F3 Law Spring 2021
Special Education Symposium

Fagen Friedman & Fulfrost LLP

Fagen Friedman & Fulfrost LLP

Nine from the 9th

Key 9th Circuit Decisions
And Their Practical Significance
For Special Educators

f3law.com

What We'll Examine Today . . .

- Background – Overview of Circuit Court system
- "Nine from the 9th"
  - N.B. and C.B v. Hellgate Elem. School Dist.
  - Parents of Student W. v. Puyallup School Dist.
  - Van Duyn v. Baker School Dist.
  - Adams v. State of Oregon
  - Gregory K. v. Longview School Dist.
  - M.L. v. Federal Way School Dist.
  - R.B. v. Napa Valley Unified School Dist.
  - Union School Dist. v. Smith

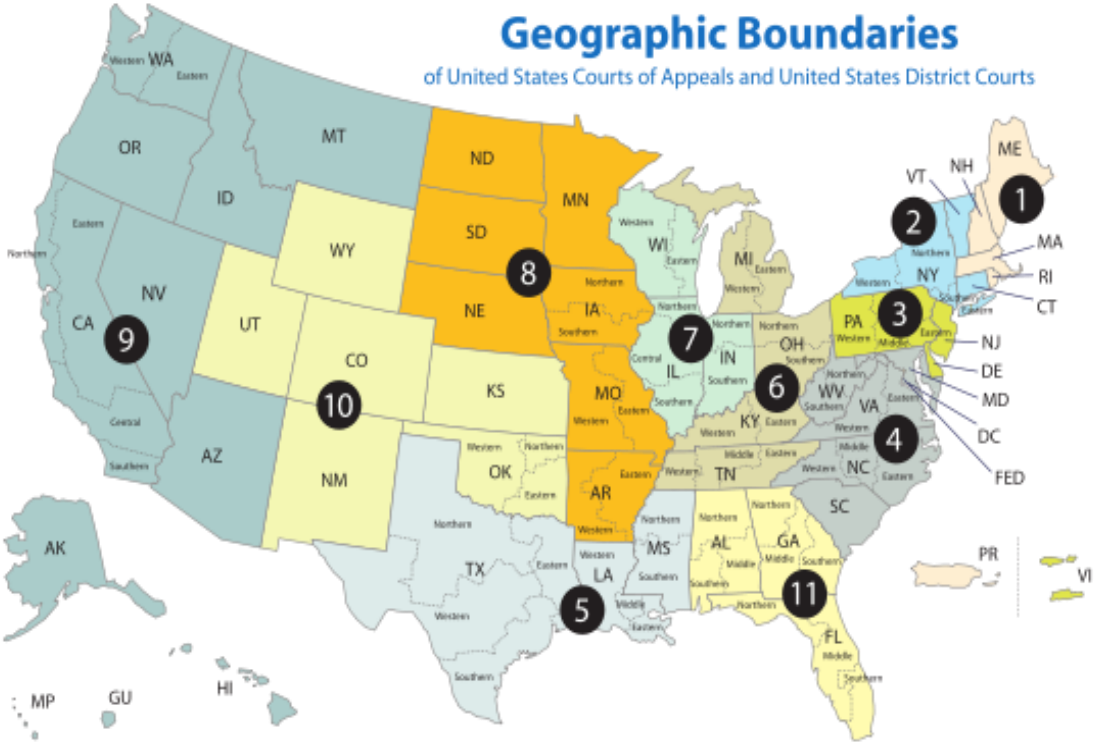
I. Background

U.S. Circuit Court System

- 94 federal judicial districts organized into 12 regional circuits, each of which has court of appeals containing multiple judges
  - Number of judges range from 6 in 1st Circuit to 29 in 9th
  - Federal Circuit Court of Appeals has nationwide jurisdiction over very specific issues such as patents
- Circuit court's task is to determine whether law was applied correctly in trial (i.e., district) court
  - Panel of three judges decide cases
  - No jury
  - Occasionally, all judges in circuit will decide case "en banc"

The 9th Circuit

Alaska
Arizona
California
Hawaii
Idaho
Montana
Nevada
Oregon
Washington
Guam
Northern Marianas



How Special Education Cases Reach the 9th Circuit

- Due process complaint
- If no settlement, hearing before administrative law judge or impartial hearing officer
- Appeal to federal district court
  - Must exhaust administrative remedies before bringing suit for claims involving FAPE
- Appeal to 9th Circuit

II. Nine from the 9th

Case #1: Assessments – N.B. and C.B v. Hellgate Elem. School Dist.

Overview

- Districts have affirmative IDEA obligation to assess when there is reason to suspect that, because of a disability, student needs special education and related services
- Hellgate instructs that even if parents have ability to obtain private assessment, district still bears ultimate responsibility of assessing student in all areas of suspected disability

N.B. and C.B v. Hellgate Elem. School Dist.

Facts

- Parent disclosed preschool Student's medical diagnosis of autism at September 2003 IEP meeting
- District developed diagnostic IEP and reconvened team meeting in November 2003, at which Parents suggested Student might have autism
- District recommended that Parents obtain general evaluation from child development center ("CDC")
- CDC report indicated autism
- IEP team increased preschool instructional time

N.B. and C.B v. Hellgate Elem. School Dist.

Facts (cont'd)

- IEP team reconvened to develop Student's IEP for 2004-05 school year and to determine possible need for ESY services
  - District IEP team members concluded that Student did not require ESY
- Parents refused to consent to proposed IEP and did not enroll Student in District for 2004-2005
- Hearing officer and district court denied Parents' claims for relief

N.B. and C.B v. Hellgate Elem. School Dist.

Ruling

- 9th Circuit vacated district court's decision in District's favor
- District failed to meet its obligation to evaluate Student in all areas of suspected disabilities after becoming aware of independent diagnosis in September 2003
  - At that point, District's IEP team members were on notice that Student likely had some form of autism

N.B. and C.B v. Hellgate Elem. School Dist.

Ruling (cont'd)

- District also did not fulfill its IDEA obligations by merely referring Parents to the CDC for assessment
  - "Such an action does not 'ensure that the child is assessed,' as required by [the IDEA]"
  - "A school district cannot abdicate its affirmative duties under the IDEA"
  - Procedural violation amounted to denial of FAPE because, without evaluative information that Student had autism, it was not possible for IEP team to develop program reasonably calculated to provide FAPE

(N.B. and C.B v. Hellgate Elem. School Dist. (9th Cir. 2008) 541 F.3d 1202)

N.B. and C.B v. Hellgate Elem. School Dist.

Practical Importance for Special Educators

- Review any medical report provided by parents and discuss need for multidisciplinary assessment
  - Medical report should be considered carefully, but it does not dictate outcome of student's eligibility
- Do not rely solely on informal observations of student to rule out disability if parents and other professionals have concerns (Timothy O.)
- Remember that complete assessment information is foundation for "connect the dots" approach

Case #2: Compensatory Education – Parents of Student W. v. Puyallup School Dist.

Overview

- Compensatory education has gained more relevance with prospect of numerous claims arising from provision of distance learning during COVID-19
- Under "totality of circumstances" analysis employed by 9th Circuit in Puyallup, student is entitled to only so much compensatory education time as is required to provide him or her with an appropriate education

Parents of Student W. v. Puyallup School Dist.

Facts

- Student was "learning disabled in math" and received special education math instruction, as well as behavior services
- Parents moved out of District and moved back several times, resulting in Student receiving no services during eighth and ninth grades
- Student, who was frequently suspended, was subsequently reassessed; District recommended self-contained classroom and counseling

Parents of Student W. v. Puyallup School Dist.

Facts (cont'd)

- Parents objected to District's proposal
  - Declined District's offer of summer school and tutoring
- ALJ dismissed due process claim based upon understanding that District would develop new IEP for upcoming school year
- Parents sued in district court, seeking injunction prohibiting imposition of suspension guidelines; also asked for award of 1½ years of comp ed
- District court rejected Parents' claims

Parents of Student W. v. Puyallup School Dist.

Ruling

- 9th Circuit affirmed, ruling that Student was not entitled to compensatory education award
- Court acknowledged that Student unquestionably lost time during eighth and ninth grade when he was not receiving special education services
- But Student ultimately was able to graduate with his class and performed at grade level (except for math)
  - Parents had declined offer of additional tutoring and summer services

Parents of Student W. v. Puyallup School Dist.

Ruling (cont'd)

- No showing that award of compensatory education was appropriate given those circumstances
  - Conduct of Parents could also be considered
- Courts have no obligation to provide day-for-day compensation for time missed
- "Compensatory education is not a contractual remedy, but an equitable remedy, part of the court's resources in crafting 'appropriate relief'"

(Parents of Student W. v. Puyallup School District, No. 3 (9th Cir. 1994) 31 F.3d 1489)

Parents of Student W. v. Puyallup School Dist.

Practical Importance for Special Educators

- "Totality of circumstances" analysis set forth in Puyallup might be crucial in determining success or failure of compensatory education claims as result of missed instructional time during COVID-19
- Keep in mind that term "compensatory education" carries with it an assumption that district is at fault
  - Consider using "learning recovery," "recovery services" or other alternatives to refer to any additional services students might receive upon return to in-person learning

Case #3: IEP Implementation – Van Duyn v. Baker School Dist. 5J

Overview

- One of IDEA's most important obligations imposed on districts is formulation and implementation of IEPs
- Prior to Van Duyn decision, 9th Circuit had not used Rowley FAPE analysis to consider challenges to implementation—as opposed to content—of IEPs
- Van Duyn analysis is currently being applied by OAH to COVID-19 cases

Van Duyn v. Baker School Dist. 5J

Facts

- District developed IEP for 13-year-old Student with autism that provided:
  - 8-10 hours per week of math instruction
  - Behavior management plan modeled after plan used at Student's elementary school
- Significant shortfall in number of hours of weekly math instruction
  - District subsequently took corrective action per ALJ order
- Several elements of BMP were not implemented in same manner as in elementary school

Van Duyn v. Baker School Dist. 5J

Ruling

- 9th Circuit concluded that District did not deny FAPE by failing to implement certain provisions in Student's IEP
- Although initial five-hour per week shortfall in math instruction was material implementation failure, District took corrective actions to ensure Student received required hours
- Student was not harmed by District's minor deviations in implementing BMP

Van Duyn v. Baker School Dist. 5J

Ruling (cont'd)

- 9th Circuit quote:
  - "A material failure to implement an IEP occurs when the services a school provides to a disabled child fall significantly short of the services required by the child's IEP. Applying that standard here, the services [District] provided did not fall significantly short of what was required by the IEP (. . . with the exception of the math instruction provided prior to the ALJ's order)."

(Van Duyn v. Baker School District 5J (9th Cir. 2007) 481 F.3d 770)

Van Duyn v. Baker School Dist. 5J

Practical Importance for Special Educators

- Communicate with appropriate personnel frequently to remind them of their specific implementation responsibilities per IEP
- Hold staff meeting one to two weeks after IEP is developed so that team members can report what is or is not being properly implemented
- Stay in touch with parents
- Inform staff of potential consequences of IEP implementation failures

Case #4: IEP Review – Adams v. State of Oregon

Overview

- Quote from Adams decision (borrowed from 3d Circuit in Fuhrmann v. East Hanover Board of Education) has become one of most frequently cited pronouncements made by 9th Circuit:
  - "Actions of the school systems cannot . . . be judged exclusively in hindsight. . . . [A]n individualized education program ("IEP") is a snapshot, not a retrospective"

Adams v. State of Oregon

Facts

- Parents believed preschool Student would benefit from their proposed 40 hours per week of 1:1 ABA
- District's IFSP offered 12.5 hours of home behavior services, along with speech therapy and consultation
- Parents grew dissatisfied with IFSP services, and again asked for 40 hours of ABA per week
- Obtained private tutoring after District refused
- Hearing officer and district court found for District

Adams v. State of Oregon

Ruling

- 9th Circuit affirmed
- IFSP was appropriately developed based on information available at time it was created by District's multidisciplinary team, which considered information obtained from Parents
- District properly considered age of Student and his tolerance for full-day program at that time
- IFSP's goals and goal-achieving methods were reasonably calculated to provide FAPE

Adams v. State of Oregon

Ruling (cont'd)

- Court acknowledged that Lovaas program Parents desired was "excellent"
  - "Nevertheless, there are many available programs which effectively help develop [children with autism]"
- Note: Court ruled that District's subsequent IFSP, which reduced services during summer to accommodate staff's vacation plans, was not based on Student's unique needs

(Adams v. State of Oregon (9th Cir. 1999) 195 F.3d 1141)

Adams v. State of Oregon

Practical Importance for Special Educators

- "Snapshot" rule established by Adams provides assurance to IEP teams that goals, services and placement decisions will not be evaluated in hindsight
- Nonetheless, it is important to remember that purpose of reporting on goal progress throughout year is to ensure teams do not wait until annual meeting to evaluate whether IEP is working

Case #5: IEP Services/Placement Decisions – Gregory K. v. Longview School Dist.

Overview

- Two principles outlined in Gregory K. are among most frequently cited pronouncements by 9th Circuit on special education law:
  - In resolving question of whether district has offered FAPE, focus is on adequacy of district's proposed program, not parent's preferred program
  - Parents must permit district assessment if they choose to avail themselves of special education for their child

Gregory K. v. Longview School Dist.

Facts

- District developed IEP for Student that placed him in "educable handicapped classroom," a program for students with mild intellectual disabilities
- After reassessment, District recommended continuing placement
- Parents withdrew Student and placed him in general education classes at private school
- Parents re-enrolled Student in District, which recommended special education services
  - Parents disagreed and obtained private tutoring

Gregory K. v. Longview School Dist.

Facts (cont'd)

- Hearing officer ruled that four periods of general education classes and two hours of special education classes per day as proposed by District was appropriate for Student
- District court reversed, finding District's placement was inappropriate
  - Ordered District to reimburse Parents for privately funded tutoring
  - Also denied District's post-trial motion to compel assessment of Student

Gregory K. v. Longview School Dist.

Ruling

- 9th Circuit reversed all components of lower court's decision
  - Placement satisfied LRE mandate, and included classes in which Student could develop intellectual skills
  - "Even if the tutoring were better for [Student] than the District's proposed placement, that would not necessarily mean that the placement was inappropriate"
  - "An appropriate' public education does not mean the absolutely best or 'potential-maximizing' education for the individual child"

Gregory K. v. Longview School Dist.

Ruling (cont'd)

- Regarding District's motion to compel assessment, 9th Circuit ruled that:
  - If Parents wanted Student to receive special education from District, they would be obligated to permit such reassessment
  - But if Parents wished to maintain Student in his current private tutoring program without availing themselves of District's services, District could not require reassessment

(Gregory K. v. Longview School Dist. (9th Cir. 1987) 811 F.2d 1307)

Gregory K. v. Longview School Dist.

Practical Importance for Special Educators

- Terminology can be important in explaining to parents about district's FAPE obligation
  - Avoid using words such as "best" or "maximize" when discussing proposed services
  - Also be careful of labeling progress "meaningful," because what is meaningful to district might not be meaningful to parents; let data speak to show parents that progress is occurring and is not trivial
  - On the other hand, avoid statements that might lead parents to believe that district is setting bar too low

Case #6: IEP Team (General Ed Teacher) – M.L. v. Federal Way School Dist.

Overview

- Federal Way emphasizes that failing to include general education teacher in IEP development process (when there is any possibility that student will participate in general education environment) is procedural violation that will result in denial of FAPE

M.L. v. Federal Way School Dist.

Facts

- Student with autism, intellectual disability and macrocephaly was globally delayed across all developmental domains and displayed significant behavioral problems
- Student had been enrolled in integrated preschool in neighboring district, which also developed IEP calling for integrated kindergarten placement
- Parents then moved to District, which began implementing previous district's IEP

M.L. v. Federal Way School Dist.

Facts (cont'd)

- Student was teased by classmates in integrated kindergarten class and was removed by Parents
- District convened IEP meeting and offered placement in self-contained classroom
  - Certified special education teacher was member of IEP team, but no general education teacher participated
- Parents challenged exclusion of gen ed teacher
- District court found it was permissible to include only those teachers who are likely to be entrusted with Student in his new placement

M.L. v. Federal Way School Dist.

Ruling

- 9th Circuit reversed, ruling that if there was any possibility of gen ed placement, participation of gen ed teacher in creation of IEP was required
- Failure to include at least one gen ed teacher, standing alone, is "structural defect" that prejudices right of student to receive FAPE
- District was aware that two teachers had observed Student in integrated classroom, but failed to include either teacher in IEP development process

M.L. v. Federal Way School Dist.

Ruling (cont'd)

- District unsuccessfully argued that participation of gen ed teacher was not required because, based on assessment report, it was very unlikely that Student would be placed in integrated classroom
  - District overlooked that previous district's IEP called for Student to be placed in integrated kindergarten classroom and that Student had attended integrated preschool classroom for three years

(M.L. v. Federal Way School Dist. (9th Cir. 2005) 394 F.3d 634)

M.L. v. Federal Way School Dist.

Practical Importance for Special Educators

- As demonstrated by Federal Way, phrase "may be participating in the general education environment" is given broad latitude
- Mere inclusion of gen ed teacher on list of IEP team members is not enough; district also must ensure that teacher participates in IEP development
  - Includes determining behavior strategies and supplementary aids, services and supports

Case #7: IEP Team ("Current" Teacher) – R.B. v. Napa Valley Unif. School Dist.

Overview

- In Napa Valley, 9th Circuit concluded that IDEA does not require districts to include student's current general education or special education teachers in IEP team meetings
- Nonetheless, district must ensure that teacher or provider invited to meeting has actually worked with student

R.B. v. Napa Valley Unif. School Dist.

Facts

- IEP for Student with ADHD and PTSD placed her in general kindergarten class with resource support
- Subsequent assessment determined Student no longer qualified for special education
  - District developed Section 504 plan
- Throughout elementary school, Student's behavior grew increasingly worse, including numerous suspensions
  - But Student excelled academically

R.B. v. Napa Valley Unif. School Dist.

Facts (cont'd)

- Parents placed Student in out-of-state RTC and filed for due process hearing to seek reimbursement
- District then convened IEP team meeting, where it concluded Student was not eligible for special ed
  - Team included special ed teacher and Student's former kindergarten teacher
  - No representative from RTC attended
- Hearing officer and district court agreed Student did not qualify as ED
  - Any procedural violation in IEP team composition did not deny FAPE

R.B. v. Napa Valley Unif. School Dist.

Ruling

- 9th Circuit: IDEA provisions regarding IEP team composition no longer required presence of student's "current" general education teacher
  - As such, including Student's kindergarten teacher was not procedural violation
  - IDEA's phrase "at least one regular education teacher of such child" provided district with more discretion in selecting general education teacher
  - "Requiring 'the current regular education teacher' to assume the role set aside for 'at least one regular education teacher' would interpret the statute too narrowly"

R.B. v. Napa Valley Unif. School Dist.

Ruling (cont'd)

- Same analysis applied to presence of special education teacher
  - Therefore, exclusion of current RTC special ed teacher was not procedural violation per se
  - But participation of District's special ed teacher who had not taught Student did not satisfy IDEA
  - Nonetheless, because 9th Circuit affirmed that Student did not qualify for special education, District's procedural violation in composition of Student's IEP team was harmless error

(R.B. v. Napa Valley Unified School Dist. (9th Cir. 2007) 496 F.3d 932)

R.B. v. Napa Valley Unif. School Dist.

Practical Importance for Special Educators

- Napa Valley serves as reminder about importance of avoiding IEP team composition mistakes
  - Always document who attends IEP meeting
  - Use caution in excusing IEP team members, especially district representatives
  - If, during meeting, it is determined that presence of excused team member is necessary, it is advisable to reconvene meeting at time when member can attend
  - Remember that district cannot place student in NPS without conducting IEP team meeting that includes participation by NPS representative

Case #8: Least Restrictive Environment – Poolaw v. Bishop

Overview

- Poolaw is 9th Circuit's follow up decision to Sacramento City Unified School Dist. v. Rachel H., decided one year earlier
- In Poolaw, court refined its LRE analysis by holding that less restrictive placements always must be considered; they do not always have to be tried
- Poolaw reminds that Rachel H. factors are not equal—because, regardless, we always must provide FAPE (educational benefit)
  - If FAPE cannot be delivered in a particular setting, IEP team need not analyze remaining factors for such setting

Poolaw v. Bishop

Facts

- Student was assessed while in District's Head Start
- Assessor recommended residential placement at Arizona School for the Deaf and Blind ("ASDB") because Student's profound hearing loss would preclude effective functioning in school classroom
- Parents moved to Louisiana, then to Idaho
  - Idaho district's IEP initially placed Student in general classroom with supports
  - Student did not make progress and his revised IEP recommended placement at state school for the deaf

Poolaw v. Bishop

Facts (cont'd)

- Parents returned to Arizona and advised District that they desired mainstream placement
  - After reviewing Student's IEP and reports from Idaho, District determined that mainstreaming Student would not result educational benefit to him
  - Proposed that Student be placed at ASDB
- Hearing officer, state review officer and district court all concluded ASDB residential placement was appropriate for Student

Poolaw v. Bishop

Ruling

- 9th Circuit agreed, ruling that ASDB was LRE
- District appropriately relied upon records of Student's prior mainstream placement and was not required to implement supplemental services before choosing more restrictive alternative further along continuum
- Student required intensive instruction in ASL that was only available in residential setting due to District's limited resources

Poolaw v. Bishop

Ruling (cont'd)

- 9th Circuit applied Rachel H. test for inclusion
  - Student could not receive any educational benefit from full or partial mainstreaming until he acquired greater communication skills
  - Although Student could receive some limited nonacademic benefit from mainstream placement, at ASDB he could develop increased ability to communicate and his social interaction skills would mature
  - Student's educational concerns outweighed absence of any detrimental impact on other students

(Poolaw v. Bishop (9th Cir. 1995) 67 F.3d 830)

Poolaw v. Bishop

Practical Importance for Special Educators

- When proposing more restrictive placement, ensure documentation supports position that there is no reasonable possibility student can make appropriate progress in less restrictive setting
- Avoid vague or generalized recommendations regarding LRE
- Do not make final placement decisions outside of IEP process (e.g., via PWN)
- Conduct regular in-service training on LRE and continuum of alternative placement issues

Case #9: Offer of FAPE – Union v. Smith

Overview

- In Union, 9th Circuit ruled that district must make formal written offer in IEP that identifies proposed placement in manner clearly enough to permit parents to make intelligent decision whether to agree or disagree
  - Union's "clear written offer" of placement directive has since been expanded to encompass entire FAPE offer
  - Courts and ALJs have invalidated IEPs that, although formally offered, were insufficiently clear and specific—with respect to services and/or placement

Union v. Smith

Facts

- Parent and Student temporarily relocated from family's residence in San Jose to Southern California (Los Angeles area) so that Student could attend private clinic for children with autism
- During IEP team meeting, District discussed placement that it could offer; however, because Parents rejected it, IEP team never formally offered placement in writing
- District court determined that District denied Student FAPE and awarded reimbursement

Union v. Smith

Ruling

- 9th Circuit affirmed lower court's decision
- Any placement that was not formally offered could not be considered
- Parents' explicit unwillingness to accept District's proposed placement did not excuse District from making formal offer
- District failed to offer FAPE, even though it might have been able to make FAPE available

Union v. Smith

Ruling (cont'd)

- 9th Circuit quotes:
  - "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"
  - "This formal requirement has an important purpose that is not merely technical, and we therefore believe it should be enforced rigorously"

(Union School District v. Smith (9th Cir. 1993) 15 F.3d 1519)

Union v. Smith

Practical Importance for Special Educators

- What to avoid:
  - Do not fail to put offer in writing because parents have stated that they will not agree to proposed placement or services
  - Do not offer multiple placements
  - Do not offer type of placement (e.g., an SDC) and leave it up to parents to select school site.
- Focus on details and clarity
  - If team members and staff are uncertain how to interpret district's offer, chances are parents also will be uncertain

Take Aways . . .

- In making our case selections, we attempted to focus not only on those cases that set important legal precedents, but also on those that impart lessons that are valuable to special educators and IEP teams in educating and supporting all students with disabilities
- We hope that cases we selected have provided useful practical strategies to help ensure compliance with special education laws


TIME FOR A
BREAK