspects of reassessment and denied publicly funded IEE

(Westminster School Dist. v. Student (OAH 2020) Case No. 2020040212)



Assessments



Why Does This Case Matter to Us?

- ALJs are more likely to uphold assessments by credentialed staff who will conduct thorough assessments and will be able to give persuasive testimony at hearing
- Note: Recently, 2d Circuit held that FBA is not an “evaluation” that triggers parent’s right to publicly funded IEE (D.S. v. Trumbull Bd. of Educ.)
 - Decisions from other circuits may be influential, but they are not binding authority on California districts



Child Find/ Prior Written Notice



Child Find/PWN

San Juan Unified School District

Facts:

- 15-year-old enrolled in Visions charter school within District in February 2020
- Student had previously been exited from special ed (SLD) in 2017 by another district
- Shortly after Student enrolled in Visions, Parent requested special ed support and offered to share previous assessment reports
- Visions sent PWN declining to assess Student, noting his academic success



Child Find/PWN

San Juan Unified School District

Decision:

- ALJ: Parent's request triggered District's child find duty to assess Student
 - Threshold for suspecting disability is "relatively low"
- PWN was legally deficient because it failed to describe each assessment or record used as basis for decision not to assess
 - Parent was unable to determine that one of Student's previous independent assessments was not part of records

(Student v. San Juan Unif. School Dist. and Visions in Education Charter School (OAH 2020) Case No. 2020050817)



Child Find/PWN



Why Does This Case Matter to Us?

- Either parent's suspicion or district's suspicion may trigger need for initial assessment to determine if student qualifies for special education
- Court: "The informed suspicions of parents, who may have consulted with outside experts, should trigger the statutory protections"
- PWNs must comply with statutory requirements



Consent



Consent

Upland Unified School District

Facts:

- Parent of 23-year-old with ID had lengthy history of disagreements with District
- Student had not attended District since kindergarten; homeschooled in program created by Parent
- District provided assessment plan in September 2016 for triennial assessment due in June 2017
 - Parent refused to consent and imposed various conditions on assessments
 - Parties continued at impasse through 2019



Consent

Upland Unified School District

Decision:

- ALJ: Because District did not have authority to proceed with assessments it was legally required to conduct by June 30, 2017, Student was no longer eligible for special education and related services
- District no longer had duty to offer or provide Student FAPE during 2017-2018 or thereafter, to convene IEP team meetings, or otherwise afford Student with IDEA rights

(Student v. Upland Unif. School Dist. and Upland Unif. School Dist. v. Student (OAH 2020) Case Nos. 2019080542, 2020040245 and 2020010465)



Consent



Why Does This Case Matter to Us?

- Courts have held that student whose parent does not consent to comprehensive reassessment at least once every three years loses eligibility for special education and related services upon expiration of last triennial assessment
- Courts and ALJs also have held that parent who insists on placing conditions on assessments may be regarded as having refused consent



Extended School Year



ESY

Los Angeles Unified School District

Facts:

- District and Parents agreed that 10-year-old Student with Down syndrome required ESY services
 - District did not operate general ed summer classes and offered Student placement in moderate-to-severe SDC due to Student's need for alternate curriculum
- Parent's claimed District should have offered placement in general ed during ESY
 - Alternatively, Parent claimed District's mild-to-moderate ESY class was less restrictive than moderate-to-severe ESY class



ESY

Los Angeles Unified School District

Decision:

- ALJ denied Parent's claims
 - California law relieves district of obligation to place inclusion student in general ed program if district does not offer regular summer classes
 - LRE provision does not differentiate between mild/moderate and moderate/severe SDC placements; no distinction in restrictiveness of the two SDCs
- Parent also failed to prove predetermination claim

(Student v. Los Angeles Unif. School Dist. (OAH 2020) Case No: 2019080679)



ESY



Why Does This Case Matter to Us?

- USDOE has frequently stated that continuum of alternative placements, including regular classes, does not to apply to summer programs
 - “Because ESY services are provided during a period of time when the full continuum of alternative placements is not normally available for any students, the Department does not require States to ensure that a full continuum of placements is available solely for the purpose of providing ESY services” (Letter to Myers (OSEP 1989))



Independent Educational Evaluations (“IEEs”)



IEEs

Alameda Unified School District

Facts:

- District's assessment of 8-year-old resulted in IEP team's conclusion that she was not eligible for special education
- Parents sought IEE to be conducted by licensed clinical psychologist
- SELPA's criteria required psychoeducational evaluators be either credentialed school psychologists or licensed educational psychologists
- District rejected IEE request; filed for due process



IEEs

Alameda Unified School District

Decision:

- ALJ found for District
- District's (SELPA's) qualification criteria was appropriate
 - School/educational psychologist were qualified personnel
- Policy did not limit Parents' ability to obtain IEE
 - Numerous assessors were available
- Parents did not demonstrate unique circumstances justifying use of clinical psychologist

(Alameda Unif. School Dist. v. Student (OAH 2020) Case No: 2020080399)



IEEs



Why Does This Case Matter to Us?

- State and federal law do not require that independent psychoeducational evaluations be conducted by “the most well trained, most highly educated or most experienced psychologists”
- Law merely requires that, for an evaluation at public expense, criteria for qualifications of examiner be same as criteria that district uses when it initiates an assessment



IEP Implementation



IEP Implementation

Long Beach Unified School District

Facts:

- District's IEP for high school Student with ID offered 5 hours of daily SAI
 - Due to COVID closure, District did not deliver any services from 3/16/20 to 3/22/20
 - District did not provide any direct services to Student from 3/23/20 to 4/9/20
 - After spring break (4/23/20) until Parents filed due process complaint (4/28/20), Student received 4 hours of daily blended instruction



IEP Implementation

Long Beach Unified School District

Decision:

- ALJ: Alternate delivery model was appropriate
- But District denied FAPE by not providing any services to Student from 3/16/20 to 4/9/20, and from 4/20/20 to 4/22/20
 - District remained responsible for materially implementing IEPs despite school closure, even if by alternate methods such as distance learning
- 4 hours of daily blended instruction from 4/23/20 to 4/28/20 (80 percent of October 2019 IEP) was also material implementation failure

(Student v. Long Beach Unified School Dist. (OAH 2020) Case No. 2019100147)



IEP Implementation



Why Does This Case Matter to Us?

- Per 9th Circuit's Van Duyn decision, only "material failure" to implement IEP violates IDEA
 - Material failure occurs when there is more than "a minor discrepancy" between services school provides and services required by student's IEP
- Districts should strive to implement IEPs as faithfully as possible during distance learning since that have no control over whether ALJ will deem any pandemic-related implementation failure to be "material"



Mental Health Assessments and Services



ERMHS

Grossmont Union High School District

Facts:

- 11th-grader experienced trauma, neglect, and physical and sexual abuse as adolescent
- District conducted multidisciplinary assessment
- Subsequently conducted ERMHS assessment based on Guardians' concerns about Student's mental health
- Student found eligible under OHI category for her ADHD, but IEP team determined she did not require ERMHS



ERMHS

Grossmont Union High School District

Decision:

- ALJ found ERMHS assessment was “fatally flawed”
 - No observation, interviews or input from Guardians, Student or teachers
 - No inquiry was made about Student’s private therapy or medical records
- But Guardians failed to prove Student needed ERMHS
 - Independent assessor acknowledged that Student’s mental health had improved during time she received counseling services from District

(Student v. Grossmont Union High School Dist. (OAH 2020) Case No. 2020030548)



ERMHS



Why Does This Case Matter to Us?

- Failure to conduct and document observations will almost always result in flawed assessment
- Here, it was inappropriate for ERMHS assessor to rely upon observations of Student from District's multidisciplinary assessment because there was no evidence that those observers looked for issues related to whether Student should be receiving ERMHS and no observations were in the report



II. Noteworthy Decisions from the Courts



Placement/LRE

E.B. v. Baldwin Park Unified School District (C.D. Cal.)

Facts:

- District's IEP team members believed elementary school Student with Down syndrome required moderate/severe SDC placement
- Teacher believed she could not meet Student's academic, social or behavior needs in current mild/moderate SDC placement and opined that Student was performing significantly below other students
- Parents wanted Student to remain in current SDC
- District sought to implement IEP over Parents' refusal to consent



Placement/LRE

E.B. v. Baldwin Park Unified School District (C.D. Cal.)

Decision:

- Court upheld ALJ's decision in District's favor
- Applied Rachel H. factors in determining that moderate/severe SDC was appropriate placement for Student
- Student received only minimal educational and nonacademic benefits from mild/moderate SDC
 - Not able to participate in classroom activities and did not interact
- Student required significant amount of teacher's time, resulting in negative impact on other students

(E.B. v. Baldwin Park Unified School Dist. (C.D. Cal. 2020) 77 IDELR 164)



Placement/LRE



Why Does This Case Matter to Us?

- While some decisions have held that there is no distinction on LRE continuum between a mild-to-moderate and moderate-to-severe SDC placement, this court clearly viewed the latter as being more restrictive
- District prevailed largely because IEP team understood and applied Rachel H. factors to Student's circumstances when making its determination that he required moderate-to-severe setting to obtain educational benefit



Transition Plans

Capistrano Unified School District v. S.W. (C.D. Cal.)

Facts:

- Student with autism and metabolic disorder attended District charter school, which was scheduled to relocate
- IEP team reviewed Student's transition to first grade, and Parents' concerns over Student's adaptation to new campus
- District did not address these concerns or develop transition plan for Student to address move to new location
- ALJ: IEP team had evidence that Student did not do well with transitions and denied FAPE by not providing additional assistance (1:1 aide and transition plan)



Transition Plans

Capistrano Unified School District v. S.W. (C.D. Cal.)

Decision:

- Court upheld ALJ's findings and reimbursement award
- District "simply ignored" Parents' requests despite knowing at IEP meetings that Parents were concerned about move to another campus
- IEP team was aware from parental input and information collected from teacher, education specialist, and autism specialist that Student had difficulties with most forms of transitions, regardless of whether from place-to-place or lesson-to-lesson

(Capistrano Unified School Dist. v. S.W. (C.D. Cal. 2020) 77 IDELR 137)



Transition Plans



Why Does This Case Matter to Us?

- This case is reminder that district members of IEP teams cannot disregard information about program changes that might affect student's learning
- In order to provide FAPE, student's unique needs might require transition plan (or services) to address transition difficulties in his or her IEP, even in absence of specific statute or regulation imposing affirmative legal duty to create such plan



III. Latest Federal Guidance



USDOE, OSERS, OSEP and OCR

- Mediation—Letter to Anonymous (OSEP 2020) 77 IDELR 50
 - Parties to IDEA mediation process cannot required to sign confidentiality pledge or agreement prior to, or as precondition to, commencement of mediation
 - IDEA already contains statutory requirement that discussions occurring during mediation must remain confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding



USDOE, OSERS, OSEP and OCR

- Postsecondary Transition—Letter to Vocational Rehabilitation and Special Education Partners (OSERS 2020) 77 IDELR 75)
 - Recognizing COVID-19 has resulted in students accessing education services differently, OSERS encouraged SEAs, LEAs, schools, and Vocational Rehabilitation (“VR”) agencies to use flexibility afforded under IDEA and Rehabilitation Act “to engage in innovative strategies, involving students and youth with disabilities and their families in the transition and pre-employment transition processes as early as possible”



USDOE, OSERS, OSEP and OCR

- Provision of Services (IDEA Part B)—COVID-19 Questions & Answers: Implementation of IDEA Part B Provision of Services (OSEP 2020) 77 IDELR 138)
 - IEP teams should consider variety of instructional methods and settings to continue to provide FAPE
 - Students must have “the chance to meet challenging objectives”
 - Consider providing ESY services during normal school year, during school breaks or vacations where appropriate
 - States have flexibility to extend evaluation timelines
 - Use alternative means of participation when COVID-19 prevents in-person IEP team meetings
 - Investigate all appropriate assessment instruments and tools to determine if some can be administered or completed remotely during the pandemic, provided that evaluation is based on personal observation (whether in person or through videoconferencing)



USDOE, OSERS, OSEP and OCR

- Provision of Services (IDEA Part C)—Questions & Answers on Implementing of IDEA Part C During COVID-19 (OSEP 2020) 77 IDELR 191
 - USDOE extending flexibility to conduct initial and annual IFSP meetings through alternate means, such as through telephone or video conference call (if feasible and consistent with privacy standards) if acceptable to parents and other IFSP team meeting participants
 - Given that in-person meetings may not be feasible or advisable due to COVID-19, pandemic can constitute the basis for “exceptional family circumstances” to extend 45-day timeline for conducting assessments and holding initial IFSP meeting
 - If lead agency or EIS provider cannot provide services in accordance with IFSP, then IFSP team, including parents, must determine which services can be provided to meet child’s needs, and consider other services or alternate means of service delivery, if feasible

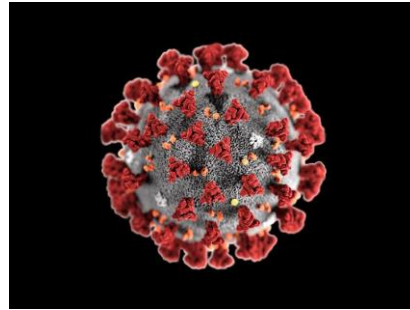


USDOE, OSERS, OSEP and OCR

- Proposed guidance: Serving Children with Disabilities Placed by Their Parents in Private School (OSERS 12/21/2020)
 - Supersedes 2011 guidance
 - New and updated topics
 - Equitable Services Providers
 - Preschool Children with Disabilities
 - Children Who Reside Out-of-State or Whose Parents Live in Other Countries
 - State-funded School Voucher and Scholarship Programs
 - Extended Public School Closures
 - Public comment period ended in January; expected final guidance in spring 2021



IV. Breaking COVID-19 Legal News



Thank you for attending!
And thank you for all you do for
students!!





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