



Fagen Friedman & Fulfroost LLP



# F3 Legal Update

Legislation and Legal Cases Affecting Public Education

## Cases, Guidance, Legislation and Other Developments



# Legal Update Overview . . .

- New OAH Decisions
- Noteworthy Decisions from Courts
- Latest Federal Guidance
- Recent Developments Affecting Special Education in California



# I. New OAH Decisions



# Behavior



# Behavior

Escondido Union School Dist.

## Facts:

- District scheduled BER IEP meeting within two days, but meeting did not take place until one week after incident
- District also decided not to develop BIP until FBA was completed
- Parents claimed that failure to convene meeting timely and failure to document reasons for not developing BIP denied FAPE



# Behavior

Escondido Union School Dist.

## Decision:

- ALJ denied claim
- Law does not require meeting to be held within two days after incident, only scheduled
- Failure to document reasons for not developing BIP was procedural violation but did not deny FAPE

(Student v. Escondido Union School Dist. and Escondido Union School Dist. v. Student (OAH 2017) Case Nos. 2017040003 and 2017050705, 117 LRP 43198)



# Behavior



## Why Does This Case Matter to Us?

- Education Code contains numerous procedural requirements and timelines that districts must follow if situation arises requiring emergency behavior interventions
- But, as in this case, minor procedural violations do not always rise to level of denial of FAPE



# Child Find and Eligibility





# Child Find and Eligibility

Los Altos School Dist.

## Facts:

- Student exhibited mild behavior issues addressed through gen ed interventions
- Suspended during second grade
- Later, private assessment diagnosed ADHD and autism
- District assessed and determined Student was not eligible for special ed



# Child Find and Eligibility

Los Altos School Dist.

## Decision:

- ALJ rejected claims of child find violation and improper finding of ineligibility
- Student's deficits were not severe and there were no flaws in assessment process
- Parents never requested assessment prior to discipline incident and District had "no basis of knowledge" of any suspected disability

(Student v. Los Altos School Dist. (OAH 2017) Case No. 2017051355, 117 LRP 45409)



# Child Find and Eligibility



## Why Does This Case Matter to Us?

- General ed teachers can provide critical evidence to help prove child find compliance
- “Basis of knowledge” triggering IDEA disciplinary protections exists when:
  - Parents express concern in writing that student is in need of special education;
  - Parent has requested an evaluation; or
  - Teacher or other district personnel express specific concerns about pattern of behavior



# IEPs and Progress



# IEPs and Progress

Lodi Unified School Dist.

## Facts:

- Student with visual and auditory processing deficits made progress in general ed classroom, but was not at grade level in reading or math
- Parents claimed denial of FAPE because Student's progress was only "de minimis"



# IEPs and Progress

Lodi Unified School Dist.

## Decision:

- ALJ ruled in favor of District
- Student made steady progress on his goals, which were adjusted/increased by IEP team
- RSP services were increased due to more challenging goals
- Student was achieving passing grades and being promoted

(Student v. Lodi Unified School Dist. (OAH 2017) Case No. 2017070105, 117 LRP 47447)



# IEPs and Progress



## Why Does This Case Matter to Us?

- OAH interprets FAPE standard post-Andrew F.
- The Court in Andrew F. recognized that for students fully integrated in general classroom, IEP typically should “be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade”



# **Interim Alternative Educational Settings ("IAES")**





# IAES

El Segundo Unified School Dist.

## Facts:

- 17-year-old with ID involved in numerous behavior episodes, including physical attacks on staff and frequent elopement
- After Parents refused to consent to placement change, District proposed 45-day IAES at NPS to begin 2017-2018 school year



# IAES

El Segundo Unified School Dist.

## Decision:

- District successfully established that Student could not remain at her high school
- IAES provided functional programs, behavior management system, closed campus
- ALJ did not rule on whether NPS setting offered FAPE for remainder of school year

(El Segundo Unified School Dist. v. Student (OAH 2017) Case No. 2017080191, 117 LRP 41962)



# IAES



## Why Does This Case Matter to Us?

- ALJ may move student to IAES if district is able to demonstrate that maintaining student's current placement is substantially likely to result in injury to student or others
- ALJ must also determine appropriateness of proposed IAES setting



# Least Restrictive Environment ("LRE")



# LRE

Ontario-Montclair School Dist.

## Facts:

- District offered 930 minutes per week in SDC for 9-year-old with autism
- Student had made little progress in RSP, and was three grade levels behind in all areas
- Teacher believed Student needed more repetition and slower pace
- Parent claimed SDC was too restrictive



# LRE

Ontario-Montclair School Dist.

## Decision:

- ALJ ruled that SDC was LRE for Student
- Academic deficits prevented any progress in gen ed classroom for core classes
- Student risked falling further behind
- Student would still have access to peers during lunch, recess, PE and other classes

(Ontario-Montclair School Dist. v. Student (OAH 2017) Case No. 2017050981, 117 LRP 41956)





## Why Does This Case Matter to Us?

- If IEP team can show that it thoroughly examined Rachel H. factors in determining whether placement in general education classroom was appropriate, its placement recommendations likely will, as here, carry significant weight with ALJ at due process



# Manifestation Determinations





# Manifestation Determinations

William S. Hart Union High School Dist.

## Facts:

- High-schooler with ADHD sent four Snapchat messages to friends depicting guns, telling them not to go to school next day
- Student later apologized
- MD team upheld suspension, concluding sending out four messages was not impulsive



# Manifestation Determinations

William S. Hart Union High School Dist.

## Decision:

- ALJ overturned MD team's findings
- Team did not know details of how and when Student planned messages or how long it took to send them
- Team also did not review assessment report or cumulative discipline history

(Student v. William S. Hart Union High School Dist. (OAH 2017) Case No. 2017081232, 117 LRP 43753)



# Manifestation Determinations



## Why Does This Case Matter to Us?

- While IDEA does not require that all MD team members review every single document in student's file, when—as was found here—MD team fails to review “all relevant information,” its findings likely will be overturned at due process



# Placement Offer



# Placement Offer

Fairfield-Suisun Unified School Dist.

## Facts:

- Student with ID and hearing impairment had been placed in SDC for DHH students
- District proposed placement change to functional academics SDC for 72% of day with 1:1 signing aide
- Parent believed Student should remain in DHH SDC



# Placement Offer

Fairfield-Suisun Unified School Dist.

## Decision:

- ALJ supported placement change
- DHH SDC class was too advanced for Student
- Parents' argument that Student must be exclusively with DHH students was flawed because it did not consider effect of ID (Student's primary disability)

(Fairfield-Suisun Unified School Dist. v. Student (OAH 2017) Case No. 2017051304, 117 LRP 49524)



# Placement Offer



## Why Does This Case Matter to Us?

- Factors pertinent to placement decisions can vary based upon student's unique and individual needs
- As ALJ pointed out, "the effect of a student's primary disability is critical to the proper crafting of his IEP"



# Placement Offer

Soledad Unified School Dist.

## Facts:

- IEP team discussed possible placements for 15-year-old with autism and ID
- Director suggested Student could be placed in SDC in another district
- After neighboring district refused to accept Student, District never reconvened IEP meeting to formalize new placement offer





# Placement Offer

Soledad Unified School Dist.

## Decision:

- ALJ ruled District denied FAPE by failing to make clear, written offer of placement
- Reasonable for Parents to believe that placement in other district's SDC was likely
- District delayed facilitating placement and never finished IEP process

(Student v. Soledad Unified School Dist. (OAH 2017) Case No. 2017060205, 117 LRP 43281)



# Placement Offer



## Why Does This Case Matter to Us?

- In Union School Dist. v. Smith (1994), 9th Circuit held that districts are required by the IDEA to make a clear, written IEP offer that parents can understand
- Courts and ALJs have emphasized need for rigorous compliance with this requirement



# Predetermination



# Predetermination

Goleta Unified School Dist.

## Facts:

- District offered SDC placement with modified curriculum for Student with ID
- Parents preferred gen ed class with RSP support or 1:1 aide
- Claimed District predetermined that gen ed class was not viable and did not consider how Student could be supported in that setting



# Predetermination

Goleta Unified School Dist.

## Decision:

- ALJ rejected predetermination claim
- Audio recordings of IEP meetings revealed that team discussed all placement options
- District listened, responded to Parent's concerns and explained why Student's program could not be implemented in gen ed

(Student v. Goleta Unified School Dist. (OAH 2017) Case No. 2017020596, 117 LRP 35677)



# Predetermination



## Why Does This Case Matter to Us?

- Best way to show that IEP meeting was properly conducted—and refute any subsequent predetermination claim—is to document it in detail in writing or, if necessary and as in this case, through audio recording



# Revocation of Consent



# Revocation of Consent

Roseville Joint Union High School Dist.

## Facts:

- Divorced Parents agreed that Student needed later start time and independent study to address hypersomnia
- Parents believed IEP could not be implemented at school that allowed late start
- Father revoked consent to special ed; District mailed PWN to Father (but not Mother) and immediately terminated services





# Revocation of Consent

Roseville Joint Union High School Dist.

## Decision:

- Failure to provide both Parents with legally compliant PWN denied FAPE
- Immediately ending services did not allow time to resolve confusion about available options
- Mother testified she would have attempted to reverse revocation had she received PWN

(Student v. Roseville Joint Union High School Dist. (OAH 2017) Case No. 2017070292, 117 LRP 47449)



# Revocation of Consent



## Why Does This Case Matter to Us?

- Although revocation of consent is effective when given by one parent (even if other parent opposes it), PWN must be given to both parents and must be provided a reasonable time before termination of services

(34 C.F.R. § 300.503(a); Ed. Code, § 56500.4; Letter to Ward (OSEP 2010) 56 IDELR 237)



# II. Noteworthy Decisions from the Courts



# Transition/Placement

R.E.B. v. State of Hawai'i Dep't of Educ. (9th Cir.)

## Facts:

- Parents raised numerous objections to proposed IEP for Student transitioning from NPS to public school kindergarten
  - Refusal to include transition services
  - Delegating placement determination to teachers outside IEP process
  - Failure to specify ABA as methodology
  - Failure to specify qualifications of 1:1 aide



# Transition/Placement

R.E.B. v. State of Hawai'i Dep't of Educ. (9th Cir.)

## Decision:

### ■ 9th Cir:

- Failure to address transition violated IDEA because Student was moving to public school for first time
- District's IEP improperly allowed teachers discretion as to where Student would receive specialized instruction
- ABA should have been specified in IEP because it played critical role and was integral to Student's education
- District was not required to specify aide qualifications

(R.E.B. v. State of Hawai'i Dep't of Educ. (9th Cir. 2017) 70 IDELR 194)



# Transition/Placement



## Why Does This Case Matter to Us?

- When transition services become necessary for children to “be educated and participate” in new academic environments, such services must be included in IEPs
  - Note: California law requires that IEPs contain provision for transition into gen ed program if student is to be transferred from special class or NPS into public school gen ed class



# Child Find

Panama-Buena Vista Union School Dist. v. A.V. (E.D. Cal.)

## Facts:

- Parent provided District with Student's Section 504 plan and BSP from previous District on first day of school
- Behavior incidents began by third day
- District developed Section 504 plan
- After one month, District sought consent for special ed assessment



# Child Find

Panama-Buena Vista Union School Dist. v. A.V. (E.D. Cal.)

## Decision:

- ALJ found child find violation, but District Court reversed
- Child find did not begin on first day of school
- District entitled to make its own determination of suspected disability
- 30-day period before referral was reasonable

(Panama-Buena Vista Union School Dist. v. A.V. (E.D. Cal. 2017) 117 LRP 49871)





# Child Find



## Why Does This Case Matter to Us?

- 9th Circuit has not set standard for how much time district should work with students in gen ed setting before initiating referral for assessment
- Other courts have said that waiting “reasonable period of time” does not require districts to “rush to judgment”



# III. Latest Federal Guidance



# Private School Students

## Letter to Radziwill

- Districts have obligation to engage in “meaningful consultation” with private school representatives
- OSEP emphasized establishing timeline for consultation
- Parents may represent themselves in consultation process

(Letter to Radziwill (OSEP 2017) 70 IDELR 234)



# Andrew F. FAPE Standard

## Q&A on U.S. Supreme Court Decision

- IEP teams should apply Andrew F. standard in:
  - Identifying present levels of academic achievement and functional performance
  - Setting measurable annual goals, including academic and functional goals
  - Determining how progress toward meeting annual goals will be measured and reported

(Questions and Answers (Q&A) on U.S. Supreme Court Case Decision Endrew F. v. Douglas County School Dist. RE-1 (OSEP 2017) 117 LRP 50044)



# **IV. Recent Developments Affecting Special Education in California**



# Antelope Valley Decision

- 2017 decision: M.C. v. Antelope Valley Union High School District
- U.S. Supreme Court refused to consider appeal
- Appeal asserted that 9th Circuit erred by rewording Supreme Court's holding in Andrew F. to mirror a legal standard for FAPE that was explicitly rejected by Rowley



# 9th Circuit Must Revisit AT Case

- E.F. v. Newport Mesa Unified School District decision (pre-Andrew F.) held that District provided FAPE to kindergartner despite not assessing him for a high-tech AT device
- U.S. Supreme Court vacated decision and ordered 9th Circuit to apply Andrew F. to determine if Student's program was "appropriately ambitious"
  - Note: In February 2018 decision, 9th Circuit ruled that Andrew F. did not change its earlier decision that District offered FAPE



# OSERS Withdraws IDEA Guidance

- Rescinded guidance dated from 1980-2014 and covered a variety of topics including LRE, maintenance of effort and parentally placed private school students
- OSERS: Most documents withdrawn were superseded or no longer relevant
- OSERS: No resulting policy implications or impact on services





# Governor Vetoes Records Bill

- AB 1264 would have required districts to offer parents copies of relevant school records and assessment reports at least five business days before IEP meeting
- Governor's veto message stated that Notice of Procedural Safeguards already provides parents with right to request records



# OAH Revises Calendaring Process

- Changes affect:
  - Scheduling orders
  - Mediation requests
  - Unrepresented parties
  - Hearing continuances
  - Prehearing conference statements
- Districts might need to update procedures to reflect new process



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



# F3 Student Awards™

## Student Art Contest: Celebrate Success



***Information in this presentation, included but not limited to PowerPoint handouts and the presenters' comments, is summary only and not legal advice. We advise you to consult with legal counsel to determine how this information may apply to your specific facts and circumstances.***