SOME ISSUES OF RELEVANCE FOR 2018
APRIL 14, 2018

SCHEDULE

8:00 - 8:30 a.m. Introduction To The Staff Of Newman Aaronson Vanaman LLP and Overview Of Schedule And Information To Be Provided
Valerie Vanaman

8:30 - 8:50 a.m. Cases Recently Decided By Supreme Court Of The United States and OAH Application
Eric Menyuk

8:50 - 9:15 a.m. Cases Recently Decided By Ninth Circuit and OAH Application
Jodi Bynder

9:15 - 10:30 a.m. Commonly Encountered Concerns

A. Assessment Process and Rights Related Thereto
Sophia Bliziotis

B. Obtaining School Records and Assessment Results
Bryan Winn

C. Timing Of IEP Meetings and Scheduling Concerns
Valerie Gilpeer

D. The Ten Day Notice Requirement
George Crook

10:30 - 10:45 a.m. BREAK

10:45 - 11:00 a.m. District Filings Against Students
Dina Kaplan

11:00 - 11:30 a.m. Accessing Legal Representation For Education Matters and Estate Work
David German
Annabel Blanchard

11:30 a.m. - Noon Questions and Answers
INTRODUCTION

SOME ISSUES OF RELEVANCE FOR 2018

I. INTRODUCTION OF STAFF

ATTORNEYS

Joel Aaronson
Sophia Bliziotis
Annabel Blanchard
Jodi Ossen Bynder
George Crook
David German
Valerie Gilpeer
Dina Kaplan
Eric Menyuk
Robert Myers
Valerie Vanaman
Bryan Winn

LAW CLERKS/PARALEGALS

Scott Bell
Brian Godfrey
Cindy Vega
Bobbie Westil

ADMINISTRATIVE ASSISTANTS

Arpine Ashikyan
Betty Barnes
Stephanie Cobian
Rose Karsian
Suzy Karsian
Edith Mnatsakanyan
Jessica Phillips
Joyelle Phillips
Erika Santamaria
II. INTRODUCTION TO MATERIALS

U.S. Department of Education Documents

Seminar Materials

III. INTRODUCTION TO SCHEDULE FOR THE DAY
U.S. DEPARTMENT OF EDUCATION

LIST OF GUIDANCE DOCUMENTS RESCINDED OCTOBER, 2017
# List of Guidance Documents Rescinded (Outdated, Unnecessary, or Ineffective)

**Office of Special Education and Rehabilitative Services**

**October 2017**

<table>
<thead>
<tr>
<th>#</th>
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<tr>
<td>2</td>
<td>Rehab. Act</td>
<td>Factors State Vocational Rehabilitation Agencies Should Consider When Determining Whether a Job Position Within a Community Rehabilitation Program is Deemed to be in an Integrated Setting for Purposes of the Vocational Rehabilitation Program. (TAC-06-01) TAC 06-01</td>
<td>11/21/2005</td>
<td>Outdated. Changes in law, regulations, or reporting requirements resulting from the amendments to the Rehabilitation Act of 1973 made by WIOA.</td>
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<td>14</td>
<td>IDEA</td>
<td>Implementing Response to Intervention (RTI) Using Title I, Title III, and CEIS Funds. No Link Available.</td>
<td>8/25/2009</td>
<td>Outdated and inaccurate.</td>
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<td>16</td>
<td>IDEA</td>
<td>OSEP Memo 08-08: Implementing the Funding Formula Under the IDEA—Year of Age Cohorts for Which FAPE is Ensured. No Link Available.</td>
<td>5/2/2008</td>
<td>Outdated. Specific only to 2008.</td>
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<td>22</td>
<td>IDEA</td>
<td>OSEP Memo 05-09 Obligations of States and Local Educational Agencies to Parentally-placed Private School Children with Disabilities. No Link Available.</td>
<td>6/27/2005</td>
<td>Superseded by 2012 Q&amp;A.</td>
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<td>27</td>
<td>IDEA</td>
<td>OSEP Memo 02-10 Medicaid and upcoming compliance deadlines under HIPAA and ASCA. No Link Available.</td>
<td>9/26/2002</td>
<td>Outdated. Specific to 10/15/02 deadline.</td>
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<td>29</td>
<td>IDEA</td>
<td>OSEP Memo 01-09 Information about new childhood regulations under the SSI Program.</td>
<td>5/24/2001</td>
<td>Outdated. Specific to SSI guidance.</td>
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<td>30</td>
<td>IDEA</td>
<td>OSEP Memo 01-06 Guidance on including students with disabilities in assessments.</td>
<td>1/17/2001</td>
<td>Superseded by assessment regulations and guidance.</td>
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<td>31</td>
<td>IDEA</td>
<td>OSEP Memo 01-05 Questions and Answers on Mediation. No Link Available.</td>
<td>11/30/2000</td>
<td>Superseded by 2013 Dispute Resolution Q&amp;A.</td>
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<td>33</td>
<td>IDEA</td>
<td>OSEP Memo 00-20 Complaint resolution procedures under Part B.</td>
<td>7/17/2000</td>
<td>Superseded by 2013 Dispute Resolution Q&amp;A.</td>
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<td>IDEA</td>
<td>OSEP Memo 00-19 IEP guidance. No Link Available.</td>
<td>6/30/2000</td>
<td>Outdated. Revised by statute and 2006 regulations.</td>
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<td>35</td>
<td>IDEA</td>
<td>OSEP Memo 00-17 Implementing the new funding formula under IDEA.</td>
<td>6/26/2000</td>
<td>Outdated. Revised by statute and 2006 regulations.</td>
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<td>IDEA</td>
<td>OSEP Memo 00-14 Qs &amp; As on obligations of public agencies serving</td>
<td>5/4/2000</td>
<td>Outdated. Revised by statute and 2006 regulations.</td>
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<td>children with disabilities placed by their parents in private schools.</td>
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<td><a href="#">www.cesa7.org/sped/discoveridea/topdocs/nichcy/private.htm</a></td>
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<td>38</td>
<td>IDEA</td>
<td>OSEP Memo 00-10 Revised Part B funding formula information request.</td>
<td>3/14/2000</td>
<td>Outdated. Specific to FY 2000.</td>
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<td>OSEP Memo 00-08 School districts, State schools, and educational</td>
<td>1/19/2000</td>
<td>Outdated. Study in effect in FY 2000.</td>
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<td>services agencies selected for National assessment study.</td>
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<td>IDEA</td>
<td>OSEP Memo 00-04 Clarification on State eligibility and public</td>
<td>11/3/1999</td>
<td>Outdated. Revised by statute and 2006 regulations.</td>
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<td>IDEA</td>
<td>OSEP Memo 00-03 School districts, State schools, and educational</td>
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<td>Outdated. Study in effect in FY 1999</td>
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<td>43</td>
<td>IDEA</td>
<td>OSEP Memo 99-14 Guidance related to State Program improvement</td>
<td>7/30/1999</td>
<td>Outdated. Program is now SPDIG.</td>
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<td>Grants.</td>
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<td>No Link Available.</td>
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<td>44</td>
<td>IDEA</td>
<td>OSEP Memo 99-12 NPRM for charter school expansion act.</td>
<td>6/28/1999</td>
<td>Outdated. Discusses NPRM.</td>
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<td>46</td>
<td>IDEA</td>
<td>OSEP Memo 99-09 Schools with IDEAs that work.</td>
<td>3/29/1999</td>
<td>Outdated. Specific to 1999.</td>
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<td>50</td>
<td>IDEA</td>
<td>OSEP Memo 98-08 Effective date of the new IEP requirements.</td>
<td>4/28/1998</td>
<td>Outdated. Revised by statute and 2006 regulations.</td>
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<td>No Link Available.</td>
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<td>51</td>
<td>IDEA</td>
<td>OSEP Memo 98-04 Guidance related to State Program improvement Grants.</td>
<td>2/26/1998</td>
<td>Outdated. Program is now SPDIG.</td>
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<td>No Link Available.</td>
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<td>52</td>
<td>IDEA</td>
<td>OSEP Memo 98-01 information related to statutory changes to Part H.</td>
<td>1/7/1998</td>
<td>Outdated. Revised by statute and 2006 regulations.</td>
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<td></td>
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<td>No Link Available.</td>
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<td>53</td>
<td>IDEA</td>
<td>Joint DCL Including Students with Disabilities in all Educational Reform Activities.</td>
<td>9/29/1997</td>
<td>Superseded by assessment regs and guidance.</td>
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<td><a href="https://www2.ed.gov/about/offices/list/ocr/docs/asses902.htm">https://www2.ed.gov/about/offices/list/ocr/docs/asses902.htm</a></td>
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<td>54</td>
<td>IDEA</td>
<td>OSEP Memo 97-7 Initial Discipline Guidance related to removal of children with disabilities for ten school days or less.</td>
<td>9/19/1997</td>
<td>Outdated. Memo in effect until 1999 regulations. Statute reauthorized.</td>
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<td>57</td>
<td>IDEA</td>
<td>OSEP Memo 94-19 Availability of draft monitoring reports under FOIA. No Link Available.</td>
<td>4/28/1994</td>
<td>Outdated. No longer have draft monitoring reports.</td>
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<td>61</td>
<td>IDEA</td>
<td>OSEP Memo 91-22 Summary of Comments of Special Education for Children with Attention Deficit Disorder. No Link Available.</td>
<td>6/21/1991</td>
<td>Outdated. Summary of comments only.</td>
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<td>64</td>
<td>IDEA</td>
<td>OSEP Memo 89-21 States responsibility to make FAPE available to certain Indian children. No Link Available.</td>
<td>6/19/1989</td>
<td>Outdated. Statute reauthorized.</td>
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<td>71</td>
<td>IDEA</td>
<td>Informal Letter to Chief State School Officers on Data Submissions Due During FY 1983. No Link Available.</td>
<td>8/31/1982</td>
<td>Outdated. Superseded by the Uniform Guidance; no longer used.</td>
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<td>72</td>
<td>IDEA</td>
<td>Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting From Federal Financial Assistance; and Assistance to States for Education of Handicapped Children. <a href="https://www2.ed.gov/about/offices/list/ocr/docs/fapeinsurance.html">https://www2.ed.gov/about/offices/list/ocr/docs/fapeinsurance.html</a></td>
<td>12/22/1980</td>
<td>Superseded by regulations governing use of insurance.</td>
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</table>
CASES RECENTLY DECIDED BY
SUPREME COURT OF UNITED STATES

1. *Fry v. Napoleon Community Schools*,


3. United States Department of Education, *Questions and Answers (Q & A) on U.S. Supreme Court Case Decision Endrew F. V. Douglas County School District Re-1*, December 7, 2017

4. Examples Of Use In OAH Decisions
137 S.Ct. 743
Supreme Court of the United States

Stacy FRY, et vir, as next friends of minor E.F., Petitioners
v.
NAPOLEON COMMUNITY SCHOOLS, et al.

No. 15–497.

Synopsis
Background: Parents sued local and regional school districts and principal, alleging that they violated Title II of Americans with Disabilities Act (ADA) and Rehabilitation Act when they refused to allow child, who had cerebral palsy, to bring service dog to school. The United States District Court for the Eastern District of Michigan, Lawrence P. Zatkoff, J., 2014 WL 106624, granted defendants' motion to dismiss. Parents appealed. The United States Court of Appeals for the Sixth Circuit, John M. Rogers, Circuit Judge, 788 F.3d 622, affirmed. Certiorari was granted.

Holdings: The Supreme Court, Justice Kagan, held that:

[1] if, in a suit brought under a statute other than the Individuals with Disabilities Education Act (IDEA), the remedy sought is not for the denial of a free appropriate public education (FAPE), then exhaustion of the IDEA’s procedures is not required, abrogating Charlie F. v. Board of Ed. of Skokie School Dist. 68, 98 F.3d 989, and

[2] to determine whether a plaintiff in such a suit seeks relief for the denial of a FAPE, a court should look to the gravamen of the plaintiff's complaint.

Vacated and remanded.

Justice Alito filed opinion concurring in part and concurring in the judgment, in which Justice Thomas joined.

*746 Syllabus*

The Individuals with Disabilities Education Act (IDEA) offers federal funds to States in exchange for a commitment to furnish a “free appropriate public education” (FAPE) to children with certain disabilities, 20 U.S.C. § 1412(a)(1)(A), and establishes formal administrative procedures for resolving disputes between parents and schools concerning the provision of a FAPE. Other federal statutes also protect the interests of children with disabilities, including Title II of the Americans with Disabilities Act (ADA) and § 504 of the Rehabilitation Act. In Smith v. Robinson, 468 U.S. 992, 104 S.Ct. 3457, 82 L.Ed.2d 746, this Court considered the interaction between those other laws and the IDEA, holding that the IDEA was “the exclusive avenue” through which a child with a disability could challenge the adequacy of his education. Id., at 1009, 104 S.Ct. 3457. Congress responded by passing the Handicapped Children's Protection Act of 1986, overturning Smith’s preclusion of non-IDEA claims and adding a carefully defined exhaustion provision. Under
that provision, a plaintiff bringing suit under the ADA, the Rehabilitation Act, or similar laws “seeking relief that is also available under [the IDEA]” must first exhaust the IDEA's administrative procedures. § 1415(f).

Petitioner E.F. is a child with a severe form of cerebral palsy; a trained service dog named Wonder assists her with various daily life activities. When E.F.’s parents, petitioners Stacy and Brent Fry, sought permission for Wonder to join E.F. in kindergarten, officials at Ezra Eby Elementary School refused. The officials reasoned that the human aide provided as part of E.F.’s individualized education program rendered the dog superfluous. In response, the Frys removed E.F. from Ezra Eby and began homeschooling her. They also filed a complaint with the Department of Education's Office for Civil Rights (OCR), claiming that the exclusion of E.F.’s service animal violated her rights under Title II and § 504. OCR agreed, and school officials invited E.F. to return to Ezra Eby with Wonder. But the Frys, concerned about resentment from school officials, instead enrolled E.F. in a different school that welcomed the service dog. The Frys then filed this suit in federal court against Ezra Eby's local and regional school districts and principal (collectively, the school districts), alleging that they violated Title II and § 504 and seeking declaratory and monetary relief. The District Court granted the school districts' motion to dismiss the suit, holding that § 1415(f) required the Frys to first exhaust the IDEA's administrative procedures. The Sixth Circuit affirmed, reasoning that § 1415(f) applies whenever a plaintiff's alleged harms are “educational” in nature.

*747 Held:*

1. Exhaustion of the IDEA's administrative procedures is unnecessary where the gravamen of the plaintiff's suit is something other than the denial of the IDEA's core guarantee of a FAPE. Pp. 752 – 758.

(a) The language of § 1415(f) compels exhaustion when a plaintiff seeks “relief” that is “available” under the IDEA. Establishing the scope of § 1415(f), then, requires identifying the circumstances in which the IDEA enables a person to obtain redress or access a benefit. That inquiry immediately reveals the primacy of a FAPE in the statutory scheme. The IDEA's stated purpose and specific commands center on ensuring a FAPE for children with disabilities. And the IDEA's administrative procedures test whether a school has met this obligation: Any decision by a hearing officer on a request for substantive relief “shall” be “based on a determination of whether the child received a free appropriate public education.” § 1415(f)(3)(E)(i). Accordingly, § 1415(f)'s exhaustion rule hinges on whether a lawsuit seeks relief for the denial of a FAPE. If a lawsuit charges such a denial, the plaintiff cannot escape § 1415(f) merely by bringing the suit under a statute other than the IDEA. But if the remedy sought in a suit brought under a different statute is not for the denial of a FAPE, then exhaustion of the IDEA's procedures is not required. Pp. 752 – 755.

(b) In determining whether a plaintiff seeks relief for the denial of a FAPE, what matters is the gravamen of the plaintiff's complaint, setting aside any attempts at artful pleading. That inquiry makes central the plaintiff's own claims, as § 1415(f) explicitly requires in asking whether a lawsuit in fact “seeks” relief available under the IDEA. But examination of a plaintiff's complaint should consider substance, not surface; § 1415(f) requires exhaustion when the gravamen of a complaint seeks redress for a school's failure to provide a FAPE, even if not phrased or framed in precisely that way. In addressing whether a complaint fits that description, a court should attend to the diverse means and ends of the statutes covering persons with disabilities. The IDEA guarantees individually tailored educational services for children with disabilities, while Title II and § 504 promise nondiscriminatory access to public institutions for people with disabilities of all ages. That is not to deny some overlap in coverage: The same conduct might violate all three statutes. But still, these statutory differences mean that a complaint brought under Title II and § 504 might instead seek relief for simple discrimination, irrespective of the IDEA's FAPE obligation. One clue to the gravamen of a complaint can come from asking a pair of hypothetical questions. First, could the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was not a school? Second, could an adult at the school have pressed essentially the same grievance? When the answer to those questions is yes, a complaint that does not expressly allege the denial of a FAPE is also unlikely to be truly about that subject. But when the answer is no, then the complaint probably does concern a FAPE. A further sign of the gravamen of a suit can emerge from the history of the proceedings.
Prior pursuit of the IDEA's administrative remedies may provide strong evidence that the substance of a plaintiff's claim concerns the denial of a FAPE, even if the complaint never explicitly uses that term. Pp. 754 – 758.

2. This case is remanded to the Court of Appeals for a proper analysis of whether the gravamen of E.F.'s complaint charges, and seeks relief for, the denial of a FAPE. The Frys' complaint alleges only disability-based discrimination, without making any reference to the adequacy of the special education services E.F.'s school provided. Instead, the Frys have maintained that the school districts infringed E.F.'s right to equal access—even if their actions complied in full with the IDEA's requirements. But the possibility remains that the history of these proceedings might suggest something different. The parties have not addressed whether the Frys initially pursued the IDEA's administrative remedies, and the record is cloudy as to the relevant facts. On remand, the court below should establish whether (or to what extent) the Frys invoked the IDEA's dispute resolution process before filing suit. And if the Frys started down that road, the court should decide whether their actions reveal that the gravamen of their complaint is indeed the denial of a FAPE, thus necessitating further exhaustion. Pp. 757 – 759.

788 F.3d 622, vacated and remanded.

KAGAN, J., delivered the opinion of the Court, in which ROBERTS, C.J., and KENNEDY, GINSBURG, BREYER, and SOTOMAYOR, JJ., joined. ALITO, J., filed an opinion concurring in part and concurring in the judgment, in which THOMAS, J., joined.

Attorneys and Law Firms

Samuel R. Bagenstos, Ann Arbor, MI, for Petitioners.

Roman Martinez, for the United States as amicus curiae, by special leave of the Court, supporting Petitioners.

Neal K. Katyal, Washington, DC, for Respondents.

Samuel R. Bagenstos, Cooperating Attorney, American Civil Liberties Union, Fund of Michigan, Ann Arbor, MI, Steven R. Shapiro, American Civil Liberties Union, Foundation, New York, NY, Jill M. Wheaton, James F. Hermon, Dykema Gossett PLLC, Ann Arbor, MI, Michael J. Steinberg, American Civil Liberties Union, Fund of Michigan, Detroit, MI, Susan P. Mizner, Claudia Center, American Civil Liberties Union, Foundation, San Francisco, CA, for Petitioners.


Opinion

Justice KAGAN delivered the opinion of the Court.

The Individuals with Disabilities Education Act (IDEA or Act), 84 Stat. 175, as amended, 20 U.S.C. § 1400 et seq., ensures that children with disabilities receive needed special education services. One of its provisions, § 1415(l), addresses the Act's relationship with other laws protecting those children. Section 1415(l) makes clear that nothing in the IDEA “restrict[s] or limit[s] the rights [or] remedies” that other federal laws, including antidiscrimination statutes, confer on children with disabilities. At the same time, the section states that if a suit brought under such a law “seek[s] relief that is also available under” the IDEA, the plaintiff must first exhaust the IDEA's administrative procedures. In this case, we consider the scope of that exhaustion requirement. We hold that exhaustion is not necessary when the gravamen of the plaintiff's suit is something other than the denial of the IDEA's core guarantee—what the Act calls a “free appropriate public education.” § 1412(a)(1)(A).
I

A

[1] The IDEA offers federal funds to States in exchange for a commitment: to furnish a “free appropriate public education”—more concisely known as a FAPE—to all children with certain physical or intellectual disabilities. Ibid.; see § 1401(3)(A)(i) (listing covered disabilities). As defined in the Act, a FAPE comprises “special education and related services”—both “instruction” tailored to meet a child's “unique needs” and sufficient “supportive services” to permit the child to benefit from that instruction. §§ 1401(9), (26), (29); see Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley, 458 U.S. 176, 203, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). An eligible child, as this Court has explained, acquires a “substantive right” to such an education once a State accepts the IDEA's financial assistance. Smith v. Robinson, 468 U.S. 992, 1010, 104 S.Ct. 3457, 82 L.Ed.2d 746 (1984).

Under the IDEA, an “individualized education program,” called an IEP for short, serves as the “primary vehicle” for providing each child with the promised FAPE. Honig v. Doe, 484 U.S. 305, 311, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988); see § 1414(d). (Welcome to—and apologies for—the acronymic world of federal legislation.) Crafted by a child's “IEP Team”—a group of school officials, teachers, and parents—the IEP spells out a personalized plan to meet all of the child's “educational needs.” §§ 1414(d)(1)(A)(i)(II)(bb), (d)(1)(B). Most notably, the IEP documents the child's current “levels of academic achievement,” specifies “measurable annual goals” for how she can “make progress in the general education curriculum,” and lists the “special education and related services” to be provided so that she can “advance appropriately toward [those] goals.” §§ 1414(d)(1)(A)(i)(I), (II), (IV)(aa).

Because parents and school representatives sometimes cannot agree on such issues, the IDEA establishes formal procedures for resolving disputes. To begin, a dissatisfied parent may file a complaint as to any matter concerning the provision of a FAPE with the local or state educational agency (as state law provides). See § 1415(b)(6). That pleading generally triggers a “[p]reliminary meeting” involving the contending parties, § 1415(f)(1)(B)(i); at their option, the parties may instead (or also) pursue a full-fledged mediation process, see § 1415(e). Assuming their impasse continues, the matter proceeds to a “due process hearing” before an impartial hearing officer. § 1415(f)(1)(A); see § 1415(f)(3)(A)(i). Any decision of the officer granting substantive relief must be “based on a determination of whether the child received a [FAPE].” § 1415(f)(3)(E)(i). If the hearing is initially conducted at the local level, the ruling is appealable to the state agency. See § 1415(g). Finally, a parent unhappy with the outcome of the administrative process may seek judicial review by filing a civil action in state or federal court. See § 1415(i)(2)(A).

Important as the IDEA is for children with disabilities, it is not the only federal statute protecting their interests. Of particular relevance to this case are two antidiscrimination laws—Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12131 et seq., and § 504 of the Rehabilitation Act, 29 U.S.C. § 794—which cover both adults and children with disabilities, in both public schools and other settings. Title II forbids any “public entity” from discriminating based on disability; Section 504 applies the same prohibition to any federally funded “program or activity.” 42 U.S.C. §§ 12131–12132; 29 U.S.C. § 794(a). A regulation implementing Title II requires a public entity to make “reasonable modifications” to its “policies, practices, or procedures” when necessary to avoid such discrimination. 28 C.F.R. § 35.130(b)(7) (2016); see, e.g., Alboniga v. School Bd. of Broward Cty., 87 F.Supp.3d 1319, 1345 (S.D.Fla.2015) (requiring an accommodation to permit use of a service animal under Title II). In similar vein, courts have interpreted § 504 as demanding certain “reasonable” modifications to existing practices in order to “accommodate” persons with disabilities. Alexander v. Choate, 469 U.S. 287, 299–300, 105 S.Ct. 712, 83 L.Ed.2d 661 (1985); see, e.g., Sullivan v. Vallejo City Unified School Dist., 731 F.Supp. 947, 961–962 (E.D.Cal.1990) (requiring an accommodation to permit use of a service animal under § 504). And both statutes authorize individuals to seek redress for violations of their substantive guarantees by bringing suits for injunctive relief or money damages. See 29 U.S.C. § 794a(a)(2); 42 U.S.C. § 12133.
This Court first considered the interaction between such laws and the IDEA in *Smith v. Robinson*, 468 U.S. 992, 104 S.Ct. 3457, 82 L.Ed.2d 746. The plaintiffs there sought “to secure a ‘free appropriate public education’ for [their] handicapped child.” *Id.*, at 994, 104 S.Ct. 3457. But instead of bringing suit under the IDEA alone, they appended “virtually identical” claims (again alleging the denial of a “free appropriate public education”) under § 504 of the Rehabilitation Act and the Fourteenth Amendment’s Equal Protection Clause. *Id.*, at 1009, 104 S.Ct. 3457; see *id.*, at 1016, 104 S.Ct. 3457. The Court held that the IDEA altogether foreclosed those additional claims: With its “comprehensive” and “carefully tailored” provisions, the Act was “the exclusive avenue” through which a child with a disability (or his parents) could challenge the adequacy of his education. *Id.*, at 1009, 104 S.Ct. 3457; see *id.*, at 1013, 1016, 1021, 104 S.Ct. 3457. Congress was quick to respond. In the Handicapped Children's Protection Act of 1986, 100 Stat. 796, it overturned *Smith*’s preclusion of non-IDEA claims while also adding a carefully defined exhaustion requirement. Now codified at 20 U.S.C. § 1415(l), the relevant provision of that statute reads:

> “Nothing in [the IDEA] shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the [ADA], title V of the Rehabilitation Act [including § 504], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under [the IDEA], the [IDEA's administrative procedures] shall be exhausted to the same extent as would be required had the action been brought under [the IDEA].”

The first half of § 1415(l) (up until “except that”) “reaffirm[s] the viability” of federal statutes like the ADA or Rehabilitation Act “as separate vehicles,” no less integral than the IDEA, “for ensuring the rights of handicapped children.” H.R.Rep. No. 99–296, p. 4 (1985); see *id.*, at 6. According to that opening phrase, the IDEA does not prevent a plaintiff from asserting claims under such laws even if, as in *Smith* itself, those claims allege the denial of an appropriate public education (much as an IDEA claim would). But the second half of § 1415(l) (from “except that” onward) imposes a limit on that “anything goes” regime, in the form of an exhaustion provision. According to that closing phrase, a plaintiff bringing suit under the ADA, the Rehabilitation Act, or similar laws must in certain circumstances—that is, when “seeking relief that is also available under” the IDEA—first exhaust the IDEA’s administrative procedures. The reach of that requirement is the issue in this case.

**B**

Petitioner E.F. is a child with a severe form of *cerebral palsy*, which “significantly limits her motor skills and mobility.” App. *751 to Brief in Opposition 6, Complaint ¶ 19. When E.F. was five years old, her parents—petitioners Stacy and Brent Fry—obtained a trained service dog for her, as recommended by her pediatrician. The dog, a goldendoodle named Wonder, “help[s E.F.] to live as independently as possible” by assisting her with various life activities. *Id.*, at 2, ¶ 3. In particular, Wonder aids E.F. by “retrieving dropped items, helping her balance when she uses her walker, opening and closing doors, turning on and off lights, helping her take off her coat, [and] helping her transfer to and from the toilet.” *Id.*, at 7, ¶ 27.

But when the Frys sought permission for Wonder to join E.F. in kindergarten, officials at Ezra Eby Elementary School refused the request. Under E.F.’s existing IEP, a human aide provided E.F. with one-on-one support throughout the day; that two-legged assistance, the school officials thought, rendered Wonder superfluous. In the words of one administrator, Wonder should be barred from Ezra Eby because all of E.F.’s “physical and academic needs [were] being met through the services/programs/accommodations” that the school had already agreed to. *Id.*, at 8, ¶ 33. Later that year, the school officials briefly allowed Wonder to accompany E.F. to school on a trial basis; but even then, “the dog was required to remain in the back of the room during classes, and was forbidden from assisting [E.F.] with many tasks he had been
specifically trained to do.” *Ibid.* ¶ 35. And when the trial period concluded, the administrators again informed the Frys that Wonder was not welcome. As a result, the Frys removed E.F. from Ezra Eby and began homeschooling her.

In addition, the Frys filed a complaint with the U.S. Department of Education's Office for Civil Rights (OCR), charging that Ezra Eby's exclusion of E.F.'s service animal violated her rights under Title II of the ADA and § 504 of the Rehabilitation Act. Following an investigation, OCR agreed. The office explained in its decision letter that a school's obligations under those statutes go beyond providing educational services: A school could offer a FAPE to a child with a disability but still run afoul of the laws' ban on discrimination. See App. 30–32. And here, OCR found, Ezra Eby had indeed violated that ban, even if its use of a human aide satisfied the FAPE standard. See id., at 35–36. OCR analogized the school's conduct to “requir [ing] a student who uses a wheelchair to be carried” by an aide or “requir[ing] a blind student to be led [around by a] teacher” instead of permitting him to use a guide dog or cane. *Id.*, at 35. Regardless whether those—or Ezra Eby's—policies denied a FAPE, they violated Title II and § 504 by discriminating against children with disabilities. See *id.*, at 35–36.

In response to OCR's decision, school officials at last agreed that E.F. could come to school with Wonder. But after meeting with Ezra Eby's principal, the Frys became concerned that the school administration “would resent [E.F.] and make her return to school difficult.” App. to Brief in Opposition 10, ¶ 48. Accordingly, the Frys found a different public school, in a different district, where administrators and teachers enthusiastically received both E.F. and Wonder.

C

The Frys then filed this suit in federal court against the local and regional school districts in which Ezra Eby is located, along with the school's principal (collectively, the school districts). The complaint alleged that the school districts violated Title II of the ADA and § 504 of the Rehabilitation Act by “denying [E.F.] equal access” to Ezra Eby and its programs, “refus[ing] to reasonably accommodate” E.F.'s use of a service animal, and otherwise “discriminat[ing] against [E.F.] as a person with disabilities.” *Id.*, at 15, ¶ 68, 17–18, ¶¶ 82–83. According to the complaint, E.F. suffered harm as a result of that discrimination, including “emotional distress and pain, embarrassment, [and] mental anguish.” *Id.*, at 11–12, ¶ 51. In their prayer for relief, the Frys sought a declaration that the school districts had violated Title II and § 504, along with money damages to compensate for E.F.’s injuries.

The District Court granted the school districts' motion to dismiss the suit, holding that § 1415(l) required the Frys to first exhaust the IDEA's administrative procedures. See App. to Pet. for Cert. 50. A divided panel of the Court of Appeals for the Sixth Circuit affirmed on the same ground. In that court's view, § 1415(l) applies if “the injuries [alleged in a suit] relate to the specific substantive protections of the IDEA.” 788 F.3d 622, 625 (2015). And that means, the court continued, that exhaustion is necessary whenever “the genesis and the manifestations” of the complained-of harms were “educational” in nature. *Id.*, at 627 (quoting *Charlie F. v. Board of Ed. of Skokie School Dist. 68, 98 F.3d 989, 993 (C.A.7 1996)*). On that understanding of § 1415(l), the Sixth Circuit held, the Frys' suit could not proceed: Because the harms to E.F. were generally “educational”—most notably, the court reasoned, because “Wonder's absence hurt her sense of independence and social confidence at school”—the Frys had to exhaust the IDEA's procedures. 788 F.3d, at 627. Judge Daughtrey dissented, emphasizing that in bringing their Title II and § 504 claims, the Frys “did not allege the denial of a FAPE” or “seek to modify [E.F.'s] IEP in any way.” *Id.*, at 634.

We granted certiorari to address confusion in the courts of appeals as to the scope of § 1415(l)'s exhaustion requirement. 579 U.S. ——, 136 S.Ct. 2540, 195 L.Ed.2d 867 (2016). * We now vacate the Sixth Circuit's decision.

II
Section 1415(l) requires that a plaintiff exhaust the IDEA's procedures before filing an action under the ADA, the Rehabilitation Act, or similar laws when (but only when) her suit “seek[s] relief that is also available” under the IDEA. We first hold that to meet that statutory standard, a suit must seek relief for the denial of a FAPE, because that is the only “relief” the IDEA makes “available.” We next conclude that in determining whether a suit indeed “seeks” relief for such a denial, a court should look to the substance, or gravamen, of the plaintiff's complaint. 4

*753 A

In this Court, the parties have reached substantial agreement about what “relief” the IDEA makes “available” for children with disabilities—and about how the Sixth Circuit went wrong in addressing that question. The Frys maintain that such a child can obtain remedies under the IDEA for decisions that deprive her of a FAPE, but none for those that do not. So in the Frys' view, § 1415(l)’s exhaustion requirement can come into play only when a suit concerns the denial of a FAPE—and not, as the Sixth Circuit held, when it merely has some articulable connection to the education of a child with a disability. See Reply Brief 13–15. The school districts, for their part, also believe that the Sixth Circuit's exhaustion standard “goes too far” because it could mandate exhaustion when a plaintiff is “seeking relief that is not in substance available” under the IDEA. Brief for Respondents 30. And in particular, the school districts acknowledge that the IDEA makes remedies available only in suits that “directly implicate[ ]” a FAPE—so that only in those suits can § 1415(l) apply. Tr. of Oral Arg. 46. For the reasons that follow, we agree with the parties' shared view: The only relief that an IDEA officer can give—hence the thing a plaintiff must seek in order to trigger § 1415(l)’s exhaustion rule—is relief for the denial of a FAPE.

We begin, as always, with the statutory language at issue, which (at risk of repetition) compels exhaustion when a plaintiff seeks “relief” that is “available” under the IDEA. The ordinary meaning of “relief” in the context of a lawsuit is the “redress[ ] or benefit” that attends a favorable judgment. Black's Law Dictionary 1161 (5th ed. 1979). And such relief is “available,” as we recently explained, when it is “accessible or may be obtained.” Ross v. Blake, 578 U.S. ––––, ––––, 136 S.Ct. 1850, 1858, 195 L.Ed.2d 117 (2016) (quoting Webster's Third New International Dictionary 150 (1993)). So to establish the scope of § 1415(l), we must identify the circumstances in which the IDEA enables a person to obtain redress (or, similarly, to access a benefit).

[2] That inquiry immediately reveals the primacy of a FAPE in the statutory scheme. In its first section, the IDEA declares as its first purpose “to ensure that all children with disabilities have available to them a free appropriate public education.” § 1400(d)(1)(A). That principal purpose then becomes the Act's principal command: A State receiving federal funding under the IDEA must make such an education “available to all children with disabilities.” § 1412(a)(1)(A). The guarantee of a FAPE to those children gives rise to the bulk of the statute's more specific provisions. For example, the IEP—“the centerpiece of the statute's education delivery system”—serves as the “vehicle” or “means” of providing a FAPE. Honig, 484 U.S., at 311, 108 S.Ct. 592; Rowley, 458 U.S., at 181, 102 S.Ct. 3034; see supra, at 746 – 747. And finally, as all the above suggests, the FAPE requirement provides the yardstick for measuring the adequacy of the education that a school offers to a child with a disability: Under that standard, this Court has held, a child is entitled to “meaningful” access to education *754 based on her individual needs. Rowley, 458 U.S., at 192, 102 S.Ct. 3034. 5

[3] The IDEA's administrative procedures test whether a school has met that obligation—and so center on the Act's FAPE requirement. As noted earlier, any decision by a hearing officer on a request for substantive relief “shall” be “based on a determination of whether the child received a free appropriate public education.” § 1415(f)(3)(E)(i); see supra, at 747. 6 Or said in Latin: In the IDEA's administrative process, a FAPE denial is the sine qua non. Suppose that a parent's complaint protests a school's failure to provide some accommodation for a child with a disability. If that accommodation is needed to fulfill the IDEA's FAPE requirement, the hearing officer must order relief. But if it is not, he cannot—even though the dispute is between a child with a disability and the school she attends. There might be good
reasons, unrelated to a FAPE, for the school to make the requested accommodation. Indeed, another federal law (like the ADA or Rehabilitation Act) might require the accommodation on one of those alternative grounds. See infra, at 754–755. But still, the hearing officer cannot provide the requested relief. His role, under the IDEA, is to enforce the child's “substantive right” to a FAPE. Smith, 468 U.S., at 1010, 104 S.Ct. 3457. And that is all. 7

[4] For that reason, § 1415(l)'s exhaustion rule hinges on whether a lawsuit seeks relief for the denial of a free appropriate public education. If a lawsuit charges such a denial, the plaintiff cannot escape § 1415(l) merely by bringing her suit under a statute other than the IDEA—as when, for example, the plaintiffs in Smith claimed that a school's failure to provide a FAPE also violated the Rehabilitation Act. 8 Rather, that plaintiff must first submit her case to an IDEA hearing officer, experienced in addressing exactly the issues she raises. But if, in a suit brought under a different statute, the remedy sought is not for the denial of a FAPE, then exhaustion of the IDEA's procedures is not required. After all, the plaintiff could not get any relief from those procedures: A hearing officer, as just explained, would have to send her away empty-handed. And that is true even when the suit arises directly from a school's treatment of a child with a disability—and so could be said to relate in some way to her education. A school's conduct toward such a child—say, some refusal to make an accommodation—might injure her in ways unrelated to a FAPE, which are addressed in statutes other than the IDEA. A complaint seeking redress for those other harms, independent of any FAPE denial, is not subject to § 1415(l)'s exhaustion rule because, once again, the only “relief” the IDEA makes “available” is relief for the denial of a FAPE.

B

[5] Still, an important question remains: How is a court to tell when a plaintiff “seeks” relief for the denial of a FAPE and when she does not? Here, too, the parties have found some common ground: By looking, they both say, to the “substance” of, rather than the labels used in, the plaintiff's complaint. Brief for Respondents 20; Reply Brief 7–8. And here, too, we agree with that view: What matters is the crux—or, in legal-speak, the gravamen—of the plaintiff's complaint, setting aside any attempts at artful pleading.

That inquiry makes central the plaintiff's own claims, as § 1415(l) explicitly requires. The statutory language asks whether a lawsuit in fact “seeks” relief available under the IDEA—not, as a stricter exhaustion statute might, whether the suit “could have sought” relief available under the IDEA (or, what is much the same, whether any remedies “are” available under that law). See Brief for United States as Amicus Curiae 20 (contrasting § 1415(l) with the exhaustion provision in the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a)). In effect, § 1415(l) treats the plaintiff as “the master of the claim”: She identifies its remedial basis—and is subject to exhaustion or not based on that choice. Caterpillar Inc. v. Williams, 482 U.S. 386, 392, and n. 7, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987). A court deciding whether § 1415(l) applies must therefore examine whether a plaintiff's complaint—the principal instrument by which she describes her case—seeks relief for the denial of an appropriate education.

[6] 7 But that examination should consider substance, not surface. The use (or non-use) of particular labels and terms is not what matters. The inquiry, for example, does not ride on whether a complaint includes (or, alternatively, omits) the precise words(?) “FAPE” or “IEP.” After all, § 1415(l)'s premise is that the plaintiff is suing under a statute other than the IDEA, like the Rehabilitation Act; in such a suit, the plaintiff might see no need to use the IDEA's distinctive language—even if she is in essence contesting the adequacy of a special education program. And still more critically, a “magic words” approach would make § 1415(l)'s exhaustion rule too easy to bypass. Just last Term, a similar worry led us to hold that a court's jurisdiction under the Foreign Sovereign Immunities Act turns on the “gravamen,” or “essentials,” of the plaintiff's suit. OBB Personenverkehr AG v. Sachs, 577 U.S. ——, ——, ——, ——, 136 S.Ct. 390, 395, 396, 397, 193 L.Ed.2d 269 (2015). “[A]ny other approach,” we explained, “would allow plaintiffs to evade the Act's restrictions through artful pleading.” Id., at ——, 136 S.Ct., at 396. So too here. Section 1415(l) is not merely a pleading hurdle.
It requires exhaustion when the gravamen of a complaint seeks redress for a school's failure to provide a FAPE, even if not phrased or framed in precisely that way.

[8] In addressing whether a complaint fits that description, a court should attend to the diverse means and ends of the statutes covering persons with disabilities—the IDEA on the one hand, the ADA and Rehabilitation Act (most notably) on the other. The IDEA, of course, protects only “children” (well, really, adolescents too) and concerns only their schooling. § 1412(a)(1)(A). And as earlier noted, the statute's goal is to provide each child with meaningful access to education by offering individualized instruction and related services appropriate to her “unique needs.” § 1401(9); see *756 Rowley, 458 U.S., at 192, 198, 102 S.Ct. 3034; supra, at 753 – 754. By contrast, Title II of the ADA and § 504 of the Rehabilitation Act cover people with disabilities of all ages, and do so both inside and outside schools. And those statutes aim to root out disability-based discrimination, enabling each covered person (sometimes by means of reasonable accommodations) to participate equally to all others in public facilities and federally funded programs. See supra, at 749 – 750. In short, the IDEA guarantees individually tailored educational services, while Title II and § 504 promise non-discriminatory access to public institutions. That is not to deny some overlap in coverage: The same conduct might violate all three statutes—which is why, as in Smith, a plaintiff might seek relief for the denial of a FAPE under Title II and § 504 as well as the IDEA. But still, the statutory differences just discussed mean that a complaint brought under Title II and § 504 might instead seek relief for simple discrimination, irrespective of the IDEA's FAPE obligation.

[9] One clue to whether the gravamen of a complaint against a school concerns the denial of a FAPE, or instead addresses disability-based discrimination, can come from asking a pair of hypothetical questions. First, could the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was not a school—say, a public theater or library? And second, could an adult at the school—say, an employee or visitor—have pressed essentially the same grievance? When the answer to those questions is yes, a complaint that does not expressly allege the denial of a FAPE is also unlikely to be truly about that subject; after all, in those other situations there is no FAPE obligation and yet the same basic suit could go forward. But when the answer is no, then the complaint probably does concern a FAPE, even if it does not explicitly say so; for the FAPE requirement is all that explains why only a child in the school setting (not an adult in that setting or a child in some other) has a viable claim.

Take two contrasting examples. Suppose first that a wheelchair-bound child sues his school for discrimination under Title II (again, without mentioning the denial of a FAPE) because the building lacks access ramps. In some sense, that architectural feature has educational consequences, and a different lawsuit might have alleged that it violates the IDEA: After all, if the child cannot get inside the school, he cannot receive instruction there; and if he must be carried inside, he may not achieve the sense of independence conducive to academic (or later to real-world) success. But is the denial of a FAPE really the gravamen of the plaintiff's Title II complaint? Consider that the child could file the same basic complaint if a municipal library or theater had no ramps. And similarly, an employee or visitor could bring a mostly identical complaint against the school. That the claim can stay the same in those alternative scenarios suggests that its essence is equality of access to public facilities, not adequacy of special education. See supra, at 751 – 752 (describing OCR’s use of a similar example). And so § 1415(f) does not require exhaustion.9

But suppose next that a student with a learning disability sues his school under *757 Title II for failing to provide remedial tutoring in mathematics. That suit, too, might be cast as one for disability-based discrimination, grounded on the school's refusal to make a reasonable accommodation; the complaint might make no reference at all to a FAPE or an IEP. But can anyone imagine the student making the same claim against a public theater or library? Or, similarly, imagine an adult visitor or employee suing the school to obtain a math tutorial? The difficulty of transplanting the complaint to those other contexts suggests that its essence—even though not its wording—is the provision of a FAPE, thus bringing § 1415(f) into play.10

[10] A further sign that the gravamen of a suit is the denial of a FAPE can emerge from the history of the proceedings. In particular, a court may consider that a plaintiff has previously invoked the IDEA's formal procedures to handle the
dispute—thus starting to exhaust the Act's remedies before switching midstream. Recall that a parent dissatisfied with her child's education initiates those administrative procedures by filing a complaint, which triggers a preliminary meeting (or possibly mediation) and then a due process hearing. See supra, at 748 – 749. A plaintiff's initial choice to pursue that process may suggest that she is indeed seeking relief for the denial of a FAPE—with the shift to judicial proceedings prior to full exhaustion reflecting only strategic calculations about how to maximize the prospects of such a remedy. Whether that is so depends on the facts; a court may conclude, for example, that the move to a courtroom came from a late-acquired awareness that the school had fulfilled its FAPE obligation and that the grievance involves something else entirely. But prior pursuit of the IDEA's administrative remedies will often provide strong evidence that the substance of a plaintiff's claim concerns the denial of a FAPE, even if the complaint never explicitly uses that term. 11

III

[11] The Court of Appeals did not undertake the analysis we have just set forward. *758 As noted above, it asked whether E.F.'s injuries were, broadly speaking, “educational” in nature. See supra, at 752; 788 F.3d, at 627 (reasoning that the “value of allowing Wonder to attend [school] with E.F. was educational” because it would foster “her sense of independence and social confidence,” which is “the sort of interest the IDEA protects”). That is not the same as asking whether the gravamen of E.F.'s complaint charges, and seeks relief for, the denial of a FAPE. And that difference in standard may have led to a difference in result in this case. Understood correctly, § 1415(l) might not require exhaustion of the Frys' claim. We lack some important information on that score, however, and so we remand the issue to the court below.

The Frys' complaint alleges only disability-based discrimination, without making any reference to the adequacy of the special education services E.F.'s school provided. The school districts' “refusal to allow Wonder to act as a service dog,” the complaint states, “discriminated against [E.F.] as a person with disabilities ... by denying her equal access” to public facilities. App. to Brief in Opposition 15, Complaint ¶ 68. The complaint contains no allegation about the denial of a FAPE or about any deficiency in E.F.'s IEP. More, it does not accuse the school even in general terms of refusing to provide the educational instruction and services that E.F. needs. See 788 F.3d, at 631 (acknowledging that the Frys do not “state that Wonder enhances E.F.'s educational opportunities”). As the Frys explained in this Court: The school districts “have said all along that because they gave [E.F.] a one-on-one [human] aide, that all of her ... educational needs were satisfied. And we have not challenged that, and it would be difficult for us to challenge that.” Tr. of Oral Arg. 16. The Frys instead maintained, just as OCR had earlier found, that the school districts infringed E.F.'s right to equal access—even if their actions complied in full with the IDEA's requirements. See App. to Brief in Opposition 15, 18–19, Complaint ¶¶ 69, 85, 87; App. 34–37; supra, at 751 – 752.

And nothing in the nature of the Frys' suit suggests any implicit focus on the adequacy of E.F.'s education. Consider, as suggested above, that the Frys could have filed essentially the same complaint if a public library or theater had refused admittance to Wonder. See supra, at 756. Or similarly, consider that an adult visitor to the school could have leveled much the same charges if prevented from entering with his service dog. See ibid. In each case, the plaintiff would challenge a public facility's policy of precluding service dogs (just as a blind person might challenge a policy of barring guide dogs, see supra, at 751) as violating Title II's and § 504's equal access requirements. The suit would have nothing to do with the provision of educational services. From all that we know now, that is exactly the kind of action the Frys have brought.

But we do not foreclose the possibility that the history of these proceedings might suggest something different. As earlier discussed, a plaintiff's initial pursuit of the IDEA's administrative remedies can serve as evidence that the gravamen of her later suit is the denial of a FAPE, even though that does not appear on the face of her complaint. See supra, at 756 – 758. The Frys may or may not have sought those remedies before filing this case: None of the parties here have addressed that issue, and the record is cloudy as to the relevant facts. Accordingly, on remand, the court below should establish whether (or to what extent) the Frys invoked the IDEA's dispute resolution process before bringing this suit. And if
the Frys started down that road, the court should decide whether *759 their actions reveal that the gravamen of their complaint is indeed the denial of a FAPE, thus necessitating further exhaustion.

With these instructions and for the reasons stated, we vacate the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Justice ALITO, with whom Justice THOMAS joins, concurring in part and concurring in the judgment.

I join all of the opinion of the Court with the exception of its discussion (in the text from the beginning of the first new paragraph on page 756 to the end of the opinion) in which the Court provides several misleading “clue[s],” ante, at 756, for the lower courts.

The Court first instructs the lower courts to inquire whether the plaintiff could have brought “essentially the same claim if the alleged conduct had occurred at a public facility that was not a school—say, a public theater or library.” Ibid. Next, the Court says, a court should ask whether “an adult at the school—say, an employee or visitor—[could] have pressed essentially the same grievance.” Ibid. These clues make sense only if there is no overlap between the relief available under the following two sets of claims: (1) the relief provided by the Individuals with Disabilities Education Act (IDEA), and (2) the relief provided by other federal laws (including the Constitution, the Americans with Disabilities Act of 1990 (ADA), and the Rehabilitation Act of 1973). The Court does not show or even claim that there is no such overlap—to the contrary, it observes that “[t]he same conduct might violate” the ADA, the Rehabilitation Act and the IDEA. Ibid. And since these clues work only in the absence of overlap, I would not suggest them.

The Court provides another false clue by suggesting that lower courts take into account whether parents, before filing suit under the ADA or the Rehabilitation Act, began to pursue but then abandoned the IDEA’s formal procedures. Ante, at 756 – 758. This clue also seems to me to be ill-advised. It is easy to imagine circumstances under which parents might start down the IDEA road and then change course and file an action under the ADA or the Rehabilitation Act that seeks relief that the IDEA cannot provide. The parents might be advised by their attorney that the relief they were seeking under the IDEA is not available under that law but is available under another. Or the parents might change their minds about the relief that they want, give up on the relief that the IDEA can provide, and turn to another statute.

Although the Court provides these clues for the purpose of assisting the lower courts, I am afraid that they may have the opposite effect. They are likely to confuse and lead courts astray.

All Citations


Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 At the time (and until 1990), the IDEA was called the Education of the Handicapped Act, or EHA. See § 901(a), 104 Stat. 1141–1142 (renaming the statute). To avoid confusion—and acronym overload—we refer throughout this opinion only to the IDEA.
Because this case comes to us on review of a motion to dismiss E.F.'s suit, we accept as true all facts pleaded in her complaint. See Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 164, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993).

See Payne v. Peninsula School Dist., 653 F.3d 863, 874 (C.A.9 2011) (en banc) (cataloguing different Circuits' understandings of § 1415(f)). In particular, the Ninth Circuit has criticized an approach similar to the Sixth Circuit's for "treat[ing] § 1415(f)" as a quasi-preemption provision, requiring administrative exhaustion for any case that falls within the general 'field' of educating disabled students." Id., at 875.

In reaching these conclusions, we leave for another day a further question about the meaning of § 1415(f): Is exhaustion required when the plaintiff complains of the denial of a FAPE, but the specific remedy she requests—here, money damages for emotional distress—is not one that an IDEA hearing officer may award? The Frys, along with the Solicitor General, say the answer is no. See Reply Brief 2–3; Brief for United States as Amicus Curiae 16. But resolution of that question might not be needed in this case because the Frys also say that their complaint is not about the denial of a FAPE, see Reply Brief 17—and, as later explained, we must remand that distinct issue to the Sixth Circuit, see infra, at 757 – 759. Only if that court rejects the Frys' view of their lawsuit, using the analysis we set out below, will the question about the effect of their request for money damages arise.

A case now before this Court, Endrew F. v. Douglas County School Dist. RE–1, No. 15–827, presents unresolved questions about the precise content of the FAPE standard.

Without finding the denial of a FAPE, a hearing officer may do nothing more than order a school district to comply with the Act's various procedural requirements, see § 1415(f)(3)(E)(iii)—for example, by allowing parents to "examine all records" relating to their child, § 1415(b)(1). Similarly, a court in IDEA litigation may provide a substantive remedy only when it determines that a school has denied a FAPE. See School Comm. of Burlington v. Department of Ed. of Mass., 471 U.S. 359, 369, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985). Without such a finding, that kind of relief is (once again) unavailable under the Act.

Once again, we do not address here (or anywhere else in this opinion) a case in which a plaintiff, although charging the denial of a FAPE, seeks a form of remedy that an IDEA officer cannot give—for example, as in the Frys' complaint, money damages for resulting emotional injury. See n. 4, supra.

The school districts offer another example illustrating the point. They suppose that a teacher, acting out of animus or frustration, strikes a student with a disability, who then sues the school under a statute other than the IDEA. See Brief for Respondents 36–37. Here too, the suit could be said to relate, in both genesis and effect, to the child's education. But the school districts opine, we think correctly, that the substance of the plaintiff's claim is unlikely to involve the adequacy of special education—and thus is unlikely to require exhaustion. See ibid. A telling indicator of that conclusion is that a child could file the same kind of suit against an official at another public facility for inflicting such physical abuse—as could an adult subject to similar treatment by a school official. To be sure, the particular circumstances of such a suit (school or theater? student or employee?) might be pertinent in assessing the reasonableness of the challenged conduct. But even if that is so, the plausibility of bringing other variants of the suit indicates that the gravamen of the plaintiff's complaint does not concern the appropriateness of an educational program.

According to Justice ALITO, the hypothetical inquiries described above are useful only if the IDEA and other federal laws are mutually exclusive in scope. See post, at 759 (opinion concurring in part and concurring in judgment). That is incorrect. The point of the questions is not to show that a plaintiff faced with a particular set of circumstances could only have proceeded under Title II or § 504—or, alternatively, could only have proceeded under the IDEA. (Depending on the circumstances, she might well have been able to proceed under both.) Rather, these questions help determine whether a plaintiff who has chosen to bring a claim under Title II or § 504 instead of the IDEA—and whose complaint makes no mention of a FAPE—nevertheless raises a claim whose substance is the denial of an appropriate education.

The point here is limited to commencement of the IDEA's formal administrative procedures; it does not apply to more informal requests to IEP Team members or other school administrators for accommodations or changes to a special education program. After all, parents of a child with a disability are likely to bring all grievances first to those familiar officials, whether or not they involve the denial of a FAPE.
137 S.Ct. 988  
Supreme Court of the United States  

ENDREW F., a minor, by and through his parents and next friends, JOSEPH F. and Jennifer F., Petitioner  
v.  
DOUGLAS COUNTY SCHOOL DISTRICT RE–1.  

No. 15–827.  
Decided March 22, 2017.  

Synopsis  
Background: Parents of student with autism filed suit against school district under the Individuals with Disabilities Education Act (IDEA), challenging district's denial of their claim for reimbursement for tuition at private school student attended during the fifth grade. The United States District Court for the District of Colorado, Lewis T. Babcock, J., 2014 WL 4548439, affirmed, and parents appealed. The United States Court of Appeals for the Tenth Circuit, Tymkovich, Circuit Judge, 798 F.3d 1329, affirmed. Certiorari was granted.  

[ Holding:] The Supreme Court, Chief Justice Roberts, held that to meet its substantive obligation under the IDEA, a school must offer an individual education plan (IEP) reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.  

Vacated and remanded.  

*991 Syllabus*  
The Individuals with Disabilities Education Act (IDEA) offers States federal funds to assist in educating children with disabilities. The Act conditions that funding on compliance with certain statutory requirements, including the requirement that States provide every eligible child a “free appropriate public education,” or FAPE, by means of a uniquely tailored “individualized education program,” or IEP. 20 U.S.C. §§ 1401(9)(D), 1412(a)(1).  

This Court first addressed the FAPE requirement in Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690. The Court held that the Act guarantees a substantively adequate program of education to all eligible children, and that this requirement is satisfied if the child's IEP sets out an educational program that is “reasonably calculated to enable the child to receive educational benefits.” Id., at 207, 102 S.Ct. 3034. For children fully integrated in the regular classroom, this would typically require an IEP “reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.” Id., at 204, 102 S.Ct. 3034. Because the IEP challenged in Rowley plainly met this standard, the Court declined “to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act,” instead “confin[ing] its analysis” to the facts of the case before it. Id., at 202, 102 S.Ct. 3034.  

Petitioner Endrew F., a child with autism, received annual IEPs in respondent Douglas County School District from preschool through fourth grade. By fourth grade, Endrew's parents believed his academic and functional progress had
stalled. When the school district proposed a fifth grade IEP that resembled those from past years, Endrew's parents removed him from public school and enrolled him in a specialized private school, where he made significant progress. School district representatives later presented Endrew's parents with a new fifth grade IEP, but they considered it no more adequate than the original plan. They then sought reimbursement for Endrew's private school tuition by filing a complaint under the IDEA with the Colorado Department of Education. Their claim was denied, and a Federal District Court affirmed that determination. The Tenth Circuit also affirmed. That court interpreted Rowley to establish a rule that a child's IEP is adequate as long as it is calculated to confer an "educational benefit [that is] merely ... more than de minimis." 798 F.3d 1329, 1338 (internal quotation marks omitted), and concluded that Endrew's IEP had been "reasonably calculated to enable [him] to make some progress," id., at 1342 (internal quotation marks omitted). The court accordingly held that Endrew had received a FAPE.

Held: To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. Pp. 997 – 1002.

(a) Rowley and the language of the IDEA point to the approach adopted here. The “reasonably calculated” qualification *992 reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials, informed by their own expertise and the views of a child's parents or guardians; any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal. An IEP must aim to enable the child to make progress; the essential function of an IEP is to set out a plan for pursuing academic and functional advancement. And the degree of progress contemplated by the IEP must be appropriate in light of the child's circumstances, which should come as no surprise. This reflects the focus on the particular child that is at the core of the IDEA, and the directive that States offer instruction “specially designed” to meet a child's “unique needs” through an “[i]ndividualized education program.” §§ 1401(29), (14) (emphasis added).

Rowley sheds light on what appropriate progress will look like in many cases: For a child fully integrated in the regular classroom, an IEP typically should be “reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.” 458 U.S., at 204, 102 S.Ct. 3034. This guidance is grounded in the statutory definition of a FAPE. One component of a FAPE is “special education,” defined as “specially designed instruction ... to meet the unique needs of a child with a disability.” §§ 1401(9), (29). In determining what it means to “meet the unique needs” of a child with a disability, the provisions of the IDEA governing the IEP development process provide guidance. These provisions reflect what the Court said in Rowley by focusing on “progress in the general education curriculum.” §§ 1414(d)(1)(A) (i)(I)(aa), (II)(aa), (IV)(bb).

Rowley did not provide concrete guidance with respect to a child who is not fully integrated in the regular classroom and not able to achieve on grade level. A child's IEP need not aim for grade-level advancement if that is not a reasonable prospect. But that child's educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives.

This standard is more demanding than the “merely more than de minimis ” test applied by the Tenth Circuit. It cannot be right that the IDEA generally contemplates grade-level advancement for children with disabilities who are fully integrated in the regular classroom, but is satisfied with barely more than de minimis progress for children who are not. Pp. 997 – 1001.

(b) Endrew's parents argue that the Act goes even further and requires States to provide children with disabilities educational opportunities that are “substantially equal to the opportunities afforded children without disabilities.” Brief for Petitioner 40. But the lower courts in Rowley adopted a strikingly similar standard, and this Court rejected it in clear terms. Mindful that Congress has not materially changed the statutory definition of a FAPE since Rowley was decided,
this Court declines to interpret the FAPE provision in a manner so plainly at odds with the Court's analysis in that case. Pp. 999 – 1001.

(c) The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created. This absence of a bright-line rule should not be mistaken for “an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review.” *Rowley*, 458 U.S., at 206, 102 S.Ct. 3034. At the same time, deference is based on the application of expertise and the exercise of judgment by school authorities. The nature of the IEP process ensures that parents and school representatives will fully air their respective opinions on the degree of progress a child's IEP should pursue; thus, by the time any dispute reaches court, school authorities will have had the chance to bring their expertise and judgment to bear on areas of disagreement. See §§ 1414, 1415; *Rowley*, 458 U.S., at 208–209, 102 S.Ct. 3034. At that point, a reviewing court may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances. Pp. 999 – 1002.

798 F.3d 1329, vacated and remanded.

ROBERTS, C.J., delivered the opinion for a unanimous Court.

Attorneys and Law Firms

Jeffrey L. Fisher, Stanford, CA, for Petitioner.

Irv Gornstein for the United States as amicus curiae, by special leave of the Court, supporting the Petitioner.

Neal K. Katyal, Washington, DC, for Respondent.


Opinion

Chief Justice ROBERTS delivered the opinion of the Court.

Thirty-five years ago, this Court held that the Individuals with Disabilities Education Act establishes a substantive right to a “free appropriate public education” for certain children with disabilities. *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). We declined, however, to endorse any one standard for determining “when handicapped children are receiving sufficient educational benefits to satisfy the requirements of the Act.” *Id.*, at 202, 102 S.Ct. 3034. That “more difficult problem” is before us today. *Ibid.*
The Individuals with Disabilities Education Act (IDEA or Act) offers States federal funds to assist in educating children with disabilities. 84 Stat. 175, as amended, 20 U.S.C. § 1400 et seq.; see Arlington Central School Dist. Bd. of Ed. v. Murphy, 548 U.S. 291, 295, 126 S.Ct. 2455, 165 L.Ed.2d 526 (2006). In exchange for the funds, a State pledges to comply with a number of statutory conditions. Among them, the State must provide a free appropriate public education—a FAPE, for short—to all eligible children. § 1412(a)(1).

*994* A FAPE, as the Act defines it, includes both “special education” and “related services.” § 1401(9). “Special education” is “specially designed instruction ... to meet the unique needs of a child with a disability”; “related services” are the support services “required to assist a child ... to benefit from” that instruction. §§ 1401(26), (29). A State covered by the IDEA must provide a disabled child with such special education and related services “in conformity with the [child's] individualized education program,” or IEP. § 1401(9)(D).

[I] The IEP is “the centerpiece of the statute's education delivery system for disabled children.” Honig v. Doe, 484 U.S. 305, 311, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988). A comprehensive plan prepared by a child’s “IEP Team” (which includes teachers, school officials, and the child's parents), an IEP must be drafted in compliance with a detailed set of procedures. § 1414(d)(1)(B) (internal quotation marks omitted). These procedures emphasize collaboration among parents and educators and require careful consideration of the child's individual circumstances. § 1414. The IEP is the means by which special education and related services are “tailored to the unique needs” of a particular child. Rowley, 458 U.S., at 181, 102 S.Ct. 3034.

The IDEA requires that every IEP include “a statement of the child's present levels of academic achievement and functional performance,” describe “how the child's disability affects the child's involvement and progress in the general education curriculum,” and set out “measurable annual goals, including academic and functional goals,” along with a “description of how the child's progress toward meeting” those goals will be gauged. §§ 1414(d)(1)(A)(i)(I)-(III). The IEP must also describe the “special education and related services ... that will be provided” so that the child may “advance appropriately toward attaining the annual goals” and, when possible, “be involved in and make progress in the general education curriculum.” § 1414(d)(1)(A)(i)(IV).

Parents and educators often agree about what a child's IEP should contain. But not always. When disagreement arises, parents may turn to dispute resolution procedures established by the IDEA. The parties may resolve their differences informally, through a “[p]reliminary meeting,” or, somewhat more formally, through mediation. §§ 1415(e), (f)(1)(B)(i). If these measures fail to produce accord, the parties may proceed to what the Act calls a “due process hearing” before a state or local educational agency. §§ 1415(f)(1)(A), (g). And at the conclusion of the administrative process, the losing party may seek redress in state or federal court. § 1415(i)(2)(A).

B

This Court first addressed the FAPE requirement in Rowley. 1 Plaintiff Amy Rowley was a first grader with impaired hearing. Her school district offered an IEP under which Amy would receive instruction in the regular classroom and spend time each week with a special tutor and a speech therapist. The district proposed that Amy's classroom teacher speak into a wireless transmitter and that Amy use an FM hearing aid designed to amplify her teacher's words; the district offered to *995* supply both components of this system. But Amy's parents argued that the IEP should go further and provide a sign-language interpreter in all of her classes. Contending that the school district's refusal to furnish an interpreter denied Amy a FAPE, Amy's parents initiated administrative proceedings, then filed a lawsuit under the Act. Rowley, 458 U.S., at 184–185, 102 S.Ct. 3034.

The District Court agreed that Amy had been denied a FAPE. The court acknowledged that Amy was making excellent progress in school: She was “perform[ing] better than the average child in her class” and “advancing easily from grade to
197 L.Ed.2d 335, 85 USLW 4109, 17 Cal. Daily Op. Serv. 2772...

grade.” *Id.*, at 185, 102 S.Ct. 3034 (internal quotation marks omitted). At the same time, Amy “under[stood] considerably less of what goes on in class than she could if she were not deaf.” *Ibid.* (internal quotation marks omitted). Concluding that “it has been left entirely to the courts and the hearings officers to give content to the requirement of an ‘appropriate education,’ ” 483 F.Supp. 528, 533 (S.D.N.Y.1980), the District Court ruled that Amy's education was not “appropriate” unless it provided her “an opportunity to achieve [her] full potential commensurate with the opportunity provided to other children.” *Rowley*, 458 U.S., at 185–186, 102 S.Ct. 3034 (internal quotation marks omitted). The Second Circuit agreed with this analysis and affirmed.

In this Court, the parties advanced starkly different understandings of the FAPE requirement. Amy's parents defended the approach of the lower courts, arguing that the school district was required to provide instruction and services that would provide Amy an “equal educational opportunity” relative to children without disabilities. *Id.*, at 198, 102 S.Ct. 3034 (internal quotation marks omitted). The school district, for its part, contended that the IDEA “did not create substantive individual rights”; the FAPE provision was instead merely aspirational. Brief for Petitioners in *Rowley*, O.T. 1981, No. 80–1002, pp. 28, 41.

Neither position carried the day. On the one hand, this Court rejected the view that the IDEA gives “courts carte blanche to impose upon the States whatever burden their various judgments indicate should be imposed.” *Rowley*, 458 U.S., at 190, n. 11, 102 S.Ct. 3034. After all, the statutory phrase “free appropriate public education” was expressly defined in the Act, even if the definition “tend[ed] toward the cryptic rather than the comprehensive.” *Id.*, at 188, 102 S.Ct. 3034. This Court went on to reject the “equal opportunity” standard adopted by the lower courts, concluding that “free appropriate public education” was a phrase “too complex to be captured by the word ‘equal’ whether one is speaking of opportunities or services.” *Id.*, at 199, 102 S.Ct. 3034. The Court also viewed the standard as “entirely unworkable,” apt to require “impossible measurements and comparisons” that courts were ill suited to make. *Id.*, at 198, 102 S.Ct. 3034.

[2] On the other hand, the Court also rejected the school district's argument that the FAPE requirement was actually no requirement at all. *Id.*, at 200, 102 S.Ct. 3034. Instead, the Court carefully charted a middle path. Even though “Congress was rather sketchy in establishing substantive requirements” under the Act, *id.*, at 206, 102 S.Ct. 3034 the Court nonetheless made clear that the Act guarantees a substantively adequate program of education to all eligible children, *id.*, at 200–202, 207, 102 S.Ct. 3034; see *id.*, at 193, n. 15, 102 S.Ct. 3034 (describing the “substantive standard ... implicit in the Act”). We explained that this requirement is satisfied, and a child has received a FAPE, if *996* the child's IEP sets out an educational program that is “reasonably calculated to enable the child to receive educational benefits.” *Id.*, at 207, 102 S.Ct. 3034. For children receiving instruction in the regular classroom, this would generally require an IEP “reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.” *Id.*, at 204, 102 S.Ct. 3034; see also *id.*, at 203, n. 25, 102 S.Ct. 3034.

In view of Amy Rowley's excellent progress and the “substantial” suite of specialized instruction and services offered in her IEP, we concluded that her program satisfied the FAPE requirement. *Id.*, at 202, 102 S.Ct. 3034. But we went no further. Instead, we expressly “confine[d] our analysis” to the facts of the case before us. *Ibid.* Observing that the Act requires States to “educate a wide spectrum” of children with disabilities and that “the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end,” we declined “to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act.” *Ibid.*

C

Petitioner Endrew F. was diagnosed with autism at age two. Autism is a neurodevelopmental disorder generally marked by impaired social and communicative skills, “engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences.” 34 C.F.R. § 300.8(c)
Endrew attended school in respondent Douglas County School District from preschool through fourth grade. Each year, his IEP Team drafted an IEP addressed to his educational and functional needs. By Endrew's fourth grade year, however, his parents had become dissatisfied with his progress. Although Endrew displayed a number of strengths—his teachers described him as a humorous child with a “sweet disposition” who “show[ed] concern[] for friends”—he still “exhibited multiple behaviors that inhibited his ability to access learning in the classroom.” Supp. App. 182a; 798 F.3d 1329, 1336 (C.A.10 2015). Endrew would scream in class, climb over furniture and other students, and occasionally run away from school. *Id., at 1336. He was afflicted by severe fears of commonplace things like flies, spills, and public restrooms. As Endrew's parents saw it, his academic and functional progress had essentially stalled: Endrew's IEPs largely carried over the same basic goals and objectives from one year to the next, indicating that he was failing to make meaningful progress toward his aims. His parents believed that only a thorough overhaul of the school district's approach to Endrew's behavioral problems could reverse the trend. But in April 2010, the school district presented Endrew's parents with a proposed fifth grade IEP that was, in their view, pretty much the same as his past ones. So his parents removed Endrew from public school and enrolled him at Firefly Autism House, a private school that specializes in educating children with autism.

Endrew did much better at Firefly. The school developed a “behavioral intervention plan” that identified Endrew's most problematic behaviors and set out particular strategies for addressing them. See Supp. App. 198a–201a. Firefly also added heft to Endrew's academic goals. Within months, Endrew's behavior improved significantly, permitting him to make a degree of academic progress that had eluded him in public school.

In November 2010, some six months after Endrew started classes at Firefly, his parents again met with representatives of the Douglas County School District. The district presented a new IEP. Endrew's parents considered the IEP no more adequate than the one proposed in April, and rejected it. They were particularly concerned that the stated plan for addressing Endrew's behavior did not differ meaningfully from the plan in his fourth grade IEP, despite the fact that his experience at Firefly suggested that he would benefit from a different approach.

In February 2012, Endrew's parents filed a complaint with the Colorado Department of Education seeking reimbursement for Endrew's tuition at Firefly. To qualify for such relief, they were required to show that the school district had not provided Endrew a FAPE in a timely manner prior to his enrollment at the private school. See § 1412(a)(10)(C)(ii). Endrew's parents contended that the final IEP proposed by the school district was not “reasonably calculated to enable [Endrew] to receive educational benefits” and that Endrew had therefore been denied a FAPE. Rowley, 458 U.S., at 207, 102 S.Ct. 3034. An Administrative Law Judge (ALJ) disagreed and denied relief.

Endrew's parents sought review in Federal District Court. Giving “due weight” to the decision of the ALJ, the District Court affirmed. 2014 WL 4548439, *5 (D.Colo., Sept. 15, 2014) (quoting Rowley, 458 U.S., at 206, 102 S.Ct. 3034). The court acknowledged that Endrew's performance under past IEPs “did not reveal immense educational growth.” 2014 WL 4548439, at *9. But it concluded that annual modifications to Endrew's IEP objectives were “sufficient to show a pattern of, at the least, minimal progress.” Ibid. Because Endrew's previous IEPs had enabled him to make this sort of progress, the court reasoned, his latest, similar IEP was reasonably calculated to do the same thing. In the court's view, that was all Rowley demanded. 2014 WL 4548439, at *9.

The Tenth Circuit affirmed. The Court of Appeals recited language from Rowley stating that the instruction and services furnished to children with disabilities must be calculated to confer “some educational benefit.” 798 F.3d, at 1338 (quoting Rowley, 458 U.S., at 200, 102 S.Ct. 3034; emphasis added by Tenth Circuit). The court noted that it had long interpreted this language to mean that a child's IEP is adequate as long as it is calculated to confer an “educational benefit [that
is merely ... more than de minimis.” 798 F.3d, at 1338 (internal quotation marks omitted). Applying this standard, the Tenth Circuit held that Endrew's IEP had been “reasonably calculated to enable [him] to make some progress.” *998 Id., at 1342 (internal quotation marks omitted). Accordingly, he had not been denied a FAPE.

We granted certiorari. 579 U.S. ———, 137 S.Ct. 29, 195 L.Ed.2d 901 (2016).

II

A

The Court in Rowley declined “to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act.” 458 U.S., at 202, 102 S.Ct. 3034. The school district, however, contends that Rowley nonetheless established that “an IEP need not promise any particular level of benefit,” *998 so long as it is “reasonably calculated’ to provide some benefit, as opposed to none.” Brief for Respondent 15.

The district relies on several passages from Rowley to make its case. It points to our observation that “any substantive standard prescribing the level of education to be accorded” children with disabilities was “[n]oticeably absent from the language of the statute.” 458 U.S., at 189, 102 S.Ct. 3034; see Brief for Respondent 14. The district also emphasizes the Court's statement that the Act requires States to provide access to instruction “sufficient to confer some educational benefit,” reasoning that any benefit, however minimal, satisfies this mandate. Brief for Respondent 15 (quoting *998 Rowley, 458 U.S., at 200, 102 S.Ct. 3034 ). Finally, the district urges that the Court conclusively adopted a “some educational benefit” standard when it wrote that “the intent of the Act was more to open the door of public education to handicapped children ... than to guarantee any particular level of education.” *998 Id., at 192, 102 S.Ct. 3034; see Brief for Respondent 14.

[3] These statements in isolation do support the school district's argument. But the district makes too much of them. Our statement that the face of the IDEA imposed no explicit substantive standard must be evaluated alongside our statement that a substantive standard was “implicit in the Act.” *998 Rowley, 458 U.S., at 193, n. 15, 102 S.Ct. 3034. Similarly, we find little significance in the Court's language concerning the requirement that States provide instruction calculated to “confer some educational benefit.” *998 Id., at 200, 102 S.Ct. 3034. The Court had no need to say anything more particular, since the case before it involved a child whose progress plainly demonstrated that her IEP was designed to deliver more than adequate educational benefits. See id., at 202, 209–210, 102 S.Ct. 3034. The Court's principal concern was to correct what it viewed as the surprising rulings below: that the IDEA effectively empowers judges to elaborate a federal common law of public education, and that a child performing better than most in her class had been denied a FAPE. The Court was not concerned with precisely articulating a governing standard for closer cases. See id., at 202, 102 S.Ct. 3034. And the statement that the Act did not “guarantee any particular level of education” simply reflects the unobjectionable proposition that the IDEA cannot and does not promise “any particular [educational] outcome.” *998 Id., at 192, 102 S.Ct. 3034 (internal quotation marks omitted). No law could do that—for any child.

More important, the school district's reading of these isolated statements runs headlong into several points on which Rowley is crystal clear. For instance—just after saying that the Act requires instruction that is “sufficient to confer some educational benefit”—we noted that “[t]he determination of when handicapped children are receiving sufficient educational benefits ... presents a ... difficult problem.” *998 Id., at 200, 202, 102 S.Ct. 3034 (emphasis added). And then we expressly declined “to establish any one test for determining the adequacy of educational benefits” under the Act. *998 Id., at 202, 102 S.Ct. 3034 (emphasis added). It would not have been “difficult” for us to say when educational benefits are sufficient if we had just said that any educational benefit was enough. And it would have been strange to refuse to set out a test for the adequacy of educational benefits if we had just done exactly that. We cannot accept the school district's reading of Rowley.
While *Rowley* declined to articulate an overarching standard to evaluate the adequacy of the education provided under the Act, the decision and the statutory language point to a general approach: To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.

The “reasonably calculated” qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. *Id.*, at 207, 102 S.Ct. 3034. The Act contemplates that this fact-intensive exercise will be informed not only by the expertise of school officials, but also by the input of the child's parents or guardians. *Id.*, at 208–209, 102 S.Ct. 3034. Any review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal. *Id.*, at 206–207, 102 S.Ct. 3034.

The IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement. See §§ 1414(d)(1)(A)(i)(I)–(IV). This reflects the broad purpose of the IDEA, an “ambitious” piece of legislation enacted “in response to Congress' perception that a majority of handicapped children in the United States ‘were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to “drop out.” ’ ” *Rowley*, 458 U.S., at 179, 102 S.Ct. 3034 (quoting H.R.Rep. No. 94–332, p. 2 (1975)). A substantive standard not focused on student progress would do little to remedy the pervasive and tragic academic stagnation that prompted Congress to act.

That the progress contemplated by the IEP must be appropriate in light of the child's circumstances should come as no surprise. A focus on the particular child is at the core of the IDEA. The instruction offered must be “specially designed” to meet a child's “unique needs” through an “[i]ndividualized education program.” §§ 1401(29), (14) (emphasis added). An IEP is not a form document. It is constructed only after careful consideration of the child's present levels of achievement, disability, and potential for growth. §§ 1414(d)(1)(A)(i)(I)–(IV), (d)(3)(A)(i)–(iv). As we observed in *Rowley*, the IDEA “requires participating States to educate a wide spectrum of handicapped children,” and “the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between.” 458 U.S., at 202, 102 S.Ct. 3034.

*Rowley* sheds light on what appropriate progress will look like in many cases. There, the Court recognized that the IDEA requires that children with disabilities receive education in the regular classroom “whenever possible.” *Ibid.* (citing § 1412(a)(5)). When this preference is met, “the system itself monitors the educational progress of the child.” *Id.*, at 202–203, 102 S.Ct. 3034. “Regular examinations are administered, grades are awarded, and yearly advancement to higher grade levels is permitted for those children who attain an adequate knowledge of the course material.” *Id.*, at 203, 102 S.Ct. 3034. Progress through this system is what our society generally means by an “education.” And access to an “education” is what the IDEA promises. *Ibid.* Accordingly, for a child fully integrated in the regular classroom, an IEP typically should, as *Rowley* put it, be “reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.” *Id.*, at 203–204, 102 S.Ct. 3034.

This guidance is grounded in the statutory definition of a FAPE. One of the components of a FAPE is “special education,” defined as “specially designed instruction ... to meet the unique needs of a child with a disability.” §§ 1401(9), (29). In determining what it means to “meet the unique needs” of a child with a disability, the provisions governing the IEP development process are a natural source of guidance: It is through the IEP that “[t]he ‘free appropriate public education’ required by the Act is tailored to the unique needs of” a particular child. *Id.*, at 181, 102 S.Ct. 3034.

The IEP provisions reflect *Rowley*’s expectation that, for most children, a FAPE will involve integration in the regular classroom and individualized special education calculated to achieve advancement from grade to grade. Every
IEP begins by describing a child's present level of achievement, including explaining “how the child's disability affects the child's involvement and progress in the general education curriculum.” § 1414(d)(1)(A)(i)(I)(aa). It then sets out “a statement of measurable annual goals ... designed to ... enable the child to be involved in and make progress in the general education curriculum,” along with a description of specialized instruction and services that the child will receive. §§ 1414(d)(1)(A)(i)(II), (IV). The instruction and services must likewise be provided with an eye toward “progress in the general education curriculum.” § 1414(d)(1)(A)(i)(IV)(bb). Similar IEP requirements have been in place since the time the States began accepting funding under the IDEA.

The school district protests that these provisions impose only procedural requirements—a checklist of items the IEP must address—not a substantive standard enforceable in court. Tr. of Oral Arg. 50–51. But the procedures are there for a reason, and their focus provides insight into what it means, for purposes of the FAPE definition, to “meet the unique needs” of a child with a disability. §§ 1401(9), (29). When a child is fully integrated in the regular classroom, as the Act prefers, what that typically means is providing a level of instruction reasonably calculated to permit advancement through the general curriculum.

Rowley had no need to provide concrete guidance with respect to a child who is not fully integrated in the regular classroom and not able to achieve on grade level. That case concerned a young girl who was progressing smoothly through the regular curriculum. If that is not a reasonable prospect for a child, his IEP need not aim for grade-level advancement. But his educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives.

Of course this describes a general standard, not a formula. But whatever else can be said about it, this standard is markedly more demanding than the “merely more than de minimis” test applied by the Tenth Circuit. It cannot be the case that the Act typically aims for grade-level advancement for children with disabilities who can be educated in the regular classroom, but is satisfied with barely more than de minimis progress for those who cannot.

When all is said and done, a student offered an educational program providing “merely more than de minimis” progress from year to year can hardly be said to have been offered an education at all. For children with disabilities, receiving instruction that aims so low would be tantamount to “sitting idly ... awaiting the time when they were old enough to ‘drop out.’ ” Rowley, 458 U.S., at 179, 102 S.Ct. 3034 (some internal quotation marks omitted). The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.

Endrew's parents argue that the Act goes even further. In their view, a FAPE is “an education that aims to provide a child with a disability opportunities to achieve academic success, attain self-sufficiency, and contribute to society that are substantially equal to the opportunities afforded children without disabilities.” Brief for Petitioner 40.

This standard is strikingly similar to the one the lower courts adopted in Rowley, and it is virtually identical to the formulation advanced by Justice Blackmun in his separate writing in that case. See 458 U.S., at 185–186, 102 S.Ct. 3034; id., at 211, 102 S.Ct. 3034 (opinion concurring in judgment) (“[T]he question is whether Amy's program ... offered her an opportunity to understand and participate in the classroom that was substantially equal to that given her non-handicapped classmates”). But the majority rejected any such standard in clear terms. Id., at 198, 102 S.Ct. 3034 (“The requirement that States provide 'equal' educational opportunities would ... seem to present an entirely unworkable standard requiring impossible measurements and comparisons”). Mindful that Congress (despite several intervening amendments to the IDEA) has not materially changed the statutory definition of a FAPE since Rowley was decided, we
decline to interpret the FAPE provision in a manner so plainly at odds with the Court's analysis in that case. Compare § 1401(18) (1976 ed.) with § 1401(9) (2012 ed.).

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[19] We will not attempt to elaborate on what “appropriate” progress will look like from case to case. It is in the nature of the Act and the standard we adopt to resist such an effort: The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created. This absence of a bright-line rule, however, should not be mistaken for “an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review.” Rowley, 458 U.S., at 206, 102 S.Ct. 3034.

[20] At the same time, deference is based on the application of expertise and the exercise of judgment by school authorities. The Act vests these officials with responsibility for decisions of critical importance to the life of a disabled child. The nature of the IEP process, from the initial consultation through state administrative proceedings, ensures that parents and school representatives will fully air their respective opinions on the degree of progress a child's IEP should pursue. See §§ 1414, 1415; id., at 208–209, 102 S.Ct. 3034. By the time any dispute reaches court, school authorities will have had a complete opportunity to bring their expertise and judgment to bear on areas of *1002 disagreement. A reviewing court may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances.

The judgment of the United States Court of Appeals for the Tenth Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

All Citations


Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 The requirement was initially set out in the Education of the Handicapped Act, which was later amended and renamed the IDEA. See Pub. L. 101–476, § 901(a), 104 Stat. 1141. For simplicity's sake—and to avoid “acronym overload”—we use the latter title throughout this opinion. Fry v. Napoleon Community Schools, 580 U.S. ———, ———, n. 1, 137 S.Ct. 743, 750, n. 1, ——— L.Ed.2d ——— (2017).

2 This guidance should not be interpreted as an inflexible rule. We declined to hold in Rowley, and do not hold today, that “every handicapped child who is advancing from grade to grade ... is automatically receiving a [FAPE].” Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley, 458 U.S. 176, 203, n. 25, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982).
On March 22, 2017 the U.S. Supreme Court (sometimes referred to as Court) issued a unanimous opinion in *Endrew F. v. Douglas County School District Re-1*, 137 S. Ct. 988. In that case, the Court interpreted the scope of the free appropriate public education (FAPE) requirements in the Individuals with Disabilities Education Act (IDEA). The Court overturned the Tenth Circuit’s decision that Endrew, a child with autism, was only entitled to an educational program that was calculated to provide “merely more than *de minimis*” educational benefit. In rejecting the Tenth Circuit’s reasoning, the Supreme Court determined that, “[t]o meet its substantive obligation under the IDEA, a school must offer an IEP [individualized education program] that is reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” The Court additionally emphasized the requirement that “every child should have the chance to meet challenging objectives.”

The *Endrew F.* decision is important because it informs our efforts to improve academic outcomes for children with disabilities. To this end, the U.S. Department of Education (Department) is providing parents and other stakeholders information on the issues addressed in *Endrew F.* and the impact of the Court’s decision on the implementation of the IDEA. Because the decision in *Endrew F.* clarified the scope of the IDEA’s FAPE requirements, the Department’s Office of Special Education and Rehabilitative Services (OSERS) is interested in receiving comments from families, teachers, administrators, and other stakeholders to assist us in identifying implementation questions and best practices. If you are interested in commenting on this document or have additional questions, please send them to OSERS by email at EndrewF@ed.gov.
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Q&A on U. S. Supreme Court Case Decision Endrew F. v. Douglas County School District Re-1

QUESTIONS AND ANSWERS

OVERVIEW

1. What were the facts surrounding the Endrew F. decision?

Endrew, a child with autism, attended public school from kindergarten through fourth grade. In April of 2010, Endrew’s parents rejected the 5th grade individualized education program (IEP) proposed by the Douglas County School District. Endrew’s parents believed the proposed IEP was basically the same as the previous IEPs under which their child’s academic and functional progress had stalled. Endrew’s parents subsequently withdrew him from public school and placed him in a private school that specialized in the education of children with autism. Endrew’s behavior in the private school setting improved significantly; his academic goals were strengthened and he thrived. This case arose because Endrew’s parents were unable to obtain tuition reimbursement for the cost of the private school placement.

Endrew’s parents sought reimbursement for the private school tuition payments at a due process hearing, and subsequently sought judicial review of the hearing decision in the U.S. District Court for the District of Colorado after the hearing officer did not grant the relief they were seeking. The District Court affirmed the hearing officer’s decision, and they appealed to the U.S. Court of Appeals for the Tenth Circuit. In these proceedings, Endrew’s parents argued that the IEP proposed by the public school was mostly unchanged from his previous IEPs, under which he made “minimal progress.” The Tenth Circuit rejected the parents’ arguments and concluded that Endrew had received FAPE through the district’s IEPs because they were calculated to provide educational benefit that is merely more than de minimis (i.e., more than trivial or minor educational benefit). Endrew’s parents then appealed the case to the U.S. Supreme Court. The Court overturned the Tenth Circuit’s decision.

2. What is the crucial issue that was addressed in the Endrew F. decision?

Endrew F. clarified the substantive standard for determining whether a child’s IEP – the centerpiece of each child’s entitlement to FAPE under the IDEA – is sufficient to confer educational benefit on a child with a disability.

3. What was the Supreme Court’s final decision in Endrew F.?

The Court held that to meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances. In clarifying the standard, the Court rejected the “merely more than de minimis” (i.e. more than trivial) standard applied by the Tenth Circuit. In determining the scope of FAPE, the Court reinforced the requirement that “every child should have the chance to meet challenging objectives.”

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1 137 S.Ct. at 1000.
CLARIFICATION OF IDEA’s FAPE REQUIREMENT

4. How is FAPE defined in the IDEA?
Under the IDEA, FAPE is a statutory term. It is defined to include special education and related services that
(1) are provided at public expense, under public supervision and direction, and without charge;
(2) meet the standards of the State educational agency (SEA), including IDEA Part B requirements;
(3) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
(4) are provided in conformity with an IEP that meets the requirements of 34 CFR §§300.320 through 300.324.

Further, each child with a disability is entitled to receive FAPE in the least restrictive environment (LRE).

5. Prior to Endrew F., what did the Court say about the substantive standard for FAPE?
Prior to Endrew F., courts relied on the landmark case Board of Education of Hendrick-Hudson Central School District v. Rowley. 458 U.S. 176 (1982) (“Rowley”). In Rowley, the Court held that Amy Rowley, a child with a disability involved in the case, would receive FAPE if her IEP was “reasonably calculated to enable the child to achieve educational benefits.” In Rowley, the Court did not establish any one test for determining educational benefit provided to all children covered by the IDEA. The Court did, however, discuss what appropriate progress would be for a child with a disability who was performing above average in the general education classroom with the supports included in her IEP. In Rowley, the Court emphasized that an IEP had to be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.

6. What does “de minimis” mean and why did the Tenth Circuit Court apply the “de minimis” standard in the Endrew F. case?
“De minimis” is a Latin term which means too trivial or minor to consider. Because the Supreme Court in Rowley did not establish one particular test for educational benefit, lower courts (Federal District Courts and Circuit Courts) disagreed over how to determine educational benefit and applied different substantive standards. For example, prior to Endrew F., six U.S. Court of Appeals Circuit Courts applied a “merely more than de minimis” standard when considering educational benefit. One of those courts was the U.S. Court of Appeals for the Tenth Circuit, where Endrew and his parents lived. Therefore, initially the court applied the “de minimis” standard to Endrew’s case. This meant that in order to meet its FAPE obligations, the school district only had to show that the child’s IEP was designed to provide a child with a disability more than trivial or minor educational benefit.

2 20 U.S.C. 1401(9) and 34 CFR §300.17.
3 20 U.S.C. 1412(a)(5) and 34 CFR §§300.114-300.117
7. How did *Endrew F.* clarify the standard for determining FAPE and educational benefit?

With the decision in *Endrew F.*, the Court clarified that for all students, including those performing at grade level and those unable to perform at grade level, a school must offer an IEP that is “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” This standard is different from, and more demanding than, the “merely more than *de minimis*” test applied by the Tenth Circuit. As the Court stated, “[t]he goals may differ, but every child should have the chance to meet challenging objectives.”

8. Does the standard in *Endrew F.* apply prospectively to IDEA cases?

Yes. The Supreme Court decisively rejected the “merely more than *de minimis*” standard used by the Tenth and other Circuits; therefore that standard is no longer considered good law. The Court explained, “[a] student offered an educational program providing merely more than *de minimis* progress from year to year can hardly be said to have been offered an education at all…The IDEA demands more.” Now, as a result of *Endrew F.*, each child’s educational program must be appropriately ambitious in light of his or her circumstances, and every child should have the chance to meet challenging objectives.

9. Does the standard in *Endrew F.* only apply to situations similar to the facts presented in *Endrew F.*?

No. The standard that the Court announced in *Endrew F.* clarifies the scope of the FAPE requirements in the IDEA and, as such, applies to the provision of FAPE to any IDEA-eligible child with a disability, as defined by the law. The standard in *Endrew F.* applies regardless of the child’s disability, the age of the child, or the child’s current placement.

**CONSIDERATIONS FOR IMPLEMENTATION**

10. What does “reasonably calculated” mean?

The “reasonably calculated” standard recognizes that developing an appropriate IEP requires a prospective judgment by the IEP Team. Generally, this means that school personnel will make decisions that are informed by their own expertise, the progress of the child, the child’s potential for growth, and the views of the child’s parents. IEP Team members should consider how special education and related services, if any, have been provided to the child in the past, including the effectiveness of specific instructional strategies and supports and services with the student. In determining whether an IEP is reasonably calculated to enable a child to make progress, the IEP Team should consider the child’s previous rate of academic growth, whether the child is on track to achieve or exceed grade-level proficiency, any behaviors interfering with the child’s progress, and additional information and input provided by the child’s parents. As stated by the Court, “any review of an IEP must consider whether the IEP is reasonably calculated to ensure such progress, not whether it would be considered ideal.”

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4 137 S.Ct. at 1000.
5 137 S.Ct. at 999.
11. What does “progress appropriate in light of the child’s circumstances” mean?

The essential function of an IEP is to provide meaningful opportunities for appropriate academic and functional advancement, and to enable the child to make progress. The expectations of progress in the IEP must be appropriate in light of the child’s unique circumstances. This reflects the focus on the individualized needs of the particular child that is at the core of the IDEA. It also reflects States’ responsibility to offer instruction “specially designed” to meet a child's unique needs through an IEP.6

While the Court did not specifically define “in light of the child’s circumstances,” the decision emphasized the individualized decision-making required in the IEP process and the need to ensure that every child should have the chance to meet challenging objectives. The IDEA’s focus on the individual needs of each child with a disability is an essential consideration for IEP Teams. Individualized decision-making is particularly important when writing annual goals and other IEP content because “the IEP must aim to enable the child to make progress.”7 For example, the Court stated that the IEP Team, which must include the child’s parents8 as Team members, must give “careful consideration to the child’s present levels of achievement, disability, and potential for growth.”

12. How can an IEP Team ensure that every child has the chance to meet challenging objectives?

The IEP must include annual goals that aim to improve educational results and functional performance for each child with a disability. This inherently includes a meaningful opportunity for the child to meet challenging objectives. Each child with a disability must be offered an IEP that is designed to provide access to instructional strategies and curricula aligned to both challenging State academic content standards and ambitious goals, based on the unique circumstances of that child. The IEP must be developed in a way that ensures that children with disabilities have the chance to meet challenging objectives, as reflected in the child’s IEP goals. Each child’s IEP must include, among other information, an accurate statement of the child's present levels of academic achievement and functional performance and measurable annual goals, including academic and functional goals.9 This information must include how the child's disability affects the child's involvement and progress in the general education curriculum.

How IEP Team members evaluate and assess this information, as well as the establishment of the child’s IEP goals, will each contribute to ensuring the child has access to challenging objectives. The IEP Team’s effectiveness in gathering and interpreting this information will ensure that, in establishing IEP goals, the child has the opportunity to meet challenging objectives. As the Court

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6 137 S.Ct. at 999.
7 137 S.Ct. at 999.
8 The term “parent” means a biological or adoptive parent of a child; a foster parent, unless State law, regulations, or contractual obligations with a State or local entity prohibit a foster parent from acting as a parent; a guardian generally authorized to act as the child's parent, or authorized to make educational decisions for the child (but not the State if the child is a ward of the State); an individual acting in the place of a biological or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives, or an individual who is legally responsible for the child's welfare; or a surrogate parent who has been appointed in accordance with 34 CFR §300.519. 34 CFR §300.30.
stated in *Endrew F.*, “the IEP must aim to enable the child to make progress.”

Determining an appropriate and challenging level of progress is an individualized determination that is unique to each child. When making this determination, each child’s IEP Team must consider the child’s present levels of performance and other factors such as the child’s previous rate of progress and any information provided by the child’s parents.

13. **How can IEP Teams determine if IEP annual goals are appropriately ambitious?**

As the Court stated, “advancement from grade to grade is appropriately ambitious for most children in the regular classroom;” however, the Court also noted that while these “goals may differ…every child should have the chance to meet challenging objectives.” In order to make FAPE available to each eligible child with a disability, the child’s IEP must be designed to enable the child to be involved in, and make progress in, the general education curriculum. The term “general education curriculum” is “the same curriculum as for nondisabled children.” We have previously clarified that the phrase “the same curriculum as for nondisabled children” is the curriculum that is based on a State’s academic content standards. This alignment, however, must guide, and not replace, the individualized decision-making required in the IEP process. This decision-making continues to “require careful consideration of the child’s present levels of achievement, disability, and potential for growth” as discussed in question #11.

14. **How can IEP Teams implement the *Endrew F.* standard for children with the most significant cognitive disabilities?**

The Department recognizes that there is a small number of children—those with the most significant cognitive disabilities—whose performance can be measured against alternate academic achievement standards. Alternate academic achievement standards also must be aligned with the State’s grade-level content standards.

Therefore, annual IEP goals for children with the most significant cognitive disabilities should be appropriately ambitious, based on the State’s content standards, and “reasonably calculated to enable the child to make progress appropriate in light of the child’s circumstances.”

15. **What actions should IEP Teams take if a child is not making progress at the level the IEP Team expected?**

An IEP is not a guarantee of a specific educational or functional result for a child with a disability. However, the IDEA does provide for revisiting the IEP if the expected progress is not occurring. This is particularly important because of the Court’s decision in *Endrew F.*, which clarifies that the standard for determining whether an IEP is sufficient to provide FAPE is whether the child is offered an IEP reasonably calculated to enable the child to make progress that is appropriate in light of the child’s circumstances. At least once a year, IEP Teams must review the child's IEP to determine whether the annual goals for the child are being achieved.

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10 137 S.Ct. at 999.
11 137 S.Ct. at 1000.
12 20 U.S.C. 1414(d)(1)(A) and 34 CFR §300.320(a).
14 137 S.Ct. at 999.
15 See section 1111(b)(1)(E) of the Elementary and Secondary Education Act (ESEA), and Section 200.6(c) of the Department’s regulations for Title I Part A of the ESEA.
The IEP Team also may meet periodically throughout the course of the school year, if circumstances warrant it. For example, if a child is not making expected progress toward his or her annual goals, the IEP Team must revise, as appropriate, the IEP to address the lack of progress. Although the public agency is responsible for determining when it is necessary to conduct an IEP Team meeting, the parents of a child with a disability have the right to request an IEP Team meeting at any time. If a child is not making progress at the level the IEP Team expected, despite receiving all the services and supports identified in the IEP, the IEP Team must meet to review and revise the IEP if necessary, to ensure the child is receiving appropriate interventions, special education and related services and supplementary aids and services, and to ensure the IEP’s goals are individualized and ambitious.

Public agencies may find it useful to examine current practices for engaging and communicating with parents throughout the school year as IEP goals are evaluated and the IEP Team determines whether the child is making progress toward IEP goals. IEP Teams should use the periodic progress reporting required at 34 CFR §300.320(a)(3)(ii) to inform parents of their child’s progress. Parents and other IEP Team members should collaborate and partner to track progress appropriate to the child’s circumstances.

16. Must IEPs address the use of positive behavioral interventions and supports?
Where necessary to provide FAPE, IEPs must include consideration of behavioral needs in the development, review, and revision of IEPs. IEP Teams must consider and, if necessary to provide FAPE, include appropriate behavioral goals and objectives and other appropriate services and supports in the IEPs of children whose behavior impedes their own learning or the learning of their peers.

17. How does the Endrew F. decision impact placement decisions?
Consistent with the decision in Endrew F., the Department continues to recognize that it is essential to make individualized determinations about what constitutes appropriate instruction and services for each child with a disability and the placement in which that instruction and those services can be provided to the child. There is no “one-size-fits-all” approach to educating children with disabilities. Rather, placement decisions must be individualized and made consistent with a child’s IEP. We note that placement in regular classes may not be the least restrictive placement for every child with a disability. The IDEA Part B regulations specify that each public agency must ensure that a continuum of alternative placements (including instruction in regular classes, special classes, special schools, home instruction, placement in private schools, and instruction in hospitals and institutions) is available to meet the needs of children with disabilities for special education and related services.

17 20 U.S.C. 1414(d)(3)(B)(i) and 34 CFR §300.324(a)(2)(i) and (b)(2).
19 20 U.S.C. 1412(a)(5)
20 20 U.S.C. 1412(a)(5)
18. Is there anything IEP Teams should do differently as a result of the *Endrew F.* decision?

The Court in *Endrew F.* held that to meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances and expressly rejected the merely more than *de minimis*, or trivial progress standard. Although the Court did not determine any one test for determining what appropriate progress would look like for every child, IEP Teams must implement policies, procedures, and practices relating to

1. identifying present levels of academic achievement and functional performance;
2. the setting of measurable annual goals, including academic and functional goals; and
3. how a child’s progress toward meeting annual goals will be measured and reported, so that the *Endrew F.* standard is met for each individual child with a disability.

Separately, IEP Teams and other school personnel should be able to demonstrate that, consistent with the provisions in the child’s IEP, they are providing special education and related services and supplementary aids and services; making program modifications; providing supports for school personnel; and allowing for appropriate accommodations that are reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances and enable the child to have the chance to meet challenging objectives.

19. Is there anything SEAs should do differently as a result of the *Endrew F.* decision?

SEAs should review policies, procedures, and practices to provide support and appropriate guidance to school districts and IEP Teams to ensure that IEP goals are appropriately ambitious and that all children have the opportunity to meet challenging objectives. States can help ensure that every child with a disability has an IEP that enables the child to be involved in and make progress in the general education curriculum and is appropriately ambitious in light of the child’s circumstances.\(^\text{21}\) While many States and school districts are already meeting the standard established in *Endrew F.*, this is an opportunity to work together to ensure that we are holding all children with disabilities to high standards and providing access to challenging academic content and achievement standards.

20. Has the *Endrew F.* decision affected parents’ due process rights under the IDEA?

No. Parents can continue to use the IDEA Part B mediation and due process procedures if they disagree with IEP Team determinations about the special education and related services that are appropriate and necessary for their child to receive FAPE.\(^\text{22}\) As reflected in *Endrew F.*, the IDEA provides a mechanism whereby parents may opt to place their child in a private school setting in circumstances where they believe FAPE has been denied. If a court or hearing officer determines that a school failed to make FAPE available in a timely manner prior to enrollment in a private school setting, that the private placement is appropriate, and that the parents provided notice to the school district, parents may recover the costs of the private placement.\(^\text{23}\) Nothing in *Endrew F.* changes or amends these procedural due process rights.

\(^{21}\) 20 USC §1414(d)(1)(A)(i)(IV); 137 S.Ct. at 1000.
\(^{22}\) 34 CFR §§300.506-300.516
\(^{23}\) 34 CFR §300.148(c).
4. In Endrew F. ex rel., Joseph F. v. Douglas County School Dist. (2017) 580 U.S. _____, 137 S.Ct. 988, 996, the Supreme Court clarified that “for children receiving instruction in the regular classroom, [the IDEA’s guarantee of a substantively adequate program of education to all eligible children] would generally require an IEP ‘reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.’” For a case in which the student cannot be reasonably expected to “progress[ ] smoothly through the regular curriculum,” the child’s educational program must be “appropriately ambitious in light of [the child’s] circumstances . . . .” (Ibid.) The IDEA requires “an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” (Id. at 1001.) Importantly, “[t]he adequacy of a given IEP turns on the unique circumstances of the child for whom it was created.” (Ibid.)

Student v. Hermosa Beach City School District
Judge: Christine Arden

LEGAL CONCLUSIONS

3. In Board of Education of the Hendrick Hudson Central School District v. Rowley (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (Rowley), the Supreme Court held that “the ‘basic floor of opportunity’ provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to” a child with special needs. Rowley expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (Id. at p. 200.) Instead, Rowley interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (Id. at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since Rowley, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (J.L. v. Mercer Island School Dist. (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the Rowley standard and could have expressly changed it if it desired to do so.].) Although sometimes described in Ninth Circuit cases as “educationalbenefit,” “some educational benefit” or “meaningful educational benefit,” all of thesephrases mean the Rowley standard, which should be applied to determine whether anindividual child was provided a FAPE. (Id. at p. 951, fn. 10.) In a unanimous decision, the United States Supreme Court declined to interpret the FAPE provision in a mannerthat was at odds with the Rowley court’s analysis, and clarified FAPE as “markedly more demanding than the ‘merely more than the de minimus test’…” (Endrew F. v. Douglas School Dist. RE-1 (2017) 137 S.Ct. 988, 1000 (Endrew F.). The Supreme Court in Endrew stated that school districts must “… offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances.” (Id. at p. 1002.)
LEGAL CONCLUSIONS

5. In *Endrew F. ex rel., Joseph F. v. Douglas County School Dist.* (2017) 580 U.S. __ [137 S.Ct. 988, 996], the Supreme Court clarified that “for children receiving instruction in the regular classroom, [the IDEA’s guarantee of a substantively adequate program of education to all eligible children] would generally require an IEP ‘reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.’” Put another way, “[f]or a child fully integrated in the regular classroom, an IEP typically should, as Rowley put it, be ‘reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.’” (*Id.* at 999 (citing *Rowley*, supra, 458 U.S. at pp. 203-04.)) The Court went on to say that the Rowley opinion did not “need to provide concrete guidance with respect to a child who is not fully integrated in the regular classroom and not able to achieve on grade level.” (*Id.* at 1000.) For a case in which the student cannot be reasonably expected to “progress[] smoothly through the regular curriculum,” the child’s educational program must be “appropriately ambitious in light of [the child’s] circumstances . . . .” (*Ibid.*.) The IDEA requires “an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” (*Id.* at 1001.) Importantly, “[t]he adequacy of a given IEP turns on the unique circumstances of the child for whom it was created.” (*Ibid.*)

LEGAL CONCLUSIONS

5. The Supreme Court’s recent decision in *Endrew F. v. Douglas County Sch. Dist. RE-1* (2017) 580 U.S.____ [137 S.Ct. 988] reaffirmed that to meet its substantive obligation under the IDEA, a school district must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances. The Ninth Circuit further refined the standard in *M.C. v. Antelope Valley Unified School Dist.* (9th Cir. 2017) 858 F.3d 1189, 1194, 1200-1201, stating that an IEP should be reasonably calculated to remediate and, if appropriate, accommodate the child’s disabilities so as to enable the child to make progress in the curriculum, taking into account the child’s potential.
LEGAL CONCLUSIONS

4. In *Endrew F. ex rel., Joseph F. v. Douglas County School Dist.* (2017) 580 U.S. _____, 137 S.Ct. 988, 996, the Supreme Court clarified that “for children receiving instruction in the regular classroom, [the IDEA’s guarantee of a substantively adequate program of education to all eligible children] would generally require an IEP ‘reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.’” For a case in which the student cannot be reasonably expected to “progress[] smoothly through the regular curriculum,” the child’s educational program must be “appropriately ambitious in light of [the child’s] circumstances . . . .” (*Ibid.*) The IDEA requires “an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” (*Id.* at 1001.) Importantly, “[t]he adequacy of a given IEP turns on the unique circumstances of the child for whom it was created.” (*Ibid.*)
LEGAL CONCLUSIONS

5. In Endrew F. ex rel., Joseph F. v. Douglas County School Dist. (2017) 580 U.S. ___ [137 S.Ct. 988, 996], the Supreme Court clarified that “for children receiving instruction in the regular classroom, [the IDEA’s guarantee of a substantively adequate program of education to all eligible children] would generally require an IEP ‘reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.’” Put another way, “[f]or a child fully integrated in the regular classroom, an IEP typically should, as Rowley put it, be ‘reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.’” (Id. at 999 (citing Rowley, supra, 458 U.S. at pp. 203-04).) The Court went on to say that the Rowley opinion did not “need to provide concrete guidance with respect to a child who is not fully integrated in the regular classroom and not able to achieve on grade level.” (Id. at 1000.) For a case in which the student cannot be reasonably expected to “progress[] smoothly through the regular curriculum,” the child’s educational program must be “appropriately ambitious in light of [the child’s] circumstances . . . .” (Ibid.) The IDEA requires “an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” (Id. at 1001.) Importantly, “[t]he adequacy of a given IEP turns on the unique circumstances of the child for whom it was created.” (Ibid.)

LEGAL CONCLUSIONS

5. The Supreme Court’s recent decision in Endrew F. v. Douglas County Sch. Dist. RE-1 (2017) 580 U.S.____ [137 S.Ct. 988] reaffirmed that to meet its substantive obligation under the IDEA, a school district must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances. The Ninth Circuit further refined the standard in M.C. v. Antelope Valley Unified School Dist. (9th Cir. 2017) 858 F.3d 1189, 1194, 1200-1201, stating that an IEP should be reasonably calculated to remediate and, if appropriate, accommodate the child’s disabilities so as to enable the child to make progress in the curriculum, taking into account the child’s potential.
RECENT DECISIONS OF NINTH CIRCUIT

I. DECISION LISTS

II. OAH DECISION REFERENCES FOR SOME CASES

A. References to Avila v. Spokane School District
   852 F.3d 936 (9th Cir. 2017)

B. References to I.R. v. Los Angeles Unified School District
   805 F.3d 1164 (9th Cir. 2015)

C. References to M.C. v. Antelope Valley Union High School
   District - 858 F.3d 1189 (9th Cir. 2017)
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RECENT DECISIONS OF NINTH CIRCUIT

A.G. v. Paradise Valley Unified School District, 815 F.3d 1195 (9th Cir. 2016)

On appeal from the U.S. District Court, District of Arizona

Appeal of District Court dismissal of student’s claims of discrimination under Section 504 of the Rehabilitation Act and Title II of the Americans With Disabilities Act as well as tort claims under Arizona state law against the District and various employees. Claims under IDEA had been settled. Court reversed the District Court order granting summary judgment on state law claims, vacated the District Court’s order addressing costs and remanded for further proceedings and provided direction as to how District Court was to evaluate the 504 and ADA claims.

Avila v. Spokane School District, 852 F.3d 936 (9th Cir. 2017)

On appeal from United States District Court for Eastern District of Washington.

Court reversed lower court and held that as a matter of first impression, IDEA’s two year state of limitations requires courts to apply the discovery rule without limiting redressability to the two year period that precedes the date when the parent or agency knew or should have known about the alleged action that forms the basis of the complaint.

Baquerizo v. Garden Grove Unified School District, 826 F.3d 1179 (9th Cir. 2016)

On appeal from the United States District Court for the Central District of California

Student sought reimbursement for two years in private school on basis that district failed to comply with procedural requirements of the law and denied placement in the least restrictive environment. Ninth Circuit upheld OAH and District Court decisions finding that the district’s offer of placement in a small classroom rather than the mainstream would have provided FAPE.
**Beauchamp v. Anaheim Union High School District, 816 F.3d 1216 (9th Cir. 2016)**

On appeal from the United States District Court for the Central District of California

Attorney sought fees for self and paralegal for non-expedited portion of an IDEA discipline case. District court awarded fees in reduced amount and denied paralegal fees. Ninth Circuit upheld district court on basis that relief obtained by parent was not substantially more favorable than what had been offered and the family was not substantially justified in rejecting the offer. Rejected request for paralegal fees on the basis of collateral estoppel because paralegal had been previously determined to be educational consultant.

**Coomes v. Edmonds School District No. 15, 816 F.3d 1255 (9th Cir. 2016)**

On appeal from the United States District Court for the Western District of Washington

Teacher filed action alleging wrongful termination on basis of retaliation for exercising her First Amendment rights with regard to district’s EBD program. Court upheld dismissal of these claims on basis that her complaints were not made in her capacity as private citizen. Case was remanded as to her claims under wrongful termination State law.

**C.R. v. Eugene School District 4 J, 835 F.3d 1142 (9th Cir. 2016)**

On appeal from United States District Court for the District of Oregon.

Parents of seventh grade student asserting that suspension of student for harassing two disabled sixth grade students in a public park shortly after school was violation of First Amendment right to free speech and Fourteenth Amendment Due Process rights. District Court entered summary judgment in favor of school district. Ninth Circuit upheld District Court finding that the school district had not violated any rights and had authority to discipline seventh grade student for off campus, sexually harassing speech.
**I.R. v. Los Angeles Unified School District, 805 F.3d 1164 (9th Cir. 2015)**

On appeal from United States District Court for the Central District of California (Judge Manuel L. Real)

Judge Real affirmed OAH decision denying parent relief. Ninth Circuit reversed. Ninth Circuit held that the district had a duty to initiate a due process hearing following the mother’s refusal to agree to all components of an IEP and recommended placement and the delay of more than a year and a half in requesting a hearing was unreasonable on the part of the district. Court held that California Education Code Section 56346(f) requires district to file against parent if it determines that the component to which the parent does not agree or consent is necessary to provide FAPE. Court found it was a procedural denial of FAPE and remanded case to district court to determine the appropriate remedy for the injury.

**Irvine Unified School District v. K.G., an adult student, 853 F.3d 1087 (9th Cir. 2017)**

On appeal from United States District Court for the Central District of California

Case involving attorney fees coming out of earlier litigation as to whether State, County or local educational agency was responsible for costs of the student’s education. On remand, the Student moved for attorney fees and was denied because the decision as to which agency was responsible was only technical or de minimis. Unfortunately, Student failed to file a timely appeal from that determination. New counsel sought relief under Rule 60(b) of the Federal Rules of Civil Procedure on the basis that extensive trauma suffered by the original attorney excused the lack of timely filing.

The district court granted the relief. School district appealed. Ninth Circuit upheld grant of relief from judgment, found student was prevailing party, found that student’s victory was not de minimis or technicality and affirmed in part, vacated in part and remanded to determine if student’s participation in lawsuit was necessary after he graduated with a diploma.
L.J. v. Pittsburg Unified School District, 850 F.3d 996 (9th Cir. 2017)

On appeal from the United States District Court for the Northern District of California.

This is the opinion that amends and supersedes opinion at 835 F.3d 1168.

OAH found student not eligible for special education services because not disabled. District court granted summary judgment for school district. Ninth Circuit rejected argument that specialized services provided to student in general education were interventions available for all students and not special education. Denied rehearing en banc but did amend opinion. In this opinion, Court continues to hold that student did exhibit need for special education services and failure of district to provide was improper and that failure of the school district to disclose to mother its assessments, treatment plans and notes interfered with mother’s ability to participate in IEP formulation.

M.C. v. Antelope Valley Union High School District, 858 F.3d 1189 (9th Cir. 2017)

On appeal from the United States District Court for the Central District of California

Student lost with OAH and in the District Court. In this revised opinion on appeal, Ninth Circuit held that an IEP is “like a contract” and cannot be changed unilaterally. Decision also found that the school district failed to identify the supports to be provided the student and that the district had failed to file a timely response. Court held that in such a circumstance “the ALJ must not go forward with the hearing. Rather it must order a response and shift the cost of the delay to the school district, regardless of who is ultimately the prevailing party.”

N.E. v. Seattle School District, 842 F.3d 1093 (9th Cir. 2016)

On appeal from the United States District Court for the Western District of Washington

ALJ found stay put to be what was in a “second stage” IEP, in which student was in a self-contained class. District court and Ninth Circuit upheld that placement as the “stay put” placement.

On appeal from the United States District Court for the District of Hawaii.

Student sought to obtain relief at administrative hearing on the basis that, among other things, the IEP failed to identify the high school the student was being offered. District Court upheld the decision as did the Ninth Circuit. While acknowledging that an IEP might need to identify a specific school in some cases, under the facts of this case, the school district did not need to identify a specific school.

**R.E.B. v. State of Hawaii**, 870 F.3d 1025 (9th Cir. 2017);

Opinion was withdrawn by Order Filed April 3, 2018 and Petitioner for Panel Rehearing was Granted.

Original decision from above citation is, therefore, no longer in effect. In that original decision Student with autism sought relief from administrative hearing officer decision finding his IEP was adequate. District court upheld ALJ. Student appealed and Ninth Circuit held that action was not moot, that law required transition services when student exited private school to attend public school, that placement was improperly determined outside of IEP process and not in the least restrictive environment and that IDEA was violated by not specifying ABA in IEP.

**Smith v. Los Angeles Unified School District**, 830 F.3d 843 (9th Cir. 2016)

On appeal from the United States District Court for the Central District of California

Efforts by attorneys for some parents of some students at segregated LAUSD campuses to intervene in class action to challenge the policy resulting from the class action that sought to close segregated school sites. Ninth Circuit held that the parents should be given an opportunity by the District Court to be certified as a subclass if such a subclass could be identified.
Timothy O. v. Paso Robles Unified School District, 822 F.3d 1105 (9th Cir. 2016)

On appeal from United States District Court for the Central District of California

Ninth Circuit overturned OAH decision and district court decision ruling against student. Ninth Circuit held that school district’s failure to assess student for autism clearly and substantially violated IDEA, that informal observation by school psychologist was not sufficient, and that student had been denied FAPE.
852 F.3d 936
United States Court of Appeals,
Ninth Circuit.

Barbara AVILA; Miguel Avila, Plaintiffs–Appellants,
v.
SPOKANE SCHOOL DISTRICT 81, Defendant–Appellee.

No. 14-35965
Argued and Submitted December 5, 2016, Seattle, Washington
Filed March 30, 2017

Synopsis
Background: Student's parents brought action against public school district, alleging that district violated Individuals with Disabilities Education Act (IDEA) by failing to identify student's disability or assess him for autism. The United States District Court for the Eastern District of Washington, No. 2:10-cv-00408-EFS, Edward F. Shea, Senior District Judge, 2014 WL 5585349, granted district's motion to dismiss on statute of limitations grounds. Parents appealed.

[Holdings] The Court of Appeals, Christen, Circuit Judge, held that as a matter of first impression, IDEA's two-year statute of limitations requires courts to apply the discovery rule without limiting redressability to the two-year period that precedes the date when the parent or agency knew or should have known about the alleged action that forms the basis of the complaint.

Reversed and remanded.

*937 Appeal from the United States District Court for the Eastern District of Washington, Edward F. Shea, District Judge, Presiding, D.C. No. 2:10-cv-00408-EFS

Attorneys and Law Firms

Mark A. Silver (argued) and Jeffrey A. Zachman, Denton US LLP, Atlanta, Georgia; Richard D. Salgado, Dentons US LLP, Dallas, Texas; for Plaintiffs–Appellants.

Gregory Lee Stevens (argued), Stevens Clay P.S., Spokane, Washington, for Defendant–Appellee.


Opinion

OPINION

CHRISTEN, Circuit Judge:

The Avilas, parents of a student in Spokane School District 81, appeal the district court's order dismissing their claims that the District violated the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 et seq. The Avilas
argue that the district court misapplied the statute of limitations in 20 U.S.C. § 1415(f)(3)(C) to their claims that the District failed to identify their child's disability or assess him for autism in 2006 and 2007.

In a question of first impression for this court, we conclude that the IDEA's statute of limitations requires courts to bar only claims brought more than two years after the parents or local educational agency “knew or should have known” about the actions forming the basis of the complaint. Because the district court barred all claims “occurring” more than two years before the Avilas filed their due process complaint, we remand so that the district court can determine when the Avilas knew or should have known about the actions forming the basis of their complaint.

*938 BACKGROUND

Appellants Barbara and Miguel Avila are the parents of G.A., a student in Spokane School District 81. In 2006, when G.A. was five, the Avilas asked the District to evaluate him for special education services based on “[b]ehavior” issues. One of the reasons for this request was a preschool teacher's concern that G.A. might be “showing slight signs of autism.” In December 2006, a school psychologist evaluated G.A. and concluded that although he displayed some “behaviors of concern,” G.A.’s behavior was not severe enough to qualify for special education services under the IDEA. G.A.’s mother was given a copy of the evaluation report and signed a form stating that she agreed with the evaluation results.

In the fall of 2007, G.A. enrolled in kindergarten. A private third-party physician diagnosed him with Asperger's Disorder in October 2007, and the Avilas requested that the District reevaluate G.A.’s eligibility for special education services. A school psychologist concluded in a reevaluation dated April 14, 2008 that G.A. was eligible for special educational services under the category of autism and, from April 2008 until February 2009, the Avilas and representatives from the District met multiple times to discuss an Individualized Education Program (IEP) for him. The Avilas and the District initially disagreed, but eventually signed an IEP in February 2009. G.A. then began attending ADAPT, a specialized program in the District for students with autism.

About a year later, the District reevaluated G.A., assessing his behavior, speech and language, occupational therapy needs, and academic achievements, including reading, writing, and mathematics. The District then drafted another IEP. The Avilas did not agree with the reevaluation's findings and did not sign it. Instead, they requested an Independent Educational Evaluation (IEE) at the District's expense. See Wash. Admin. Code § 392–172A–05005(1). The District denied this request.

The Avilas filed a request for a due process hearing with the Washington State Office of Administrative Hearings on April 26, 2010. As required by law after the denial of a parent's request for an IEE, the District also initiated a due process hearing with the Washington State Office of Administrative Hearings to consider whether the District's reevaluation was sufficient. See Wash. Admin. Code § 392–172A–05005(2)(c). Ultimately, the ALJ ruled that the District's reevaluation was appropriate and that the Avilas were not entitled to an IEE at the District's expense. In a separate order, the ALJ ruled in favor of the District on all other claims. Specifically, he concluded that eleven of the Avilas' pre-April 2008 claims were time-barred. These claims consisted of nine procedural claims concerning the District's alleged failure to give prior written notice to the Avilas and two substantive claims. The substantive claims alleged that the District denied G.A. a free appropriate public education (FAPE) by failing to identify him as a child with a disability in 2006, and that the District failed to assess his suspected disability in 2006 and 2007. The ALJ concluded that no statutory exceptions applied and held that the Avilas' claims were time-barred, reasoning “[t]he Parents’ due process complaint was filed on April 26, 2010 and any complaint by Parents regarding the District actions or inactions occurring prior to April 26, 2008 are barred by the statute of limitations.”

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The Avilas timely appealed both decisions to the United States District Court for the Eastern District of Washington, where their appeals were consolidated. The consolidated appeal addressed seven of the claims the ALJ deemed time-barred: five of their prior written notice claims and the two substantive claims arguing denials of G.A.'s right to a FAPE.

The district court agreed with the ALJ's determination that neither exception to the statute of limitations applied and affirmed the ALJ's decision that the IDEA's two-year limitations period barred the Avilas' claims arising before April 26, 2008. The district court also affirmed the ALJ's ruling that the April 2010 reevaluation was appropriate, that the IEP provided G.A. with a FAPE, and that the Avilas were not entitled to an IEE at the District's expense. The Avilas timely appealed to this court. They argue that the district court improperly applied the IDEA's statute of limitations to their two substantive claims. They do not appeal the district court's ruling that their five remaining prior written notice claims lack merit.

**JURISDICTION AND STANDARD OF REVIEW**

The district court had jurisdiction pursuant to 20 U.S.C. § 1415(i)(2)(A) and 28 U.S.C. § 1331. We have appellate jurisdiction pursuant to 28 U.S.C. § 1291.

[1] Our court reviews de novo the district court's conclusions of law, including the question whether a claim is barred by a statute of limitations. See Butler v. Nat'l Cnty. Renaiss. of Cal., 766 F.3d 1191, 1194 (9th Cir. 2014).

**DISCUSSION**

1. The IDEA's statute of limitations requires courts to apply the discovery rule.

   A. Statutory overview

   [2] “The IDEA provides federal funds to assist state and local agencies in educating children with disabilities, but conditions such funding on compliance with certain goals and procedures.” Ojai Unified Sch. Dist. v. Jackson, 4 F.3d 1467, 1469 (9th Cir. 1993). The IDEA seeks “to ensure that all children with disabilities have available to them a free appropriate public education.” 20 U.S.C. § 1400(d)(1)(A). “A FAPE is defined as an education that is provided at public expense, meets the standards of the state educational agency, and is in conformity with the student's IEP.” Baquerizo v. Garden Grove Unified Sch. Dist., 826 F.3d 1179, 1184 (9th Cir. 2016) (citing 20 U.S.C. § 1401(9)). Upon request of a parent or agency, a local educational agency must “conduct a full and individual initial evaluation” to determine whether a child has a disability and the child's educational needs. 20 U.S.C. § 1414(a)(1)(A)-(C). If a child is determined to have a disability, a team including a local educational agency representative, teachers, parents, and in some cases, the child, formulates an IEP. 4 §1414(d)(1)(B). The local educational agency must conduct a reevaluation of the child if it “determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation,” or if a reevaluation is requested by the child's parents or teacher. §1414(a)(2)(A).

   The IDEA permits parents and school districts to file due process complaints “with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.” §1415(b)(6)(A). The state educational agency or local educational agency hears due process complaints in administrative due process hearings. §1415(f)(1)(A). If a party disagrees with the administrative findings and decision, the IDEA allows for judicial review in state courts and federal district courts. §1415(i)(2)(A).

   B. The IDEA's statute of limitations
Prior to 2004, the IDEA did not include a statute of limitations for due process hearings or complaints. See 20 U.S.C. § 1415(b)(6) (1999); S.V. v. Sherwood Sch. Dist., 254 F.3d 877, 879 (9th Cir. 2001) (“The IDEA specifies no limitations period governing either a plaintiff's request for an administrative hearing or the filing of a civil action.”). Congress amended the IDEA in 2004 to add a two-year statute of limitations period that is now codified in two different provisions of the IDEA: 20 U.S.C. § 1415(b)(6)(B) and 20 U.S.C. § 1415(f)(3)(C). Our circuit has not addressed these amendments, but in G.L. v. Ligonier Valley School District Authority, 802 F.3d 601 (3d Cir. 2015), the Third Circuit described § 1415(b)(6)(B) and § 1415(f)(3)(C) as alike “in almost all respects” except for one glaring ambiguity: “§ 1415(b)(6)(B)'s two-year limitations period runs backward instead of forward from the reasonable discovery date.” Id. at 610.

The Avilas contend that § 1415(f)(3)(C) requires this court to apply a discovery rule to IDEA claims, meaning that the statute of limitations is triggered when “a plaintiff discovers, or reasonably could have discovered, his claim.” See O'Connor v. Boeing N. Am., Inc., 311 F.3d 1139, 1147 (9th Cir. 2002). The District does not dispute that the discovery rule should apply to trigger the statute of limitations, but argues that the district court did apply the discovery rule and that the Avilas' claims are barred because they failed to file suit within two years after they knew or should have known about their claims.

**C. Analysis**

[3] The application of the IDEA's statute of limitations is a question of first impression for this court: we have not squarely addressed the “knew or should have known” standard in the IDEA or the seemingly contradictory provisions in § 1415(b)(6)(B) and § 1415(f)(3)(C). In the first federal appellate decision addressing how § 1415(b)(6)(B) and § 1415(f)(3)(C) should be reconciled, the Third Circuit concluded that the IDEA's statute of limitations requires courts to apply the discovery rule described in § 1415(f)(3)(C). Ligonier, 802 F.3d at 625. The statutory text of the IDEA, including its language and context, persuade us that the Third Circuit's approach in Ligonier is correct and that the IDEA's statute of limitations requires courts to apply the discovery rule described in § 1415(f)(3)(C). The Department of Education's interpretation of the 2004 statutory amendments and the associated legislative history support this reading of the statute.

[4] [5] [6] “When interpreting a statute, we are guided by the fundamental canons of statutory construction and begin with the statutory text.” United States v. Neal, 776 F.3d 645, 652 (9th Cir. 2015) (citing BedRoc Ltd., LLC v. United States, 541 U.S. 176, 183, 124 S.Ct. 1587, 158 L.Ed.2d 338 (2004)). “The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which the language is used, and the broader context of the statute as a whole.” Geo–Energy Partners–1983 Ltd. v. Salazar, 613 F.3d 946, 956 (9th Cir. 2010) (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 341, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997)). “If the statutory text is ambiguous, we employ other tools, such as legislative history, to construe the meaning of ambiguous terms.” Benko v. Quality Loan Serv. Corp., 789 F.3d 1111, 1118 (9th Cir. 2015).

Read in isolation, § 1415(f)(3)(C) appears straightforward. Entitled “Timeline for requesting hearing,” it states:

A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for requesting such a hearing under this subchapter, in such time as the State law allows.

§ 1415(f)(3)(C). However, an ambiguity arises when § 1415(f)(3)(C) is read in conjunction with § 1415(b)(6)(B). The latter states, under the heading “Types of procedures,” that the IDEA allows:

[An opportunity for any party to present a complaint] which sets forth an alleged violation that occurred not more than 2 years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit
time limitation for presenting such a complaint under this subchapter, in such time as the State law allows....

§ 1415(b)(6)(B).

The Third Circuit's *Ligonier* decision recognized that litigants have advanced various interpretations of the IDEA's statute of limitations: (1) the occurrence rule suggested by § 1415(b)(6)(B), under which the statute of limitations begins to run on the date the injury occurs; (2) the discovery rule provided in § 1415(f)(3)(C); or (3) the “2+2” rule. *Ligonier*, 802 F.3d at 607, 612–15. Under the 2+2 rule, the statute of limitations is triggered when a plaintiff knew or should have known of his claim, but the scope of redressable harm is limited to the “two years before the reasonable discovery date through the date the complaint was filed, which could be up to two years after the reasonable discovery date, for a maximum period of relief of four years.” *Id.* at 607.

We first conclude that Congress did not intend the IDEA's statute of limitations to be governed by a strict occurrence rule. Both § 1415(b)(6)(B) and § 1415(f)(3)(C) include language pegging the limitations period to the date on which the parent or agency “knew or should have known about the alleged action that forms the basis of the complaint,” not the date on which the *942* action occurred. *See* § 1415(b)(6)(B), (f)(3)(C). If Congress intended a strict occurrence rule, there would have been no need to include the “knew or should have known” language in § 1415(b)(6)(B) and § 1415(f)(3)(C).

The text of the two provisions also undercuts the 2+2 rule. Both § 1415(b)(6)(B) and § 1415(f)(3)(C) allow the two-year statute of limitations to be replaced by “an explicit time limitation ... in such time as the State law allows.” § 1415(b)(6)(B), (f)(3)(C). If states adopt their own statutes of limitations pursuant to these provisions, § 1415(b)(6)(B) and § 1415(f)(3)(C) provide that the federal exceptions to the statute of limitations still apply, *see* 20 U.S.C. § 1415(b)(6)(B), (f)(3)(C)–(D), and it would make little sense to incorporate the federal exceptions for equitable tolling if § 1415(b)(6)(B) were a remedy cap rather than a preview of the statute of limitations set forth in § 1415(f)(3)(C). *See* *Ligonier*, 802 F.3d at 615.

We hold that the text of the IDEA cannot support the “2+2” construction of the statute.

The next question is how to reconcile these two seemingly conflicting provisions. Looking to “the specific context in which the language is used and the broader context of the statute as a whole,” *Geo–Energy Partners–1983*, 613 F.3d at 956, § 1415(b) provides an overview of the other provisions of § 1415, including § 1415(f), while § 1415(f)(3)(C) addresses in more specific language the allowable period for requesting a due process hearing. *See* *Ligonier*, 802 F.3d at 616–18. *Section 1415* is entitled “Procedural Safeguards,” with subsection (a) mandating that any state educational agency that receives federal assistance under the subchapter must establish and maintain certain procedures. Subsection (b), entitled “Types of procedures,” broadly outlines the many procedures state educational agencies are required to adopt, including the opportunity for any party to present a complaint regarding the identification, evaluation or educational placement of the child, or the provision of a FAPE. § 1415(b).

In contrast, § 1415(f), entitled “Impartial due process hearing,” describes in detail the procedures required whenever a parent or local education agency files a due process complaint under subsection (b)(6) or (k). *Section 1415(f)(2)* addresses evaluations and recommendations to be prepared in advance of a due process hearing. *Section 1415(f)(3)*, entitled “Limitations on hearing,” is divided into “Persons conducting hearing,” “Subject matter of hearing,” and “Timeline for requesting hearing.” § 1415(f)(3)(A)–(C). It is this last provision, located in the subsection that expressly limits the right to a due process hearing, which specifies that the hearing must be requested within two years from the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint. § 1415(f)(3)(C). Thus, the structure of § 1415 supports the conclusion that “§ 1415(b)(6)(B), though poorly penned, was intended merely as a synopsis of § 1415(f)(3)’s” “knew or should have known” benchmark for the statute of limitations. *See* *Ligonier*, 802 F.3d at 618.

We have considered that Congress might have intended different limitations periods for presenting complaints and requesting due process hearings, but that possibility is inconsistent with the overall statutory scheme. Read that way,
subsides (b) and (f) cannot be harmonized because § 1415(b) would bar a complaint arising from conduct occurring more than two years before the discovery date, but § 1415(f) would preserve the right to request a due process hearing concerning the same conduct. Our task is to harmonize *943 the statutory scheme as a whole, and our interpretation of § 1415 as having just one applicable limitations period is consistent with the Department of Education's position that the two provisions provide the same limitations period, discussed infra. See U.S. W. Comm'n's, Inc. v. Hamilton, 224 F.3d 1049, 1053 (9th Cir. 2000) (stating the duty to harmonize statutory provisions is “particularly acute” when the provisions are enacted at the same time and are part of the same statute).

Other sources of statutory interpretation confirm this reading. First, the broader context of the IDEA shows that it has a wide-ranging remedial purpose intended to protect the rights of children with disabilities and their parents. One express purpose of the IDEA is “to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.” 20 U.S.C. § 1400(d)(1)(A). As the Supreme Court stated, “[a] reading of the [IDEA] that left parents without an adequate remedy when a school district unreasonably failed to identify a child with disabilities would not comport with Congress' acknowledgment of the paramount importance of properly identifying each child eligible for services.” Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 245, 129 S.Ct. 2484, 174 L.Ed.2d 168 (2009). The broad purpose of the IDEA is clear and has been acknowledged repeatedly by our court. See E.M. ex rel. E.M. v. Pajaro Valley Unified Sch. Dist. Office of Admin. Hearings, 758 F.3d 1162, 1173 (9th Cir. 2014) (citing Forest Grove, 557 U.S. at 244–45, 129 S.Ct. 2484); Michael P. v. Dep't of Educ., 656 F.3d 1057, 1060 (9th Cir. 2011) (same); Compton Unified Sch. Dist. v. Addison, 598 F.3d 1181, 1184 (9th Cir. 2010) (same). Cutting off children's or parents' remedies if violations are not discovered within two years, as the occurrence rule and the 2+2 rule would do, is not consistent with the IDEA's remedial purpose. See Ligonier, 802 F.3d at 619–20 (concluding that applying the occurrence or 2+2 rules would go against the broad remedial purpose of the IDEA and serve as a sub silentio repeal of prior court decisions confirming the intent of the IDEA).

In commentary addressing its enabling regulations, the Department of Education (DOE) stated that it interprets § 1415(b)(6)(B) and § 1415(f)(3)(C) to provide the same limitations period. Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, 71 Fed. Reg. 46,706 (Aug. 14, 2006). The DOE's interpretation necessarily rejects the 2+2 rule, which assumes that § 1415(b)(6)(B) and § 1415(f)(3)(C) provide two different limitations periods, although the agency's interpretation does not offer any guidance on whether the discovery rule or occurrence rule should prevail. As the Third Circuit noted, the DOE's interpretation of its own regulation should be respected if “it has the 'power to persuade.’ ” Ligonier, 802 F.3d at 621 (quoting Gonzales v. Oregon, 546 U.S. 243, 256, 126 S.Ct. 904, 163 L.Ed.2d 748 (2006) and Skidmore v. Swift & Co., 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944)). The DOE's rejection of the 2+2 rule is in accord with the text of § 1415(f)(3)(C), our contextual reading of § 1415(b) as providing an overview of procedures required by the IDEA, and the IDEA's broader statutory scheme.

The IDEA's legislative history is in accord. When the 2004 IDEA amendments were crafted, the House of Representatives' initial proposal was for a one-year statute of limitations that relied on the occurrence rule and required that a complaint *944 “set forth a violation that occurred not more than one year before the complaint is filed.” H.R. Rep. 108–77, at 36 (2003). The Senate version of the bill included the wording that later became § 1415(f)(3)(C). S. Rep. 108–185, at 222 (2003) (“A parent or public agency shall request an impartial due process hearing within 2 years of the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint....”). Considering the two draft bills, the Third Circuit concluded:

The conference committee then incorporated the Senate's version at § 1415(f) and the House's version in the summary listing at § 1415(b). When it did so, however, it omitted to change the backward-looking framework of the House's version to the forward-looking framework of the Senate's. Thus was created the problem we grapple with today.
This legislative history suggests that Congress intended to adopt the discovery rule, not the occurrence rule, in the final version of the 2004 amendments. See id.

The text and purpose of the IDEA, the DOE's interpretation of the Act, and the legislative history of the 2004 amendments all lead us to the same conclusion. We hold the IDEA's statute of limitations requires courts to apply the discovery rule without limiting redressability to the two-year period that precedes the date when “the parent or agency knew or should have known about the alleged action that forms the basis of the complaint.” § 1415(f)(3)(C).

II. The district court erred by concluding that the IDEA's two-year statute of limitations necessarily barred claims arising in 2006 and 2007.

Having concluded that the IDEA's statute of limitations is triggered when “the parent or agency knew or should have known about the alleged action that forms the basis of the complaint,” we turn to the Avilas' claims. See § 1415(f)(3)(C) (emphasis added). In dismissing the Avilas' complaint, the district court cited the correct standard from § 1415(f)(3)(C), but concluded, “Parents' due process complaint was made April 26, 2010. Accordingly, unless an exception is shown, the Court finds any alleged misconduct prior to April 26, 2008, was not timely raised by Parents.” In other words, apart from considering the two express exceptions to the IDEA's statute of limitations, the district court barred the Avilas' claims arising before April 26, 2008 based on when the actions complained of occurred, rather than applying the discovery rule.

The district court found that Ms. Avila signed forms agreeing with the 2006–2007 evaluation results, but this does not end the inquiry because the Avilas' awareness of the evaluations does not necessarily mean they “knew or had reason to know” of the basis of their claims before April 26, 2008. Cf. A.G. v. Paradise Valley Unified Sch. Dist. No. 69, 815 F.3d 1195, 1205 (9th Cir. 2016) (holding that parents' consent to a disabled child's placement does not waive later challenges to the placement under Title II of the Americans with Disabilities Act and § 504 of the Rehabilitation Act, “at least where the issue is one that requires specialized expertise a parent cannot be expected to have”). Other courts have held that the “knew or had reason to know date” stems from when parents know or have reason to know of an alleged denial of a free appropriate public education under the IDEA, not necessarily when the parents became aware that the district acted or failed to act. See, e.g., Somoza v. N.Y. City Dep't of Educ., 538 F.3d 106, 114 (2d Cir. 2008) (holding that the “knew or should have known” date occurred when parent viewed a child's rapid improvement in a new program); Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1288 (11th Cir. 2008) (holding the “knew or should have known date” occurred after new evaluation and declining to hold that “famil [ies] should be blamed for not being experts about learning disabilities”).

Because the district court barred the Avilas' pre-April 2008 claims based on when the District's actions occurred, we remand to the district court to make findings and address the statute of limitations under the standard we adopt here, namely when the Avilas “knew or should have known about the alleged action[s] that form[ ] the basis of the complaint.” See § 1415(f)(3)(C).

Each party shall bear its own costs.

REVERSED and REMANDED.

All Citations


Footnotes
The Avilas' claim that the District violated the IDEA by failing to assess their child for dyslexia and dysgraphia is addressed in an unpublished memorandum disposition filed concurrently with this opinion.

The IDEA requires IEPs, which are “written statement[s] for each child with a disability,” as part of its mandate of ensuring students are provided with a free appropriate public education. See 20 U.S.C. §§ 1401(9)(D), 1414(d).

There are two express exceptions to the IDEA's two-year statute of limitations: (1) when a local educational agency misrepresents that it has resolved issues underlying a claim; and (2) when a local educational agency withholds necessary information. 20 U.S.C. § 1415(f)(3)(D). The Avilas do not argue that either of these exceptions apply.

An IEP includes the following: 1) a statement about the child's level of academic achievement; 2) “measurable annual goals”; 3) a description of how the child's progress towards the goals will be measured; and 4) a statement of the special education and other services to be provided. 20 U.S.C. § 1414(d)(1)(A).

The events underlying this action took place from 2006 to April 2010, and the applicable version of the IDEA was in effect from 2004 to October 2010. See Amanda J. ex rel. Annette J. v. Clark Cty. Sch. Dist., 267 F.3d 877, 882 n.1 (9th Cir. 2001) (applying the 1994 version of IDEA to events that took place in 1995, despite 1997 revision of IDEA). The 2010 amendments do not materially affect the analysis or outcome of this case. See Pub. L. No. 111–256, 124 Stat. 2643 (2010) (amending the IDEA to change references from “mental retardation” to “intellectual disabilities”).
805 F.3d 1164
United States Court of Appeals,
Ninth Circuit.

I.R., a minor by her Mother E.N., Plaintiff–Appellant,
v.
LOS ANGELES UNIFIED SCHOOL DISTRICT, Defendant–Appellee.

No. 13–56211.

Argued and Submitted July 10, 2015.

Filed Nov. 17, 2015.

Synopsis

Background: Disabled student, through her mother, brought action challenging decision of an administrative law judge (ALJ) excusing school district's failure to provide her with a free appropriate public education (FAPE), in violation of Individuals with Disabilities in Education Act (IDEA). The United States District Court for the Central District of California, Manuel L. Real, J., affirmed the ALJ's decision. Student appealed.

Holdings: The Court of Appeals, Du, District Judge sitting by designation, held that:

[1] district had duty to initiate a due process hearing following mother's refusal to agree with individualized education program's (IEP) recommended placement; and

[2] district's delay of more than a year and a half in requesting due process hearing was unreasonable.

Reversed and remanded.

Attorneys and Law Firms

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David Holmquist, Diane H. Pappas, Patrick J. Balucan (argued), Office of General Counsel, Los Angeles Unified School District, Los Angeles, CA, for Defendant–Appellee.

Appeal from the United States District Court for the Central District of California, Manuel L. Real, District Judge, Presiding. D.C. No. 2:12–cv–09924–R–VBK.

Before: STEPHEN REINHARDT and RICHARD R. CLIFTON, Circuit Judges, and MIRANDA M. DU,* District Judge.
Opinion

OPINION

DU, District Judge:

California Education Code § 56346(f) requires school districts to initiate a due process hearing if the school district determines that a portion of an Individualized Education Program (“IEP”) to which a parent does not consent is necessary to provide a child with a Free Appropriate Public Education (“FAPE”) under the Individuals with Disabilities Education Act (“IDEA”). 20 U.S.C. §§ 1400–1450. This appeal raises the issue of a school district's responsibility to initiate a due process hearing within a reasonable time after a child's parents fail to consent to the provision of services necessary to provide a FAPE. Because we conclude that a period of a year and a half is too long for a school district to wait to initiate a due process hearing pursuant to California Education Code § 56346(f), we reverse and remand.

I. BACKGROUND

Appellant I.R. is a child. I.R., through her mother (“Mother”), contends that Appellee Los Angeles Unified School District (“LAUSD”) failed to provide I.R. with a FAPE for the 2010/2011 and 2011/2012 school years in which I.R. was in second and third grade.

In 2006, in response to Mother's request for an assessment, LAUSD found I.R. to be eligible for special education under the category of “autistic-like” behaviors. An initial IEP meeting was held in August 2006. However, Mother decided to enroll I.R. in a private preschool and then a private school through first grade.

In the fall of 2010, Mother sought to enroll I.R. at Heliotrope Elementary School, a public school in LAUSD, for second grade. In September 2010, Mother consented to portions of the August 2006 IEP but did not consent to other portions. I.R. was placed in a second grade general education class with a one-on-one special education aide.

A later IEP, prepared on November 9, 2010, recommended placement in a special education environment at Heliotrope. On November 10, 2010, Mother's counsel wrote a letter to Heliotrope's principal in which she consented to some of the services offered in the IEP but disagreed with the special education placement. Among other things, Mother wanted I.R. to be placed in a general education classroom with a one-on-one aide. In a response letter dated November 19, 2010, Heliotrope's principal affirmed that I.R. would remain in her general education placement, pursuant to an earlier IEP issued on October 13, 2010. However, the response letter noted that the IEP members believed that I.R. required a smaller classroom setting with individualized instruction, which was not available in the general education classroom.

Several more IEP meetings were held throughout I.R.'s second and third grade years, from March 2011 to February 2012. From November 2010 until February 2012, all the IEPs recommended placing I.R. in a special education environment.1 Mother consented to portions of the IEPs but never consented to the IEPs' proposal to place I.R. outside of the general education classroom. LAUSD implemented components of the services offered in the IEPs to which Mother gave her consent, but not the portions to which Mother did not consent and, as a result, I.R. remained in a general education class with a special education aide.

On May 29, 2012, I.R. filed a request for a due process hearing in which she raised a number of issues. Relevant to this appeal is the issue of whether LAUSD denied I.R. a FAPE by failing to provide I.R. with an appropriate placement during each of the 2010/2011 and 2011/2012 school years. For the most part, LAUSD prevailed at the hearing. The administrative law judge (“ALJ”) who conducted the hearing concluded that the program proposed by LAUSD was...
appropriate for I.R. and that LAUSD had thus offered her a FAPE. The ALJ acknowledged that California Education Code § 56346(f) required LAUSD to initiate a due process hearing if it determined that the component to which a parent did not consent was necessary to provide a FAPE. The ALJ's decision stated that the “District acknowledged that the general education classroom placement was inappropriate and, therefore, [the] District failed to provide [a] FAPE.” Nonetheless, the ALJ did not hold LAUSD liable for failing to request a due process hearing. Instead, the ALJ concluded that “the evidence convincingly establishes that [LAUSD] offered an appropriate placement, but Mother's refusal to consent prevented [the] District from implementing and providing a FAPE.”

I.R. appealed to the district court, but that court affirmed the ALJ’s decision. *1167 The court noted that the ALJ had found that LAUSD had not provided I.R. with a FAPE for two years, a finding that LAUSD did not contest before the district court. The court further observed that the ALJ also found that LAUSD had offered an appropriate program, a finding that I.R. did not contest before the district court. Instead, before the district court, I.R. focused on the failure of LAUSD to request a due process hearing. On that subject, the district court noted that the ALJ had excused LAUSD for its failure to provide a FAPE because I.R.’s parents refused to consent to LAUSD’s proposed program. The district court agreed and affirmed. With regard to the failure to initiate a due process hearing, the district court held that LAUSD could not initiate such a hearing or take action to override the parents' failure to consent under 20 U.S.C. § 1414. Nor, under that section, the district court held, could LAUSD be held liable for its failure to provide a FAPE. The district court thus affirmed the ALJ's decision in favor of LAUSD.

I.R. timely appealed. This court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. K.D. ex rel. C.L. v. Dep't of Educ., 665 F.3d 1110, 1116 (9th Cir.2011).

II. STANDARD OF REVIEW

I.R. raises questions of law and is thus entitled to de novo review. See Amanda J. ex rel. Annette J. v. Clark Cty. Sch. Dist., 267 F.3d 877, 887 (9th Cir.2001) (“Questions of law and mixed questions of fact and law are reviewed de novo, unless the mixed question is primarily factual.”). Further, the Ninth Circuit reviews de novo “the district court's decision that the school district complied with the IDEA.” E.M. ex rel. E.M. v. Pajaro Valley Unified Sch. Dist. Office of Admin. Hearings, 758 F.3d 1162, 1170 (9th Cir.2014) (quoting K.D., 665 F.3d at 1117).

III. DISCUSSION

A.

The district court held that, in effect, 20 U.S.C. § 1414 foreclosed LAUSD from initiating a due process hearing. We disagree.2

The district court's error is apparent upon examination of the plain language of the applicable statutes. The district court appears to have been relying on 20 U.S.C. § 1414(a)(1)(D)(ii)(II), which states that if the parent “refuses to consent to services under clause (i)(II), the local educational agency shall not provide special education and related services to the child” by utilizing the procedures described in [20 U.S.C. § 1415]. Section 1415, in turn, grants school districts the power to initiate a due process hearing. However, 20 U.S.C. § 1414(a)(1)(D)(ii)(II) and its implementing regulations, by their plain text, foreclose a school district from initiating a due process hearing only where a parent has refused consent before the initial provision of special education and related services. Clause (i)(II), the parental consent provision to which § 1414(a)(1)(D)(ii)(II) refers, states that a school district must obtain parental consent “before providing special education and related services to the child.” 20 U.S.C. § 1414(a)(1)(D)(i)(II) (emphasis added). The implementing regulation similarly forecloses a school district's ability to file a due process complaint and relieves it of its duty to provide a FAPE only “[i]f the parent of a child fails to respond to a request for, or refuses to consent to, the initial provision of special education and related services....” 34 C.F.R. § 300.300(b)(3) (emphasis added).

The statute relied upon by the district court thus does not apply where, as in this case, a parent consented to special education and related services, but did not consent to a specific component of the IEP.

B.

LAUSD conceded at oral argument that a school district is required to initiate a due process hearing pursuant to California Education Code § 56346(f). LAUSD argues, however, that its obligation to initiate a due process hearing was not yet triggered.

The California Education Code supplements the IDEA. See J.W. ex rel. J.E.W. v. Fresno Unified Sch. Dist., 626 F.3d 431, 433 (9th Cir.2010) (“Both state statutes and federal regulations supplement IDEA's procedural and substantive requirements.”). The California Education Code requires that “as soon as possible following development” of the IEP, “special education and related services shall be made available to the individual with exceptional needs in accordance” with the IEP. Cal. Educ.Code § 56344(b) (emphasis added).

To that end, California Education Code § 56346(e) requires that the school district implement those portions of the IEP to which the parent has consented if “the parent of the child consents in writing to the receipt of special education and related services for the child but does not consent to all of the components of the IEP.” In accordance with subsection (e), California Education Code § 56346(f) provides, in pertinent part, that if a school district “determines that the proposed special education program component to which the parent does not consent is necessary to provide” a FAPE, “a due process hearing shall be initiated.”

Section 56346(f) thus delineates certain steps that must be taken after an IEP is prepared and presented to the parent if the parent consents in writing to the receipt of special education and related services but does not consent to all components of the IEP. First, the school district must determine whether the proposed special education program component to which the parent does not consent is necessary to provide a FAPE. If the disputed component is determined to be necessary, the school district must initiate a due process hearing. Once the school district determines that the component is necessary, and that the parents will not agree to it, the district cannot opt to hold additional IEP meetings or continue the IEP process in lieu of initiating a due process hearing. Rather, the school district must initiate a due process hearing expeditiously.
In effect, § 56346(f) compels a school district to initiate a due process hearing when the school district and the parents reach an impasse. As the goal of the statute is to ensure that the conflict between the school district and the parents is resolved promptly so that necessary components of the IEP are implemented as soon as possible, a school district may not artificially prolong the process by failing to make the necessary determination to trigger § 56346(f)'s mandate.

In evaluating how long is too long for a school district to take in determining a component's necessity and initiating a due process hearing, we recognize that the school district must have some flexibility to allow for due consideration of the parents' reasons for withholding consent to an IEP component. Parents are an integral part of the IEP process. See Amanda J., 267 F.3d at 891 (“By mandating parental involvement and requiring that parents have full access to their child's records, Congress sought to ensure that the interests of the individual children were protected.” (citing Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 208, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982))). Indeed, parents are part of the cooperative team that determines the contents of the IEP in the first place. See M.M. v. Lafayette Sch. Dist., 767 F.3d 842, 851 (9th Cir.2014) (citing 20 U.S.C. §§ 1400(c)(5)(B), 1414(a)(1)(D), 1414(b)(4)(A); 34 C.F.R. § 300.306(a)(1)). Given the parents' involvement in the process from the first IEP team meeting, a school district should be able to consider the parents' position and make a determination as to a disputed component's necessity within a reasonable period of time.

[4] The relevant period in this case runs from November 2010, when Mother failed to consent to I.R.'s placement in a special education environment, to May 2012, when I.R. requested a due process hearing. LAUSD does not contend that it took that entire period for it to assess whether placement in a special education environment was necessary to provide I.R. with a FAPE. LAUSD had already reached that conclusion when it prepared the November 2010 IEP.

Instead, LAUSD simply argues that during that year and a half time frame, it was continuing to try to work with I.R.'s parents through the IEP process. It argues that “[w]hile [LAUSD] may eventually have had to initiate the due process hearing proceedings pursuant to California Education Code, section 56346(f), it was still attempting to use the IEP team meeting process prior to doing so.” Indeed, it was finally I.R.'s parents who requested a due process hearing. LAUSD never did.

LAUSD's approach cannot be squared with the requirement to initiate a due process hearing imposed on school districts under California Education Code § 56346(f). The statute does not say that a school district is obligated to request a due process hearing “eventually” or “when the school district finally gets around to it.” If, in the school district's judgment, the child is not receiving a FAPE, the district must act with reasonable promptness to correct that problem by adjudicating the differences with the parents. The reason for this urgency is that it is the child who suffers in the meantime. LAUSD had concluded that I.R. was not receiving a FAPE in her current placement. The obvious point of § 56346(f) is to minimize the duration of the denial of a FAPE by requiring the school district, if it cannot reach agreement with the child's parents, to initiate the process to adjudicate the dispute.

In other circumstances, determining within what time period the school district must act might require factual findings by the trier of fact, an ALJ, or a district court. In this case, though, it is plain that the delay of LAUSD of more than a year in requesting a due process hearing was unreasonable. A vague hope that maybe an agreement with the child's parents will be reached someday is not enough to justify putting off the obligation imposed by section 56346(f). Accepting the explanation offered by LAUSD here would effectively gut the statute.

A school district's failure to comply with a procedural requirement, such as the requirement of California Education Code § 56346(f), denies a child a FAPE when the procedural inadequacy “result[s] in the loss of educational opportunity” or “cause[s] a deprivation of educational benefits.” M.M., 767 F.3d at 852 (quoting N.B. v. Hellgate Elementary Sch. Dist., 541 F.3d 1202, 1207 (9th Cir.2008)). LAUSD's failure to comply with its obligation to initiate the adjudication process left I.R. to remain in a placement that LAUSD itself acknowledged was inappropriate. To the extent that I.R. lost
an educational opportunity and was deprived of educational benefits for an unreasonably prolonged period, LAUSD can be held responsible for denying her a FAPE for that unreasonably prolonged period.

C.

LAUSD has argued that its sole obligation under the IDEA was to offer I.R. a FAPE, an obligation it claims was satisfied by its November 9, 2010 offer of special education placement, along with its later, similar offers during 2011. I.R., in response, has argued that school districts also have a duty to provide a FAPE to students by implementing any proposed plan. We do not agree that a school district's duty extends quite this far. As I.R. herself argues, parents retain the right to refuse consent to an offer of a FAPE. See 34 C.F.R. § 300.300(d)(3). Accordingly, it would prove impossibly onerous to require school districts to somehow implement a rejected IEP and provide a FAPE in the face of such refusal.

But this does not mean that the mere offer of a FAPE is enough to immunize a district from liability. As we have explained, school districts in California must comply with the additional requirement imposed by the California Education Code of initiating a due process hearing if agreement between the district and the parent on an appropriate placement cannot be reached. LAUSD's failure to initiate a due process hearing, as was required under California law, directly resulted in a clear injury, namely I.R. remaining in an inappropriate program for a much longer period of time than should have been the case.

On remand, the district court shall determine the appropriate remedy for this injury.

*1171 IV. CONCLUSION

For the foregoing reasons, we reverse the judgment of the district court and remand for further proceedings consistent with this opinion.

REVERSED and REMANDED.

All Citations


Footnotes

1 IEPs and amended IEPs prepared in November 2010, March 2011, and April 2011 all offered placement in a special education environment. An IEP prepared in June 2011 allowed for placement in a general education class for some classes. An IEP prepared in February 2012 offered placement in a general education class.

2 LAUSD conceded as much during oral argument by taking the position that it could have chosen to initiate a due process hearing in this case.

3 The district court did not cite to a specific subsection of 20 U.S.C.

4 Further, 20 U.S.C. § 1415(b)(6)(A) provides an “opportunity for any party” to present a due process complaint with respect to a child's placement. If § 1414(a)(1)(D)(ii)(II) served to Foreclose a school district from initiating a due process hearing where a parent has consented to special education and related services but the parties have disagreements over placement, § 1415(b)(6)(A) would be rendered meaningless.

5 LAUSD also relies on Anchorage School District v. M.P., 689 F.3d 1047, 1056 (9th Cir.2012) to argue that it opted to resolve the placement dispute by continuing to work with I.R.’s parents through the IEP process. In Anchorage, the court held that where a school district developed an IEP and then received extensive revisions to the IEP from parents, the school district
could either continue working with the parents on the IEP or initiate a due process hearing. *Id.* However, in *Anchorage*, the parties were not in California and California Education Code § 56346(f)'s mandate did not apply.
Synopsis

**Background:** Following administrative determination that student was not entitled to special education services because he was not disabled, student's mother appealed to district court, requesting that school district by required to provide student with individualized education plan (IEP) under Individuals with Disabilities Education Act (IDEA). The United States District Court for the Northern District of California, Jacqueline Scott Corley, United States Magistrate Judge, 2014 WL 1947115, granted district's summary judgment motion. Mother appealed.

**Holdings:** On denial of rehearing, the Court of Appeals, Schroeder, Circuit Judge, held that:

[1] student exhibited need for special education services under IDEA, and thus school district's refusal to enter IEP and placement of student in general education program were improper, and

[2] district failed to disclose to student's mother its assessments, treatment plans, and progress notes from student's time at school, thus interfering with mother's opportunity to participate in IEP formulation process.

Reversed and remanded.

Opinion, 835 F.3d 1168, amended and superseded.

*998* Appeal from the United States District Court for the Northern District of California, Jacqueline Scott Corley, Magistrate Judge, Presiding, D.C. No. 3:13-cv–03854-JSC

**Attorneys and Law Firms**

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Before: Mary M. Schroeder, A. Wallace Tashima, and John B. Owens, Circuit Judges.

Opinion

ORDER

The opinion filed September 1, 2016, slip op. 1, and appearing at 835 F.3d 1168 (9th Cir. 2016), is amended. It may not be cited as precedent by or to this court or any district court of the Ninth Circuit. An Amended Opinion is being filed concurrently with this order.

The panel has voted to deny Appellees–Defendants' petition for panel rehearing. Judge Owens has voted to deny the petition for rehearing en banc, and Judges Schroeder and Tashima have so recommended.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellees–Defendants' petition for panel rehearing and the petition for rehearing en banc are DENIED. Further petitions for rehearing and rehearing en banc shall not be entertained.

OPINION

SCHROEDER, Circuit Judge:

INTRODUCTION

This is an Individuals with Disabilities Education Act (“IDEA”) case of an emotionally troubled young child with suicidal tendencies beginning in the second grade, and with attention deficit hyperactivity disorder (“ADHD”) augmenting his disruptive behaviors. Congress created the IDEA to bring disabled students into the public education system by requiring states to adopt procedures to develop individualized plans for such students. Students with disabilities are entitled to special education services to ensure that they receive a “free and appropriate public education” (“FAPE”).

The Pittsburg Unified School District (“School District”) determined that L.J. was not entitled to special education services because he was not disabled, and its determination was upheld on administrative review. L.J.’s mother filed this action in federal district court to require the School District to provide L.J. with an Individualized Education Plan (“IEP”) to provide specialized services to assist with what she contends are serious disabilities.

The district court reviewed the record and found that L.J. was disabled under three categories defined by the IDEA. It nevertheless concluded that an IEP for specialized services was not necessary because of L.J.’s satisfactory performance in general education classes. The court discounted L.J.’s suicide attempts as not bearing on the need for educational services because they took place outside of school.

The school records show, however, that beginning in the second grade and continuing into the third and fourth grades, when the parent invoked administrative remedies, the School District had already been providing L.J. with special
services, including counseling, one-on-one assistance, and instructional accommodations. These services resulted in L.J.'s materially improved performance. The School District consistently refused, however, to provide him with an IEP that would ensure such services in the future as required by the IDEA. The record also reflects that the School District violated procedural protections of the IDEA by failing to provide the parents with education records bearing on L.J.'s disabilities and services that had been provided. We therefore reverse and remand for consideration of appropriate remedies.

BACKGROUND

This case presents a bright child's disturbingly troubled history in the primary grades of two through five. L.J. was suspended from school multiple times for disruptive behavior that included kicking and hitting his teachers, throwing rocks, calling teachers and students names, and endangering and physically injuring classmates. L.J. has attempted to kill himself on at least three occasions and has manifested suicidal ideations prompting the School District's mental health providers to conduct at least one emergency suicide evaluation. L.J. has been diagnosed with three serious disorders, including Bipolar Disorder, Oppositional Defiant Disorder ("ODD"), and ADHD. He has been prescribed a cocktail of serious medications for these conditions.

For years, L.J.'s mother has repeatedly requested, to no avail, that the School District find L.J. eligible for special education. The School District has provided many services to L.J., but has never classified L.J. as eligible for special education under the IDEA. Without such eligibility, L.J. is not guaranteed the services his mother believes that he needs, such as one-on-one educational therapy, counseling services, and behavior intervention services. Instead, the School District has transferred him between at least three different schools.

1000 The history of L.J.'s difficulties began in second grade. During this year, L.J. demonstrated inappropriate behaviors at school, including anger, lack of self-control, and not following rules. After being verbally disciplined by his teacher for bullying other students, L.J. told her that he wanted to die and that life was too hard. School staff called L.J.'s mother, and mental health staff prepared an emergency suicide evaluation. The School District referred L.J. to Lincoln Child Center ("Lincoln"), the School District's counseling center, where mental health providers assessed him. L.J. was diagnosed with ADHD, ODD, and Bipolar Disorder.

L.J. began his third grade year at the same school, but exhibited negative behaviors which the teacher had difficulty controlling. The School District held a student study team ("SST") meeting on September 7, 2011. The purpose of an SST is to develop interventions for students having trouble in school, either academically or behaviorally. In many schools, an SST is the first step in addressing a student's needs before initiating the IEP process.

After L.J.'s SST meeting, the School District's behavior specialist created a behavioral support plan ("BSP") to address his problematic behavior. Over the course of the school year, the behavior specialist revised the BSP multiple times, but L.J. continued to act inappropriately. As a result of the failed BSP, the School District proposed moving L.J. to a segregated trailer at a different school, but with no special education services, with six other African–American boys with extreme behavior problems.

L.J.'s mother disputed the move, retained counsel, and entered mediation. The parties settled by agreeing to place L.J., temporarily, in a different school, in a general education class, conditioned on his having a one-to-one behavioral aide. The School District also agreed to evaluate L.J. for special education.

At the new school, a paraeducator was assigned to work with L.J. one-on-one, and continued to work with him through his third grade year. A paraeducator is a specially trained staff member, assigned to work with special education students. While L.J. progressed academically and behaviorally, he continued to have issues. In April 2012, L.J. wrapped a seatbelt
around his neck, and saying he wanted to die, began rolling around uncontrollably trying to rub his face on the ground. L.J. was taken to the emergency room.

Also, pursuant to the settlement agreement, Dr. Sherry Burke, a school psychologist, conducted psychoeducational and functional analysis assessments of L.J. to assist the IEP team in determining if he qualified for special education under the categories of other health impairment, or specific learning disability. See 34 C.F.R. §§ 300.8(c)(9), (10). Dr. Burke reviewed available school records, conducted various interviews of L.J.’s teachers, counselors, and family members, and administered a series of tests. She concluded that L.J. did not meet the eligibility criteria for special education.

On May 29, 2012, L.J. again attempted to kill himself by sticking his finger in a light socket and putting items down his throat. He said that everyone hated him and he did not want to live. He was then confined to a psychiatric hospital, causing him to miss six school days.

The next day, May 30, 2012, while L.J. was hospitalized, the IEP team held a meeting to review L.J.’s assessment results and to make a special education eligibility determination. An IEP team is composed of School District teachers, the parent and other experts familiar with the child. See 20 U.S.C. § 1414(d)(1)(B). Dr. Burke presented her findings to the IEP team, including her recommendation that L.J. did not meet eligibility requirements. The IEP team agreed with the psychologist that L.J. had no qualifying disabilities.

The next month, on June 25, 2012, L.J.’s mother formally requested all of L.J.’s school records from the School District, including any records from Lincoln, where L.J. had received counseling and had been assessed. The School District claimed there were no Lincoln records that had not already been disclosed. L.J.’s mother submitted another request for L.J.’s records on June 28. The School District again failed to disclose any further records.

L.J. was admitted for psychiatric hospitalization on July 17 and again on July 26, when he was detained as a danger to himself or others for banging his head and making threats. Doctors placed L.J. on the psychotropic medications, Adderall, Seroquel, and Wellbutrin, to help stabilize his mood and sustain focus, and later Vistaril to treat his anxiety.

On July 27, 2012, L.J.’s mother filed a request for a due process hearing with the California Office of Administrative Hearings (“OAH”). She claimed that the School District denied L.J. a FAPE by failing to make him eligible for special education and related services, and that the School District had failed to conduct assessments in areas of suspected disability, specifically other health impairment and emotional disturbance. L.J.’s mother also contended that the School District had failed to make requested records available.

The parties again participated in mediation on August 23, 2012. The parties agreed to place L.J. at yet another elementary school, pending the School District's review of L.J.’s psychiatric hospitalization records and Dr. Burke's updating her report. The School District generated a new Assessment Plan for IEP eligibility purposes. L.J.’s mother authorized the release of L.J.’s psychiatric records on the condition that a school nurse would conduct a health assessment and that L.J.’s original third grade teacher would be included in the eligibility process.

For fourth grade, beginning in the fall of 2012, L.J. was in a classroom with a teacher experienced with students with disciplinary problems. L.J. was also provided with special accommodations, including freedom to leave the classroom at will. On September 25, 2012, L.J. was suspended for two days for throwing rocks and threatening to kill the school's principal. The teacher's one-on-one assistance and special accommodations continued throughout the school year, and, as a result, L.J.’s academic performance was satisfactory.

After Dr. Burke updated her assessments, a second IEP team meeting was held on October 9, 2012, to reconsider L.J.’s eligibility for special education services under the category of emotional disturbance. See 34 C.F.R. § 300.8(c)(4). The requested third grade teacher was not present at the meeting and L.J. had not been assessed by a nurse, in violation of
both conditions insisted upon by L.J.’s mother in the agreement. The team again concluded that L.J. was not eligible for special education, the same conclusion reached at the first meeting the preceding May, despite repeated intervening hospitalizations, heavy medications, renewed suicide attempts, and individualized accommodations in school.

On October 15, 2012, L.J. filed an amended complaint with the California OAH. L.J.’s mother again submitted formal requests for L.J.’s school records in October and November 2012, and in March 2013. The mental health records kept by the School District, including Lincoln, were never disclosed.

During that fourth grade year, L.J. was sent to the office multiple times for physically injuring classmates, disrupting class, and refusing to follow directives. School staff contacted L.J.’s mother to pick him up from school early on numerous occasions. The School District conducted another mental health assessment. He was again diagnosed with ADHD. In this assessment, the clinician concluded his ADHD symptoms caused clinically significant impairment in L.J.’s social and academic functioning, that L.J. relied extensively on medications, and further, that he evidenced functional impairments in the areas of family relations, school performance, and peer relations.

The following year, in the fall of 2013, the School District nevertheless placed L.J. in a regular fifth grade classroom without accommodations or services. In November, L.J. was rushed to the emergency room by ambulance after attempting to hang himself with a lanyard. That year, L.J. physically injured children and at least one teacher. L.J. was suspended for “kicking and hitting” his science teacher, calling another teacher “stupid,” and brandishing a fake knife in the classroom. L.J. was also suspended again because he endangered a classmate by putting expandable pellets in the classmate's water bottle without his knowledge.

That spring, L.J.’s due process request made its way before an Administrative Law Judge (“ALJ”). The ALJ conducted a three-day hearing in April, and on May 23, 2013, the ALJ issued her decision, denying all of L.J.’s requests for relief. The ALJ found that L.J. had no disabilities that would qualify him for special education services, and even if he had qualifying disabilities, he had not demonstrated a need for special services because his academic performance was satisfactory when he was able to attend school.

PROCEDURAL BACKGROUND

L.J. timely appealed the ALJ’s ruling to the district court. L.J. contended that he was eligible for special education services and asked the district court to order the School District to provide an IEP. The parties filed cross-motions for summary judgment. The district court disagreed with the ALJ’s decision that L.J. had no disabling conditions. The district court ruled that L.J. met the qualifying criteria as a student with three disabilities: specific learning disability, other health impairment (due to his ADHD), and serious emotional disturbance (due to his ODD and bipolar disorder).

The district court, nevertheless, granted the School District's motion for summary judgment, ruling that L.J. did not need special education services because of his satisfactory performance in general education. The district court adopted the ALJ's findings that L.J. was performing well behaviorally, socially, and academically between May and October 2012 with the help of services the court characterized as general education accommodations, not individualized special education services.

This appeal followed.

STANDARD OF REVIEW
The district court's findings of fact are reviewed for clear error, even when the district court based those findings on an administrative record, and conclusions of law are reviewed de novo. *J.G. v. Douglas Cty. Sch. Dist.*, 552 F.3d 786, 793 (9th Cir. 2008). This court gives “due weight” to ALJ special education decisions. *J.W. v. Fresno Unified Sch. Dist.*, 626 F.3d 431, 440–41 (9th Cir. 2010). This standard is far less deferential than judicial review of other agency actions, but requires this court to refrain from substituting its own notions of educational policy for those of the school authority it reviews. *Amanda J. v. Clark Cty. Sch. Dist.*, 267 F.3d 877, 887–88 (9th Cir. 2001).

I. Statutory Background and Legal Framework

Under the IDEA, 20 U.S.C. §§ 1400–1491, all states that receive federal education funding must establish policies and procedures to ensure that a “free appropriate public education is available to all children with disabilities.” *Id.* at § 1412(a)(1)(A). The IDEA defines a FAPE as “special education” that is provided at public expense. *Id.* at § 1401(9). A child receives a FAPE, for purposes of the IDEA, if the program addresses the child's unique needs, provides adequate support services so that the child can take advantage of educational opportunities, and is in accord with the IEP. *Id.* A state must comply both procedurally and substantively with the IDEA. *Id.* at § 1400 et seq.

In determining whether a student has received a FAPE in compliance with the IDEA, the court conducts both a procedural and substantive inquiry. The court considers whether the school complied with the procedures set forth in the IDEA. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206–07, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). The court also evaluates whether the IEP in this case, or lack thereof, was reasonably calculated to enable the child to receive educational benefits. *Id.* Where a court identifies a procedural violation that denied a student a FAPE, the court need not address the second substantive prong of the inquiry. *Doug C. v. Haw. Dept. of Educ.*, 720 F.3d 1038, 1043 (9th Cir. 2013).

Not all procedural violations constitute a denial of a FAPE. *R.B. v. Napa Valley Unified Sch. Dist.*, 496 F.3d 932, 938 (9th Cir. 2007). A child is denied a FAPE when procedural inadequacies result in the loss of an educational opportunity, or seriously infringe on the parents' opportunity to participate in the IEP formulation process. *Doug C.*, 720 F.3d at 1043. A procedural error is harmless if the student is substantively ineligible for IDEA benefits. *R.B.*, 496 F.3d at 942.

II. Eligibility for IDEA Benefits

The initial issue in this case is whether L.J. was substantively eligible for IDEA benefits, since the ALJ held he was not. A child is substantively eligible for special education and related services if he is a “child with a disability,” which is statutorily defined, in relevant part, as a child with a serious emotional disturbance, other health impairment, or specific learning disability and who, by reason thereof, needs special education and related services. 20 U.S.C. § 1401(3)(A). California Education Code similarly provides that a “student with exceptional needs” who is eligible under § 1401(3)(A) must have an impairment that “requires instruction and services which cannot be provided with modification of the regular school program.” Cal. Educ. Code §§ 56026(a), (b).

Even if a child has such a disability, he or she does not qualify for special education services if support provided through the regular school program is sufficient. 20 U.S.C. § 1401(3)(A); Cal. Educ. Code § 56026. “[S]pecial classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 20 U.S.C. § 1412(a)(5)(A).

The parties on appeal no longer dispute that L.J. should have been categorized as a child with a disability under three categories set forth in the statute. First, L.J. has a “specific learning disability” because he has exhibited a severe discrepancy between his intellectual ability and his achievement. 34 C.F.R. § 300.8(c)(10). Second, L.J. has an “other health impairment” because his ADHD and mood disorders interfere with his ability to progress academically and socially. 34 C.F.R. § 300.8(c)(9). Lastly, L.J.’s mood disorders constitute a “serious emotional disturbance.” 34 C.F.R. § 300.8(c)(4).
The critical issue in this appeal therefore is whether L.J. demonstrated a need for special education services. This case differs from most IDEA cases in that L.J. never received an IEP because the School District continually maintained he had no qualifying disabilities. The ALJ agreed that he had no qualifying disabilities. The district court held that the ALJ was incorrect in this regard and that L.J. had qualifying disabilities. The district court went on to conclude, however, that L.J. was performing satisfactorily without the need for special education services. We must therefore determine whether general education was appropriate or whether L.J. exhibited a need for special education services.

The appropriateness of a student's eligibility should be assessed in terms of its appropriateness at the time of the child's evaluation and not from the perspective of a later time with the benefit of hindsight. Adams v. Oregon, 195 F.3d 1141, 1149 (9th Cir. 1999). When making this assessment of whether an eligibility determination is “appropriate” under the IDEA, this court looks to the time of the child's evaluation by the School District. We employ what is termed the “snapshot” rule that instructs the court to judge the appropriateness of the determination on the basis of the information reasonably available to the parties at the time of the IEP meeting. Id. “An IEP must take into account what was and was not, objectively reasonable when the snapshot was taken.” Id. (citation omitted). We judge the eligibility decision on the basis of whether it took the relevant information into account, not on whether or not it worked. Id.

In this case, it is undisputed that the snapshot period was the period surrounding the two IEP meetings: on May 30, 2012, in the third grade, and October 9, 2012, in the fourth grade. That was the critical period on which the School District based its eligibility decisions, and the district court correctly focused on L.J.'s eligibility for special education by looking to his behavior, academic progress, and social needs at that time. The district court was correct when it found that L.J. should have been categorized as a child with a disability within the meaning of the IDEA. L.J. had multiple disabilities, which manifested serious behavioral problems.

The district court nonetheless concluded that L.J. was not eligible for special education because he was academically performing satisfactorily without receiving special education services and on the basis of the general education curriculum. This was clear error because L.J. was receiving special services, including mental health counseling and assistance from a one-on-one paraeducator. These are not services offered to general education students.

This distinction is important. General education is what is provided to non-disabled children in the classroom. Special education, on the other hand, is “specially designed instruction” to meet the unique needs of a child with a disability. 34 C.F.R. § 300.39(a)(1). “Specially designed instruction” is defined under the IDEA regulations:

1005 *Specially designed instruction* means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction—

(i) To address the unique needs of the child that result from the child's disability; and

(ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.

34 C.F.R. § 300.39(b)(3) (emphasis added).

The district court decided that L.J. did not need an IEP because, despite his multiple disabilities, L.J. was performing satisfactorily in general education. The problem with the district court's analysis is that many of the services the district court viewed as general education services were in fact special education services tailored to L.J.'s situation. The district court thus classified many of the services L.J. received as general education, when they were not. Discussion of a few examples will make the point.
First, general education instruction does not provide for one-on-one direction. L.J. received special assistance in the third grade from a one-on-one paraeducator, pursuant to the parties agreement that year. The School District claims that the paraeducator “faded back considerably” by May 30, the date of the initial IEP meeting, but this is not accurate. The paraeducator continued to assist L.J. throughout the third grade.

Second, general education instruction does not provide for specially designed mental health services. The School District's position is that L.J. received only general education mental health services from Lincoln that the School District makes available to all students. The School District distinguishes such services from services received by special education students, which are specially designed mental health services.

The flaw in the School District's argument is that the mental health services that L.J. received from second grade through fourth grade were specially-designed for him. Such services included services that the School District described as follows: Assessments, Plan Development, Group and Individual Rehabilitation, Group and Individual Therapy, Family Therapy, and Collateral Family Group and Intensive Home-Based Services. The School District acknowledges that only students requiring special education receive an educationally-related mental health assessment. L.J. received two such mental health assessments. L.J. was referred to Lincoln by the School District's Director of Special Education and Psychological Services, and the School District acknowledged this means of referral is for special education students only.

Third, general education instruction does not typically include extensive clinical interventions by a School District behavior specialist. While it is not unusual for a behavior specialist to offer support to a general education teacher, here the School District's behavior specialist did much more. Throughout the third grade year, he designed specific BSPs in an attempt to meet L.J.’s needs. The plans included adapting the method and delivery of L.J.’s instruction, and strategies to promote a structured environment and reinforce positive behavior. The behavior specialist also designed a nine-hour training session for L.J.’s paraeducator. After training L.J.’s aide, the behavior specialist closely supervised him to ensure the interventions followed the new BSP.

The district court clearly erred by mischaracterizing all of these individualized services as general education available to all students, rather than as special education provided to students with disabilities. The court went on to conclude, erroneously, that L.J. did not require specialized assistance in the future on the ground that he was no longer exhibiting behaviors that interfered with his school performance. Granted, his condition had improved during the snapshot period, for by the time of the IEP meetings, L.J.’s impairments had been eased with the accommodations and services provided by the School District. With the assistance of medication and specially designed instruction, L.J. had periods of temporary behavioral and academic gain. L.J.’s teachers, service providers, and mother all reported that L.J. had made good progress in academics and improved his social skills with his classmates during the snapshot period.

Dr. Burke opined that his average or above-average academic testing scores showed academic achievement had not been impacted by any of his issues. Standardized tests ranked L.J.’s academic performance in an overall average range. Although there was progress, it was no doubt in a setting where multiple services were being provided and the progress must at least, in substantial part, be attributed to those services. Moreover, L.J. has shown himself to be an intelligent child, so his academic performance could have been even more improved with the appropriate specially designed instruction.

Yet, L.J. continued to have troubling behavioral and academic issues during the snapshot period. The district court did not adequately take these into account when it decided there was no need for future specialized services. The information available to the IEP team during the snapshot period was dramatic.

L.J. threatened and attempted to kill himself on numerous occasions. On May 29, 2012, the day before his initial IEP meeting, L.J. attempted to kill himself by sticking his finger in a light socket and putting items down his throat. On May 30, 2012, the day of his first eligibility determination, L.J. could not have been doing well socially, behaviorally,
or academically at school because he was in extended care at a psychiatric hospital. He was confined to the hospital for over a week and missed at least six school days. L.J. was again admitted for psychiatric hospitalization on July 17 and July 26, 2012. L.J. was detained as a danger to himself or others because he was banging his head against walls and making threats of harm.

The district court concluded that L.J.’s psychiatric hospitalizations and suicide attempts were not relevant to his eligibility for specialized instruction because they occurred outside the school environment. Yet, the issue is whether his disabilities interfered with his education and necessitated special services. It is hard to imagine how an emotional disturbance so severe that it resulted in repeated suicide attempts would not interfere with school performance. That he attempted suicide outside the school environment is immaterial. His emotional disturbance adversely affected his attendance and his teachers all reported that L.J.’s classroom absences, due to psychiatric hospitalizations, hurt his academic performance. To distinguish between where a student attempted suicide—between home and school—misses the point. The point being that whether having a suicidal ideation and attempting suicide interfered with L.J.’s education.

In fourth grade, in September, L.J. was suspended for two days after throwing rocks at and threatening to kill the school principal. The district court did not think his suspension was of great import, noting *1007 that it was only for two days. But this was not L.J.’s only incident. Shortly before the October 9, 2012, IEP meeting, L.J. was unable to ride the school bus because he refused to follow the bus driver's directions.

L.J. also continually had needs associated with his medication and treatment for his mood disorders and ADHD. By fourth grade, L.J. relied on psychotropic medications in order to attend school. His fourth grade teacher reported that L.J.’s functioning declined in the absence of medication or when it had no mitigating effects. School counselors repeatedly expressed their concern regarding L.J.’s medication management. The district court neglected to discuss L.J.’s ongoing needs associated with his medication.

L.J. clearly exhibited behavioral and academic difficulty during the snapshot period. He threatened and attempted to kill himself on three occasions in 2012. In the fall, he frequently acted out at school, and continued to have needs associated with his medication regimen. The district court should not have discounted these facts. They demonstrate that L.J. required special education services.

Because L.J. is eligible for special education, the School District must formulate an IEP. We reverse the district court's decision and remand for it to order that the School District provide that remedy.

III. Procedural Violations of the IDEA

[8] Procedural safeguards are built into the IDEA to ensure that a child's education is fair and appropriate and the parents have an opportunity to participate in the IEP formulation process. *Doug C.*, 720 F.3d at 1043. The record in this case reflects some serious violations of these safeguards by the School District.

The School District failed to disclose assessments, treatment plans, and progress notes from L.J.'s time at Lincoln. The district court erred in concluding that this failure did not interfere with L.J.’s mother's opportunity to participate in the IEP formulation process.

Under the IDEA, parents have the right to informed consent. 20 U.S.C. § 1414(a)(1)(D). Consent means that the parent has been fully informed of all information relevant to the activity for which consent is sought. 34 C.F.R. § 300.9(a). To guarantee parents the ability to make informed decisions about their child's education, the IDEA gives them the right to examine all pertinent education records relating to their child. *20 U.S.C. § 1415(b)(1). The Lincoln records constitute such education records and should have been disclosed to L.J.’s mother.
Parents also have the right to invite to attend IEP meetings individuals with knowledge or special expertise regarding their child. 34 C.F.R. § 300.321(a)(6). L.J.'s mother had the right to have L.J.'s mental health providers at both the May and October IEP meetings. Id. Without knowledge of the Lincoln records, however, L.J.'s mother waived the attendance of his mental health clinicians at the IEP meetings. At the very least, L.J.'s parent should have received complete copies of the Lincoln records so that she could provide informed consent regarding the exclusion of his mental health providers from the IEP team. Had L.J.'s mother been aware of the content of the Lincoln records, she may well not have waived the mental health providers' attendance.

The School District also failed to conduct a health assessment for the purpose of determining how L.J.'s health, and particularly his medications, affected his performance. The district court held that this error did not infringe on L.J.'s mother's ability to participate in the IEP process because L.J.'s medications were not administered at school. We fail to see that the need for a health assessment should depend on where medications are administered, and we are cited to nothing in support of the proposition.

Under the IDEA, the School District must conduct a “full and initial evaluation,” one which ensures the child is assessed in “all areas of suspected disability.” 20 U.S.C. §§ 1414(a)(1)(A), (b)(3)(B). This requirement allows the child's IEP team to have a complete picture of the child's functional, developmental, and academic needs. When a student has been diagnosed as having a chronic illness, as L.J. was, the student may be referred to the School District for a health assessment. 5 Cal. Code Reg. § 3021.1. A health assessment focuses on diagnoses, health history, and those specific health needs while in school which are necessary to assist a child with a disability. The regulations then require that the IEP team review, among other things, the “possible medical side effects and complications of treatment that could affect school functioning.” Id. The district court erred when it dismissed the School District's failure to conduct a health assessment, depriving L.J. of an educational benefit. See Doug C., 720 F.3d at 1043 (a FAPE is denied where procedural inadequacies result in loss of educational benefits).

Here, there is reason to believe that alternative services would have at least been more seriously considered during the IEP process if the School District had assessed L.J.'s health, including the effects of his medication on his health. The record evidence showed that L.J. continually had needs associated with his medication and treatment, which adversely impacted his academic, behavioral, and social performance. Because his health and the impacts of his medication were never assessed, no matter what assistance L.J. received, the School District would remain unable to appropriately address those needs.

In sum, the School District clearly violated important procedural safeguards set forth in the IDEA. The School District failed to disclose assessments, treatment plans, and progress notes kept by Lincoln, which deprived L.J.'s mother of her right to informed consent. The School District also failed to conduct a health assessment, which rendered the School District and IEP team unable to evaluate and address L.J.'s medication and treatment related needs.

When this matter returns to the School District for the preparation of an IEP, the School District must comply with the IDEA's procedural safeguards. Additional procedural violations can only result in the further protraction of proceedings and costly financial and emotional burdens for all those involved.

**CONCLUSION**

L.J. is a child with disabilities within the meaning of the IDEA and needs special education. The judgment of the district court is reversed and the matter remanded to the district court with instruction to order the School District to provide an appropriate remedy.

Costs are awarded to Plaintiffs–Appellants.

REVERSED and REMANDED.

All Citations


End of Document
858 F.3d 1189
United States Court of Appeals,
Ninth Circuit.

M.C., BY AND THROUGH his guardian ad litem M.N.; M. N., Plaintiffs–Appellants,
v.
ANTELOPE VALLEY UNION HIGH SCHOOL DISTRICT, Defendant–Appellee.

No. 14-56344

Argued and Submitted August 2, 2016 Pasadena, California
Filed March 27, 2017
Amended May 30, 2017

Synopsis

Background: Mother of student rendered blind and developmentally delayed by Norrie Disease filed suit against school district alleging substantive and procedural violations of Individuals with Disabilities Education Act (IDEA). The United States District Court for the Central District of California, Dolly M. Gee, J, affirmed ALJ’s denial of the claim. Mother appealed.

Holdings: The Court of Appeals, Kozinski, Circuit Judge, held that:

[1] ALJ’s findings would not be given deference upon court’s de novo review;

[2] mother did not waive claim for procedural violation of IDEA, even though it was omitted from ALJ’s restatement of issues;

[3] school district violated procedural requirements of IDEA when it failed to present accurate offer of services in individualized education program (IEP), and then unilaterally revised IEP;

[4] school district violated California Education Code by failing to identify in IEP the types of assistive technology it offered the student;

[5] school district’s failure to respond to mother’s complaint violated IDEA;

[6] remand was required to determine if IEP conferred student with meaningful benefit and accommodated his disabilities; and

[7] mother was prevailing party under IDEA for purposes of attorney fees and compensatory education.

Reversed and remanded.

Opinion, 852 F.3d 840, superseded.
*1193 Appeal from the United States District Court for the Central District of California, Dolly M. Gee, District Judge, Presiding, D.C. No. 2:13-cv-01452-DMG-MRW

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OPINION

KOZINSKI, Circuit Judge:

The Individuals with Disabilities Education Act (“IDEA”) guarantees children with disabilities a free appropriate public education (“FAPE”). 20 U.S.C. § 1400(d)(1)(A). We consider the interplay between the IDEA’s procedural and substantive safeguards.

BACKGROUND

M.C. suffers from Norrie Disease, a genetic disorder that renders him blind. He also has a host of other deficits that cause him developmental delays in all academic areas. M.C.’s mother, M.N., met with several school administrators and instructors to discuss M.C.’s educational challenges and draft an individualized educational program (“IEP”). At the conclusion of this meeting, she signed an IEP document and *1194 “authorize[d] the goals and services but [did] not agree it provides a FAPE.”

M.N. then filed a due process complaint alleging that the Antelope Valley Union High School District (the “District”) committed procedural and substantive violations of the IDEA. The due process hearing took place before an Administrative Law Judge who denied all of M.C.’s claims and the district court affirmed.

DISCUSSION

[1] The IDEA’s “primary goal is ‘to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services....’ ” J.L. v. Mercer Island Sch. Dist., 592 F.3d 938, 947 (9th Cir. 2010) (quoting 20 U.S.C. § 1400(d)(1)(A)). A FAPE must be “tailored to the unique needs of the

I. STANDARD OF REVIEW
[2] [3] Judicial review in IDEA cases “differs substantially from judicial review of other agency actions, in which courts are generally confined to the administrative record and are held to a highly deferential standard of review.” Ojai Unified Sch. Dist. v. Jackson, 4 F.3d 1467, 1471 (9th Cir. 1993). We review whether the state has provided a FAPE de novo. Union Sch. Dist. v. Smith, 15 F.3d 1519, 1524 (9th Cir. 1994). We can accord some deference to the ALJ's factual findings, but only where they are “thorough and careful,” and “the extent of deference to be given is within our discretion.” Id. (citations omitted).

[4] [5] The district court accorded the ALJ's findings substantial deference because the ALJ “questioned witnesses during a three-day hearing” and “wrote a 21-page opinion that reviewed the qualifications of witnesses and culled relevant details from the record.” But neither the duration of the hearing, nor the ALJ's active involvement, nor the length of the ALJ's opinion can ensure that the ALJ was “thorough and careful.” 1 J.W. ex rel. J.E.W. v. Fresno Unified Sch. Dist., 626 F.3d 431, 440 (9th Cir. 2010). And, in this case, the ALJ was neither thorough nor careful. As plaintiffs point out, the ALJ didn't address all issues and disregarded some of the evidence presented at the hearing. Even the district court recognized that the ALJ's analysis “is not entirely satisfying.” Accordingly, the district court erred in deferring to the ALJ's findings.

II. PROCEDURAL VIOLATIONS
[6] The IDEA contains numerous procedural safeguards that are designed to protect the rights of disabled children and their parents. See 20 U.S.C. § 1415. These safeguards are a central feature of the IDEA process, not a mere afterthought: “Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process as it did upon the measurement of the resulting IEP against a substantive standard.” Rowley, 458 U.S. at 205, 102 S.Ct. 3034. Because disabled children and their parents are generally not represented by counsel during the IEP process, procedural errors at that stage are particularly likely to be prejudicial and cause the loss of educational benefits.

[7] [8] Therefore, compliance with the IDEA's procedural safeguards “is essential to ensuring that every eligible child receives a FAPE, and those procedures which provide for meaningful parent participation are particularly important.” Amanda J. v. Clark Cty. Sch. Dist., 267 F.3d 877, 891 (9th Cir. 2001). “Procedural violations that interfere with parental participation in the IEP formulation process undermine the very essence of the IDEA.” Id. at 892.

Plaintiffs allege that the District violated the IDEA by (1) failing to adequately document the services provided by a teacher of the visually impaired (“TVI”), (2) failing to specify the assistive technology (“AT”) devices provided and (3) failing to file a response to the due process complaint.

A. Failure to Adequately Document TVI Services
Plaintiffs claim that the District didn't provide a “‘written record of reasonable expectations' to hold the District accountable for the provision of vision services to M.C.” (quoting Amanda J., 267 F.3d at 891). A brief history of the District's shifting offer of TVI services is necessary: The IEP document signed by M.N. and the District included an offer of 240 minutes of TVI services per month. According to the District, it realized a week later this was a mistake. But the District did nothing to notify M.N. More than a month later, the District purported to unilaterally amend the IEP by changing the offer of TVI services to 240 minutes per week. The District didn't send M.N. a copy of the revised IEP or otherwise notify her of this change. In fact, she didn't learn of it until the first day of the due process hearing, a month later. Moreover, at the hearing, District witnesses testified that the District offered M.C. 300 minutes of TVI services per week.

[9] Plaintiffs claim that the District's failure to accurately document the offer of TVI services denied M.C. a FAPE by precluding M.N. from meaningfully participating in the IEP process. Before discussing the merits of this claim we must address the District's argument that the claim is waived.

1. The district judge recognized that plaintiffs' due process complaint “arguably encompassed Plaintiffs' argument that the provision of TVI services was inadequate.” The judge nevertheless found that plaintiffs “waived any argument that the District's failure to specify the frequency of *1196 TVI services in the August 2, 2012 IEP resulted in an actual denial of an educational benefit to M.C.” because the due process complaint was superseded by the ALJ's restatement of issues, which omitted the adequacy of TVI services.

[10] The district judge held that plaintiffs waived the issue by failing to object to this omission.2 But plaintiffs weren't aware that the District had unilaterally changed the IEP until after the ALJ had restated the issues, so they could hardly have raised that as a procedural violation. And it turns out that the amendment didn't even provide an accurate statement of the services that M.C. was offered. District witnesses later testified that the District intended to offer M.C. 300 minutes of TVI services per week.

The district judge purported to understand the difficult position that plaintiffs were in due to this sequence of events but still found that “there [was] no indication in the record that Plaintiffs ever sought during the administrative hearing to amend the issues to be addressed to include the District's failure to provide M.C. with adequate TVI services.” But we generally treat issues as if they were raised in the complaint if they are tried by consent. Rule 15 of the Federal Rules of Civil Procedure provides that an issue “tried by the parties' express or implied consent ... must be treated in all respects as if raised in the pleadings.” Fed. R. Civ. P. 15(b)(2); see 6A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1491 (3d ed.). While we haven't previously recognized this practice in IDEA cases, it's often been applied in a variety of other agency adjudications: before the IRS, Lysek v. C.I.R., 583 F.2d 1088, 1091–92 (9th Cir. 1978), the Department of Labor, 20 C.F.R. § 901.40; Pierce County v. U.S. ex rel. Dep't of Labor, 699 F.2d 1001, 1004 (9th Cir. 1983), and the Patent and Trademark Office, US PTO Stip. § 507.03. We see no reason IDEA cases should be treated differently.

Both sides presented extensive evidence regarding the District's offer of TVI services. Multiple witnesses testified as to the initial offer of 240 minutes per month, the District's purported secret amendment of 240 minutes per week, and the District's actual offer of 300 minutes per week as presented at the hearing. The District's presentation of evidence on this point vitiated any waiver on M.N.'s part. Accordingly, we hold that plaintiffs' claim that the District committed a procedural violation of the IDEA by failing to adequately document its offer of TVI services isn't waived.3

[11] 2. The IEP is a “formal, written offer [that] creates a clear record that will do much to eliminate troublesome factual disputes ... about when placements were offered, what placements were offered, and *1197 what additional education assistance was offered to supplement a placement, if any.” Union Sch. Dist., 15 F.3d at 1526. The IEP must specify “the anticipated frequency, location, and duration of [education] services.” 20 U.S.C § 1414(d)(1)(A)(i)(VII). Such “a formal, specific offer from a school district will greatly assist parents in ‘present[ing] complaints with respect to any
matter relating to the ... educational placement of the child.’” Union Sch. Dist., 15 F.3d at 1526 (quoting 20 U.S.C. § 1415(b)(1)(E)).

[12] [13] The district judge agreed with the ALJ's finding “that the September 17, 2012 Amendment merely corrected an unintentional error in the August 2, 2012 IEP.” We fail to see how this can be so. An IEP, like a contract, may not be changed unilaterally. It embodies a binding commitment and provides notice to both parties as to what services will be provided to the student during the period covered by the IEP. If the District discovered that the IEP did not reflect its understanding of the parties' agreement, it was required to notify M.N. and seek her consent for any amendment. See 20 U.S.C. § 1414(d)(3)(D), (F) (discussing amendments to the IEP). Absent such consent, the District was bound by the IEP as written unless it sought to re-open the IEP process and proposed a different IEP.

[14] Because the District did neither of these things, the IEP actually in force at the time of the hearing was that signed by the parties, not that presented by the District as the amended IEP. Allowing the District to change the IEP unilaterally undermines its function of giving notice of the services the school district has agreed to provide and measuring the student's progress toward the goals outlined in the IEP. Moreover, any such unilateral amendment is a per se procedural violation of the IDEA because it vitiates the parents' right to participate at every step of the IEP drafting process. 4

Finally, we must express our disapproval of the District's conduct with respect to this issue. The District discovered what it believed was a mistake in the IEP just a week after it was signed, yet failed to bring this problem to M.N.'s attention until weeks later, on the first day of the due process hearing. Even then, its lawyers didn't identify the purported amendment but rather buried it in a document production, leaving it to plaintiffs' counsel to stumble upon it. Had the District raised the issue immediately upon discovering the suspected error, it's entirely possible that M.N. would have found the amount of TVI services to be satisfactory. Plaintiffs might have avoided hiring a lawyer and taking the case to a due process hearing—saving attorneys' fees on both sides and perhaps disruption to M.C.'s education. We find no justification in the record for the District's failure to be forthright on this point and the District has offered none in its brief or when questioned about it at oral argument. 5

[15] *1198 Because the District denied M.N. an opportunity to participate in the IEP drafting process by unilaterally revising the IEP, and because the IEP as initially drafted didn't provide M.N. with an accurate offer of the TVI services provided to M.C., the District committed two procedural violations of the IDEA. Union Sch. Dist., 15 F.3d at 1526. The district court nevertheless found that M.C. wasn't denied a FAPE, reasoning that “[a] procedural violation denies a child a FAPE when the violation seriously infringe[s] the parents' opportunity to participate in the IEP formation process.” (emphasis in original) (internal quotation and citation omitted). But, as explained above, M.N. was denied an opportunity to participate in the IEP drafting process. Moreover, in enacting the IDEA, Congress was as concerned with parental participation in the enforcement of the IEP as it was in its formation. See Rowley, 458 U.S. at 205, 102 S.Ct. 3034 (discussing Congress's intent to “give[e] parents and guardians a large measure of participation at every stage of the administrative process” (emphasis added)). Under the IDEA, parental participation doesn't end when the parent signs the IEP. Parents must be able to use the IEP to monitor and enforce the services that their child is to receive. When a parent is unaware of the services offered to the student—and, therefore, can't monitor how these services are provided—a FAPE has been denied, whether or not the parent had ample opportunity to participate in the formulation of the IEP.

Whether, and to what extent, M.C. was prejudiced by these procedural improprieties is a more difficult question. Assuming that M.C. was receiving 300 minutes of TVI services per week, as the District apparently intended to offer, M.C. may not have suffered any substantive harm. M.N. nevertheless suffered procedural harm by not being apprised of the actual status of the services being provided, causing her to incur legal fees in attempting to protect that right. Because any TVI services provided beyond what was specified in the written IEP would have been gratuitous, M.N. could not be sure that the District would continue to provide them. With only 240 minutes per month (about an hour a week) specified in the IEP, the District was entitled to cut back these services to that level. M.N. was amply justified in seeking the aid of counsel to clarify the amount of services provided. Incurring unnecessary legal fees is, of course, a
form of prejudice that denies a student and his parents an educational benefit. See Parents on Behalf of Student v. Julian Charter Sch., OAH No. 2012100933, at 2 (Jan. 17, 2013) (order denying motion to dismiss). The fact that the District could have avoided the harm by promptly notifying M.N. that it was agreeing to provide far more services than specified in the IEP only makes matters worse.

**B. Failure to Identify the AT Devices Provided**

When a student requires “a particular device or service” California requires that the IEP “include a statement to that effect.” Cal. Educ. Code § 56341.1(b)(5), (c). M.C.’s IEP initially indicated that M.C. didn’t require AT devices or services. The District conceded that this was erroneous and issued an amendment that changed the checkbox for AT devices from “no” to “yes.” But neither the IEP nor the amendment specified the devices that M.C. required.

[16] The district judge recognized that “the language of [section 56341.1] requires the District to identify the particular types of AT devices and services to be provided to M.C.” But the judge found that this procedural violation didn’t “seriously infringe[] M.N.’s opportunity to participate in the IEP formulation process.” As we’ve made clear, however, parents must be able to participate in both the formulation and enforcement of the IEP. See supra at 1197–98. Even if M.N. was able to participate in the IEP’s formulation, the District’s failure to identify the AT devices that M.C. required rendered the IEP useless as a blueprint for enforcement.

The district judge noted that the IEP team discussed “at least some of the AT services and equipment to be provided to M.C.” at the IEP meeting. But a discussion does not amount to an offer. M.N. could force the District to provide only those services and devices listed in the IEP, not those discussed at the IEP meeting but left out of the IEP document. See Union Sch. Dist., 15 F.3d at 1526 (requiring a “formal, written offer”). Indeed, items discussed at the IEP meeting but not included in the IEP document could be deemed to have been omitted on purpose.

Nor was this a case where “everyone involved in the individualized education team—including [the student’s] parents—knew of the amounts [of services]” that were offered. J.L., 592 F.3d at 953. M.N. testified at the due process hearing that she didn’t know which AT devices were offered to M.C. M.C.’s TVI services provider testified that M.C. received a laptop, a Book Port, software developed for the visually impaired, a screen reading program, a talking calculator and an Eye-Pal Solo. But M.N. was only aware that M.C. received a laptop, braille machine, braille calendar and a Book Port. M.N. also testified that the laptop didn't have the software that M.C. needed, but she didn't know which software was missing. Because the IEP didn't specify which AT devices were being offered, M.N. had no way of confirming whether they were actually being provided to M.C. The District's failure to specify the AT devices that were provided to M.C. thus infringed M.N.’s opportunity to participate in the IEP process and denied M.C. a FAPE. Id. at 953.

**C. Failure to Respond to the Complaint**

[17] The IDEA requires a school district to respond to a parent's due process complaint within 10 days. 20 U.S.C. §§ 1415(c)(2)(B)(ii) & 1415(c)(2)(B)(ii). The District failed to do this and plaintiffs argue that this violated the IDEA. To be clear, the District didn't just miss a deadline: It failed to ever respond to the complaint. The district court found that the failure to respond didn't infringe M.N.’s opportunity to participate in the IEP formulation process and, therefore, wasn't a denial of a FAPE. But this misses the mark. The District's failure to respond may not have denied plaintiffs a FAPE but it still violated the IDEA and due process.

Like an answer to a complaint, a response serves an important dual purpose: It gives notice of the issues in dispute and binds the answering party to a position. See, e.g., United States v. All Assets Held at Bank Julius Baer & Co., 959 F.Supp.2d 81, 116 n.21 (D.D.C. 2013) (noting that “one function of an answer” is to identify “points of disagreement”); Lopez v. U.S. Fidelity & Guaranty Co., 18 F.R.D. 59, 61 (D. Alaska 1955) (explaining that the purpose of rules governing answers to a complaint “is to prevent surprise”). Failure to file a response puts the opposing party at a serious
disadvantage in preparing for the hearing, as it must guess what defenses the opposing party will raise. The problem is particularly severe in IDEA cases because there is no discovery.

[18] When a school district fails to file a timely response, the ALJ must not go forward with the hearing. Rather, it must order a response and shift the cost of the *1200 delay to the school district, regardless of who is ultimately the prevailing party. 6 We remand for a determination of the prejudice M.N. suffered as a result of the District's failure to respond and the award of appropriate compensation therefor. 7

III. SUBSTANTIVE VIOLATIONS

In order for M.C. to have received a FAPE, the IEP must have “(1) address[ed] [his] unique needs, (2) provide[d] adequate support services so [M.C.] can take advantage of the educational opportunities, and (3) [been] in accord with the individualized education program.” Capistrano Unified Sch. Dist. v. Wartenberg, 59 F.3d 884, 893 (9th Cir. 1995) (citing Rowley, 458 U.S. at 188–89, 102 S.Ct. 3034).

1. Plaintiffs argue that the District denied M.C. a FAPE by providing him with less than 300 minutes of TVI services per week. The District doesn't address the substance of plaintiffs' argument, arguing that the issue was waived. For the reasons explained above, plaintiffs haven't waived this issue. See supra at 1195–97.

[19] Both the ALJ and district judge placed the burden on M.N. to show that the services provided to M.C. were inadequate. Normally, the party alleging a violation of the IDEA bears the burden of showing that the services received amounted to a denial of a FAPE. See Schaffer ex rel. Schaffer v. Weast, 546 U.S. 49, 57–58, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005). But here there was a procedural violation that deprived M.N. of the knowledge of what services were being offered to M.C. If parents don't know what services are offered to the student—in kind or in duration—it's impossible for them to assess the substantive reasonableness of those services. In such circumstances, the burden shifts to the school district to show that the services the student actually received were substantively reasonable. We remand so the District can have an opportunity to make such a showing before the district court.

[20] [21] 2. Plaintiffs also claim that the District denied M.C. a FAPE by failing to develop measurable goals in all areas of need, including “the areas of life skills, residential travel, and business travel.” Additionally, plaintiffs argue that the District failed to provide adequate orientation and mobility services, as well as adequate social skills instruction. The district court found that plaintiffs failed to meet their burden of showing that the IEP wasn't “reasonably calculated to confer [M.C.] with a meaningful benefit.” J.W., 626 F.3d at 439. In doing so, it relied on the Supreme Court's comment in Rowley that, by “an ‘appropriate’ education, it is clear that [Congress] did not mean a potential-maximizing education.” 458 U.S. at 197 n.21, 102 S.Ct. 3034. But Rowley “did not attempt to establish any one test for determining the adequacy of educational benefits.” Id. at 202, 102 S.Ct. 3034. Recently, the Supreme Court clarified Rowley and provided a more precise standard for evaluating whether a school district has complied substantively with the IDEA: *1201 “To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.” Endrew F., at ———, 137 S.Ct. 988. In other words, the school must implement an IEP that is reasonably calculated to remediate and, if appropriate, accommodate the child's disabilities so that the child can “make progress in the general education curriculum,” id. at ———, 137 S.Ct. 988 (citation omitted), taking into account the progress of his non-disabled peers, and the child's potential. We remand so the district court can consider plaintiffs' claims in light of this new guidance from the Supreme Court.

IV. PREVAILING PARTY

[22] [23] The IDEA provides that a “court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parent or guardian of a child or youth with a disability who is a prevailing party.” 20 U.S.C. § 1415(i)(3)(B)(i)(I). A parent need not succeed on every issue in order to be a prevailing party. Park v. Anaheim Union High Sch. Dist.,
Rather, parents are prevailing parties if they “succeed [ ] on any significant issue in litigation which achieves some of the benefit [they] sought in bringing the suit.” *Id.* at 1034 (emphasis in original) (citation omitted). M.N. is the prevailing party in this appeal and is therefore entitled to attorneys' fees. See *Ash v. Lake Oswego Sch. Dist.*, 980 F.2d 585, 590 (1992).

* * *

The District's failure to adequately document the TVI services and AT devices offered to M.C. violated the IDEA and denied M.C. a FAPE. These procedural violations deprived M.N. of her right to participate in the IEP process and made it impossible for her to enforce the IEP and evaluate whether the services M.C. received were adequate. At the very least, plaintiffs are entitled to have the District draft a proper IEP and receive compensatory education to “place [M.C.] in the same position [he] would have occupied but for the school district's violations of [the] IDEA.” *R.P. ex rel. C.P. v. Prescott Unified Sch. Dist.*, 631 F.3d 1117, 1125 (9th Cir. 2011) (citations omitted). We remand the case to the district court for proceedings consistent with this opinion.

**REVERSED and REMANDED.**

**Footnotes**

1 In *Timothy O. v. Paso Robles Unified Sch. Dist.*, for example, we reversed a lengthy ALJ opinion with detailed findings that were unsupported by the record. 822 F.3d 1105, 1117, 1123 (9th Cir. 2016). The district court nevertheless deferred to the ALJ's findings, apparently impressed by the length and superficial plausibility of the ALJ's opinion. *Id.* at Dist. Ct. Dkt. No. 78. Such blind deference is not appropriate. Rather, the district judge must actually examine the record to determine whether it supports the ALJ's opinion. See, e.g., *J.G. ex rel. Jimenez v. Baldwin Park Unified Sch. Dist.*, 78 F.Supp.3d 1268, 1281–82 (C.D. Cal. 2015) (Olguin, J.) (according “substantially less deference” where “the ALJ's decision ignore[d] and mischaracterize[d] key evidence”).

2 It is apparently common practice in IDEA cases for ALJs to restate and reorganize the issues presented by the parties. See *J.W.*, 626 F.3d at 442; *Ford ex rel. Ford v. Long Beach Unified Sch. Dist.*, 291 F.3d 1086, 1090 (9th Cir. 2002). We question the wisdom of such a procedure where the parents are represented by counsel and the complaint states the issues intelligibly, as was the case here. A party bringing a due process complaint is entitled to frame the issues it wishes to present and should not be put in the difficult position of contradicting the presiding official who will soon be the trier of fact. In such circumstances, failure to object will not be deemed a waiver of any claim fairly encompassed in the complaint.

3 The District also makes a separate waiver argument: It claims that plaintiffs waived their objection to the admission of the amendment into evidence. While plaintiffs did waive their objection to the admissibility of the amendment, for the reasons described above, *see supra* at 1195–96, the waiver does not extend to its legal significance.

4 The District's purported amendment was also improper for a separate reason: The District presented no evidence supporting its claim that the parties agreed to 240 minutes of TVI services per week when the IEP was drafted. Indeed, it is unclear how the District came up with this figure given that its witnesses at the hearing testified that M.C. was actually provided 300 minutes of TVI services per week. Nevertheless, the ALJ and the district court accepted this as true. However, a party's mere allegations are not proof.

5 On remand, the district court shall determine whether this course of conduct was a deliberate attempt to mislead M.N. or mere bungling on the part of the District and its lawyers. If the district court determines that the former is the case, it shall impose a sanction sufficiently severe to deter any future misconduct.

6 Even if a motion to compel a response isn't brought, the ALJ should raise the issue sua sponte at the pre-hearing conference. This is imperative in IDEA cases where parents often proceed without the aid of counsel and may not be aware that the IDEA requires a school district to respond to the complaint within 10 days. See 20 U.S.C. §§ 1415(c)(2)(B)(i)(I) & 1415(c)(2)(B)(ii).
We do not address the reverse situation where the due process case is brought by the school district and the parents fail to file a response. Different considerations may apply in such circumstances, especially if the parents are pro se. We leave that situation for a case that presents the issue.
822 F.3d 1105
United States Court of Appeals,
Ninth Circuit.

TIMOTHY O., individually; Amy O., individually; L.O., Timothy O. as guardian ad litem for his minor, Plaintiffs–Appellants,
v.
PASO ROBLES UNIFIED SCHOOL DISTRICT, Defendant–Appellee.

No. 14–55800.


Filed May 23, 2016.

Synopsis

Background: Parents of child with autism appealed decision by administrative law judge (ALJ) denying their claims under the Individuals with Disabilities Education Act (IDEA). The United States District Court for the Central District of California, Jesus G. Bernal, J., affirmed on different grounds. Parents appealed.

Holdings: The Court of Appeals, Reinhardt, Circuit Judge, held that:

[1] school district's failure to assess child for autism clearly and substantially violated IDEA's procedural requirements;

[2] school psychologist's informal observation of child during psychological assessment did not satisfy formal assessment requirement;

[3] report by psychologist from regional center where child received developmental services before age three, which provisionally diagnosed him with autism spectrum disorder, did not qualify as an initial assessment that satisfied school district's obligations under IDEA; and

[4] school district's failure to assess child for autism deprived him of a free appropriate public education (FAPE) under IDEA.

Reversed and remanded.

Attorneys and Law Firms

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Appeal from the United States District Court for the Central District of California, Jesus G. Bernal, District Judge, Presiding. D.C. No. 2:12–cv–06385–JGB–JEM.


Opinion

OPINION

REINHARDT, Circuit Judge:

The Center for Disease Control and Prevention estimates that nearly one in sixty-eight children has autism spectrum disorder, a neurodevelopmental disorder that is characterized, in varying degrees, by difficulty communicating and socializing and by restricted repetitive behavior, interests, and activities. The disorder is present from birth, or very early in development, and affects children's ability to communicate ideas and feelings, to use their imagination, and to develop relationships with others. Every individual with autism spectrum disorder is unique, although the main characteristics in children—behavioral deficits in eye contact, responding to one's name, joint attention behavior, pretend play, imitation, nonverbal communication, and language development—are measurable by eighteen months of age.

Early diagnosis and intervention is critical for the education of children with autism. In fact, with early and appropriate intervention, as many as 25% of children with early autism will, at an early age, no longer meet the criteria for that disorder. For the remaining children, intervention in the child's preschool years greatly increases the likelihood that the child will learn to verbally communicate. Indeed, the success of early intervention techniques has lowered the number of autistic children who will remain non-verbal throughout their lifetime to fewer than 10%, down from roughly 50% in the 1980s. Early intervention also minimizes the secondary symptoms and disruptive behavior, such as aggression, tantrums, and self-injury, that are displayed by children with the disorder. If left untreated, however, symptoms of autism spectrum disorder can become more severe and require extensive and expensive therapeutic interventions.

Luke is a child with autism. Under the Individuals with Disabilities Education Act (“IDEA” or “the Act”), 20 U.S.C. §§ 1400–1487, the defendant Paso Robles Unified School District (“Paso Robles”) became responsible for providing Luke with a free appropriate public education (“FAPE”) when he turned three years old. In order to ensure that children with disabilities receive an appropriate education tailored to their unique condition, the IDEA requires that when a school district is afforded reason to suspect that a child has a disability, it “conduct a full and individual initial evaluation” that ensures the child is assessed for “all areas of suspected disability,” using a variety of reliable and technically sound instruments. 20 U.S.C. §§ 1414(a)(1), (b)(2)-(3). At the time of Luke's initial evaluation, Paso Robles was aware that Luke displayed signs of autistic behavior, and therefore, autism was a suspected disability for which it was required to assess him. It chose, however, not to formally assess him for autism because a member of its staff opined, after an informal, unscientific observation of the child, that Luke merely had an expressive language delay, not a disorder on the autism spectrum. We hold that, in so doing, Paso Robles violated the procedural requirements of the IDEA and, as a result, was unable to design an educational plan that addressed Luke's unique needs. Accordingly, we hold that Paso Robles denied Luke a free appropriate public education, and remand for the determination of an appropriate remedy.
STATUTORY AND REGULATORY BACKGROUND

The Individuals with Disabilities Education Act (originally the Education for All Handicapped Children Act), was designed to reverse a history of educational neglect for disabled children. Schaffer ex rel. Schaffer v. Weast, 546 U.S. 49, 52, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005) (citing H.R. Rep. No. 94–332, p. 2 (1975)). At the time of its passage, the need for institutional reform was pervasive: millions of children with a multitude of disabilities were entirely excluded from public schools, and others, while present, could not benefit from the experience because of undiagnosed—and therefore unaddressed—disabilities. See 20 U.S.C. § 1400(c)(2).

*1110 With the goal of remediying these systemic problems, the Act conditions the receipt of federal funds on States' maintenance of policies and procedures ensuring that a “free appropriate public education” is available to all children with disabilities between the ages of three and twenty-one. Id. § 1412(a)(1)(A). A free appropriate public education requires the provision of “specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability,” id. § 1401(9) & (29), as well as transportation, developmental, corrective and other supportive services required to ensure that the child benefits from that special education, id. § 1401(26).

Identification and Evaluation of Children with Disabilities

In order to provide a free appropriate public education to all children with disabilities States must, of course, first identify those children and evaluate their disabling conditions. Accordingly, the IDEA requires that every State have procedures in place that are designed to identify children who may need special education services. Id. § 1412(a)(3)(A). Once identified, those children must be evaluated and assessed for all suspected disabilities so that the school district can begin the process of determining what special education and related services will address the child's individual needs. See id. §§ 1412(a)(7), 1414(a)-(c).

That this evaluation is done early, thoroughly, and reliably is of extreme importance to the education of children. Otherwise, many disabilities will go undiagnosed, neglected, or improperly treated in the classroom. See id. § 1400(c).

For this reason, the IDEA requires that local school districts must “conduct a full and individual initial evaluation” of a child “before the initial provision of special education and related services” to that child. Id. § 1414(a)(1)(A) (emphasis added). Furthermore, the IDEA and its accompanying regulations contain an extensive set of procedural requirements that are designed to ensure that this initial evaluation (as well as any subsequent reevaluations) achieves a complete result that can be reliably used to create an appropriate and individualized educational plan tailored to the needs of the child.

*1111 First, the initial evaluation must be designed not only to determine whether the child has a disability, but also “to gather relevant functional, developmental, and academic information about the child,” that can be used to determine the child's individual educational needs. 34 C.F.R. § 300.304(b)(1); 20 U.S.C. § 1414(a)(1)(C). The school district must, therefore, “ensure that... the child is assessed in all areas of suspected disability.” 20 U.S.C. § 1414(b)(3)(B) (emphasis added). Anything less would not provide a complete picture of the child's needs.

Second, the local school district must provide notice to the child's parents that describes “any evaluation procedures” that the district proposes to conduct, as well as why it has made those decisions. 20 U.S.C. § 1414(b)(1) (emphasis added); 34 C.F.R. § 300.304(a). The statute further requires, inter alia, that in conducting the evaluation, school districts must:

1. Use a “variety of assessment tools and strategies” without relying on “any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child,” 20 U.S.C. § 1414(b)(2)(A) & (B);
2. Use “technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors,” id. § 1414(b)(2)(C); and

3. Ensure that all assessments are conducted by trained and knowledgeable personnel, in accordance with instructions provided by the producer of the assessment, and for purposes which the assessments or measures are valid and reliable, id. § 1414(b)(3)(A).

Upon completion of this full and individual initial evaluation, the school district shall provide a copy of the evaluative report to the child's parents. Id. § 1414(b)(4)(B). If the parents disagree with the school district's evaluation of their child, they have a right to “obtain an independent educational evaluation” or “IEE” at public expense. 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502.

**Creation of an Individualized Education Program (“IEP”)**

The results of the initial evaluation are critical to the next step of the process: the creation of an individualized education program or “IEP.” The IEP is a written document that states the child's present levels of academic achievement and functional performance, creates measurable annual goals for the child, describes the child's progress toward meeting the annual goals, and explains the services that will be provided to the child to help him advance toward attaining his particular goals. 20 U.S.C. § 1414(d)(1)(A). It is created by a child's “IEP Team”—which consists of the child's parents, teachers, evaluators, and administrators, see generally Winkelman ex rel. Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 524, 127 S.Ct. 1994, 167 L.Ed.2d 904 (2007)—after the team has considered the child's strengths, the parents' concerns about the child's education, and the results of the school district's initial evaluation of the child, which (if done appropriately) provides a complete picture of the child's specific academic, developmental, and functional needs. See 20 U.S.C. § 1414(d)(3)(A)(iii); 34 C.F.R. § 300.304(b)(1).

Although the IDEA gives discretion to school districts to create and execute appropriate educational programs for children with disabilities, the IDEA requires that parents be afforded a significant and collaborative role in the development of a *1112* child's IEP. Winkelman, 550 U.S. at 524, 127 S.Ct. 1994. To that end, the IDEA contains a significant number of procedural safeguards that are designed to ensure that the child's parents have sufficient information to understand and participate meaningfully in all aspects of that discussion. See M.M. v. Lafayette Sch. Dist., 767 F.3d 842, 851 (9th Cir.2014). It requires, among other things, that school districts provide copies of the initial evaluative report to the parents, 20 U.S.C. § 1414(b)(4), thoroughly document all information used to evaluate the educational needs of the child, 34 C.F.R. § 300.306(c)(1), and provide parents with an opportunity to examine all of their child's records. 20 U.S.C. § 1415(b)(1).

It also requires that parents be given formal, written notice whenever the school district intends to change or refuses to change the identification, evaluation, or educational placement of their child. Id. § 1415(b)(3). That notice must not only describe the action proposed or refused by the agency, but also explain why the agency proposes or refuses to take the action, as well as the records or assessments that the agency used as a basis for its decision. 34 C.F.R. § 300.503(a) & (b).

Further, any parent who is dissatisfied with the identification, evaluation, or educational placement of the child must have the opportunity to present a formal complaint. 20 U.S.C. § 1415(b)(6). Whenever a complaint is filed, the school district must convene a meeting with the parents and members of the IEP Team during which the parents may discuss the complaint and give the school district the opportunity to resolve it. Id. § 1415(f)(1)(B)(ii). If the school district does not resolve the complaint to the satisfaction of the parents within thirty days, the parents have the right to an impartial due process hearing before an administrative law judge. Id. § 1415(f)(1)(B)(ii). Any party aggrieved by the findings and decision rendered at the hearing may appeal to the state educational agency or may bring a civil action in federal court. Id. § 1415(i)(2)(A).
FACTUAL BACKGROUND

Luke, an autistic child, was five years old when this case was originally filed. He displayed symptoms of a developmental disorder early in life, and in March 2009, when he was twenty-seven months old, he began to receive speech, language, and occupational therapy at the Tri–Counties Regional Center ("Tri–Counties"). Tri–Counties, like all regional centers in California, is a nonprofit private corporation that contracts with the Department of Developmental Services to provide early intervention services for at-risk infants and toddlers. 10 California children under the age of three qualify for services at regional centers if they have a “developmental delay in one or more of the following five areas: cognitive development; physical and motor development, including vision and hearing; communication development; social or emotional development; or adaptive development” or if they suffer from “conditions of known etiology or conditions with established harmful developmental consequences.” Cal. Gov't Code § 95014.

After the age of three, local school districts become responsible for the education of children with disabilities. 20 U.S.C. § 1412. In California, however, children can also continue to receive services at private regional centers if they have “mental retardation, autism, epilepsy, cerebral palsy, or a condition that is similar to mental retardation or requires similar treatment.” Cal. Welf. & Inst. Code § 4512. At least at the time of the events in this case, that meant that children with Autistic Disorder, but not any other disorder on the spectrum, were eligible for continued regional center services. 11 In contrast, under the IDEA and the California law that supplements that Act, local school districts have at all times been required to provide special education services to a much broader category of children, including any child who manifests autistic-like behavior, regardless whether he or she has been formally diagnosed with Autistic Disorder. See 34 C.F.R. § 300.8(c)(1); Cal. Educ. Code § 56846.2(a). 12

After three months of Luke's receiving services at Tri–Counties, his parents had a meeting with staff from Tri–Counties and Paso Robles to discuss what would happen when Luke turned three years old. During that meeting, Paso Robles scheduled a date on which it would conduct an initial assessment to determine whether Luke was a child with a disability and therefore qualified for special education and related services under the IDEA. Paso Robles' notes of that meeting reflect that the group discussed how Luke seemingly had no health needs, but that there were concerns about his speech, and that Tri–Counties would perform a psychological assessment of Luke—presumably to test for Autistic Disorder—in order to determine whether he qualified for further regional center services. 13

*1114 On October 30, 2009, a few weeks before Luke's third birthday, Paso Robles conducted Luke's initial evaluation. According to the notice provided to Luke's parents, Luke was to be assessed by Christie Youngdale, a resource specialist for Paso Robles, and Lisa Stinson, a speech and language therapist, for academic/pre-academic achievement, sensory-motor development, communication development, and health issues. He was not, the notice reflected, to be given any assessments under the category of “social/adaptive behavior,” the category covering disorders on the autism spectrum.

Youngdale and Stinson observed Luke and tried to engage him in play, but their attempts to utilize standard assessment tools were unsuccessful because of his “compliance” issues. During the assessment, William Peck, a Paso Robles psychologist, stopped by and observed Luke for approximately thirty to forty minutes. Although the notice to Luke's parents mentioned nothing about Peck's involvement, Peck later testified that he came to observe in order to “consult with the staff in terms of possible handicapping conditions which may be—may have or may not have been present.” Specifically, he later admitted, “there was a possibility of looking at autism as a handicapping condition.” Rather than schedule a formal assessment for that condition, however, Peck merely observed Luke in order to advise Paso Robles' staff whether it needed to conduct a full and formal test for autism. This was, apparently, his standard practice. Peck at no point explained the purpose of his visit to Luke's parents. Indeed, during the observation, he did not communicate at all with either Luke or his parents, who were present while the tests were administered.
From his cursory observation, during which he did not utilize any standard assessment tools, Peck concluded that there was no need for Paso Robles to formally assess Luke for any disorder on the autism spectrum because he saw Luke use a “variety of facial expressions,” display emotions, and demonstrate his “skill at turn-taking.” In Peck's opinion, this was uncharacteristic of a child with a disorder on the autism spectrum. Relying on this informal advice, Paso Robles concluded that Luke had only an expressive language impairment—not autism—and without taking any steps to assess Luke for autism or autistic-like behaviors, or to ensure that he would be so assessed, it scheduled an initial IEP meeting for early December 2009. At no point, however, did Paso Robles explain to Luke's parents that it had thought about assessing Luke for autism, and indeed, had called Peck in to observe for that reason. Nor did it explain that it had decided not to formally assess Luke for autism based on Peck's recommendation.

On November 18, 2009, Tri–Counties performed a psychological assessment of Luke to determine whether he had Autistic Disorder and therefore qualified for continued regional center services after the age of three. Dr. Linda Griffin's final report concluded that:

Luke has some autistic symptoms which are a concern. He has significantly delayed expressive language; he is also not exhibiting varied and frequent social pretend play, with the exception of transportation toys. He prefers to play alone much of the time. His joint attention to adult directed tasks is poor generally speaking, however there are exceptions seemingly dependent on the nature of the activity ... It is difficult to get his attention.... With the exception of his expressive language delay which is very pronounced, the severity of the other symptoms above are mild in my opinion; however, taken together, they stand in contrast to a child with only a language disorder.

She provisionally diagnosed Luke with Pervasive Developmental Disorder, Not Otherwise Specified (“PDD–NOS”), a disorder on the autism spectrum, and opined that potentially, with “therapeutic intervention[ ]” Luke might no longer meet the criteria for that disorder, but that “[i]t is very important that he receive appropriate interventions that address his areas of concern” because “mild symptoms may become more pronounced over time.”

Tri–Counties sent a copy of Dr. Griffin's report (hereinafter “Griffin Report”) to Paso Robles, which received it on December 2, 2009, two days before the initial IEP meeting. Despite its diagnosis and recommendation, the report was not discussed at the IEP meeting; nor did Paso Robles reevaluate its decision not to assess Luke for autism. Indeed, Paso Robles contends that Dr. Griffin's diagnosis was insufficient to even create suspicion that Luke had a disorder on the autism spectrum because Peck's earlier observation of Luke had dispelled any suspicion that Luke had such a disorder and because Dr. Griffin's “provisional” diagnosis was not conclusive.

The IEP that was created as a result of the meeting identified Luke's disability as a “speech or language impairment,” and set several goals for Luke to achieve in those areas, including a goal that he would begin speaking in small phrases, have a limited vocabulary of fifteen to twenty words, and use other nonverbal means to communicate. Luke was offered group speech and language services for twenty-five minutes, seven times a month, as well as placement in a preschool classroom that met two days a week for 1.5 hours each day. The IEP contained no mention of any disorder on the autism spectrum or even any possibility of such a disorder.

The 2009–2010 School Year

Luke exhibited signs of extreme difficulty in his first year of school. He often refused to leave his mother's side and, according to her, displayed other problems in his classroom behavior. In February, Youngdale suggested that Luke should be transferred to a more intensive program. Ultimately, however, neither Paso Robles nor Luke's parents called an IEP meeting to discuss such a change. Luke's mother also expressed concerns about aggressive and obsessive behavior outside the school, and asked his other teacher, Stinson, whether Luke might be autistic. Without scheduling an assessment, Stinson assured Luke's mother that he was not, but also suggested that Luke might make better progress in a more intensive program.
In May, another IEP meeting was held. The team agreed that Luke would attend a more intensive preschool program in the next year, but that he would not receive extended school year services over the summer.

**The 2010–2011 School Year**

During the summer of 2010, Luke's parents had him privately evaluated by a speech and language pathologist, an occupational therapist, and a neurologist. Subsequently, his parents determined that he would not return to Paso Robles for preschool, and that instead, he would be educated at home utilizing the private services of a behaviorist. In October 2010, however, in part due to the cost of the private services, Luke returned to school.

Luke's IEP was amended to reflect that he would attend a preschool class taught by Noah Cooper. This class, which met three hours a day, had approximately eight students with mild to moderate language and social skill defects, some of whom had autism or exhibited autistic-like behavior. Luke began attending the class in November. While in Cooper's class, Luke would occasionally whisper to his peers, but would immediately stop speaking when an adult approached.

At an IEP meeting in December 2010, staff expressed concern that Luke was not talking to either adults or peers and suggested that he might have “selective mutism.” Luke's parents reported that he was having tantrums at home, including crying and aggressive behavior. According to Peck, it was apparent from these complaints that Luke displayed several types of autistic-like behavior, which would ordinarily qualify him to receive special education services for autism, but he did not mention that possibility at the IEP meeting because:

> [W]e didn't have an assessment to address that disability. In other words, off the top of my head, I'm not going to be at an IEP meeting and say a kid has autism when I haven't done an assessment specifically using instruments standardized and developed to make that particular determination. I'm just not going to make that diagnosis off the top of my head.

Despite having previously expressed the view that Paso Robles did not need to assess Luke for disorders on the autism spectrum, Peck did not inform the IEP Team of his new concern or suggest that Luke should now be assessed for autism.

As the year progressed, Cooper continued to try to accommodate Luke's refusal to speak, and Luke's mother continued to communicate her concerns that Luke was demonstrating aggressive behavior at home. In January, her attorney sent a letter to Paso Robles informing the District that Luke had obtained legal representation and that his parents requested that the school fund an independent educational evaluation of Luke for autism. His parents also retained the services of Genevieve Sullivan, a behavior specialist, to observe Luke in class and had him privately assessed for autism by Dr. B.J. Freeman, a well-respected national expert on autism and autism-like disorders.

Dr. Freeman diagnosed Luke with Autistic Disorder. She determined that Luke needed a positive behavior support plan to address his problems, including his refusal to talk. Luke's mother testified that she told several members of Paso Robles' staff, including Luke's teacher, about this diagnosis. The next month, Paso Robles announced that it would finally do a formal and comprehensive evaluation of Luke, motivated by his parents seeking “some type of outside assessment.” Paso Robles did not complete the assessment for almost an entire year, until January 2012, after which Peck opined for the first time that Luke had autistic-like behavior.

In the meantime, Luke's parents arranged for him to receive behavioral therapy from Sullivan's agency. Within a few short weeks, Luke began speaking to unfamiliar adults, and a few months later he was speaking in multi-word sentences to therapists, his parents, and non-family members who had never before heard him speak.
PROCEDURAL BACKGROUND

On July 6, 2011, Luke's parents filed a request for a due process hearing with the Office of Administrative Hearings, alleging in relevant part that Paso Robles violated the procedural and substantive requirements of the IDEA and the California Education Code by (1) failing to assess Luke in all areas of suspected disability, specifically autism; and (2) failing to appropriately address his behavioral issues, such as refusing to speak, tantrums, and non-compliance, during the 2010–2011 school year. They further alleged that, by violating these requirements, the school denied Luke a free appropriate public education during the 2009–2010 and 2010–2011 school years. They requested, as a remedy for these violations, that Paso Robles pay for the private assessments and private behavioral services that Luke received, that it provide Luke with compensatory behavioral and speech services, and that it include the behavioral therapy recommended by Dr. Freeman as part of Luke's ongoing educational program. His parents also withdrew Luke from school in a letter dated July 15, 2011.

A multi-day hearing was held in March and April of 2012. On July 6, 2012, the administrative law judge (“ALJ”) denied all of Luke's claims. Most relevant to the current appeal, the ALJ declined to address whether Paso Robles' October 2009 initial evaluation of Luke was deficient, and instead found that, “[b]ecause Dr. Griffin's report was so thorough, the District saw no need to conduct further assessments of [Luke], and relied heavily on the report.” Without citing any authority, she held that Luke “failed to meet his burden of proof that the District should have assessed him in the areas of autism and behavior.” Even if Paso Robles was required to assess for autism, the ALJ found, that failure was harmless because Paso Robles relied heavily on Dr. Griffin's assessment when creating Luke's IEP. The ALJ also concluded that Paso Robles did not need to assess Luke for autism or behavioral functioning in the 2010–2011 school year because Luke did not display any serious autistic-like behavior at school.

Luke's parents appealed the ALJ's decision to the United States District Court for the Central District of California. The district court affirmed the ALJ's decision, but adopted a different rationale. The district court concluded that Paso Robles “knew” that Tri-Counties suspected Luke might be autistic, but it did not need to formally assess Luke for autism because Peck observed him at his initial evaluation on October 30, 2009 and did not observe obvious characteristics of a child with autism. The district court also agreed with the ALJ that, even if Paso Robles was required to perform an assessment of Luke for autism, any failure to do so was harmless because Paso Robles “made appropriate recommendations” based on Dr. Griffin's report which assessed Luke for autism. Further, the court asserted, Paso Robles did not need to reassess Luke in 2010 because Luke's parents never requested a reassessment, and because his teacher reasonably wanted to observe Luke for a longer period of time to determine what testing needed to be done. This appeal followed.

STANDARD OF REVIEW

[1] [2] This case requires us to review both the decision of the district court and that of the administrative law judge. We review de novo the question whether a school district's proposed individualized education program provided a free appropriate public education. Amanda J., 267 F.3d at 887. In doing so, we may review a district court's findings of fact only for clear error. Id. Further, we must offer “due weight” to the decisions of the state's administrative bodies, a standard which is far less deferential than judicial review of other agency actions, but rather, requires us to refrain from substituting our “own notions of sound educational policy for those of the school authorities which [we] review.” Id. (quoting Bd. of Educ. v. Rowley, 458 U.S. 176, 206, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982)).

ANALYSIS
School districts may deny a child a free appropriate public education by violating either the substantive or procedural requirements of the IDEA. *M.M.*, 767 F.3d at 852. A school district denies a child a free appropriate public education by violating the IDEA's substantive requirements when it offers a child an IEP that is not reasonably calculated to enable the child to receive educational benefits. *J.W. ex rel. J.E.W. v. Fresno Unified Sch. Dist.*, 626 F.3d 431, 432–33 (9th Cir.2010). The school district may also, however, deny the child a free appropriate public education by failing to comply with the IDEA's extensive and carefully drafted procedures. See *Doug C. v. Hawaii Dep't of Educ.*, 720 F.3d 1038, 1043 (9th Cir.2013). While some procedural violations can be harmless, procedural violations that substantially interfere with the parents' opportunity to participate in the IEP formulation process, result in the loss of educational opportunity, or actually cause a deprivation of educational benefits “clearly result in the denial of a [free appropriate public education.]” *Amanda J.*, 267 F.3d at 892.

Luke's primary contention on this appeal is that Paso Robles violated the IDEA's essential procedural requirement that it conduct an initial evaluation to assess a child “for all areas of suspected disabilities” when it failed to formally assess him for autism or autistic-like behavior. We agree and reject the district court's holding that, although Paso Robles was aware that Tri–Counties suspected Luke might be autistic, it did not need to assess him for autism because one of the District's staff members, William Peck, informally observed Luke and did not see him exhibit any such behavior. The IDEA *1119* requires that, if a school district has notice that a child has displayed symptoms of a covered disability, it must assess that child in all areas of that disability using the thorough and reliable procedures specified in the Act. School districts cannot circumvent that responsibility by way of informal observations, nor can the subjective opinion of a staff member dispel such reported suspicion. Further, we reject the ALJ's equivocal and unsupported statement that Paso Robles may not have needed to assess Luke for autism because it “knew” that Tri–Counties was going to assess him. There is no support for this finding in the record and, even if there were, Paso Robles took no steps to ensure that any assessment by Tri–Counties complied with the requirements of the IDEA imposed on the District. Under these circumstances, the potential Tri–Counties assessment could not satisfy Paso Robles' obligation to conduct an IDEA-compliant individual initial evaluation prior to developing Luke's IEP and providing special education services to Luke.

Finally, we hold that Paso Robles' fundamental procedural violations denied Luke a free appropriate public education during the 2009–2010 and 2010–2011 school years because the District's failure to assess Luke for all areas of suspected disability deprived his IEP Team of critical evaluative information about his developmental abilities as an autistic child. That deprivation made it impossible for the IEP Team to consider and recommend appropriate services necessary to address Luke's unique needs, thus depriving him of critical educational opportunities and substantially impairing his parents' ability to fully participate in the collaborative IEP process. In so holding, we reject the argument advanced by both the district court and the ALJ that any failure to assess Luke for autism was rendered harmless by Paso Robles' reliance on the Griffin Report in creating Luke's IEP. There is no evidence in the record that Dr. Griffin's assessment was conducted with the intent of helping Luke's IEP Team to develop an appropriate educational plan or to gather all the necessary information required by the IDEA for that purpose. Nor is there any evidence that the Griffin Report was actually considered by Luke's team as part of the collaborative process mandated by the IDEA, or that the information it collected or its findings were incorporated into Luke's IEP. In fact, all the evidence is to the contrary. Accordingly, we reverse the decision of the district court and remand for the determination of an appropriate remedy.

**I. Paso Robles Failed to Conduct an Assessment for Autism, as Required by the IDEA**

Under the IDEA, the school district must conduct a “full and individual initial evaluation,” one which ensures that the child is assessed in “all areas of suspected disability,” before providing that child with any special education services. 20 U.S.C. §§ 1414(a)(1)(A), 1414(b)(3)(B). The California Education Code, which incorporates the requirements of the IDEA into state law, similarly requires that the child be assessed “in all areas related to the suspected disability.” See Cal. Educ. Code § 56320(f). As described earlier, this requirement serves a critical purpose: it allows the child's IEP Team to have a complete picture of the child's functional, developmental, and academic needs, which in turn allows the team to design an individualized and appropriate educational plan tailored to the needs of the individual child.
[6] Our precedent establishes that a disability is “suspected,” and therefore must be assessed by a school district, when the district has notice that the child has displayed symptoms of that disability. In *1120 Pasatiempo by Pasatiempo v. Aizawa, 103 F.3d 796 (9th Cir.1996), for example, we held that the “informed suspicions of parents, who may have consulted outside experts,” trigger the requirement to assess, even if the school district disagrees with the parent's suspicions because “[t]he identification [and assessment] of children who have disabilities should be a cooperative and consultative process.” Id. at 802. Once either the school district or the parents suspect disability, we held, a test must be performed so that parents can “receive notification of, and have the opportunity to contest, conclusions regarding their children.” Id.

Similarly, in N.B. v. Hellgate Elementary School District, 541 F.3d 1202 (9th Cir.2008), we held that the requirement to assess may be triggered by the informed suspicions of outside experts. There, a young child was assessed by a professional for speech and language problems before the child began school. Id. at 1205–06. The professional concluded that an “autistic component” was complicating the child's performance, although the professional did not diagnose the child with a disorder on the autism spectrum. Id. at 1209. The child's parents delivered these records to the school district's special education director and discussed the evaluation with him, but the school district never arranged for the child to be assessed for autism. Id. at 1205–06. Instead, it referred the child's parents to a third party which would perform a free autism test for the parents. Id. at 1206. The school district, like Paso Robles, later claimed that it did not arrange for the child to be tested because it did not suspect that the child had autism. Id. at 1209. We held that the district's assertion of ignorance was plainly contradicted by the record because the school was aware (due to the prior evaluation) that autism was a possibility. Id. at 1209–10.

[7] Here, the record shows that Paso Robles had notice that Luke displayed symptoms of autism. Both the ALJ and the district court found that Paso Robles was aware, before its initial evaluation of Luke in October 2009, that Tri-Counties believed that he might have a disorder on the autism spectrum.18 Indeed, Peck admitted at the administrative hearing that autism was a suspected disability when he stated that he had been called to informally observe Luke's initial evaluation because there was a possibility of looking at autism as a disabling condition.

Despite this knowledge, when creating a plan for Luke's initial assessment, Paso Robles did not include any of the standard assessments for autism. Rather, the notice sent to Luke's parents reflected that he would not be given any assessment for social/adaptive behavior, which would be necessary in order to determine whether Luke had autistic-like symptoms. Instead, during the October 2009 initial assessment, Paso Robles attempted to assess Luke for several other disorders, but was unable to complete its tests of him because of Luke's “compliance” issues. At no point during its examination did Paso Robles conduct or attempt to conduct any form of standard or reliable assessment for autism or autistic-like behavior.

*1121 Moreover, even if Paso Robles had not had notice of Luke's autistic symptoms at the time of the October 30, 2009 initial assessment, it obtained such notice when it received the Griffin Report, which “provisionally” diagnosed Luke with a disorder on the autism spectrum and noted that he displayed troubling autistic behavior. Peck testified that he did not give much weight to Dr. Griffin's assessment because it was only a “provisional” diagnosis. Regardless of Paso Robles' subjective opinion about the validity of Dr. Griffin's diagnosis, however, the “informed suspicions of ... [a] consulted outside expert[ ]”—here, Dr. Griffin, whose report stated that Luke displayed troubling autistic behavior—establishes the statutory requirement of suspicion thus necessitating a full assessment for autism. See Pasatiempo, 103 F.3d at 802. Paso Robles still did not do so, and instead, two days later, held an IEP meeting during which neither autism nor the Griffin Report were ever discussed. Further, neither the possibility of autism nor the recommendations of the Griffin Report were incorporated into Luke's IEP.

Even more troubling, by the time of the December 2010 IEP, it was clear from parent and teacher complaints that Luke displayed autistic-like behavior at home and at school. Even then, Paso Robles did not suggest that Luke should be provided services to address his autistic-like behavior or even that Luke should be assessed for autism. This complete
failure to assess Luke for all areas of suspected disability clearly and substantially violated the IDEA's procedural requirements.

A. Peck's Informal Observation of Luke Could Not Satisfy Paso Robles’ Obligation to Assess for Autism

[8] Despite its clear notice of Luke's autistic-like behavior, Paso Robles argues that autism was not a “suspected disability” either at the time of its October 2009 initial assessment or after it received Dr. Griffin's assessment. The district court agreed, and held that while Paso Robles “knew that [Tri-Counties] suspected that [Luke] may be autistic,” it did not need to formally assess Luke because it had requested that its staff member, Peck, observe informally Luke's assessment for other disorders and determine whether additional testing was needed. According to Peck, he saw Luke display behavior that was not characteristic of a child with autism, and therefore advised the district that no additional assessment was necessary. Specifically, the district court wrote, it was “not aware of any authority that supports that where the school district is on notice that a student may be on the autism spectrum, observes the student, and determines that he did not exhibit any characteristics of autism, that the district is still required to complete additional testing.”

That conclusion, however, is directly contrary to the provisions of the IDEA and our precedent, which establish that if a school district is on notice that a child may have a particular disorder, it must assess that child for that disorder, regardless of the subjective views of its staff members concerning the likely outcome of such an assessment. That notice may come in the form of expressed parental concerns about a child's symptoms, as in Pasatiempo, of expressed opinions by informed professionals, as in Hellgate, or even by other less formal indicators, such as the child's behavior in or out of the classroom. A school district cannot disregard a non-frivolous suspicion of which it becomes aware simply because of the subjective views of its staff, nor can it dispel this suspicion through informal observation. Rather, such notice automatically triggers mandatory statutory procedures: the school district must conduct an assessment for all areas of the suspected disability *1122 using the comprehensive and reliable methods that the IDEA requires. In this case, it is particularly egregious that in conducting Luke's initial evaluation which assessed him for other possible disorders, Paso Robles deliberately refused to include an assessment of the one suspected disability of which it had clear notice—autism.

Peck, of course, did not conduct an assessment for autism, let alone one that complied with the IDEA. Not only was his involvement in Luke's initial evaluation not included within the original notice provided to Luke's parents, but he did not use a variety of standard or reliable methods. 20 U.S.C. § 1414(b)(3)(A). Rather, he used only one, generally unreliable method—informal observation—or to use a phrase later employed by him, observation “off the top of my head.” While the record reflects that a complex form of structured observation may be used as a tool to identify autistic-like behavior, Peck was not certified at that time to perform that kind of testing, and in fact did not do so or even purport to have attempted to do so.

To hold that Peck's informal observation could overcome Paso Robles' statutory obligation to formally assess Luke for a suspected disability would allow school districts to disregard expressed and informed concerns about a child's disabilities on the basis of prejudicial stereotypes about what certain disabilities look like, rather than on the objective evidence and the thorough and reliable standardized testing that the IDEA requires. This result would be particularly devastating for children with autism because, as Dr. Freeman explained at the administrative hearing, the condition “can be very subtle” and manifest itself in many different ways. It would likely be missed by an informal observation, resulting in many children remaining undiagnosed, untreated, and unable to reach their full educational potential. The effect, moreover, would be felt most heavily by children from disadvantaged families without the sophistication or resources to obtain outside professional opinions.

B. The Griffin Report Cannot Qualify as an Assessment that Satisfies Paso Robles' Obligations Under the IDEA

[9] Although Paso Robles does not advance the argument on appeal, the ALJ equivocally expressed an alternate theory as to why Paso Robles did not need to assess Luke for autism. Without citing any legal or factual support, the ALJ said that “[t]he District knew that [Luke] was to be formally assessed by a psychologist through Tri-Counties,” and the
Griffin Report “was so thorough, the District saw no need to conduct further assessments of [Luke].” There is no support in the record for this finding. The Griffin Report was conducted explicitly for the purpose of assisting Tri–Counties in determining whether Luke qualified for continued regional center services, not to gather information about him that could be used to determine his individual educational needs or to determine whether he qualified for special education under the IDEA. Further, Paso Robles took absolutely no steps to ensure that this assessment would occur or that it would be conducted and considered in a manner that complies with the IDEA. It also did not inform Luke's parents that it intended to rely, or did in fact rely, on the Griffin Report in creating Luke's IEP. Accordingly, the Griffin Report cannot qualify as an assessment that satisfies Paso Robles' obligations under the IDEA. 19

*1123 As an initial matter, there is no support for the ALJ's suggestion that Paso Robles did not assess Luke for autism because it “knew” that he was going to be assessed by Tri–Counties or for the finding that Paso Robles believed the Griffin Report to be comprehensive and thorough. To the contrary, the record clearly establishes that the reason Paso Robles did not assess Luke for autism was because it did not subjectively believe that he was autistic and because Peck had not observed any autistic-like behavior during his informal observation of Luke. Had Paso Robles truly intended to rely on Tri–Counties' assessment of Luke, it surely would have taken steps to ensure that the assessment occurred when, on November 10, 2009, it learned that Tri–Counties had not yet received parental consent to conduct an assessment. Instead, Paso Robles sent invitations to Luke's December IEP meeting that same day, signaling its intent to proceed without any assessment for autism by Tri–Counties or otherwise. Testimony from the administrative hearing, moreover, reveals that Paso Robles' staff believed the Griffin Report to be unreliable and inaccurate and that the District therefore disregarded it entirely. Peck criticized Dr. Griffin's methodology, and explained that he understood the “provisional” diagnosis to mean the results of the test were non-conclusive. Similarly, Stinson testified that she believed that Paso Robles could ignore the provisional diagnosis because the school district received a lot of reports of PDD–NOS when the child had only a severe language impairment.

Moreover, even were we to accept the ALJ's clearly erroneous factual findings, we would still be compelled to conclude that Paso Robles violated the IDEA because it took absolutely no steps to “ensure” that the Tri–Counties assessment occurred or was conducted and considered in a manner that complies with the Act. See Hellgate, 541 F.3d at 1209 (holding that a school district may not “abdicate” its responsibilities under the IDEA and that merely referring a child's parents to a third party for testing violates the statutory requirement that the school district “ensure” that the child has only a severe language impairment). Paso Robles did not explain to Luke's parents that it intended to rely on Tri–Counties to assess Luke for autism or include an assessment for autism in Luke's initial evaluation plan. See 20 U.S.C. § 1414(b)(1) & (c)(1). It also did not take any steps to ensure that the Tri–Counties assessment actually took place, nor did it give Luke's parents notice that the Griffin Report would be considered in creating Luke's IEP, as it would be required to do if it were part of Paso Robles' initial evaluation. See 20 U.S.C. § 1414(d)(3)(A)(iii) (requiring that the IEP Team consider “the results of the initial evaluation”); 34 C.F.R. § 300.303 (prior notice requirement). Finally, as described below in Part II, the report was never discussed or considered by Luke's IEP Team when creating his initial IEP.

In short, the record clearly reflects that Paso Robles was on notice that Luke might have a disorder on the autism spectrum before it developed and provided him with special educational services. It was therefore required by the IDEA to ensure that an assessment for that disability was conducted using the sound and reliable methods that the Act demands and to consider the results of that assessment when creating Luke's IEP and providing him special education services. It failed to do so, which in itself constituted a substantial procedural violation of the IDEA.

II. Paso Robles' Violation of the IDEA's Procedural Requirements Denied Luke a Free Appropriate Education

Having concluded that Paso Robles violated the procedural requirements of the IDEA, we must determine whether the violations are “sufficient to support a finding that [Luke] was denied a [free appropriate public education].” Amanda J., 267 F.3d at 892. While some procedural violations of the IDEA may be harmless, such errors constitute a denial of a free appropriate public education if they seriously impair the parents' opportunity to participate
in the IEP formulation process, result in the loss of educational opportunity for the child, or cause a deprivation of the child's educational benefits. *Id.; see also M.L. v. Fed. Way Sch. Dist.*, 394 F.3d 634, 652 (9th Cir.2005) (Gould, J., concurring). A loss of an educational opportunity occurs, for example, when there is a “strong likelihood” that, but for the procedural error, an alternative placement “would have been better considered.” *Doug C.*, 720 F.3d at 1047 (quoting *M.L.*, 394 F.3d at 657 (Gould, J., concurring)). As we have previously held, to succeed on a claim that a child was denied a free appropriate public education because of a procedural error, the individual need not definitively show that his educational placement would have been different without the error. *Id.*

On more than one occasion, we have held that the provision of a free appropriate public education is “impossible” when the IEP Team fails to obtain information that might show that the child is autistic. See, e.g., *Hellgate*, 541 F.3d at 1210 (“The failure to obtain critical medical information about whether a child has autism ‘render[s] the accomplishment of the IDEA's goals—and the achievement of a free appropriate public education—impossible.’ ”); *Amanda J.*, 267 F.3d at 894 (“The IEP team could not create an IEP that addressed Amanda's special needs as an autistic child without knowing that Amanda was autistic.”). 20

[13] We reaffirm that holding today. As in *Hellgate* and *Amanda J.*, any goals set forth in Luke's IEP were likely inappropriate because they were made without sufficient evaluative information about Luke's individual capabilities as an autistic child. Indeed, testimony from Paso Robles' staff indicates that any ostensible progress that Luke made was likely attributable to an “underestimation of his abilities” at the outset. 21 Further, this lack of *1125* information denied Luke educational opportunities and substantially hindered his parents' ability to participate in the IEP process.

Here, there is strong reason to believe that alternative services would have at least been more seriously considered during the collaborative IEP process if the school district had formally assessed Luke for autism. *See Doug C.*, 720 F.3d at 1047. Because Luke was never formally so assessed, several members of Paso Robles' staff treated him as if he had selective *mutism*, an anxiety disorder. Rather than engaging in positive interventions to encourage Luke to talk, the staff strove to create an environment that would minimize his supposed anxiety. As Luke's private behaviorist explained, these actions should not have been taken in the case of an autistic child and may actually have reinforced Luke's refusal to speak. Similarly, as Erika Castro, a Paso Robles speech therapist, testified, had she been aware that Luke had been diagnosed by Dr. Griffin as having a disorder on the autism spectrum, she would not have suggested that he was selectively mute. Indeed, because she was under the misperception that Luke's refusal to speak was due to an anxiety disorder, she never suggested to Luke's teacher that he needed to be seen and possibly be treated by a behaviorist—a recommendation that she might have otherwise made. Such a referral would likely have been of immense benefit with respect to Luke's education, as evidenced by the tremendous improvement in his speech once he began receiving such services.

Further, by failing to assess Luke for autism, Paso Robles deprived Luke's parents of vital information necessary for them to meaningfully participate in the IEP process. It is clear from the record that Paso Robles considered assessing Luke for autism but decided not to do so after Peck's informal and procedurally inadequate observation. It did not, however, explain this to Luke's parents. Without this information, his parents—who were not represented by counsel at the time—had no reason to question the initial evaluation report and had no basis to request an independent educational evaluation.

[14] Paso Robles argues that it provided Luke with a free appropriate public education because its staff would have made the same recommendations as to the specialized services Luke required regardless whether he had been diagnosed as autistic. Peck, for example, testified that he would have made the same recommendations during the December 2009 IEP. 22 This argument is plainly contradicted by the fact that Paso Robles' staff treated Luke as if he were selectively mute, which they certainly would not have done if they had an assessment for autism. Even if true, however, this argument misses a central concern of our inquiry. The creation of an IEP is not a unilateral enterprise by the school district, but rather, a collaborative process that necessitates parents' input. Regardless whether Paso Robles *1126* staff might
have made identical recommendations in the absence of informed parental participation in the collaborative process, the failure to obtain necessary information about Luke's disorder prevented an informed discussion with his parents about his specific needs as an autistic child. Thus, Paso Robles' violation of the statutory requirement deprived Luke of educational opportunities and substantially hindered his parents' participation in the process. So that there may be no similar misunderstanding in the future, we will say it once again: the failure to obtain critical and statutorily mandated medical information about an autistic child and about his particular educational needs “render[s] the accomplishment of the IDEA's goals—and the achievement of a FAPE—impossible.” Hellgate, 541 F.3d at 1210 (emphasis added) (quoting Amanda J., 267 F.3d at 894). Because the school district failed to conduct the statutorily mandated assessment of “all areas of suspected disability” it necessarily deprived Luke of a free appropriate public education.

Finally, in so holding, we reject the argument of the ALJ and the district court that any failure by Paso Robles to assess Luke for autism was harmless because Paso Robles relied heavily on the Griffin Report when creating Luke's IEP. There are three substantial problems with this argument: (1) there is no evidence that Paso Robles took any steps to ensure that the Griffin Report was conducted in a manner that complied with the IDEA's procedural requirements, (2) the determination that Paso Robles relied on the Griffin Report is entirely unsupported by, indeed is contrary to, the evidence in the record, and (3) any reliance on the Griffin Report was without notice to or discussion with Luke's parents, which would have substantially hindered their ability to fully and fairly participate in the IEP process, thus exacerbating the denial to Luke of a free appropriate public education.

First, as discussed supra Section I.B, Paso Robles took absolutely no steps to “ensure” that the Tri-Counties assessment occurred or that it was conducted in a manner that complies with the procedural requirements of the Act. See Hellgate, 541 F.3d at 1209. Second, there is absolutely no evidence that the Griffin Report was actually discussed at Luke's December 2009 IEP meeting or that it was relied on at any point during the development of the IEP. The only evidence that it was considered at all is a single statement made by Peck at the administrative hearing that he considered it during the initial IEP meeting. When asked “So did you consider that assessment at the 12/4/2009 IEP meeting?” he responded “Yes.” The fact that Peck “considered” the Griffin Assessment, however, does not suggest that it was relied upon when creating Luke's IEP or that it was carefully considered by the entire IEP Team. Rather, the argument is directly contrary to the unrebuted evidence that Paso Robles considered the report to be unreliable: Peck read the report, believed the “provisional” diagnosis meant that the results were non-conclusive, disregarded it, and did not even mention it during the IEP meeting. Similarly, none of Paso Robles' other staff members mentioned the Griffin Report when describing what the IEP Team discussed at the IEP meeting, and indeed, Luke's mother testified that she did not even know that the school district had received a copy of the report because it was never mentioned. The IEP, of course, makes absolutely no mention of the report. Finally, Paso Robles has maintained throughout these proceedings that the Griffin Report would have been of so little significance as not even to warrant a suspicion of autism.

*1127 Third, even if we were to accept the clearly erroneous factual finding that the report was “considered,” that consideration would have constituted a further procedural violation that would only have exacerbated the denial of a free appropriate public education to Luke. That is because any purported reliance on the Griffin Report would have occurred without notice to Luke's parents that the assessment was being considered in creating the IEP, as required by 34 C.F.R. § 300.503(a) & (b). The notice requirement provides parents with information necessary to an understanding of the rationale behind the school district's proposal, thus ensuring the “meaningful participation by parents and informed parental consent” that the IDEA was designed to afford. M.M., 767 F.3d at 851. If Paso Robles had given Luke's parents written notice that the Griffin Report would be considered in drafting the IEP, it would have been required to explain to them why it disagreed with Dr. Griffin's diagnosis and to state whether it was making any recommendations for Luke's education based on her report. In the absence of such notice, however, Luke's parents were left without critical information. Because they did not have Paso Robles' relative sophistication, they could not be expected to understand how Tri-Counties' test results could affect Luke's special education eligibility or what services needed to be provided in light of Dr. Griffin's diagnosis. Accordingly, they could not give informed consent or participate meaningfully in the creation of the IEP, a separate statutory violation in itself.
Because we hold that the failure to assess Luke for autism constituted a substantial procedural violation of the IDEA that denied him a free appropriate public education during the 2009–2010 and 2010–2011 school years, we need not address the separate question raised by him on this appeal: whether the school district's failure to take appropriate steps to address his refusal to speak denied him a free appropriate education during those same years.

CONCLUSION

Well before creating an individual education plan for Luke, Paso Robles had notice that he might have a disorder on the autism spectrum. Under the IDEA, the school district had an affirmative obligation to formally assess Luke for autism using reliable, standardized, and statutorily proscribed methods. Paso Robles, however, ignored the clear evidence requiring it to do so, and instead determined that Luke was not autistic based on the view of a staff member who opined, after a casual observation, that Luke did not display signs of autism. This failure to formally assess Luke's disability rendered the provision of a free appropriate education impossible and left his autism untreated for years while Paso Robles's staff, because of a lack of adequate information, took actions that may have been counter-productive and reinforced Luke's refusal to speak. We hold, therefore, that Paso Robles violated the IDEA and denied Luke a free appropriate public education during the 2009–2010 and 2010–2011 school years. We reverse the decision of the district court and remand for a determination of the appropriate remedy.

REVERSED AND REMANDED.

All Citations


Footnotes

1 See CDC Autism and Developmental Disabilities Monitoring Network, Prevalence of Autism Spectrum Disorder Among Children Aged 8 Years (Mar. 28, 2014), http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6302a1.htm?s_cid=ss6302a1_w.


4 In the caption, Luke is named “L.O.” In his brief on appeal, as in this opinion, he is referred to as Luke.

5 At the time this case was filed, “autism spectrum disorder” was not recognized as a single disorder, but rather, as subgroups associated with the severity of the person's symptoms: Autistic Disorder, Asperger's Disorder, Childhood Disintegrative Disorder, and Pervasive Developmental Disorder Not Otherwise Specified. Since the 2013 revisions to the Diagnostic and Statistical Manual of Mental Disorders, however, these subgroups have been replaced by the umbrella term “autism spectrum disorder.” Throughout this opinion, the original subgroups will generally be referred to individually and collectively as “disorders on the autism spectrum” or “autism.”

6 A “child with a disability” is one who has either intellectual disabilities, hearing impairments, speech or language impairments, visual impairments, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities, and who, by reason thereof, needs special education and related services. 20 U.S.C. § 1401(3)(A).

7 Specifically, the statute requires that the initial evaluation be conducted by a “State educational agency, other State agency, or local educational agency.” A State educational agency is the State agency primarily responsible for the State supervision of public schools. 20 U.S.C. § 1401(32). Generally, a “local educational agency” is synonymous with the local school district. See id. § 1401(19). Thus, for simplicity's sake, this opinion will refer simply to “school districts,” or “the district.”
Any parents who have reason to suspect their child may have a disability may request such an initial evaluation. 34 C.F.R. § 300.301(b). If the school district wishes to deny the request, it must provide written notice to the parents explaining that it refuses to conduct an initial evaluation and provide an explanation as to why it does not suspect the child has a disability and what records or evaluations it used as the basis for its decision. 34 C.F.R. § 300.503(a) & (b). A parent may then challenge this decision by requesting a due process hearing under 34 C.F.R. § 300.507 or filing a State complaint under 34 C.F.R. § 300.153. The school district may also initiate an evaluation sua sponte if it seeks and receives parental consent. 34 C.F.R. § 300.301(b).

To ensure that parents are aware of these rights, school districts are required to provide parents an explanation of these procedural safeguards. 20 U.S.C. § 1415(c)(1)(C).

As noted supra note 3, at the time of the events in this case, “autism spectrum disorder” was not yet recognized as a single disorder. Although the California Department of Developmental Services did not take a formal position as to whether ‘autism’ in the California statute regarding regional centers referred to any disorder on the spectrum or merely Autistic Disorder, it filed briefs supporting the decisions of regional centers not to offer continued services to children with disorders other than Autistic Disorder. This ultimately resulted in the California Court of Appeal concluding, in an unpublished decision, that “autism” in this statute was synonymous with Autistic Disorder. See Brian S. v. Delgadillo, 2010 WL 2933624 (Cal.App.2010) (unpublished). It is not clear what effect, if any, the recent changes to the Diagnostic and Statistical Manual would have on this interpretation.

The IDEA requires that local school districts provide special education services to children with autism, but allows the States to define what qualifies as autistic for the purpose of special education. Some states, for example, follow the medical definition found in the Diagnostic and Statistical Manual. In California at the time of the events in this case, any child who displayed two of seven listed types of autistic-like behavior qualified as ‘autistic’ for the purpose of receiving special education through local school districts, regardless whether the child had been formally diagnosed with any disorder on the spectrum. 5 C.C.R. § 3030(g) (2009).

Although Paso Robles' records do not state precisely what Tri–Counties wanted to test Luke for, Autistic Disorder seems to be the only true possibility. If Luke had “no health needs,” he certainly would not qualify for further regional center services as a child with either epilepsy or cerebral palsy. Further, nothing in the record suggests that he displayed any signs of mental retardation “or a condition that is similar to mental retardation,” which are the only other conditions, aside from autism, that would have qualified him for continued regional center services. The conclusion that Tri–Counties wanted to perform a psychological assessment for Autistic Disorder, and, in fact, discussed that possibility with Paso Robles at the June 2009 meeting is also made clear by the fact that (1) Paso Robles conceded in the district court that it “was aware” that the Regional Center suspected Luke was autistic before it conducted its own assessment, and (2) Tri–Counties ultimately assessed Luke for autism but not for any other disabilities.

On November 10, Paso Robles called Tri–Counties asking if it had assessed Luke. Tri–Counties told Paso Robles that it had not yet received consent from Luke's parents to conduct an assessment. That same day, Paso Robles sent invitations to the IEP meeting, demonstrating its intent to proceed to the IEP meeting without an assessment for autism.

Paso Robles argues that the Griffin Report was “considered,” at the IEP meeting, and indeed, the administrative law judge so found. The sole support for this statement is a single question asked at the administrative hearing. Peck, who was a member of the IEP Team, was asked “So did you consider that assessment at the 12/4/2009 IEP meeting?” and he responded “Yes.” Regardless whether Peck himself considered the Griffin Report at the meeting, there is no evidence that the assessment was discussed at the meeting as part of the collaborative process mandated by the IDEA. The IEP itself does not mention the Griffin Report, and another member of Paso Robles' staff who testified at length about what was considered during the IEP meeting never once mentioned the Griffin Report. Further, Luke's mother testified that she did not know that the school district had received a copy of the report because it was never mentioned during the meeting.

Peck at no point explained why he was previously able to make a diagnosis “off the top of [his] head” as to why Luke did not have autism without doing an assessment, but because he could not know the answer without an assessment, would not advise the participants at the IEP meeting that he now believed that Luke might have such a disability.

Plaintiffs raise both of these issues on appeal. Because we hold that Paso Robles denied Luke a free appropriate public education by failing to assess him for autism, we do not reach the second question presented—whether the school district denied Luke a free appropriate public education by failing to address his behavioral issues. The plaintiffs also presented a host of other issues before the administrative law judge, including whether Luke should have been made eligible for special education under the category of “autistic-like,” none of which is raised on this appeal. Amicus Curiae California Boards Association's Education Legal Alliance asks us to hold that neither the IDEA nor California law entitles special education...
students to a particular diagnosis or “eligibility classification.” That question, however, is different from the question whether a school district must assess a child for all areas of suspected disability and, as noted, is no longer at issue in this case.

Paso Robles now asserts that there is no basis to conclude that Tri-Counties told the District that it suspected Luke had autism. While the notes from the June 2009 meeting between Luke's parents, Tri-Counties, and Paso Robles do not specifically mention “autism,” they do establish that Tri-Counties wanted to give Luke a psychological examination to see if he qualified for further regional center services, which he would qualify for only if he had mental retardation, epilepsy, cerebral palsy, or autism. The only plausible such disorder in Luke's case was autism. In any event, Paso Robles conceded in the district court that it was aware that Tri-Counties suspected Luke was autistic before it conducted its own assessment.

Amicus Curiae Learning Rights Law Center asks that we hold that school districts are never allowed to rely on the assessments performed by regional centers as a substitute for conducting their own. According to the amicus, the regional center's assessment is performed strictly for the purpose of diagnosing a child to determine eligibility to receive continued regional center services, whereas, in contrast, school districts must perform assessments not only to diagnose children's medical disability, but also to assess the child's strengths and needs for educational planning, including helping in the creation of an IEP. We express no view on this question.

Weissburg v. Lancaster School District, 591 F.3d 1255 (9th Cir.2010), cited by the amicus in support of the school district, does not undermine these cases. There, we noted that the IDEA does not give a student the legal right to a proper disability classification. Whether Luke should have been given a different eligibility classification, however, is not the basis of the plaintiffs' appeal. Instead, the question is whether the IEP Team could have properly created an individualized education plan tailored to Luke's particular needs without having before it the statutorily required assessment of him for autism.

Although not essential to our holding that Luke was denied a FAPE, some evidence in the record suggests that Luke did not actually make meaningful progress toward even the limited goals in his IEP. There were conversations between Luke's parents and teachers during the 2009-2010 school year to the effect that Luke was not making adequate progress toward his goals and required a more intensive program. Further, Luke's assessment score dropped significantly between November 2009—when he was assessed by Dr. Griffin before he received any special education from Paso Robles—and January 2012—when he was assessed by Dr. Freeman. As Dr. Freeman explained, if Luke had made “meaningful progress,” the score would have remained the same or increased. A significant drop suggested that Luke was “not keeping pace.”

Regardless of the veracity of this statement, the record strongly suggests that Peck would at least have made different recommendations at the December 2010 IEP. As he admitted during the administrative hearing, he did not suggest that Luke had autism or needed treatment for autistic behavior during that meeting because he had not yet “done an assessment” for autism. We need not further comment on how his testimony that he would not do so “off the top of [his] head” comports with the role he played in 2009 when he ruled out the need for an autism assessment on the basis of a casual observation.
REFERENCES IN OAH DECISIONS

Avila v. Spokane School District,
815 F.3d 1195 (9th Cir. 2016)

1. Student v. Colton Joint Unified School District
   December 20, 2017 2017060750
   Judge: Chris Butchko

LEGAL CONCLUSIONS

7. The statute of limitations in California is two years, consistent with federal law. (Ed. Code, § 56505, subd. (l); see also 20 U.S.C. § 1415(f)(3)(C).) An action must be filed within two years from the date a party knew or had reason to know of the facts underlying the action. (Education Code section 56505, subdivision (l), see also title 20 United States Code section 1415(f)(3)(C) (“knew or should have known about the alleged action that forms the basis of the complaint.”) The law contains exceptions to the statute of limitations in cases in which the parent was prevented from filing a request for due process due to specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint, or the local educational agency’s withholding of information from the parent that was required to be provided to the parent. (20 U.S.C. § 1415(f)(3)(D)(i) and (ii); Ed. Code, § 56505, subd. (l)(1) and (2).) The Ninth Circuit recently reaffirmed this rule. (Avila v. Spokane School Dist. 81 (2017) 852 F.3d 936.) Otherwise, the statute of limitations for due process complaints in California precludes claims that occurred more than two years prior to the date of filing the request for due process. Cal. Educ.Code § 56505(l); 20 U.S.C. § 1415(f)(3)(c). (M.M. v. Lafayette School District (9th Cir. 2014) 767 F.3d 842, 309.)
I.R. v. Los Angeles Unified School District, 805 F.3d 1164 (9th Cir. 2015)

1. Student v. Los Angeles Unified School District  
   Judge: Cole Dalton

   LEGAL CONCLUSIONS

   43. School districts have no duty to provide a FAPE to students by implementing a plan, rejected by parents. (I.R. ex rel E.N. v. Los Angeles Unified School Dist. (9th Cir. 2015) 805 F.3d 1164; see also 34 C.F.R. § 300.300(d)(3).)

2. Hungtington Beach City School District v. Student  
   Judge: Ted Man

   LEGAL CONCLUSIONS

   6. If the parent or guardian of a child who is an individual with exceptional needs refuses all services in the IEP after having consented to those services in the past, the local educational agency shall file a request for a due process hearing. (Ed. Code, § 56346, subd. (d).) I.R. v. Los Angeles Unified Sch. Dist. (9th Cir. 2015) 805 F.3d 1164.

3. Student v. Torrance Unified School District  
   Judge: Alexa Hohensee

   LEGAL CONCLUSIONS

   45. The IDEA provides that if the parent refuses to consent to services offered in an IEP, other than an initial IEP, the school district may initiate a due process hearing. (20 U.S.C. § 1414(a)(1)(D)(ii)(II); 34 C.F.R. § 300.300(b)(3); I.R. v. Los Angeles Unified Sch. Dist. (9th Cir. 2015) 805 F.3d 1164, 1167-1168 (I.R.).) The California Education Code requires that “as soon as possible following development” of the IEP, “special education and related services shall be made available” to the student in accordance with the IEP. (Ed. Code § 56344(b).) If the parent consents to some, but not all, of the components of an IEP, the school district must determine whether the proposed special education program component is determined to be necessary to provide a FAPE. If the school district “determines that the proposed special education program component to which the parent does not consent is necessary to provide” a FAPE, “a due process hearing shall be initiated.” (Ed. Code. § 56346(f).) The school district cannot opt to hold additional IEP team meetings, or continue the IEP process in lieu of initiating a due process hearing; rather, the school district must initiate a due process hearing expeditiously. (I.R., supra, 805 F.3d at p. 1169.)

   46. In evaluating how long is too long for a school district to take in determining a component’s necessity and initiating a due process hearing, the school district must have some flexibility to allow for due consideration of the parent’s reasons for withholding consent to an IEP component. (I.R., supra, at 805 F.3d 1169.) However, a school district should be able to consider the parents’ position and make a
determination as to the component’s necessity within a reasonable period of time. (Ibid.) If, in the school district’s judgment, the child is not receiving a FAPE, the district must act with reasonable promptness to correct that problem by adjudicating the differences with the parent. The reason for this urgency is that it is the child who suffers in the meantime. (Id. at 1169-170.)

47. A school district’s failure to comply with a procedural requirement, such as Education Code section 56346, subdivision (f), denies a child a FAPE when the procedural inadequacy results in the loss of educational opportunity or causes a deprivation of educational benefit. (I.R., supra, 805 F.3d at p. 1170.) To the extent a student loses an educational opportunity and was deprived of educational benefits for an unreasonably prolonged period, the school district can be held responsible for denying the child a FAPE for that period. (Ibid.) In I.R., the school district’s delay of more than a year and a half in requesting a due process hearing following the parent’s failure to consent to a provision of the IEP determined to be necessary to provide the student a FAPE was unreasonable. (Ibid.)

Judge: Rebecca Freie

LEGAL CONCLUSIONS

10. When a parent refuses to consent to the receipt of special education and services, after having consented in the past, California law requires that the school district seek resolution of the impasse by filing a request for a due process hearing. (Ed. Code, § 56346, subd. (d).) If a parent consents to some but not all of a proposed program, the district must implement only those portions to which the parent has agreed so as not to delay providing instruction and services to the child. (Ed. Code, § 56346, subd. (e).) If the local educational agency believes that the components of the IEP to which the parent will not consent are necessary to provide the student a FAPE, it must seek an order from an ALJ to that effect in accordance with title 20 United States Code section 1415(f). (Ed. Code, § 56346, subd. (f).) The mandatory duty of a California school district to seek a due process hearing when a parent refuses to consent to an IEP that the district believes offers a student a FAPE was recently confirmed by I.R. v. Los Angeles Unified School Dist. (9th Cir. 2015) 805 F.3d 1164, 1169-1170.

Judge: B. Andrea Miles

LEGAL CONCLUSIONS

8. If a parent will not consent to a proposed IEP component that the school district determines is necessary to provide a FAPE, the school district must initiate a due process hearing. (Ed. Code, § 56346, subd. (f).) Under that provision, the school district must file expeditiously once an impasse with the parent is reached, and cannot opt to hold additional IEP team meetings or continue the IEP process in lieu of initiating a due process hearing. (I.R. v. Los Angeles Unified School Dist. (9th Cir. 2015) 805 F.3d 1164, 1170 (I.R.).) Notably, Education Code section 56346, subdivision (f) does not then authorize a hearing officer to approve that one component. Instead, it provides, “a due process hearing shall
I.R. v. Los Angeles Unified School District,
805 F.3d 1164 (9th Cir. 2015)

be initiated in accordance with Section 1415(f) of Title 20 of the United States Code.” That section, in turn, provides that “a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education.” (20 U.S.C. § 1415(f)(3)(E)(i).)

9. Education Code section 563456, subd. (f) and I.R. do not address the evidence that is necessary to prove that the contested component of the IEP is necessary to provide a student a FAPE. Furthermore, in this case, Dublin has not asserted that requested transition of behavior services and aide are “necessary” for Student to receive a FAPE, and if she continued to receive nonpublic agency provided behavior services and aide that she would not be receiving a FAPE. Instead, Dublin has argued, that it can provide the services at least as effectively as those being provided by First Steps and that it should be allowed to determine the methodology of the services offered by the IEP.
1. **Student v. Hayward USD**

   **Judge:** Penelope S. Pahl

   **LEGAL CONCLUSIONS**

   19. The “snapshot rule” instructs that a determination regarding Student’s IEP should be judged on the basis of the information reasonably available to the parties at the time of the IEP meeting. *(L.J. by and through Hudson v. Pittsburg Unified School District (9th Cir. 2017) 850 F. 3d 996, 1004, citing, Adams. V. Oregon, (9th Cir. 1999) 195 F. 3d. 1141, 1149.)* The rule is not absolute, however. Later acquired evidence is relevant if it sheds light on the reasonableness of a decision at the time the decision was made. *(E.M. v. Pajaro Valley Unified School District (9th Cir. 2011) 652 F. 3d 999, 1004.)*

2. **Student v. Irvine USD**

   **Judge:** Robert G. Martin

   **LEGAL CONCLUSIONS**

   18. In *L.J. v. Pittsburg Unified School District* (9th Cir. 2017) 850 F.3d 996 (*L.J. v. Pittsburgh*), the court addressed the issue of whether a student had demonstrated a need for special education services to address needs arising from medical conditions and treatment. The student had been diagnosed with bipolar disorder, oppositional defiant disorder, and attention deficit hyperactivity disorder. His physician had prescribed a cocktail of serious medications for these conditions. *(Id. at p. 999.)* The student continually had needs associated with his medication and treatment. He relied on psychotropic medications to be able to attend school, and his ability to function declined when he was not medicated or when the medication was ineffective. Staff were concerned that his medications were not being managed properly. *(Id. at p. 1007.)*

   23. District, Parents, and Dr. Brutoco were now aware of two potential medical causes of Student’s sleep behavior: her sleep apnea and side effects from the prescription medications prescribed by Dr. Brutoco. If Student’s sleep behavior at that time had been adversely impacting Student’s performance, District would have been required under the principles set forth in *L.J. v. Pittsburgh* to assess the effects of Student’s sleep apnea and her behavior medications on Student’s school functioning. However, as of January 2015, Student had made such significant progress on her target behavior goals that her behavior intervention specialist considered recommending the phase-out of Student’s behavior intervention plan. Student had also met 12 of her 16 annual IEP goals from 2014, and had made significant progress on her remaining four goals in physical fitness, counting money to pay for items, spelling of grocery words, and reducing her target behavior of elopement. Although Student was now losing over 10 percent of her school day to her naps, overall Student’s sleep behaviors did not appear to be adversely impacting her progress on her goals. District did not deny Student a FAPE by failing to assess the effects of Student’s sleep apnea and her behavior medications on Student’s school functioning, or failing to change the placement or services in Student’s January 22, 2015 IEP to address Student’s sleeping in class.
M.C. v. Antelope Valley Union High School District,
858 F.3d 1189 (9th Cir. 2017)

1. Student v. San Dieguito Union High School District; SDUHSD v. Student
   April 3, 2017 2016120475 & 2016101051
Judge: Paul H. Kamoroff

DECISION

San Dieguito Union High School District filed a due process hearing request with the Office of Administrative Hearings on October 27, 2016, naming Parents on behalf of Student. On December 13, 2016, Student filed a due process hearing request with OAH, naming District.¹ On December 19, 2016, OAH consolidated these cases. On February 2, 2017, OAH continued the consolidated matter.

¹ District filed its response to Student’s complaint on December 23, 2016, which permitted the hearing to go forward. (M.C. v. Antelope Valley Unified Sch. Dist. (9th Cir. March 27, 2017) ___ F.3d ___, 2017 WL 1131821, **5-6.)

2. Student v. Tehachapi Unified School District
   April 24, 2017 2016110289
Judge: Christine Arden

LEGAL CONCLUSIONS

9. Because disabled children and their parents are frequently not represented by counsel during the IEP process, procedural errors at that stage are likely to be prejudicial and result in lost educational benefits. Consequently, compliance with the IDEA’s procedural safeguards “… is essential to ensuring that every eligible child receives a FAPE, and those procedures which provide for meaningful parent participation are particularly important.” (Amanda J. v. Clark Cty. Sch. Dist. (9th Cir. 2001) 267 F.3d 877, 891 (Amanda J.).) Procedural violations that interfere with parental participation in the IEP process undermine the essence of the IDEA. (M.C. v. Antelope Valley Union High School District (9th Cir. March 27, 2017) ___ F.3d ___ (2017 WL 1131821 at p. 2).)

3. Student v. Liberty Union High School District
   May 17, 2017 2017040078
Judge: Charles Marson

ISSUE

Did Liberty wrongfully determine that Student’s conduct on January 19, 2017, for which he was suspended and expelled, was:
   a. Not caused by, or have a direct and substantial relationship to, his disabilities; or
   b. Not a direct result of Liberty’s failure to implement his March 2, 2016 individualized education program?¹
4. Riverside Unified School District
Judge: Linda Johnson

LEGAL CONCLUSIONS

5. The Supreme Court’s recent decision in Endrew F. v. Douglas County Sch. Dist. RE-1 (2017) 580 U.S. _____, 137 S.Ct. 988 (2017 WL 1066260) reaffirmed that to meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances. The Ninth Circuit further refined the standard in M.C. v. Antelope Valley Unified Sch. Dist. (9th Cir 2017) 852 F.3d 840, stating that that an IEP should be reasonably calculated to remediate and, if appropriate, accommodate the child’s disabilities so as to enable progress commensurate with non-disabled peers, taking into account the child’s potential.

5. Student v. Sylvan Union School District
Judge: Christine Arden

DECISION

Student filed a due process hearing request (complaint) with the Office of Administrative Hearings (OAH), State of California, on February 8, 2017, naming Sylvan Union School District. The matter was continued for good cause on March 30, 2017. ¹

¹ District served Student with its response to Student’s complaint on February 16, 2017, which permitted the hearing to go forward. (M.C. v. Antelope Valley Unified Sch. Dist. (9th Cir. 2017) 2017 WL 2330662, ** 6-7.)

6. Student v. Temecula Valley Unified School District; TVUSD v. Student
Judge: Paul H. Kamoroff

DECISION

Parents on behalf of Student filed a request for due process hearing with the Office of Administrative Hearings on September 26, 2016, naming Temecula Valley Unified School District. District filed a request for due process hearing with OAH on December 6, 2016, naming Student. On December 19, 2016, OAH consolidated the cases. On February 6, 2017, OAH granted the parties’ joint request to amend their complaints. ¹ On February 21, 2017, OAH granted the parties joint request to continue the consolidated matter.
LEGAL CONCLUSIONS

37. Student complains that District denied him a FAPE, by failing to offer assistive technology services during the 2014-2015 school year; failing to implement assistive technology services during the 2015-2016 school year, and; failing to implement assistive technology services during the 2016-2017 school year, beginning September 23, 2016.9

9 During hearing, witness testimony suggested that District failed to implement portions of Student’s IEP that were unrelated to assistive technology. Whether District failed to implement portions of Student’s IEP, other than assistive technology, was not one of the 68 issues specified for this matter and was not fully litigated during the hearing. That issue will therefore not be considered in this Decision. (M.C., supra.)

7. Student v. Bellflower Unified School District

Judge: Sabrina Kong

DECISION

Student filed a due process hearing request (complaint) with the Office of Administrative Hearings on February 7, 2017, naming Bellflower Unified School District. On March 24, 2017, OAH granted a continuance for good cause. Administrative Law Judge Sabrina Kong heard this matter in Bellflower, California, on May 24, 2017.1

8. Student v. Rialto Unified School District

Judge: Linda Johnson

CORRECTED DECISION

Parent on behalf of Student filed a due process hearing request with the Office of Administrative Hearings on December 16, 2016, naming Rialto Unified School District.2 On March 3, 2017, OAH granted Student’s request to amend the complaint. OAH continued the matter for good cause on April 6, 2017.
M.C. v. Antelope Valley Union High School District, 858 F.3d 1189 (9th Cir. 2017)

1. The previously issued July 19, 2017 decision is corrected to reflect dates in 2016 instead of 2017 in paragraphs 1, 17, 26, and 28. No other changes to the decision were made.

   Judge: Chris Butchko

EXPEDITED DECISION

Parent on behalf of Student filed an expedited due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on July 6, 2017, naming Southern Kern Unified School District. District filed a response to Student’s complaint on July 14, 2017, which permitted the hearing to go forward. (M.C. v. Antelope Valley Unified Sch. Dist. (9th Cir. 2017) 858 F.3d 1189, 1199-1200.)

10. Chaffey Joint Union School District v. Student 
    Judge: Judith L. Pasewark

LEGAL CONCLUSIONS

10. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district’s proposed program. (Gregory K. v. Longview School Dist. (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (Ibid.) For a school district’s offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district’s offer must be designed to meet the student’s unique needs, comport with the student’s IEP, and be reasonably calculated to provide the student with some educational benefit in the least restrictive environment. (Ibid.) An IEP should be reasonably calculated to remediate and, if appropriate, accommodate the child’s disabilities to enable progress commensurate with non-disabled peers, taking into account the child’s potential in light of his unique circumstances. (M.C. v. Antelope Valley Unified Sch. Dist. (9th Cir. 2017) 858 F.3d 1189, 1201.) As such the IEP constituted a FAPE for Student.

11. Student v. Colton Joint Unified School District 
    Judge: Chris Butchko

LEGAL CONCLUSIONS

5. The Supreme Court’s recent decision in Endrew F. v. Douglas County Sch. Dist. RE-1 (2017) 580 U.S. _____ [137 S.Ct. 988] reaffirmed that to meet its substantive obligation under the IDEA, a school district must offer an IEP reasonably calculated to enable a child to make progress appropriate in light
of the child’s circumstances. The Ninth Circuit further refined the standard in *M.C. v. Antelope Valley Unified School Dist.* (9th Cir. 2017) 858 F.3d 1189, 1194, 1200-1201, stating that an IEP should be reasonably calculated to remediate and, if appropriate, accommodate the child’s disabilities so as to enable the child to make progress in the curriculum, taking into account the child’s potential.
Timothy O. v Paso Robles Unified School District
822 F.3d 1105

1. Tracy USD v. Student  
June 8, 2017  
2017010024  
Judge: Theresa Ravandi

LEGAL CONCLUSIONS

17. The purpose of a special education assessment is to identify a student’s unique and individualized needs. The IDEA and California state law require that a school district assess a student in all areas of suspected disability. (20 U.S.C. § 1414(b)(3)(B); See 34 C.F.R. § 300.304(c)(4) and Ed. Code, § 56320, subd. (f) [child must be assessed in all areas related to the suspected disability].) Children who may be eligible for special education “must be evaluated and assessed for all suspected disabilities so that the school district can begin the process of determining what special education and related services will address the child’s individual needs.” (Timothy O. v. Paso Robles Unified School Dist. (9th Cir. 2016) 822 F.3d 1105, 1110, cert. denied (Apr. 17, 2017, No. 16-672) ___ S.Ct. ___; [2017 WL 1366731] (Timothy O.).)

18. Given the importance of assessments, the IDEA and accompanying regulations set forth an extensive set of procedural safeguards to ensure that evaluations achieve “a complete result that can be reliably used to create an appropriate and individualized educational plan tailored to the needs of the child.” (Timothy O., supra, 822 F.3d 1105, 1110,) A district must, therefore, ensure that the evaluation is sufficiently comprehensive to identify all of the child’s needs for special education and related services, whether or not commonly linked to the identified disability category. (34 C.F.R. § 300.304(c)(6); Letter to Baus (2015 OSEP) 65 IDELR 81 [right to request an independent evaluation in an area district failed to assess].) A school district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent. (20 U.S.C. § 1414(b)(2)(A); 34 C.F.R. § 300.304(b)(1); see also Ed. Code, § 56320, subd. (b)(1).)

23. Tracy did assess Student’s language needs by means of the Oral Language Battery as well as through Ms. Edache’s separate speech and language assessment which is not at issue in this hearing. That Ms. Magdaleno did not collaborate with Ms. Edache did not render the psycho-educational assessment legally deficient. Tracy administered test instruments that assessed Student in the areas of attention, executive functioning, memory, and processing. The results from the assessment tools did not indicate a need for additional testing in these areas. Although Dr. Schiff would have referred Student to a licensed audiologist for an audiological assessment, such a referral is not required unless a student continues to fail a threshold hearing test. (Cal. Code Regs., tit. 5, § 3028.) Tracy’s testing was sufficiently comprehensive to establish that Student had an auditory processing deficit. Tracy also adequately assessed Student’s visual processing by means of the Visual Motor Integration test, and the Spatial Cluster of the Differential Abilities Scales. Tracy’s failure to adequately explain its conclusion that Student did not have a visual processing deficit rendered the assessment report inadequate, rather than the underlying assessment.
14. A disability is “suspected,” and a child must be assessed, when the district is on notice that the child has displayed symptoms of that particular disability or disorder. (Timothy O. v. Paso Robles Unified School Dist. (9th Cir. 2016) 822 F.3d 1105, 1119.) A district cannot circumvent that responsibility by way of informal observations or the subjective opinion of a school employee. (Ibid.) Such notice may come in the form of concerns expressed by parents about the child’s symptoms, opinions expressed by informed outside experts, or other less formal indicators, such as the child’s behavior. (Id. at pp. 1120-1121 [citing Pasatiempo by Pasatiempo v. Aizawa (9th Cir. 1996) 103 F.3d 796 and N.B. v. Hellgate Elementary School Dist. (9th Cir. 2008) 541 F.3d 1202].)

18. A school district’s failure to conduct appropriate assessments or to assess in all areas of suspected disability may constitute a procedural denial of a FAPE. (Timothy O. v. Paso Robles Unified School Dist. (9th Cir. 2016) 822 F.3d 1105, 1124-1127.) Procedural flaws do not automatically require a finding of a denial of FAPE. A procedural violation does not constitute a denial of FAPE unless it (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(i)-(iii); Ed. Code, § 56505, subd. (f); W.G. v. Board of Trustees of Target Range School Dist. No. 23 (9th Cir. 1992) 960 F.2d 1479, 1483-1484.)(superseded on other grounds by 20 U.S.C. § 1414(d)(1)(B).) Procedural violations constitute a denial of FAPE when such violations resulted in a loss of educational opportunity to the student or interfered with the parent's opportunity to participate in the IEP formulation process. (Ed. Code, § 56505, subd. (j).)

19. The informed involvement of parents is central to the IEP process. (Winkelman v. Parma City School Dist. (2007) 550 U.S. 516, 524 [127 S.Ct. 1994.] Protection of parental participation is “[a]mong the most important procedural safeguards” in the IDEA. (Amanda J. v. Clark County School Dist. (9th Cir. 2001) 267 F.3d 877, 882.) The Ninth Circuit Court of Appeals in Timothy O. held a school district’s failure to assess Student may result in substantially hindering a parent’s ability to participate in a child’s educational program, and seriously deprive the child’s parents, teachers and district staff of the information necessary to develop an appropriate educational program with appropriate supports and services for the child. Failure to assess the Student therefore resulted in a denial of FAPE. (Timothy O., supra, at pp. 1124-1126.)
22. In addition to failing to file to defend the behavior assessment or to fund an independent assessment without undue delay, and the procedural failures, which alone provide the basis for the award of the payment of the IEE, the functional behavior assessment and the report failed to meet the substantive standards of state and federal law. It was not comprehensive and the analysis employed was not thorough, accurate or reliable. (Timothy O. v. Paso Robles Unified School Dist. (9th Cir. 2016) 822 F.3d 1105, 1121, cert. denied (Apr. 17, 2017, No. 16-672) S.Ct.; [2017 WL 1366731] (Timothy O.); Ed. Code § 56320 subd. (b)(2) and (f.).

23. The purpose of a special education assessment is to identify a student’s unique and individualized needs. The IDEA and California state law require that a school district assess a student in all areas of a suspected disability. (20 U.S.C. § 1414(b)(3)(B); See C.F.R. § 300.304(c)(4) and Ed. Code, § 56320, subd. (f) [child must be assessed in all areas related to the suspected disability].) Children who may be eligible for special education “must be evaluated and assessed for all suspected disabilities so that the school district can begin the process of determining what special education and related services will address the child’s individual needs.” (Timothy O., supra, 822 F.3d. at p.1110.)

24. Given the importance of assessments, the IDEA and accompanying regulations set forth an extensive set of procedural safeguards to ensure that evaluations achieve “a complete result that can be reliably used to create an appropriate and individualized educational plan tailored to the needs of the child.” (Timothy O., supra, 822 F.3d. at p.1110.) A district must, therefore, ensure that the evaluation is sufficiently comprehensive to identify all of the child’s needs for special education and related services, whether or not commonly linked to the identified disability category. (34 C.F.R. § 300.304(c)(6); Letter to Baus (2015 OSEP) 65 IDELR 81 [right to request an independent evaluation in an area district failed to assess].) A school district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent. (20 U.S.C. § 1414(b)(2)(A); 34 C.F.R. § 300.304(b)(1); see also Ed. Code, § 56320, subd. (b)(10.).

29. Another concern raised by the functional behavior assessment is that Ms. Foster testified that it was limited to only the behaviors of elopement and physical aggression despite the fact that additional behaviors were impeding Student’s ability to access his education.8 Ms. Foster explained that these were Parents’ priorities for Student when the behavior assessment and behavior intervention plan were done. However, not only were the terms not well defined, in limiting the assessment to only the behaviors to be targeted by the behavior plan, the functional behavior assessment fails to provide a comprehensive assessment of Student in all areas related to the suspected disability. (Timothy O., supra, 822 F.3d. at p.1110; Ed. Code § 56320, subdivision (f.).)
ASSESSMENT PROCESS AND RIGHTS RELATED THERETO

1. 20 U.S.C. Section 1414(a)

2. 34 C.F.R. Section 300.9

3. California Education Code Section 56321

4. California Education Code Section 56327

5. California Education Code Section 56329

6. 5 California Code of Regulations Section 3022


8. Examples of References In OAH Decisions
§ 1414. Evaluations, eligibility determinations, individualized..., 20 USCA § 1414

United States Code Annotated
Title 20. Education
   Chapter 33. Education of Individuals with Disabilities (Refs & Annos)
      Subchapter II. Assistance for Education of All Children with Disabilities

20 U.S.C.A. § 1414

§ 1414. Evaluations, eligibility determinations, individualized education programs, and educational placements

Effective: October 1, 2016
Currentness

(a) Evaluations, parental consent, and reevaluations

(1) Initial evaluations

   (A) In general

   A State educational agency, other State agency, or local educational agency shall conduct a full and individual initial evaluation in accordance with this paragraph and subsection (b), before the initial provision of special education and related services to a child with a disability under this subchapter.

   (B) Request for initial evaluation

   Consistent with subparagraph (D), either a parent of a child, or a State educational agency, other State agency, or local educational agency may initiate a request for an initial evaluation to determine if the child is a child with a disability.

   (C) Procedures

   (i) In general

   Such initial evaluation shall consist of procedures--

   (I) to determine whether a child is a child with a disability (as defined in section 1401 of this title) within 60 days of receiving parental consent for the evaluation, or, if the State establishes a timeframe within which the evaluation must be conducted, within such timeframe; and

   (II) to determine the educational needs of such child.

   (ii) Exception
The relevant timeframe in clause (i)(I) shall not apply to a local educational agency if--

(I) a child enrolls in a school served by the local educational agency after the relevant timeframe in clause (i)(I) has begun and prior to a determination by the child's previous local educational agency as to whether the child is a child with a disability (as defined in section 1401 of this title), but only if the subsequent local educational agency is making sufficient progress to ensure a prompt completion of the evaluation, and the parent and subsequent local educational agency agree to a specific time when the evaluation will be completed; or

(II) the parent of a child repeatedly fails or refuses to produce the child for the evaluation.

(D) Parental consent

(i) In general

(I) Consent for initial evaluation

The agency proposing to conduct an initial evaluation to determine if the child qualifies as a child with a disability as defined in section 1401 of this title shall obtain informed consent from the parent of such child before conducting the evaluation. Parental consent for evaluation shall not be construed as consent for placement for receipt of special education and related services.

(II) Consent for services

An agency that is responsible for making a free appropriate public education available to a child with a disability under this subchapter shall seek to obtain informed consent from the parent of such child before providing special education and related services to the child.

(ii) Absence of consent

(I) For initial evaluation

If the parent of such child does not provide consent for an initial evaluation under clause (i)(I), or the parent fails to respond to a request to provide the consent, the local educational agency may pursue the initial evaluation of the child by utilizing the procedures described in section 1415 of this title, except to the extent inconsistent with State law relating to such parental consent.

(II) For services

If the parent of such child refuses to consent to services under clause (i)(II), the local educational agency shall not provide special education and related services to the child by utilizing the procedures described in section 1415 of this title.
(III) Effect on agency obligations

If the parent of such child refuses to consent to the receipt of special education and related services, or the parent fails to respond to a request to provide such consent--

(aa) the local educational agency shall not be considered to be in violation of the requirement to make available a free appropriate public education to the child for the failure to provide such child with the special education and related services for which the local educational agency requests such consent; and

(bb) the local educational agency shall not be required to convene an IEP meeting or develop an IEP under this section for the child for the special education and related services for which the local educational agency requests such consent.

(iii) Consent for wards of the State

(I) In general

If the child is a ward of the State and is not residing with the child's parent, the agency shall make reasonable efforts to obtain the informed consent from the parent (as defined in section 1401 of this title) of the child for an initial evaluation to determine whether the child is a child with a disability.

(II) Exception

The agency shall not be required to obtain informed consent from the parent of a child for an initial evaluation to determine whether the child is a child with a disability if--

(aa) despite reasonable efforts to do so, the agency cannot discover the whereabouts of the parent of the child;

(bb) the rights of the parents of the child have been terminated in accordance with State law; or

(cc) the rights of the parent to make educational decisions have been subrogated by a judge in accordance with State law and consent for an initial evaluation has been given by an individual appointed by the judge to represent the child.

(E) Rule of construction

The screening of a student by a teacher or specialist to determine appropriate instructional strategies for curriculum implementation shall not be considered to be an evaluation for eligibility for special education and related services.

(2) Reevaluations
(A) In general

A local educational agency shall ensure that a reevaluation of each child with a disability is conducted in accordance with subsections (b) and (c)--

(i) if the local educational agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or

(ii) if the child's parents or teacher requests a reevaluation.

(B) Limitation

A reevaluation conducted under subparagraph (A) shall occur--

(i) not more frequently than once a year, unless the parent and the local educational agency agree otherwise; and

(ii) at least once every 3 years, unless the parent and the local educational agency agree that a reevaluation is unnecessary.

(b) Evaluation procedures

(1) Notice

The local educational agency shall provide notice to the parents of a child with a disability, in accordance with subsections (b)(3), (b)(4), and (c) of section 1415 of this title, that describes any evaluation procedures such agency proposes to conduct.

(2) Conduct of evaluation

In conducting the evaluation, the local educational agency shall--

(A) use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining--

(i) whether the child is a child with a disability; and

(ii) the content of the child's individualized education program, including information related to enabling the child to be involved in and progress in the general education curriculum, or, for preschool children, to participate in appropriate activities;
(B) not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child; and

(C) use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

(3) Additional requirements

Each local educational agency shall ensure that--

(A) assessments and other evaluation materials used to assess a child under this section--

(i) are selected and administered so as not to be discriminatory on a racial or cultural basis;

(ii) are provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is not feasible to so provide or administer;

(iii) are used for purposes for which the assessments or measures are valid and reliable;

(iv) are administered by trained and knowledgeable personnel; and

(v) are administered in accordance with any instructions provided by the producer of such assessments;

(B) the child is assessed in all areas of suspected disability;

(C) assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided; and

(D) assessments of children with disabilities who transfer from 1 school district to another school district in the same academic year are coordinated with such children's prior and subsequent schools, as necessary and as expeditiously as possible, to ensure prompt completion of full evaluations.

(4) Determination of eligibility and educational need

Upon completion of the administration of assessments and other evaluation measures--
(A) the determination of whether the child is a child with a disability as defined in section 1401(3) of this title and the educational needs of the child shall be made by a team of qualified professionals and the parent of the child in accordance with paragraph (5); and

(B) a copy of the evaluation report and the documentation of determination of eligibility shall be given to the parent.

(5) Special rule for eligibility determination

In making a determination of eligibility under paragraph (4)(A), a child shall not be determined to be a child with a disability if the determinant factor for such determination is--

(A) lack of appropriate instruction in reading, including in the essential components of reading instruction (as defined in section 6368(3) of this title, as such section was in effect on the day before December 10, 2015);

(B) lack of instruction in math; or

(C) limited English proficiency.

(6) Specific learning disabilities

(A) In general

Notwithstanding section 1406(b) of this title, when determining whether a child has a specific learning disability as defined in section 1401 of this title, a local educational agency shall not be required to take into consideration whether a child has a severe discrepancy between achievement and intellectual ability in oral expression, listening comprehension, written expression, basic reading skill, reading comprehension, mathematical calculation, or mathematical reasoning.

(B) Additional authority

In determining whether a child has a specific learning disability, a local educational agency may use a process that determines if the child responds to scientific, research-based intervention as a part of the evaluation procedures described in paragraphs (2) and (3).

(c) Additional requirements for evaluation and reevaluations

(1) Review of existing evaluation data

As part of an initial evaluation (if appropriate) and as part of any reevaluation under this section, the IEP Team and other qualified professionals, as appropriate, shall--
(A) review existing evaluation data on the child, including--

(i) evaluations and information provided by the parents of the child;

(ii) current classroom-based, local, or State assessments, and classroom-based observations; and

(iii) observations by teachers and related services providers; and

(B) on the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine--

(i) whether the child is a child with a disability as defined in section 1401(3) of this title, and the educational needs of the child, or, in case of a reevaluation of a child, whether the child continues to have such a disability and such educational needs;

(ii) the present levels of academic achievement and related developmental needs of the child;

(iii) whether the child needs special education and related services, or in the case of a reevaluation of a child, whether the child continues to need special education and related services; and

(iv) whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the individualized education program of the child and to participate, as appropriate, in the general education curriculum.

(2) Source of data

The local educational agency shall administer such assessments and other evaluation measures as may be needed to produce the data identified by the IEP Team under paragraph (1)(B).

(3) Parental consent

Each local educational agency shall obtain informed parental consent, in accordance with subsection (a)(1)(D), prior to conducting any reevaluation of a child with a disability, except that such informed parental consent need not be obtained if the local educational agency can demonstrate that it had taken reasonable measures to obtain such consent and the child's parent has failed to respond.

(4) Requirements if additional data are not needed

If the IEP Team and other qualified professionals, as appropriate, determine that no additional data are needed to determine whether the child continues to be a child with a disability and to determine the child's educational needs, the local educational agency--
(A) shall notify the child's parents of--

(i) that determination and the reasons for the determination; and

(ii) the right of such parents to request an assessment to determine whether the child continues to be a child with a disability and to determine the child's educational needs; and

(B) shall not be required to conduct such an assessment unless requested to by the child's parents.

(5) Evaluations before change in eligibility

(A) In general

Except as provided in subparagraph (B), a local educational agency shall evaluate a child with a disability in accordance with this section before determining that the child is no longer a child with a disability.

(B) Exception

(i) In general

The evaluation described in subparagraph (A) shall not be required before the termination of a child's eligibility under this subchapter due to graduation from secondary school with a regular diploma, or due to exceeding the age eligibility for a free appropriate public education under State law.

(ii) Summary of performance

For a child whose eligibility under this subchapter terminates under circumstances described in clause (i), a local educational agency shall provide the child with a summary of the child's academic achievement and functional performance, which shall include recommendations on how to assist the child in meeting the child's postsecondary goals.

(d) Individualized education programs

(1) Definitions

In this chapter:

(A) Individualized education program
As part of the assessment plan given to parents or guardians pursuant to Section 56321, the parent or guardian of the pupil shall be provided with a written notice that shall include all of the following information:

(a)(1) Upon completion of the administration of tests and other assessment materials, an individualized education program team meeting, including the parent or guardian and his or her representatives, shall be scheduled, pursuant to Section 56341, to determine whether the pupil is an individual with exceptional needs as defined in Section 56026, and to discuss the assessment, the educational recommendations, and the reasons for these recommendations.

(2) In making a determination of eligibility under paragraph (1), a pupil shall not, pursuant to Section 1414(b)(5) of Title 20 of the United States Code, and Section 300.306(b) of Title 34 of the Code of Federal Regulations, be determined to be an individual with exceptional needs if the determinant factor for the determination is one of the following in subparagraphs (A) to (C), inclusive, plus subparagraph (D):

(A) Lack of appropriate instruction in reading, including the essential components of reading instruction as defined in Section 6368(3) of Title 20 of the United States Code.

(B) Lack of appropriate instruction in mathematics.

(C) Limited-English proficiency.

(D) If the pupil does not otherwise meet the eligibility criteria under Section 300.8(a) of Title 34 of the Code of Federal Regulations.

(3) A copy of the assessment report and the documentation of determination of eligibility shall be given to the parent or guardian.
§ 56329. Notice to parents or guardians; independent... 

(b) A parent or guardian has the right to obtain, at public expense, an independent educational assessment of the pupil from qualified specialists, as defined by regulations of the board, if the parent or guardian disagrees with an assessment obtained by the public education agency, in accordance with Section 300.502 of Title 34 of the Code of Federal Regulations. A parent or guardian is entitled to only one independent educational assessment at public expense each time the public education agency conducts an assessment with which the parent or guardian disagrees. If a public education agency observed the pupil in conducting its assessment, or if its assessment procedures make it permissible to have in-class observation of a pupil, an equivalent opportunity shall apply to an independent educational assessment of the pupil in the pupil's current educational placement and setting, and observation of an educational placement and setting, if any, proposed by the public education agency, regardless of whether the independent educational assessment is initiated before or after the filing of a due process hearing proceeding.

(c) The public education agency may initiate a due process hearing pursuant to Chapter 5 (commencing with Section 56500) to show that its assessment is appropriate. If the final decision resulting from the due process hearing is that the assessment is appropriate, the parent or guardian maintains the right for an independent educational assessment, but not at public expense.

If the parent or guardian obtains an independent educational assessment at private expense, the results of the assessment shall be considered by the public education agency with respect to the provision of free appropriate public education to the child, and may be presented as evidence at a due process hearing pursuant to Chapter 5 (commencing with Section 56500) regarding the child. If a public education agency observed the pupil in conducting its assessment, or if its assessment procedures make it permissible to have in-class observation of a pupil, an equivalent opportunity shall apply to an independent educational assessment of the pupil in the pupil's current educational placement and setting, and observation of an educational placement and setting, if any, proposed by the public education agency, regardless of whether the independent educational assessment is initiated before or after the filing of a due process hearing proceeding.

(d) If a parent or guardian proposes a publicly financed placement of the pupil in a nonpublic school, the public education agency shall have an opportunity to observe the proposed placement and the pupil in the proposed placement, if the pupil has already been unilaterally placed in the nonpublic school by the parent or guardian. An observation conducted pursuant to this subdivision shall only be of the pupil who is the subject of the observation and shall not include the observation or assessment of any other pupil in the proposed placement. The observation or assessment by a public education agency of a pupil other than the pupil who is the subject of the observation pursuant to this subdivision may be conducted, if at all, only with the consent of the parent or guardian pursuant to this article. The results of an observation or assessment of any other pupil in violation of this subdivision shall be inadmissible in a due process or judicial proceeding regarding the free appropriate public education of that other pupil.

Credits

Current with urgency legislation through Ch. 9 of 2018 Reg.Sess
Consent means that—

(a) The parent has been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or through another mode of communication;

(b) The parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records (if any) that will be released and to whom; and

(c)(1) The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at any time.

(2) If a parent revokes consent, that revocation is not retroactive (i.e., it does not negate an action that has occurred after the consent was given and before the consent was revoked).

(3) If the parent revokes consent in writing for their child's receipt of special education services after the child is initially provided special education and related services, the public agency is not required to amend the child's education records to remove any references to the child's receipt of special education and related services because of the revocation of consent.

(Authority: 20 U.S.C. 1414(a)(1)(D))

Credits

SOURCE: 71 FR 46755, Aug. 14, 2006; 72 FR 17781, April 9, 2007; 80 FR 23666, April 28, 2015; 82 FR 29759, June 30, 2017; 82 FR 31912, July 11, 2017, unless otherwise noted.
§ 56321. Development or revision of individualized education program; proposed assessment plan; requirements; parental consent; documentation

Effective: October 10, 2007

Currentness

(a) If an assessment for the development or revision of the individualized education program is to be conducted, the parent or guardian of the pupil shall be given, in writing, a proposed assessment plan within 15 days of the referral for assessment not counting days between the pupil's regular school sessions or terms or days of school vacation in excess of five schooldays from the date of receipt of the referral, unless the parent or guardian agrees, in writing, to an extension. However, in any event, the assessment plan shall be developed within 10 days after the commencement of the subsequent regular school year or the pupil's regular school term as determined by each district's school calendar for each pupil for whom a referral has been made 10 days or less prior to the end of the regular school year. In the case of pupil school vacations, the 15-day time shall recommence on the date that the pupil's regular schooldays reconvene. A copy of the notice of a parent's or guardian's rights shall be attached to the assessment plan. A written explanation of all the procedural safeguards under the federal Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 et seq.), and the rights and procedures contained in Chapter 5 (commencing with Section 56500), shall be included in the notice of a parent's or guardian's rights, including information on the procedures for requesting an informal meeting, prehearing mediation conference, mediation conference, or due process hearing; the timelines for completing each process; whether the process is optional; and the type of representative who may be invited to participate.

(b) The proposed assessment plan given to parents or guardians shall meet all the following requirements:

(1) Be in language easily understood by the general public.

(2) Be provided in the native language of the parent or guardian or other mode of communication used by the parent or guardian, unless to do so is clearly not feasible.

(3) Explain the types of assessments to be conducted.

(4) State that no individualized education program will result from the assessment without the consent of the parent.
(c)(1) The local educational agency proposing to conduct an initial assessment to determine if the child qualifies as an individual with exceptional needs shall make reasonable efforts to obtain informed consent from the parent of the child before conducting the assessment, in accordance with Section 1414(a)(1)(D) of Title 20 of the United States Code.

(2) If the parent of the child does not provide consent for an initial assessment, or the parent fails to respond to a request to provide the consent, the local educational agency may, but is not required to, pursue the initial assessment utilizing the procedures described in Section 1415 of Title 20 of the United States Code and in accordance with paragraph (3) of subdivision (a) of Section 56501 and subdivision (e) of Section 56506.

(3) In accordance with Section 300.300(a)(3)(ii) of Title 34 of the Code of Federal Regulations, the local educational agency does not violate its obligation under Section 300.111 and Sections 300.301 to 300.311, inclusive, of Title 34 of the Code of Federal Regulations if it declines to pursue the assessment.

(4) The parent or guardian shall have at least 15 days from the receipt of the proposed assessment plan to arrive at a decision. The assessment may begin immediately upon receipt of the consent.

(d) Consent for initial assessment shall not be construed as consent for initial placement or initial provision of special education and related services to an individual with exceptional needs, pursuant to Section 1414(a)(1)(D)(i)(I) of Title 20 of the United States Code.

(e) In accordance with Section 300.300(d)(1) of Title 34 of the Code of Federal Regulations, parental consent is not required before reviewing existing data as part of an assessment or reassessment, or before administering a test or other assessment that is administered to all children, unless before administration of that test or assessment, consent is required of the parents of all the children.

(f) Pursuant to Section 1414(a)(1)(E) of Title 20 of the United States Code, the screening of a pupil by a teacher or specialist to determine appropriate instructional strategies for curriculum implementation shall not be considered to be an assessment for eligibility for special education and related services.

(g) In accordance with Section 300.300(d)(5) of Title 34 of the Code of Federal Regulations, to meet the reasonable efforts requirement in subdivision (c), the local educational agency shall document its attempts to obtain parental consent using the procedures in subdivision (h) of Section 56341.5.

Credits


Current with urgency legislation through Ch. 9 of 2018 Reg.Sess
§ 56327. Results; reports, CA EDUC § 56327

Currentness

The personnel who assess the pupil shall prepare a written report, or reports, as appropriate, of the results of each assessment. The report shall include, but not be limited to, all the following:

(a) Whether the pupil may need special education and related services.

(b) The basis for making the determination.

(c) The relevant behavior noted during the observation of the pupil in an appropriate setting.

(d) The relationship of that behavior to the pupil's academic and social functioning.

(e) The educationally relevant health and development, and medical findings, if any.

(f) For pupils with learning disabilities, whether there is such a discrepancy between achievement and ability that it cannot be corrected without special education and related services.

(g) A determination concerning the effects of environmental, cultural, or economic disadvantage, where appropriate.

(h) The need for specialized services, materials, and equipment for pupils with low incidence disabilities, consistent with guidelines established pursuant to Section 56136.

Credits

§ 3022. Assessment Plan.

In addition to the assessment plan requirements of Education Code section 56321, the proposed written assessment plan shall include a description of any recent assessments conducted, including any available independent assessments and any assessment information the parent requests to be considered, and information indicating the pupil's primary language and the pupil's language proficiency in the primary language as determined by Education Code section 52164.1.

Note: Authority cited: Section 56100, Education Code. Reference: Sections 56321 and 56329, Education Code; and 34 C.F.R. Sections 300.301, 300.302, 300.303, 300.304 and 300.305.

HISTORY

1. Change without regulatory effect amending section and Note filed 9-27-2012 pursuant to section 100, title 1, California Code of Regulations (Register 2012, No. 39).

This database is current through 3/23/18 Register 2018, No. 12

5 CCR § 3022, 5 CA ADC § 3022
MEMORANDUM AND ORDER

MORRISON C. ENGLAND, JR., UNITED STATES DISTRICT JUDGE

*1 Through the present lawsuit, Plaintiff A.V. (“Plaintiff”), by his parent and guardian ad litem, Concepcion Varela (“Plaintiff’s mother” or “Ms. Varela”), challenges various actions taken by Defendant Panama–Buena Vista School District (“District” or “Panama”) with respect to A.V.’s educational placement. Plaintiff has already pursued two special education “due process” proceedings in accordance with the provisions of the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, et seq. (“IDEA”), to rectify what he alleges were unlawful steps taken by the District against him. He now appeals adverse decisions rendered by the Office of Administrative Hearings (“OAH”) following those proceedings. In addition to IDEA violations, Plaintiff claims violations of § 504 of the Rehabilitation Act of 1973, 29 U.SC. § 701 et seq. (“Section 504”) as well as claims for discrimination and retaliation on the basis of disability and national origin under both Section 504 and Title II of the Americans with Disabilities Act. 1

Presently before the Court is Plaintiff’s Motion for Summary Judgment—Appeal of Administrative Hearing Decisions (ECF No. 116). As set forth below, that Motion is DENIED and the appealed determinations made by the OAH are AFFIRMED. 2

BACKGROUND 3
Plaintiff’s mother enrolled A.V. at the District’s Stonecreek Junior High School prior to the first day of the 2014–15 school term. A.V. was twelve years old at the time of that enrollment. On August 18, 2014, the first day of school, Ms. Varela provided the District with a copy of A.V.’s most recent Section 504 plan along with a behavioral support plan from the Bakersfield City School District (“BCSD”) where A.V. had previously attended classes. The Section 504 and behavioral support plans were apparently developed given A.V.’s medical diagnosis of Attention Deficit Hyperactivity Disorder (“ADHD”).

A.V. began to have behavioral incidents at school as early as August 21, 2014, just three days after classes commenced. He was referred to the office that day for provoking a fight with another student and for being combative. The District requested A.V.’s student records from BCSD that day, and those records were obtained on September 5, 2014. The records showed a history of multiple incidents during the preceding school year that required discipline, including suspensions. E–AR 369–97. BCSD conducted a psychoeducational evaluation of A.V. between February and April of 2013 and assessed his cognitive, academic, and social/emotional functioning. See ECF No. 96–3. The report concluded that A.V. had average intelligence, that his academic abilities ranged from average to high average, and that he was unlikely to be autistic. Id. at p. 25. The report further concluded that although A.V. had “an apparent disorder in one or more of the basic psychological processes,” that disorder did not hinder his ability “to acquire academic skills and function in a general education classroom.” Id. BCSD thereafter convened an Individualized Educational Plan (“IEP”) meeting to consider and discuss the results of the psychoeducational assessment and to determine whether A.V. was eligible for special education and related services. Id. The IEP team concluded that A.V. was not eligible. ECF 96–4 at p. 6.

On August 27, 2014, A.V. allegedly threatened to injure another student at Stonecreek and was also purported to have bullied, intentionally harassed and intimidated a group of students. This caused the District to suspend A.V. for two days. That same day, however, the District held a Section 504 team meeting and developed a Section 504 Accommodation Plan for A.V. Ms. Varela attended the meeting with the assistance of a Spanish interpreter provided by the District and accompanied by an educational advocate. At that time, the District believed that A.V.’s behaviors could be addressed through accommodations in his Section 504 plan, and Plaintiff’s mother consented to the District’s proposals in that regard. In addition, the District presented and explained a general education behavior contract to Ms. Varela and to A.V., which they signed and understood. Ms. Varela did not indicate at this time that her son had any disability that would interfere with his ability to comply with the contract. There is also no indication that she asked for a referral for special education at that time.

Despite A.V.’s behavior contract, he was referred to the office twice on September 3 and 4, 2014, for poor attitude and profanity. In addition, on September 5, 2014, A.V. received five days of lunch detention for showing disrespect to another student. Then, on September 11, 2014, after the District intervention counselor observed A.V. grabbing a female student’s buttocks, A.V. was suspended for an additional three days, and the District scheduled a Section 504 “Manifestation Determination” meeting for September 18, 2014. 4 In the meantime, on September 15, 2014, Plaintiff’s mother sent the District a handwritten letter in English requesting that A.V. be assessed for eligibility for special education services. Thereafter, at the September 18, 2014 meeting, the District’s psychologist told Ms. Varela, who again participated through a Spanish interpreter, that the District wanted to assess A.V. for special education (it appears that the psychologist was not aware of Ms. Varela’s recent letter at that time). This was approximately twenty-two days following A.V.’s enrollment in the District for the 2014–15 school year. Consequently, while the District initially thought that A.V.’s behavior was not necessarily inconsistent with the behavior of many seventh grade boys adjusting to junior high school, within about three weeks it determined that he in fact needed to be further assessed for disability purposes.

After Plaintiff’s mother told District staff that she thought A.V. did better with male teachers and counselors, the District recommended that A.V. transfer to Thompson Junior High School where more support from male staff members was available. Ms. Varela consented to that transfer.
A.V. began attending Thompson the following day, September 19, 2014. On September 22, 2014, school psychologist Brittany Gentry generated a “Consent for Assessment” of A.V.’s special education eligibility that included both a functional behavioral assessment and an evaluation of any emotional disturbance and specific learning disability. Ms. Gentry made that decision both because of Ms. Varela's concerns and because she believed A.V.’s numerous defiant and inappropriate behaviors made such an evaluation appropriate. According to the District, it mailed the Consent for Assessment to Ms. Varela at her address of record and it was not returned. The initial Consent form was generated in English because that was the language Defendant’s mother had used in her written letter requesting a special education evaluation.

Nonetheless, in a subsequent Section 504 amendment meeting on October 7, 2014, which Ms. Varela attended, District Special Education Assistant Director Janet Clark claims she provided Plaintiff's mother with, and reviewed, a Spanish language version of the September 22, 2014 assessment. Ms. Clark and school psychologist Matt Harper allegedly told Ms. Varela why the District wanted to perform an assessment of her son, explaining that an evaluation was needed before determining what additional supports and services A.V. might need. Plaintiff's mother declined to sign the Consent, stating that she wanted to discuss it with her husband and would return it the following day. When Ms. Varela failed to do so, the District sent another Consent for Assessment form, also in Spanish, to her home address. That form was not signed and returned, either.

*3 Between August 21, 2014 and October 6, 2014, A.V. was suspended a total of six school days. On October 2, 2014, for example, he was suspended for three days for making sexual gestures towards a female student. Despite numerous efforts on the District’s part to obtain Ms. Varela’s consent to special education assessment, she did not sign the Consent form until January 6, 2015, nearly four months after the District initially requested it and on the first day of A.V.’s expedited OAH hearing. Thereafter, the District undertook comprehensive assessments of A.V. and convened an IEP team meeting on March 2, 2015. The team ultimately determined that A.V. qualified for special education and related services, under a primary disabling condition of emotional disturbance and a secondary disabling condition of other health impairment.

On October 6, 2014, Plaintiff’s mother, through her attorney, filed an expedited due process hearing request with the OAH on grounds that A.V. was entitled to a special education manifestation determination since he had suffered multiple class and school removals as discipline for school behaviors. According to the request, Plaintiff's mother had requested an evaluation on September 14, 2014, but the District had nonetheless failed to afford her and A.V. their rights under the IDEA. A hearing on the expedited claim was scheduled for November 4, 2014. Plaintiff’s counsel filed a request to dismiss the expedited claim the afternoon before the hearing was scheduled to commence, however, on grounds that she had “just realized” that A.V. did not meet the criteria for an expedited hearing since the District’s records showed fewer than eleven days of suspensions prior to October 6, 2014. This prompted the District, on November 4, 2014, to move for sanctions on grounds that the expedited complaint was frivolous. On December 10, 2014, the Administrative Law Judge (“ALJ”) assigned by the OAH issued sanctions in the amount of $1,793.50 on grounds that had Plaintiff’s counsel reviewed the District’s records prior to filing her request, she would have discovered that A.V. had not been removed from school in excess of ten days by October 6, 2014 The sanctions figure compensated the District's counsel only for her preparation for the expedited hearing between October 23, 2014, when the ALJ reasoned that Plaintiff’s counsel should have been aware that A.V. had not been suspended for enough days to support an expedited hearing request, and November 3, 2014, when Plaintiff’s counsel actually cancelled the hearing.

Despite Ms. Varela’s continued failure to sign the needed Consent for special assessment, her counsel filed, on or about November 22, 2014, an amended request for due process which ultimately resulted in expedited and non-expedited decisions. The expedited portions of her complaint in that regard take issue with the discipline A.V. had received and the fact that his disabilities had not been adequately considered. Because expedited claims have to be adjudicated in short order, the expedited claims were determined first over a three-day hearing between January 6 and 8, 2015. The expedited hearing focused on whether the District should have conducted IDEA manifestation determinations prior to A.V.’s discipline, if it was deemed to have been on notice beforehand that A.V. was a student with a disability.
The District was on notice that A.V. potentially had a disability when his mother sent her assessment request on September 15, 2014. 20 U.S.C. § 1415(K)(5)(A). Moreover, while school districts can discipline a disabled student, once the student has been removed from school longer than ten days a “change in placement” is deemed to have occurred which, in turn, requires that a manifestation hearing determination be held to determine whether the underlying misconduct is related to the student’s disability. Both of these requirements are, however, subject to an exception. If the District provides a request for assessment once a student is suspected of having a disability and if the student’s parent declines to allow an evaluation, the District no longer has a basis of knowledge that the student is disabled until the parent provides the needed consent. Id. at § 1415(k)(5)(C).

Following the expedited hearing, the ALJ found that because Plaintiff’s mother did not provide consent for assessment until after the disciplinary events occurred, it had no obligation to provide IDEA manifestation hearings before the discipline was imposed. Additionally, despite Ms. Varela’s claim that her son should have been entitled to protections on October 6, 2014, since he had been suspended in excess of ten days for disciplinary-related issues at that point, the ALJ determined that due to partial days and non-suspension absences the requisite eleven-day threshold had not been reached on October 7, 2014, when the Spanish language Consent form was provided. Moreover, the ALJ rejected Ms. Varela’s claim, as both implausible and contrary to the testimony of all the other witnesses, that she had not received any of the Consent forms until after Plaintiff was expelled on or about November 14, 2014. Given that determination, the ALJ determined that Plaintiff had no IDEA protection available prior to his expulsion, either.

Plaintiff’s second hearing, which encompassed his non-expedited claims, was conducted later, between April 15, 2015, and April 17, 2015. That hearing adjudicated claims that the District had failed to timely assess A.V. in all areas of suspected need for special education placements, as well as claims that the District had deprived Ms. Varela of the opportunity to meaningfully participate in A.V.’s IDEA program by failing to translate disciplinary documents into Spanish. The hearing took place over the course of three days between April 15, 2015, and April 17, 2015. The OAH’s resulting decision, dated June 11, 2015, was in A.V.’s favor to the extent the hearing officer concluded that the District had sufficient information between August 18, 2014, and October 6, 2014, to trigger its duty to assess A.V. for special education eligibility. Nonetheless, given Ms. Varela’s repeated failure to return the Consent form in a timely fashion once it had been provided to her as delineated above, the hearing officer found that no IDEA child-find obligation was breached after October 7, 2014. In addition, the hearing officer rejected A.V.’s claim that the District had to translate all disciplinary documents from A.V.’s cumulative file for Ms. Varela, or to provide Ms. Varela written explanations in Spanish for each disciplinary event, in order to ensure her meaningful participation in the IDEA process.

Plaintiff instituted the present proceeding on February 7, 2015, after the ALJ ruled against him on or about January 23, 2015, on his expedited claims, and following the sanctions order against Plaintiff’s counsel on December 10, 2014. On August 28, 2015, A.V. filed a First Amended Complaint which appealed, in addition to the OAH’s January 23, 2015, decision and the sanctions order, also the OAH’s June 11, 2015, decision on the non-expedited portions of Plaintiff’s claim.

In now moving for summary judgment, Plaintiff seeks a reversal of the ALJ’s decision in the expedited hearing that he was not entitled to a manifestation hearing as of October 6, 2014, or alternatively by November 14, 2014, prior to his expulsion. In addition, Plaintiff seeks a ruling that the District denied him FAPE for the entire 2014–15 and 2015–16 school year by failing to properly provide a Consent form for his assessment. Plaintiff also asks the Court to make a finding that the District had a duty to either verbally translate, or translate in writing, his disciplinary records. Finally, Plaintiff’s counsel requests an order overturning the ALJ’s imposition of sanctions against her.

**STANDARD**
In adjudicating an appeal from an administrative decision regarding the rights of students with disabilities, the court is charged with receiving the record of the administrative proceeding which, in essence, forms the undisputed facts of the case. Though not a “true” motion for summary judgment, the appeal of an IDEA–based due process hearing decision is properly styled and presented by the parties in a summary judgment format. Capistrano Unified Sch. Dist. v. Wartenberg, 59 F.3d 884, 892 (9th Cir. 1995). “[T]he procedure is in substance an appeal from an administrative decision not a summary judgment.” Id.

The standard for district court review under the IDEA is set forth in 20 U.S.C. § 1415(i)(C), which provides as follows:

(i) shall receive the records of the administrative proceedings;

(ii) shall hear additional evidence at the request of a party; and (iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

This standard requires that “due weight” be given to the administrative proceedings. Anchorage School Dist. v. M.P., 689 F.3d 1047, 1053 (9th Cir. 2012); Hendrick Hudson Central Sch. Dist. v. Rowley, 458 U.S. 176, 206 (1982). The amount of deference so accorded is subject to the court’s discretion. Gregory K. v. Longview Sch. Dist., 811 F.2d 1307, 1311 (9th Cir. 1987). In making that determination, the thoroughness of the hearing officer’s findings should be considered, with the degree of deference increased where said findings are “thorough and careful”. Capistrano Unified Sch. Dist. v. Wartenberg, 59 F.3d 884, 892 (9th Cir. 1995), citing Union Sch. Dist. v. Smith, 15 F.3d 1519, 1524 (9th Cir. 1994). Such deference is appropriate because “if the district court tried the case anew, the work of the hearing officer would not receive ‘due weight,’ and would be largely wasted.” Capistrano, 59 F.3d at 891.

Because of the deference potentially accorded the administrative proceedings, complete de novo review is inappropriate. Anchorage School Dist. v. M.P., 689 F.3d at 1053.; Amanda J. v. Clark County Sch. Dist., 267 F.3d 877, 887 (9th Cir. 2001). Instead, the district court must make an independent judgment based on a preponderance of the evidence and giving due weight to the hearing officer’s determination. Capistrano, 59 F.3d at 892. After such determination, the court is free to accept or reject the hearing officer’s findings in whole or in part. Ojai Unified Sch. Dist. v. Jackson, 4 F.3d 1467, 1473–73 (9th Cir. 1993). In addition, a district conference must also grant deference to a hearing officer’s findings where those findings “are based on credibility determinations of live witness testimony.” J.S. v. Shoreline Sch. Dist., 220 F. Supp. 2d 1175, 1184 (W. D. Wash. 2002).

While the petitioning party bears the burden of proof at the administrative level, Schaffer v. Weast, 546 U.S. 49, 57 (2005), the party challenging an administrative decision in federal district court has the burden of persuasion on his or her claim. Clyde K. v. Puyallup Sch. Dist. No. 3, 35 F.3d 1396, 1399 (9th Cir. 2004).

ANALYSIS

A. Because The District Lacked The Requisite Knowledge That A.V. Was A Student With A Disability Prior To The Behavioral Incidents Giving Rise To His Expulsion, A.V. Was Not Entitled To The Procedural Protections Afforded Under The IDEA.

*6 Plaintiff claims that the ALJ erred by determining that he was not entitled to the IDEA’s procedural protection when subjected to disciplinary measures by the District, either after October 6, 2014, or alternatively by November 14, 2014, shortly prior to AV’s expulsion on November 18, 2014. After reviewing the ALJ’s decision along with the administrative record, the Court does not find any such error.

A student not yet determined to be eligible for special education can claim the IDEA’s procedural protections, including a manifestation determination hearing, if the local education authority, here the District, had a “basis for knowledge, that the student was disabled before the behavior giving rise to a disciplinary action occurred.” 20 U.S.C. § 1415(k)(5)
(A); 34 C.F.R. § 300.534(a). To the extent that a student with disabilities is removed from school more than ten days in the course of such discipline, a manifestation determination review is required inasmuch as removals exceeding that length are deemed to constitute a “change in placement.” 34 C.F.R. § 300.536.

In this matter, the critical issue is whether the District had the requisite “basis for knowledge” of A.V.’s disability. To the extent that Plaintiff’s mother requested that he be evaluated for special education services by letter dated September 15, 2014, a basis for knowledge exists. 20 U.S.C. § 1415(k)(5)(B); 34 C.F.R. § 300.534(b). Nevertheless, the District is not deemed to have knowledge if the parent has not allowed an evaluation of the student. 20 U.S.C. § 1415(k)(5)(C); 34 C.F.R. § 300.534(c). What the District must do is to make reasonable efforts to gain a parent’s informed consent for such evaluation. 34 C.F.R. 300.300(a)(iii). As long as those reasonable efforts are made, a parent’s failure to consent to special education evaluation means that his or her child can be disciplined in the same manner as students without disabilities who engage in comparable behavior. 20 U.S.C. § 1415(k)(5)(D)(1); 34 C.F.R. § 300.534(d).

Plaintiff’s mother’s September 15, 2014 request for assessment, which was handwritten in English (E–AR 401), triggered a fifteen-day period from that date within which the District had to provide a Consent for Assessment. Cal. Ed. Code § 56321(a). The evidence shows that the District provided Plaintiff’s mother with the necessary Consent for Assessment, in English, on September 22, 2014. E–AR 1156:1–5. Given the fact that Plaintiff’s mother had requested special assessment just a week earlier, in English, it was not unreasonable for the District to have initially generated the Consent for Assessment in the English language, particularly since Plaintiff’s mother had otherwise communicated with the District in English and continued to do so on many occasions. E–AR 686:9–687:8; 727:25–728:23; 737:11–17; 748:15–750:24; 1157:20–1158:8; 1295:18–1296:21; U–AR 611:13–17; 626:24–627:5; 945:2–5. In addition, after the District determined that a Spanish language Consent was necessary at the Section 504 meeting on October 6, 2014, it provided both Spanish and English consent forms, both by mail and delivered personally to Ms. Varela, all without success. Once the District requested Consent from Ms. Varela, it no longer had a basis of knowledge that A.V. was a child with a disability until his mother provided her Consent for Assessment. 20 U.S.C. § 1415(k)(5)(C). Had Plaintiff’s mother provided her Consent and permitted assessment prior to November 14, 2014, when A.V. engaged in behaviors that ultimately resulted in his expulsion from the District, he would have been entitled to a manifestation determination hearing under the IDEA beforehand. Plaintiff’s mother, however, did not give her Consent until January 6, 2015, well after Plaintiff was expelled from the District. Consequently, Plaintiff was not entitled to the protections of the IDEA before his expulsion.

*7 While Plaintiff appears to claim she never received a Consent for Assessment before November 14, 2015, the ALJ found that claim to lack credibility. As the ALJ observed:

Parent’s testimony was particularly inconsistent regarding the Consent for Assessment. She initially denied at hearing that she had ever seen the document in English or Spanish, or had it explained to her, including the English copy mailed on September 22, 2014. During the October 7, 2014, 504 amendment meeting, [Special Education Assistant Director Janet] Clark, who is a licensed school psychologist and board certified behavior analyst, asked Parent about the Consent for Assessment. Both Ms. Clark and [School psychologist Matt] Harper testified that Parent stated at the meeting that she had signed the Consent for Assessment but did not believe she was required to return it. Parent did not explain or refute Ms. Clark’s and Mr. Harper’s credible testimony.

Parent is fluent in the Spanish language, reads only a few words in Spanish and English, and speaks and understands some English. Parent’s testimony that she never saw, received or had explained to her, any of the documents from Panama, was not credible. She denied ever receiving any mail at
her home address from Panama, even though she received other mail at home. Numerous Panama witnesses consistently and credibly testified that: Panama provided a Spanish language interpreter for Section 504 meetings; various Panama staff gave detailed explanations to Parent at the meetings and occasionally spoke to her on the phone after meetings, both in English and Spanish; a Spanish speaking educational advocate accompanied Parent to the Section 504 meetings; Panama gave Parent documents at or after October 7, 2014, and explained documents at each meeting; and Panama mailed copies of documents in English and Spanish to Parent’s address of record on at least four different occasions without receiving them back as undeliverable. Student offered no credible evidence to establish that the assessment plans were never received.

Id. at ¶ 10.

This Court will not revisit the credibility determinations made by the ALJ over the course of a hearing lasting several days and entailing multiple witnesses. Moreover, given the multiple Consent for Assessment forms both mailed to Plaintiff’s mother and delivered to her during the course of multiple meetings at which a Spanish language interpreter was present and participated, her claim that she never received the assessments is unpersuasive on its very face.

Plaintiff’s allegation that the District failed to offer his mother the Consent for Assessment “by means accessible to her” completely lacks merit under the circumstances of this case. The District was required only to make reasonable efforts to obtain the necessary consent from Plaintiff’s mother, and the facts and testimony presented demonstrate that the District went the extra mile, and then some, to do so, all to no avail. Given that conclusion, and the fact that Ms. Varela did not return the Consent for Assessment form until well after the disciplinary events leading to A.V.’s expulsion occurred, under the IDEA the District was deemed to have been without knowledge that A.V. was a student with a disability at all pertinent times prior to that expulsion.

*8 In addition, despite Plaintiff’s claim to the contrary, he was not entitled to IDEA protections as of October 6, 2014, when Plaintiff’s counsel filed her original expedited request for due process. Plaintiff appears to argue that because the District did not provide Plaintiff with a Spanish-language Consent for Assessment form until October 7, 2014, and because A.V. had been suspended for in excess of ten days by October 6, his IDEA protections were triggered because the District had not yet properly requested assessment. Again, Plaintiff is wrong. Ms. Varela requested, in English, that her son be evaluated for special education purposes by handwritten letter dated September 15, 2014. Within seven days, a period well within the fifteen-day period prescribed by the California Education Code, the District generated a Consent for Assessment (also in English) and sent it to Plaintiff’s mother. This satisfied the District’s Child Find obligation with respect to Ms. Varela’s September 15, 2014 request. Moreover, even if it did not, the ALJ determined after examining all the evidence that A.V. had been suspended for a total of only six days as of October 6, 2014. The Court declines to revisit that factual determination, and believes it to be correct in any event. This means that even assuming the District did not generate a proper Consent for Assessment form until October 7, 2014, when forms in both English and Spanish were provided to Ms. Varela, discipline resulting in excess of ten days of suspension still had not occurred before the Consent for Assessment was unquestionably provided on October 7, 2014. It should also be noted in connection with this determination that even Plaintiff’s counsel conceded that the District had not suspended A.V. for the requisite period as of October 6, 2014 when she voluntarily withdrew her expedited request for due process filed at that time for failing to meet the IDEA’s prerequisites in that regard. 8

B. Because Plaintiff’s Mother Failed To Return A Signed Consent For Assessment To The District Until January 6, 2015, The District Did Not Fail To Meet Its Child Find Obligation Under The IDEA Prior To That Time.

Because this contention has already been addressed in connection with the preceding argument, any claim otherwise is also rejected as a basis for Plaintiff’s appeal.
C. The District Met Its Obligation To Ensure Plaintiff's Mother's Involvement In The Disciplinary Proceedings Leading To A.V.'s Expulsion; It Had No Duty Per Se To Translate All Disciplinary Documents Into Spanish.

Plaintiff correctly points out that “the informed involvement of parents” is central to the IDEA and its requirement that disabled children receive a free and appropriate public education. See Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 524 (2007). Consequently, protecting parental participation is deemed to be “[a]mong the [IDEA’s] most important procedural safeguards.” Amanda J. v. Clark County Sch. Dist., 267 F.3d 877, 882 (9th Cir. 2001). To that end, the law requires that local educational agencies like the District “shall take any action necessary to ensure that the parent or guardian understands the proceedings at a meeting, including arranging for an interpreter for parents or guardians...whose native language is a language other than English.” Cal. Ed. Code § 56341.5(i); see also 34 C.F.R. 300.322(3).

Meaningful participation in the special education request nonetheless is deemed to have occurred when the parent is informed of the child’s problems, attends meetings, expresses disagreement regarding conclusions reached with regard to special education services, and requests revisions to a student’s special education services plan. N.L. v. Knox County Schools, 315 F.3d 688, 693 (6th Cir. 2003); Fuhrmann v. East Hanover Bd. of Educ., 993 F.2d 1031, 1036 (3rd Cir. 1993). Contrary to Plaintiff’s argument, however, facilitating a parent’s ability to participate in the special education planning process, and to provide consent for assessment, does not require that all disciplinary documents be translated into the parent’s native language. The ALJ did not err when she found no such duty.

Here, as explained above, it was initially reasonable for the District to have provided its Consent for Assessment and notice of parents’ rights in English on September 22, 2014. Additionally, beginning on October 7, 2014, the District also ensured Ms. Varela’s ability to participate in the process through the Spanish language, which it appears undisputed that she spoke fluently. The District met numerous times both informally and formally to discuss A.V.’s issues. During most, if not all of those meetings, Ms. Varela was either accompanied by a Spanish-speaking advocate or was provided with interpreters or Spanish-speaking staff to aid in communication, or both. E–AR 407; 408, 419; 420; 610:19–21; 614:11–24; 941:11–23. In this manner, even if one accepts Ms. Varela’s argument that she was unable to read much in either English or Spanish, her rights to participate in communication were nonetheless protected orally by explanations provided in Spanish.

D. Sanctions Against Plaintiff's Attorney Were Properly Imposed.

*9 Although not specifically requested in Plaintiff's Statement of Relief Requested (See Pl.’s Mot, 5:19–23), Plaintiff nonetheless argues in his motion that the $1,793.50 in sanctions awarded by the ALJ in her Order of December 9, 2014 (Ex. A to Pl.’s Compl.) be reversed. While conceding that the District’s records identified only six removal days as of the time Plaintiff filed her expedited hearing request on October 6, 2014, Plaintiff nonetheless appears to argue that because the District “falsified records” and was “deceptive,” the sanctions award was improper.

This argument also misses the mark. The ALJ found no evidence of falsification, and despite bare assertions to that effect Plaintiff provides no supporting evidence for any such assertion, either. What the ALJ did find was that Plaintiff’s counsel 1) had not examined the District’s records herself before filing her expedited claim on October 6, 2014; and 2) did nothing to cancel the hearing on the expedited claim, which had been set for November 4, 2014, until the day beforehand despite having been on constructive if not actual notice of the District’s records by approximately October 23, 2014. December 9, 2014 OAH Decision, Ex. A to Pl.’s Compl., pp. 4–5. Given counsel’s failure to dismiss her claim and cancel the hearing, despite that constructive notice, until just before the hearing was scheduled to commence, the ALJ imposed sanctions against Plaintiff’s counsel based upon time expended by the District’s lawyers between October 23, 2014 and November 3, 2014. The Court does not find that determination to be erroneous and consequently will not disturb the sanctions awarded.
CONCLUSION

Based on all the foregoing, Plaintiff’s Motion for Summary Judgment/Appeal of Administrative Hearing Decisions (ECF No. 116) is DENIED. The challenged OAH decisions are hereby affirmed. Since this matter is now concluded, the Clerk of Court is directed to close the file.

IT IS SO ORDERED.

All Citations

Slip Copy, 2018 WL 339055

Footnotes

1 In a related proceeding, Panama–Buena Vista Union School District v. A.V., et al., Case No. 1:15–cv–01375–MCE–JLT, (“Related Case”) the District appealed that portion of one of the OAH decisions decided against it. That appeal has been adjudicated by separate Memorandum and Order filed in the Related Case.

2 Having determined that oral argument was not of material assistance, the Court ordered this Motion submitted on the briefing in accordance with Local Rule 230(g).

3 The facts in this section are derived from the allegations as set forth in Plaintiff’s Second Amended Complaint, as augmented by additional facts drawn from the OAH’s decisions in this matter attached as Exhibits A, B, and C to the Complaint and Amended Complaint. Citations to the Expedited Hearing Administrative Record made in this Memorandum and Order are denoted as “E–AR”; references to the Non–Expedited Hearing Administrative Record will be listed as “U–AR”.

4 The purpose of a Manifestation Determination Hearing under the Rehabilitation Act is to determine whether the offending behaviors arise from the student’s identified disability, here ADHD, as opposed to other sources.

5 An expedited due process complaint is made pursuant to 34 CFR §§ 300.530 and 300.532 and challenges, inter alia, discipline meted out to a disabled student that changes the student’s placement. An expedited hearing can also be requested for a manifestation determination that the student’s offending conduct was or was not caused by his or her disability. See 34 CFR § 300.530(e). A non-expedited complaint, on the other hand, may generally challenge the provision of a Free and Appropriate Public Education (“FAPE) to disabled students as guaranteed by the IDEA under 34 CFR §§ 300–507–300.516.

6 As indicated above, the ALJ’s decision in that regard was separately appealed by the District in the Related Case. By Memorandum and Order dated December 5, 2017, this Court overturned that decision.

7 As of November 14, 2014, the District appears to concede that Plaintiff had been removed from school for more than eleven days.

8 The Court recognizes that Plaintiff, in his reply papers, makes a completely new argument (having not been made either in her complaint or in the moving papers for the present motion) that aside from whether A.V. had been suspended for more than ten days as of October 6, 2014, he still had been subjected to a “pattern of removal” under 34 C.F.R. § 300.536. Because this argument was not made until Plaintiff’s reply, it will not be considered because arguments first raised at that time are improper. Eberle v. City of Anaheim, 901 F.2d 814, 817–18 (9th Cir. 1990) (new issue cannot be raised for the first time in a reply brief); Zamani v. Carnes, 491 F.3d 990, 997 (9th Cir. 2007) (“The district court need not consider arguments raised for the first time in a reply brief”).
REFERENCES IN OAH DECISIONS

1. LAUSD v. Student

Judge: Deidre L. Johnson

ISSUE

Does District have the right to assess Student in the absence of parental consent?

CONTENTIONS OF THE PARTIES

LAUSD contends that Parent consented to two out of three proposed assessment areas in LAUSD’s December 2006 assessment plan (the health and career areas), and that Parent refused to consent to LAUSD’s proposed academic performance assessment of Student in that plan. LAUSD contends that Parent has failed or refused to consent to its February 2007 assessment plan, which includes proposed assessments in the areas of academic performance, general ability, language function, motor abilities, and social-emotional status. LAUSD contends that it has taken reasonable measures to obtain Parent’s consent for the assessments after proper notice and advisement of rights. Student did not participate in the hearing.

FACTUAL FINDINGS

7. LAUSD Assistant Principal Sharon Greene of Hamilton High School then met with Parent. Parent insisted that Student was eligible for special education services, and claimed to be in litigation with ABCUSD regarding those services. Ms. Greene telephoned ABCUSD and spoke with Kathleen Cronin. Ms. Cronin informed Ms. Greene that ABCUSD had not completed its assessments of Student regarding eligibility for special education services because Parent had not cooperated to consent to their assessment plans, and that ABCUSD’s IEP offer was contingent on completion of assessments. Parent faxed Ms. Greene a copy of ABCUSD’s IEP offer, which was not signed by Parent, either for attendance or consent. Ms. Greene determined that Student did not have a pre-existing eligibility determination for special education services.

District’s December 2006 Proposed Assessment Plan

11. During the November 2006 resolution session, LAUSD personnel explained to Parent their need to assess Student to determine her eligibility for special education services. Parent and her advocate took a draft assessment plan form with them in order to review it, but never returned it. On December 7, 2006, LAUSD sent Parent a formal assessment plan form for Parent’s consent. Consistent with the assessment offer made during the resolution session, LAUSD offered to assess Student in the areas of health and development, including vision and hearing; academic performance; and career and vocational abilities/interests. The plan proposed that the health assessment would be completed by a nurse or physician, and the other two assessments would be done by a special education teacher. Enclosed with the December 2006 assessment plan was a copy of “A Parent’s Guide to Special Education Services (Including Procedural Rights and Safeguards).”

12. On January 11, 2007, LAUSD received the December 2006 assessment plan back, signed by Parent and dated January 8, 2007. Parent’s signature includes a checkmark in a circle next to the following pre-printed phrase: “YES, I consent to the Assessment Plan except in the following area(s): ...” Printed by hand next to this phrase and above Parent’s signature is the following: “IEP TESTING HAS TO BE
DONE BY ABC UNIFIED SCHOOL DISTRICT.” Parent did not provide any written reason for wanting ABCUSD to test Student’s 2007 levels of academic performance, when ABCUSD had not taught Student since spring 2005.

13. LAUSD personnel spoke with Parent and concluded that Parent’s reference to “IEP testing” meant the academic performance testing. LAUSD determined that, by virtue of Parent’s qualified signature as found in Factual Findings 12 above, Parent consented to District’s health and career assessments, but did not consent to District’s offer to assess Student’s academic performance.

14. District began its health assessment of Student on January 23, 2007. Hamilton health nurse Linda Luther, a registered nurse, interviewed Parent by telephone, reviewed available health records, and began a modified physical assessment of Student. Student has not rescheduled an audiometric screening. The health assessment has not been completed. Parent’s cooperation with the commencement of the health assessment is consistent with District’s understanding that Parent consented to the health assessment.

*District’s February 2007 Proposed Assessment Plan*

15. In February 2007, LAUSD provided an additional assessment plan to establish Student’s baseline information in more areas related to her suspected disability. On February 6, 2007, Ms. Greene sent a letter to Parent along with the additional proposed assessment plan, and another copy of LAUSD’s guide for parents and advisement of procedural rights and safeguards. Ms. Greene explained to Parent in the letter that LAUSD requested consent to conduct an academic performance assessment of Student, and requested that Parent consent to additional areas of assessment as follows: general ability, language function, motor abilities, and social-emotional status. The plan proposed that the academic performance assessment would be conducted by a special education teacher, and the other new areas would be assessed by a psychologist. Since Parent had already consented to the health and career assessments in the December 2006 assessment plan, those areas were not included in the new 2007 assessment plan.

16. Ms. Green’s February 2007 letter further advised Parent that if Parent chose not to consent or failed to respond to the request to provide consent within 15 days, pursuant to California Education Code section 56321(c), LAUSD might pursue the matter by filing a request for a due process hearing.


18. The 2006 assessment plan remains in effect pursuant to Parent’s qualified consent, as found in Factual Findings 12 and 13 above. LAUSD has not conducted the career assessment for Student yet, because it plans to have that area assessed by the same special education teacher who would conduct Student’s academic performance assessment. LAUSD’s December 2006 assessment plan does not need to be enforced by OAH in this proceeding because Parent consented to the health and career assessments, and LAUSD again proposed to do an academic performance assessment as part of the February 2007 assessment plan. No other assessments have been commenced or completed under either assessment plan.
19. Both the December 2006 and February 2007 assessment plans were duly served on Parent with written notice of parental rights and an explanation of procedural safeguards that are required by law. Both proposed assessment plans were understandable, in English, Parent’s language, and explained the general types of assessments that were proposed.

20. LAUSD’s assessments pursuant to the December 2006 and February 2007 assessment plans would use multiple standardized tests and tools, and would be conducted by qualified school district personnel. LAUSD was obligated to conduct its own assessments of Student, and could not legally comply with Parent’s demand that ABCUSD conduct an academic performance assessment of Student. LAUSD has the right and obligation to determine which of its competent personnel would conduct the assessments.

21. LAUSD has a valid concern that Student should be assessed for eligibility for special education and related services. In addition to the Parent’s express request for special education services, LAUSD’s records show that Student has numerous tardies to certain class periods, and absences from class periods, as well as school days, and that she has suffered low or failing grades in some subjects. Ms. Makkar meets informally with Student about once a week. Ms. Makkar is concerned about Student’s unusually high number of unexplained or “uncleared” absences, without parental explanation. Parent has informed Ms. Makkar that Student takes medications that have made it difficult for her to get up in the morning. LAUSD has made Student’s first period a “home period” instead of an academic subject class to accommodate her tardiness. LAUSD has sufficient information from Parent and from Student’s attendance and grade problems to support the appropriateness of assessing Student. The school district’s personnel plan to evaluate all pertinent information in order to assess Student, and to present the assessment results to an IEP team meeting, including Parent, so that the IEP team would be able to make an eligibility determination.

22. The evaluation of Student’s eligibility is not an issue in the present case. However, sickle cell anemia may qualify a student as eligible for special education and related services under the OHI category, provided that it is shown to result in a student’s limited strength, vitality or alertness due to a chronic or acute health problem, not temporary in nature, and provided that it is shown to adversely affect a student’s educational performance.

23. Parent’s failure or refusal to consent to Student’s assessments in the proposed areas listed in the February 2007 assessment plan has continued to the date of the hearing herein. LAUSD has shown that it has taken reasonable measures to obtain Parent’s consent.

LEGAL CONCLUSIONS

2. Before any action is taken with respect to the initial placement of a child with special needs, an assessment of the pupil’s educational needs shall be conducted. (Ed. Code, § 56320.) The student must be assessed in all areas related to his or her suspected disability, and no single procedure may be used as the sole criterion for determining whether the student has a disability or an appropriate educational program. (20 U.S.C. § 1414(a)(2), (3); Ed. Code, § 56320, subds. (e) & (f).) Areas of suspected disability include, if appropriate, health and development, vision, hearing, language function, general intelligence, academic performance, communicative status, motor abilities, career and vocational abilities and interests, and social and emotional status. (20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304(c)(4); Ed. Code, § 56320, subd. (f).)
4. As found in Factual Findings 2, 3, and 22, Student’s diagnosis of sickle cell anemia qualifies to meet one aspect of the eligibility criteria in Legal Conclusions 3 above. Assessments would be appropriate to evaluate the other aspects of the criteria.

5. As found in Factual Findings 9, 11, 15, 18, 19, and 20, both of LAUSD’s assessment plans, taken together, proposed to assess Student in most if not all areas related to her suspected disability, and would involve the use of multiple standardized tests and tools.

6. The assessment plan must be accompanied by a notice of the parent’s rights and a written explanation of the procedural safeguards under IDEA 2004 and California law. (Ed. Code, § 56321, subd. (a).) The parent has at least 15 days from the receipt of the proposed assessment plan to arrive at a decision. (Ed. Code, § 56321, subd. (c).) Consent for initial assessment may not be construed as consent for any initial placement or provision of services. (Ed. Code, § 56321, subd. (e).)

7. As found in Factual Findings 11, 12, 13, 15, 16, and 17, both the December 2006 assessment plan and the February 2007 assessment plan were properly sent to Parent along with written notice of parental rights and an explanation of procedural safeguards. Parent was given from November 21, 2006, through January 8, 2007, to respond to the December 2006 plan, and was given more than 15 days to respond to the February 2007 assessment plan, from February 6, 2007, to February 26, 2007, when District filed its request for a due process hearing.

8. Tests and assessment materials must be administered by trained personnel in conformance with the instructions provided by the producers of the tests. (20 U.S.C. § 1414(a)(2), (3); Ed. Code, § 56320, subd. (a) & (b).) Assessments must be conducted by individuals who are knowledgeable and “competent to perform the assessment, as determined by the school district, county office, or special education local plan area.” (20 U.S.C. § 1414(b)(3)(B)(ii); Ed. Code, §§ 56320, subd. (g), 56322.)

9. As found in Factual Findings 11, 14, 15, and 20, LAUSD’s December 2006 and February 2007 proposed assessments meet the requirements in Legal Conclusions 8 above, because they would be conducted by qualified LAUSD personnel: a registered nurse, a special education teacher, and a psychologist. LAUSD was and is obligated to conduct its own assessments of Student, and could not legally comply with Parent’s demand that ABCUSD conduct an academic performance assessment of Student.

10. While the law provides that a local educational agency (LEA) has the right and obligation to conduct assessments, parental consent is generally required before a school district may conduct assessments. (20 U.S.C. § 1414(a)(1)(C)(i); Ed. Code, § 56321, subd. (c).) 8

11. As found in Factual Findings 12, 13, 14, 16, and 23, Parent consented to two areas of assessment in the December 2006 plan, refused to consent to an academic performance assessment to be conducted by LAUSD, and has failed or refused to consent to any of the proposed areas of assessment in the February 2007 plan.

13. As found in Factual Findings 11, 12, 15, 16, and 17, and Legal Conclusions 7 above, LAUSD personnel met with Parent and her advocate in November 2006, and explained the need for assessments. They provided Parent with a draft assessment at the meeting, and duly served Parent with the December 2006 assessment plan, and the February 2007 assessment plan. LAUSD provided Parent with sufficient time within which to consent, and its attorney sent another copy of the February
2007 assessment plan to Parent in March 2007. LAUSD has met its burden of proof to establish that it has taken reasonable measures to obtain the consent of Parent.

14. As found in Factual Findings 18, LAUSD’s December 2006 assessment plan does not need to be enforced by OAH in this proceeding because Parent consented to the health and career assessments, and LAUSD again proposed to do an academic performance assessment as part of the February 2007 assessment plan.

15. As found in Factual Findings 2, 3, 4, 5, 6, 7, 14, 21, and 22, LAUSD has valid concerns that Student should be assessed based on Parent’s request for special education and related services, and Student’s reported diagnosis, attendance, and grades. In Gregory K. v. Longview School District (9th Cir. 1987) 811 F.2d 1307, 1315, the Ninth Circuit Court of Appeals held that “if the parents want Gregory to receive special education under the Act, they are obligated to permit such testing.” Likewise, the court in Andress v. Cleveland Independent School District (5th Cir. 1995) 64 F.3d 176, 53, held that “there is no exception to the rule that a school district has a right to test a student itself in order to evaluate or reevaluate the student’s eligibility under IDEA.”

ORDER

1. Los Angeles Unified School District may conduct assessments of Student pursuant to the proposed assessment plan of February 2007.

2. If Parent wants Student to receive special education and related services from Los Angeles Unified School District, Parent shall make Student reasonably available for the assessments.

2. **Clovis Unified v. Student**

Judge: Margaret Broussard

July 17, 2014 2014060342

**LEGAL CONCLUSIONS**

3. Reassessments require parental consent. (20 U.S.C. § 1414(c)(3); Ed. Code, § 56381, subd. (f)(1)). To obtain parental consent for a reassessment, the school district must provide proper notice to the student and his/her parent. (20 U.S.C. § 1414(b)(1); 20 U.S.C. § 1415(b)(3),(c)(1); Ed. Code, §§ 56321, subd. (a), 56381, subd. (a).) The notice consists of the proposed assessment plan and a copy of parental procedural rights under the IDEA and related state law. (20 U.S.C. §§ 1414(b)(1), 1415(c)(1); Ed. Code, § 56321, subd. (a).) The assessment plan must be in a language easily understood by the public and the native language of the student; explain the assessments that the district proposes to conduct; and provide that the district will not implement an individualized education program without the consent of the parent. (Ed. Code, § 56321, subd. (b)(1)-(4).) The district must give the parent at least 15 days to review, sign, and return the proposed assessment plan. (Ed. Code, § 56321, subd. (a).)

4. On March 4, 2014, Clovis provided the proposed triennial assessment plan to Parent with a copy of Parent’ procedural rights. Clovis provided explanatory letters on March 4, 2014, and May 16, 2014. The March 4, 2014 assessment plan was in Student’s and Parent’s native language of English. The assessment plan identified the assessments that Clovis proposed to conduct. It explained that assessments were in conjunction with Student’s triennial review. The assessment plan also explained
that Parent’s consent to assess was required and the evidence established that Clovis made reasonable efforts to obtain Parent’ consent to the assessment plan and provided them at least 15 days to review

10. If the parents do not consent to a reassessment plan, the district may conduct the reassessment by showing at a due process hearing that it needs to reassess the student and it is lawfully entitled to do so. (20 U.S.C. § 1414(c)(3); 34 C.F.R. § 300.300(c)(ii)(2006); Ed. Code, §§ 56381, subd. (f)(3), 56501, subd. (a)(3).)

11. Parents who want their children to receive special education services must allow reassessment by the district, with assessors of its choice, and cannot force the district to rely solely on an independent evaluation. (Johnson v. Duneland Sch. Corp. (7th Cir.1996) 92 F.3d 554, 558; Andress v. Cleveland Indep. Sch. Dist. (5th Cir.1995) 64 F.3d 176, 178-79; Gregory K. v. Longview Sch. Dist. (9th Cir. 1987) 811 F.2d 1307, 1315.)

3. **Student v. Capistrano USD**

   June 14, 2017

   2016100466 & 2017030402

   **Judge: Darrell Lepkowsky**

**SUMMARY OF DECISION**

Student sustained a concussion due to a sports injury in fall 2014. She thereafter began experiencing emotional difficulties that initially manifested only at home. Student was hospitalized due to mental health crises three times between May 2015 and October 2015. District assessed her for special education eligibility after her October 2015 hospitalization and found her eligible under the category of emotional disturbance in February 2016. Student contends that District should have assessed her when she first suffered the concussion in fall 2014, or that it should have assessed her after her first or second hospitalizations. Student also contends that District should have found her eligible primarily under the category of traumatic brain injury, with emotional disturbance as a secondary classification. Student contends that because District did not, it failed to assess her properly, and failed to provide her with an appropriate IEP because its offers did not address all her needs. Student also contends that District committed several procedural violations with regard to the development of her IEPs and the provision of independent educational evaluations requested by Parent.

This Decision finds that Student met her burden of proof that District should have assessed her after Parent’s request for assessment on September 18, 2015. Student has also met her burden of proof that District denied her a FAPE by failing to provide prior written notice of its refusal to fund the private math class Parent requested. Student has failed to meet her burden of proof as to all other issues she raised in this consolidated case.

**FACTUAL FINDINGS**

40. Parent also failed to give School Psychologist a copy of an intellectual assessment Parent had obtained for Student when Student was nine years old. Parent was curious about her children’s intellectual capacities and paid for a private assessment. The assessment only tested intellectual capacity. That assessment determined that Student, at the time, had a full-scale intelligence quotient of 115. Parent, at one time, had given a copy of the assessment to a District clerical staff member, but the test was never placed in Student’s school file. Parent never mentioned the test to School...
Psychologist, never asked if School Psychologist had seen it, and did not provide her or any other District assessor with a copy during the assessment process or at Student’s initial IEP team meeting.

41. Parent did not provide any input into the assessment process on the space available for her input on the assessment plan. She did not ask District to assess Student for any particular issues, and specifically did not discuss concerns relating to Student’s concussion the previous year.

LEGAL CONCLUSIONS

12. A school district’s child find obligation toward a specific child is triggered when there is knowledge of, or reason to suspect, a disability and reason to suspect that special education services may be needed to address that disability. A disability is “suspected,” and a child must be assessed, when the district is on notice that the child has displayed symptoms of that disability or that the child may have a particular disorder. (Timothy O. v. Paso Robles Unified School Dist. (9th Cir. 2016) 822 F.3d 1105, 1120-21 (Timothy O.); Department of Educ., State of Hawaii v. Cari Rae S. (D. Hawaii 2001) 158 F. Supp. 2d 1190, 1194 (Cari Rae S.).) That notice may come in the form of concerns expressed by parents about a child’s symptoms, opinions expressed by informed professionals, or other less formal indicators, such as the child’s behavior. (Timothy O., supra, 822 F.3d at 1119-1120 [citing Pasatiempo by Pasatiempo v. Aizawa (9th Cir. 1996) 103 F.3d 796, and N.B. v. Hellgate Elementary School Dist. (9th Cir. 2008) 541 F.3d 1202].) The threshold for suspecting that a child has a disability is relatively low. (Cari Rae S. supra, 158 F.Supp.2d at p. 1195.) A school district’s appropriate inquiry is whether the child should be referred for an evaluation, not whether the child actually qualifies for services. (Ibid.)

13. California Code of Regulations, tit. 5, section 3021, subdivision (a) requires that “all referrals for special education and related services shall initiate the assessment process and shall be documented. When a verbal referral is made, staff of the school district, special education local plan area, or county office shall offer assistance to the individual in making a request in writing, and shall assist the individual if she requests such assistance.”

25. The fact that a child experiences a psychiatric hospitalization is not grounds for assessment unless the child’s problems have affected her educational performance. For example, in the case of L.J. v. Pittsburg Unified School District (9th Cir. 2016) 835 F.3d 1168 (Pittsburg), the Ninth Circuit found that a district should have found a child was eligible for special education. The court noted that the child’s mental health issues, including suicidal ideation and severe disruptive behavior at school, had occurred over a long period of time, and were affecting his school performance to such a degree that his school district had provided counseling, instructional accommodations, and one-on-one services outside the IEP process. Here, Student did not evidence any behaviors at school that interfered with her access to her education, or interfered with her socialization, until she expressed suicidal ideation at school on October 6, 2015.

38. In performing an assessment, a school district must review existing assessment data, including information provided by the parents and observations by teachers and service providers. (20 U.S.C. § 1414(c)(1)(A); 34 C.F.R., § 300.305; Ed. Code, § 56381, subd. (b)(1).) Based upon such review, the district must identify any additional information that is needed by the IEP team to determine the present levels of academic achievement and related developmental needs of the student, and to decide whether modifications or additions in the child’s special education program are needed. (20 U.S.C. § 1414(c)(1)(B); Ed. Code, § 56381, subd. (b)(2).) The district must perform assessments that are necessary to obtain such information concerning the student. (20 U.S.C. § 1414(c)(2); Ed. Code, §
56381, subd. (c.) In performing an assessment, an educational agency cannot use a single measure or evaluation as the sole criteria for determining whether the pupil is a child with a disability and in preparing the appropriate educational plan for the pupil. (Ed. Code, § 56320, subd. (e); see also 20 U.S.C. § 1414(b)(2)(B); 34 C.F.R. § 300.304(b)(2).) Persons who conduct assessments shall prepare a written report, as appropriate, of the results of each assessment. (Ed. Code, § 56327.)

40. Student failed to meet her burden of proof that District’s initial assessment was inappropriate because it did not assess in the area of traumatic brain injury. The assessment met all statutory requirements. The assessors conducted it in Student’s native English language. There is no evidence the testing instruments were biased in any manner. There is no evidence that the testing instruments used were not age-appropriate for Student. The assessors chose a wide variety of testing instruments; there is no evidence that District conducted the tests improperly or scored them improperly.

48. Second, and perhaps more significant, is that the independent assessment Dr. Johnson administered, 11 irrespective of her conclusions, did not contain any elements or assessment methods that District did not use or do. Both assessments contained a review of Student’s records, educational history, and medical. Both District’s and Dr. Johnson’s assessment contained interviews with Student and Parent; District also included input from Student’s teachers and observations of Student in class. Both assessments included standardized cognitive testing. Both assessments included several measures, including rating scales, to determine the extent of Student’s emotional issues. Student put on no evidence as to what other types of tests District should have done. Dr. Johnson specified the reason for her assessment was to determine whether Student had a traumatic brain injury that was adversely affecting her education. It is unreasonable to conclude that District should have done other unspecified tests when Student’s chosen independent assessor, who specifically assessed for traumatic brain injury, did basically the same testing as District.

79. Further, Student failed to present any evidence of the fact that District should have done a medical evaluation as part of its initial assessment in February 2016. Student did not display symptoms of any medical condition at school. The only issues Student presented at school were related to her emotional and mental health. Even assuming that her emotional issues resulted from her September 2014 concussion, District thoroughly assessed those emotional issues as part of its February 2016 initial assessment. District also reviewed Student’s medical history as part of the assessment.

4. Student v. Oxnard UHSD

Judge: Adrienne Krikorian

July 13, 2017 2017020382

FACTUAL FINDINGS

51. District’s 2017 language and speech evaluation was not sufficiently comprehensive to identify all of Student’s communication needs. In Ms. Schnee’s opinion, it was not “even an evaluation.” She disagreed that the Goldman-Fristoe was sufficiently comprehensive for a child with cerebral palsy. Ms. Marz and Ms. Chirdon did not look globally at Student’s physical needs associated with cerebral palsy, and did not take any measures of breath support or how long he could phonate (produce speech sounds). They did not evaluate whether seating accommodations would support Student’s sound production. Their observations were insufficient because they did not conduct multiple observations in the classroom, informal settings, between classes, and in a formal setting. Ms. Marz’s language sample only sampled a small number of utterances. A valid sample typically recorded close to 200 utterances.
The language sample should look at how many words are in a spoken statement. If Student had been taught and developed proper breath support, he would have been capable of forming adult-level sentences. Ms. Schnee disagreed that Student’s needs in speech production were a “medical issue,” and with Ms. Marz’s and Ms. Chirdon’s conclusions that school speech therapists could not address Student’s needs in speech production related to limited range of motion of his tongue and oral musculature.

LEGAL AUTHORITIES AND CONCLUSIONS

9. To determine the contents of an IEP, school districts must assess a student eligible for special education under the IDEA in all areas related to his or her suspected disability. (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) No single procedure may be used as the sole criterion for determining whether the student has a disability or whether the student’s educational program is appropriate. (20 U.S.C. § 1414 (a)(2), (3); Ed. Code § 56320, subds. (c), (e), (f).)

10. A school district shall develop a proposed assessment plan within 15 calendar days of referral for assessment, unless the parent agrees in writing to an extension (Ed. Code §56043, subd. (a)), and shall attach a copy of the notice of parent’s rights to the assessment plan (Ed. Code §56321, subd. (a)). A parent shall have at least 15 calendar days from the receipt of the proposed assessment plan to arrive at a decision whether to consent to the assessment plan. (Ed. Code §56403, subd. (b).) A school district cannot conduct an assessment until it obtains the written consent of the parent prior to the assessment (unless the school district prevails in a due process hearing relating to the assessment); assessment may begin immediately upon receipt of the consent. (Ed. Code, §56321, subd. (c).) Thereafter, a school district must develop an IEP required as a result of an assessment no later than 60 calendar days from the date of receipt of the parent’s written consent to assessment, unless the parent agrees in writing to an extension. (Ed. Code, §56043, subd. (f)(1).)

11. Procedural inadequacies that result in the loss of educational opportunity or seriously infringe on parent’s opportunity to participate in the IEP formulation process clearly result in the denial of a FAPE. (Shapiro v. Paradise Valley Unified Sch. Dist. (9th Cir. 2003) 317 F.3d 1072, 1078; see also Amanda J. v. Clark Cnty. Sch. Dist., (9th Cir. 2001) 267 F.3d 877, 892.) A procedural error results in the denial of educational opportunity where, absent the error, there is a “strong likelihood” that alternative educational possibilities for the student “would have been better considered.” (M.L. v. Federal Way Sch. Dist. (9th Cir. 2003) 394 F.3d 634, 657 (Gould, J. concurring in part and concurring in the judgment).) Thus, an IEP team’s failure to properly consider an alternative educational plan can result in a lost educational opportunity even if the student cannot definitively demonstrate that his placement would have been different but for the procedural error. (Ibid.)

12. The informed involvement of parents is central to the IEP process. (Winkelman v. Parma City Sch. Dist. (2007) 550 U.S. 516, 524 [127 S.Ct. 1994].) Protection of parental participation is “among the most important procedural safeguards” in the IDEA. (Amanda J. supra, 267 F.3d at p. 882.) The Ninth Circuit Court of Appeals in Timothy O. v Paso Robles Unified Sch. Dist. (9th Cir. 2016) 822 F.3d 1105, 1124-1126, recently held that a school district’s failure to assess Student may result in substantially hindering a parent’s ability to participate in a child’s educational program, and seriously deprived the child’s parents, teachers and district staff of the information necessary to develop an appropriate educational program with appropriate supports and services for the child. Failure to assess the Student therefore resulted in a denial of FAPE.
5. Student v. Santa Paula USD and Ventura USD

Judge: Alexa Hohensee

SUMMARY OF DECISION

For the claims against Santa Paula that are not time-barred, Student did not prove that autism was a suspected area of disability from December 16, 2014 through November 3, 2016, the date on which Parent informed Santa Paula that Student was being assessed for autism by a medical doctor, or that Santa Paula failed to act promptly to assess Student when it received that information (Issue 1). Student did not prove that Parent requested assessments for autism and ADHD from Santa Paula (Issue 2). Student did not prove that Santa Paula denied him a FAPE by offering him half school days and reduced instructional time, or that the behavior interventions offered in the IEP’s of May 5, 2015, November 18, 2015 and November 3, 2016 were otherwise inappropriate (Issue 3). Student did not prove that Santa Paula failed to consider a continuum of options for Student’s placement at the IEP team meeting of November 3, 2016 (Issue 4). Student did not prove that he was physically restrained by Santa Paula staff at any time (Issue 5). Student did not prove that further assessments in the area of behavior were required (Issue 6). Student did not prove that Parent requested a one-on-one aide (Issue 7). Therefore Santa Paula prevailed on all issues against it (Issues 1 through 7).

LEGAL AUTHORITIES AND CONCLUSIONS

30. The IDEA does not require a functional behavior assessment prior to development of a behavior intervention plan unless the child’s placement has been changed for disciplinary reasons and the conduct that resulted in discipline is determined to have been a manifestation of the child’s disability. (See 20 U.S.C. 1415(k)(1)(f).) The United States Department of Education, in promulgating regulations implementing the IDEA, explained that the IEP team determines whether a behavior implementation plan is required, and although a functional behavior assessment may assist the team to address behavioral issues, the IDEA does not require functional behavior assessment in order to formulate a behavior intervention plan. (71 Fed. Reg. 46683 (Aug. 14, 2006); see also J.C. v. New York City Dept. of Educ. (2d Cir. 2016) 643 Fed.Appx. 31 [67 IDELR 109] [pre-plan functional behavior assessment is not necessary if the IEP adequately identifies a student’s behavioral impediments and implements strategies to address that behavior].)

6. Student v. LAUSD

Judge: Cole Dalton

LEGAL CONCLUSIONS

30. Student failed to meet his burden of proof that Los Angeles should have assessed him and made an offer of FAPE before the end of the 2016-2017 school year. The evidence showed that Student did not want Los Angeles to either assess or offer services and did not provide Los Angeles with consent to do so, in any event. For the foregoing reasons, there is no basis upon which to hold Los Angeles responsible for not offering Student a FAPE by the end of the 2016 – 2017 school year.
38. Los Angeles was prepared to attend the July 13, 2017 IEP team meeting to review the above-referenced assessments and offer Student a FAPE. Los Angeles did not require Student to enroll in its district before agreeing to attend the meeting. Los Angeles’ school year ended June 9, 2017. Nonetheless, between El Monte and Los Angeles, the districts secured the attendance of all mandatory IEP team meeting members: Mother, who held educational rights; special and general education teachers; district representatives; and individuals who could interpret the instructional implications of assessment results. (20 U.S.C. § 1414(d)(1)(B)(i), (iv-vi); Ed. Code, § 56341, subds. (b)(1), (5)-(6).)

40. Attorney Weissburg responded by filing Student’s complaint and cancelling the IEP team meeting. Through the end of the Phase 1 hearing, Student refused to receive assessments from or attend an IEP team meeting with Los Angeles. Such actions are not consistent with Student’s Phase 2 claim that he sought assessments and an IEP from Los Angeles, which it failed to offer.

41. Under these circumstances, Los Angeles was not obligated to make FAPE available to Student until Mother expressed a desire to receive an offer of FAPE from Los Angeles. Mother expressed no such desire until the end of the Phase 1 hearing, long after the end of the 2016-2017 school year. Once Mother sought assessments, Los Angeles timely provided an assessment plan, which Mother signed on November 8, 2017.

7. Visalia USD v. Student

Judge: Tiffany Gilmartin

March 28, 2018

2018020456

SUMMARY OF DECISION

Visalia seeks permission to conduct special education assessments of Student to develop an appropriate individualized education program. Visalia met its burden of proof that its proposed assessments are warranted; that it provided Parents appropriate notice of the proposed assessments; and that is has qualified personnel to conduct the assessments. Therefore, this Decision authorizes Visalia to assess Student pursuant to its December 2017 assessment plan without parental consent.

LEGAL CONCLUSIONS

5. Reassessments generally require parental consent. (20 U.S.C. § 1414(c)(3); Ed. Code, §56381, subd. (f)(1).) If the parents do not consent to a proposed reassessment plan, the district may conduct the reassessment by showing at a due process hearing that it needs to reassess the student and it is lawfully entitled to do so. (20 U.S.C. § 1414(c)(3); 34 C.F.R. § 300.300(a)(3)(i), (c)(ii); Ed. Code, §§ 56381, subd. (f)(3), 56501, subd. (a)(3).) A district may also file for due process, “for example, if they wish to change an existing IEP but the parents do not consent, or if parents refuse to allow their child to be evaluated.” (Schaffer v. Weast, supra, 546 U.S. 49, 53.) Parents who want their children to receive special education services must allow reassessment by the district. (Gregory K. v. Longview Sch. Dist. (9th Cir. 1987) 811 F.2d 1307, 1315; Dubois v. Conn. State Bd. of Ed. (2d Cir.1984) 727 F.2d 44, 48.)

6. Visalia’s request to assess Student is warranted. Student is currently eligible for special education and related services. Student has not been assessed since 2013. The Visalia members of Student’s IEP team established that changes may be necessary to Student’s IEP. The evidence further established that to propose changes, Student’s IEP team requires current assessment information to determine his
educational and related service needs. Student is now a fifth grader and the data representing Student’s most up-to-date data is outdated.
OBTAINING SCHOOL RECORDS and ASSESSMENT RESULTS

1. Sources of Law and Definitions


3. Examples of References In OAH Decisions
SOURCES OF LAW

I. Federal Statutes and Regulations

The Family Educational Rights and Privacy Act of 1974

20 U.S.C. Section 1232g

34 C.F.R. Sections 99 et seq.

The Individuals With Disabilities Education Act

34 C.F.R. Section 300.613

II. State Statutes and Regulations

California Education Code

California Education Code Sections 49060 - 49085

California Education Code Sections 56043(n) and 56043 (o)

California Education Code Sections 56504

III. Definitions

Educational records is a record directly related to a student that is maintained by an education agency or recorded in any way, including handwriting, print, computer media, video or audio tape, film, microfilm or microfiche. To be an educational record, it must be maintained by the educational agency. In California,

IV. Timelines

Under FERPA it is forty-five days from request.

Under IDEA, it is five business days. Note that the requirement of California Education Code Section 56504 is for access to be provided within “five business days” after the request and “without unnecessary delay before any meeting regarding an individualized education program . . . ” An IEP meeting is a meeting regarding an individualized program, and, therefore, although there is no specific number of days before the meeting by which the records should be produced, certainly the family is entitled to the records, including the assessments, prior to the IEP meeting.
§ 56504. School records; examination and reproduction; compliance

The parent shall have the right and opportunity to examine all school records of his or her child and to receive copies pursuant to this section and to Section 49065 within five business days after the request is made by the parent, either orally or in writing. The public agency shall comply with a request for school records without unnecessary delay before any meeting regarding an individualized education program or any hearing pursuant to Section 300.121, 300.301, 300.304, or 300.507 of Title 34 of the Code of Federal Regulations or resolution session pursuant to Section 300.510 of Title 34 of the Code of Federal Regulations and in no case more than five business days after the request is made orally or in writing. The parent shall have the right to a response from the public agency to reasonable requests for explanations and interpretations of the records. If a school record includes information on more than one pupil, the parents of those pupils have the right to inspect and review only the information relating to their child or to be informed of that specific information. A public agency shall provide a parent, on request of the parent, a list of the types and locations of school records collected, maintained, or used by the agency. A public agency may charge no more than the actual cost of reproducing the records, but if this cost effectively prevents the parent from exercising the right to receive the copy or copies, the copy or copies shall be reproduced at no cost.

Credits

Current with urgency legislation through Ch. 9 of 2018 Reg.Sess
371 F.Supp.2d 1170
United States District Court,
C.D. California,
Southern Division.

NEWPORT–MESA UNIFIED SCHOOL DISTRICT, Plaintiff,
v.
STATE OF CALIFORNIA DEPARTMENT OF EDUCATION et al., Defendants.
No. SACV 04–512–GLT (ES).
May 24, 2005.

Synopsis

Background: California school district that was found by state Department of Education to be out of compliance with California Education Code section for failing to provide parent of special education student with requested copy of copyrighted achievement test protocol and was ordered to revise its policies and procedures on student record requests brought action requesting declaration of its rights under copyright law and injunction to prevent Department from enforcing its compliance report. At court's invitation, test publishers intervened to assert copyright interest. Parties cross-moved for summary judgment.

Holdings: The District Court, Taylor, J., held that:

[1] school district had standing to assert its own interest in avoiding civil liability for copyright infringement;

[2] state statute requiring copies of test protocols to be provided to parents of special education students fell within acceptable “fair use” under federal copyright law, which did not preempt the state statute; and

[3] in order to minimize risk of improper use, district could choose to use appropriate safeguards, such as requiring review by parents of original test protocols before obtaining copy, written request for copy, nondisclosure or confidentiality agreement, or other reasonable measures.

Plaintiffs' motion denied; defendants' motion granted.

Attorneys and Law Firms

*1173 John E. Hayashida, Parker & Covert, Tustin, Cynthia J. Larsen, Orrick Herrington & Sutcliffe (Intervenor Plaintiff), Sacramento, CA, for plaintiff.


Opinion

ORDER ON CROSS–MOTIONS FOR SUMMARY JUDGMENT
TAYLOR, District Judge.

On apparent first impression, and contrary to the body of law on competitive admission testing, the Court holds a state statute requiring copies of test protocols to be provided to parents of special education students falls within acceptable “fair use” under federal copyright law, and the federal copyright law does not preempt the state statute.

I. BACKGROUND

California Education Code section 56504 provides parents of special education students may have copies of their child's test protocols. Defendant Jack Anthony's son is a seven-year-old with special education needs who lives in Plaintiff Newport–Mesa Unified School District. Mr. Anthony requested copies of his son's test protocols before a scheduled Individualized Education Program (“IEP”) meeting. The District declined to provide him with the copyrighted test protocol for the Woodcock–Johnson Test of Achievement III.

Mr. Anthony filed a complaint with Defendant California Department of Education, which found the District out of compliance with California Education Code section 56504 by failing to provide Mr. Anthony with records within five days of his request. The Department ordered the District to revise its policies and procedures on student record requests to comply with section 56504 and to send it a copy of the new written policy within sixty days. The Department denied a request for reconsideration of this compliance report. Plaintiff brought the matter to this Court, contending United States copyright law prevents it from providing copies of copyrighted test protocols.

The District requested a declaration of its rights under copyright law and an injunction to prevent the Department from enforcing its compliance report. At the Court's invitation, Harcourt Assessment, Inc., the publisher and copyright owner of the Weschler Intelligence Scale for Children–III, and Riverside Publishing Co., the publisher and copyright owner of the Woodcock–Johnson III, intervened in the case to assert the copyright interest.

After an early hearing, the parties held lengthy conferences to create a plan accommodating both interests: providing adequate information to special education parents under the state's section 56504, while safeguarding protected works under federal copyright law. Ultimately, the parties failed to work out a plan, and the Court now rules on all parties' cross-motions for summary judgment.

II. DISCUSSION

A. School District's Standing
Defendants challenge the District's standing to sue for a claimed copyright violation. The District sues in its own right as a party that fears violating the copyright law by distributing another party's copyrighted material. The Court is satisfied the District has standing to assert its own interest in avoiding civil liability for copyright infringement.

[1] [2] To have standing to bring a declaratory relief action, the plaintiff must show “under all the circumstances of the case, there is a substantial controversy between parties having adverse legal interests, and the controversy is of sufficient immediacy and reality to warrant declaratory relief.” Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1555 (9th Cir.1989). For copyright matters, this requirement is satisfied if the plaintiff has a “‘real and reasonable apprehension’” it will be subject to liability if it continues to engage in allegedly infringing conduct. Id. at 1555–56 (quoting a patent case, Societe de Conditionnement v. Hunter Eng'g Co., 655 F.2d 938, 944 (9th Cir.1981), and applying it in the copyright context). The District has made this showing here.
The threat to the District of future injury is both “‘real and immediate.’” Am.-Arab Anti–Discrimination Comm. v. Thornburgh, 970 F.2d 501, 507 (9th Cir.1991) (quoting City of Los Angeles v. Lyons, 461 U.S. 95, 102, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983)). If the Department enforces its compliance report, the District will have to give a copy of the test protocol to Mr. Anthony or lose state funding. If it distributes a copy, it risks being a copyright infringer, liable to the copyright owner for actual or statutory damages. 17 U.S.C. §§ 501, 504 (1996 & Supp.2005).

The damage threat is real and immediate, not merely hypothetical or conjectural. See Thornburgh, 970 F.2d at 507 (quoting O'Shea v. Littleton, 414 U.S. 488, 494, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974)). The test publishers have intervened in this action and have asserted that giving a copy of test protocols to parents of special education students is not fair use. They have sent a letter to the District stating they would consider any failure to maintain confidentiality of their test materials as a contractual violation subjecting the District to liability. By intervening, the publishers have shown their willingness to litigate to protect their interests. See Virginia v. Am. Booksellers Ass'n, 484 U.S. 383, 392, 108 S.Ct. 636, 98 L.Ed.2d 782 (1988) (plaintiffs identified a sufficient threatened or actual injury when the challenged law was “aimed directly at plaintiffs, who, if their interpretation of the statute is correct, will have to take significant and costly compliance measures or risk criminal prosecution”).

To have standing, the District need not first copy and distribute the test protocols and wait for the publishers to sue. Thornburgh, 970 F.2d at 508 (“It is not necessary that [it] currently be subject to the challenged provisions in order to have standing; nor need [it] actually commit the forbidden provisions” to establish standing). The District has standing now.

B. Fair Use

California Education Code section 56504 states, in the context of special education, “[t]he parent shall have the right and opportunity to examine all school records of the child and to receive copies pursuant to this section ... within five days after such request is made by the parent, either orally or in writing.” 4 At the same time, federal copyright law grants copyright owners the exclusive right to copy and distribute copies of copyrighted works. 17 U.S.C. § 106(1), (3) (1996). This case presents a clash of those two valid but competing interests. The central issue is whether the doctrine of “fair use” avoids preemption of California Education Code section 56504 by the federal copyright law.

[3] The parties agree the test protocols sought by Mr. Anthony are “school records” under section 56504 because, after students write answers on the test protocols, they are identifiable with the students. 5 The parties do not dispute the test protocols, other than the students' answers, are copyrighted works.


However, these cases involved standardized competitive admission testing where future test-takers were given access to the tests before taking them. For this and other reasons, the situation presented in this case is quite different, and this line of cases is not applicable here.

*1176 The Court finds giving a copy of the test protocols to parents of special education students falls within 17 U.S.C. § 107, commonly referred to as the “fair use doctrine.”
Fair use is a mixed question of law and fact that may be decided on summary judgment. *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110, 1115 (9th Cir.2000).

If there are no genuine issues of material fact, or if, even after resolving all issues in favor of the opposing party, a reasonable trier of fact can reach only one conclusion, a court may conclude as a matter of law whether the challenged use qualifies as a fair use of the copyrighted work.

*Id.* (citing *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1150–51 (9th Cir.1986)).

Under the fair use doctrine, copying a copyrighted work “for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research,” is a fair use of the copyrighted work and is not a copyright infringement. 17 U.S.C. § 107 (1996). The doctrine is necessary “to fulfill copyright's very purpose, ‘[t]o promote the Progress of Science and useful Arts ....' ” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575, 114 S.Ct. 1164, 127 L.Ed.2d 500 (1994) (alterations in original) (quoting U.S. Const. art. I, § 8, cl. 8); see also *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 545, 105 S.Ct. 2218, 85 L.Ed.2d 588 (1985) (stating “copyright is intended to increase and not to impede the harvest of knowledge”).

The fair use doctrine “‘is an equitable rule of reason.’ ” *Harper & Row*, 471 U.S. at 560, 105 S.Ct. 2218 (quoting House Report, at 65, U.S.Code Cong. & Admin. News 1976, p. 5678). It “‘permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.’ ” *Campbell*, 510 U.S. at 577, 114 S.Ct. 1164 (alteration in original) (quoting *Stewart v. Abend*, 495 U.S. 207, 236, 110 S.Ct. 1750, 109 L.Ed.2d 184 (1990)). Factors to be considered include, but are not limited to:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

2. the nature of the copyrighted work;

3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

4. the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107. These and other elements are not considered in isolation from each other, but are weighed together in light of the purposes of copyright. *Campbell*, 510 U.S. at 577–78, 114 S.Ct. 1164. The fair use analysis “is not to be simplified with bright-line rules” and requires a case-by-case analysis. *Id.* at 577, 114 S.Ct. 1164.

1. Purpose and Character of Use

Mr. Anthony's purpose is an independent educational evaluation of his son's special education needs and abilities to place him in an appropriate educational program. This is a nonprofit educational use not for commercial gain. Unlike commercial use of copyrighted standardized test questions, Mr. Anthony's purpose weighs in favor of finding fair use. See *Katzman*, 793 F.2d at 543 (finding Princeton Review's use of copyrighted Scholastic Aptitude Test (“SAT”) questions to prepare students for the test in exchange for a fee was “highly commercial” and weighed against fair use).

Noncommercial uses to broaden a person's understanding of an issue can be fair use. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 455 n. 40, 104 S.Ct. 774, 78 L.Ed.2d 574 (1984) (stating “a teacher who copies for the sake of broadening his personal understanding of his specialty[, o]r a legislator who copies for the sake of broadening her understanding of what her constituents are watching; or a constituent who copies a news program to help make a decision on how to vote” are examples of fair use). Here, Mr. Anthony seeks to broaden his understanding, and the understanding of experts he may consult, of his son's special educational needs.
“Commercial or nonprofit educational purpose of a work is only one element of the first factor enquiry into its purpose and character.” *Campbell*, 510 U.S. at 584, 114 S.Ct. 1164. The Court also considers whether use of the work is transformative. *Id.* at 578–79, 114 S.Ct. 1164. A work is transformative if it “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.” *Id.* at 579, 114 S.Ct. 1164. Transformative works “lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright, and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.” *Id.*

Here, copies of test protocols with answers are transformative. *Section 56504* does not permit parents to have copies of the test protocols before the children have taken the tests. Such copies would not be transformative because they would be identical reproductions of the copyrighted test material. See *Pataki*, 889 F.Supp. at 568 (finding disclosure of standardized admissions test questions was non-transformative). The only copies implicated by *section 56504*, and the only copies at issue in this case, are those identifiable with a student after the student has taken the test. The copies, containing the students' answers, have a different character than the copyrighted material standing alone.

Even if not transformative, copying can be fair use when it is in the public interest. See, e.g., *Sony*, 464 U.S. at 454, 455 n. 40, 104 S.Ct. 774 (holding time-shifting by taping a television broadcast for later viewing was fair use, in part because it “yields societal benefits,” and stating “[m]aking a copy of a copyrighted work for the convenience of a blind person is ... an example of fair use”); *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 922 (2d Cir.1994) (“Courts are more willing to find a secondary use fair when it produces a value that benefits the broader public interest.”); *Key Maps, Inc. v. Pruitt*, 470 F.Supp. 33, 37–38 (S.D. Tex.1978) (ruling a county fire marshal's copying of fire zone maps was fair use in light of the public interest in fire prevention). Here, there is a legislated public interest in the appropriate education of special education students. This interest is advanced by providing copies of completed test protocols to parents to ensure their effective involvement in their children's education.

Under the second fair use factor, the nature of the copyrighted work is creative rather than informational. “Development of the test questions as well as their compilation in a particular test form is a ‘creative, imaginative, and original’ process.” *Pataki*, 889 F.Supp. at 569 (quoting *Cuomo*, 928 F.2d at 524). This ordinarily would weigh against finding fair use. See *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1016 (9th Cir.2001). But, with the addition of a student's answers, the questions and answers are informational in nature, which weighs in favor of fair use.

The distinction between published and unpublished works, often analyzed under the second fair use factor, see *Harper & Row*, 471 U.S. at 564, 105 S.Ct. 2218, is not particularly useful here. The test protocols are “published” in the sense that the public has access to them. Students use them to take the tests, and parents are allowed to examine the original completed test protocols. But, they are “unpublished” in the sense that the test publishers take steps to ensure their secrecy. Test protocols do not fit the “published/unpublished” framework. Cf. Robert A. Kreiss, *Copyright Fair Use of Standardized Tests*, 48 Rutgers L.Rev. 1043, 1071–72 (1996) (arguing for standardized tests, “the appropriate issue is whether the copyright owner is commercializing the work, not whether the work is published”).

Only part of the entire copyrighted test—portions identifiable with a student—is copied for parents under *section 56504*. This weighs in favor of fair use. The test publishers argue the copies include a large portion of, or all of, the copyrighted test material because test answers are integrated with the questions on test protocols. Even so, the copying of an entire work would not necessarily preclude fair use. *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1155 (9th Cir.1986); see also *Sony*, 464 U.S. at 456, 104 S.Ct. 774 (finding copying entire television broadcasts for later viewing is fair use). The amount copied of the copyrighted test material is no more than necessary to see the
students' answers and determine whether they were evaluated properly. The amount copied is “reasonable in relation to the purpose of the copying,” to assess the students' educational needs. *Campbell, 510 U.S. at 586, 114 S.Ct. 1164.*

4. Market Effect

It is important to consider whether the potential market for the tests will be substantially affected if parents of special education students receive copies of their child's test protocol. *Campbell, 510 U.S. at 590, 114 S.Ct. 1164* (considering “whether unrestricted and widespread conduct of the sort engaged in by the defendant ... would result in a substantially adverse impact on the potential market for the original”) (omission in original) (quoting 3 M. Nimmer & D. Nimmer, *Nimmer on Copyright* § 13.05[A][4], at 13–102.61 (1993)). The parties agree widespread public access to the test protocols, if it existed, could have a detrimental effect on the tests' market value.

No evidence has been presented indicating there is a substantial risk of widespread public access or an adverse market effect. In fact, the showing is to the contrary. Section 56504 does not provide widespread public access, or access by future test-taking students, but only authorizes receipt of copies by parents of special education students. Since at least 1983 it has been the Department's policy that parents may receive copies of their student's test protocols as fair use under 17 U.S.C. § 107. There is no indication that, during that time, parents have taken improper advantage of the protocols' availability or a publisher has had to re-standardize the protocols because of public access.

Concerns of a compromised market, or potential distribution to competitors or parents of children who have not yet taken the tests, are conclusory and not supported by evidence. The Court concludes there is a showing of no “meaningful likelihood” of an adverse market effect if parents continue to receive test protocols under section 56504. *Sony, 464 U.S. at 451, 104 S.Ct. 774* (test is meaningful likelihood of future harm). If, in the future, an adverse market effect materializes, the fair use analysis can be reviewed.

5. Other Factors

Consideration of other fair use factors further supports a finding of fair use. Parents such as Mr. Anthony already may examine the test protocols in the presence of a school official. Providing a copy is more like the time-shifting found permissible in *Sony* than the disclosure of secure test information found impermissible in *Pataki. Compare Sony, 464 U.S. at 449, 104 S.Ct. 774* (stating time-shifting enables a viewer to see a work “he had been invited to witness in its entirety free of charge”), with *Pataki, 889 F.Supp. at 571* (comparing *Sony* to a case in which the test publishers “have done everything they can to ensure that the test-taking public not gain access to ... copyrighted materials”).

6. Conclusion

The Court concludes a school giving parents of special education students copies of their children's test protocols when requested under California Education Code section 56504 is a fair use under 17 U.S.C. § 107. In order to minimize the risk of improper use, the District may choose to use appropriate safeguards, such as requiring a review by parents of the original test protocols before obtaining a copy, a written request for a copy, a nondisclosure or confidentiality agreement, or other reasonable measures.

The more appropriate outcome of this case is apparent to all. In order to avoid a “fair use” analysis whenever a district releases documents, and to protect California's school districts from fear of violating federal law, the California legislature should update section 56504 with appropriate standards to protect legitimate copyright concerns, while affording the important disclosure protections for parents of special education students the legislature intended. This should not be a difficult task.
III. DISPOSITION

Plaintiff's and Plaintiffs–Interveners' motion for summary judgment is DENIED. Defendants' motion for summary judgment is GRANTED.

All Citations


Footnotes
1 All statutory references are to the California Education Code unless otherwise stated.
2 Plaintiff and Plaintiffs–Interveners also assert a trade secret interest in the test protocols under state law and common law. That interest is not part of these cross-motions.
3 The Court would be concerned about deciding copyright issues unless the copyright owner was also a party to the case. Here, the owner has intervened.
4 Federal regulations implementing the Individuals with Disabilities Education Act have a similar provision. Parents are permitted “to inspect and review any education records relating to their children.” 34 C.F.R. § 300.562(a) (2004). The federal right to inspect and review includes “[t]he right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records.” Id. § 300.562(b)(2).
5 Test protocols generally include score sheets on which students mark their answers and tables on which examiners calculate the students' scores. Test protocols also can include the “prompts” of the test questions and instructions for the test administrators.
REFERENCES IN OAH DECISIONS

1. Student v. St. Helena USD & St. Helena USD v. Student
   Judge: Suzanne Brown

FACTUAL FINDINGS

42. Pupil records include any item of information directly related to an identifiable pupil, other than directory information, which is maintained by a school district or required to be maintained by an employee in the performance of his or her duties whether recorded by handwriting, print, tapes, film, microfilm or other means. Pupil records do not include informal notes related to a pupil compiled by a school officer or employee which remain in the sole possession of the maker, and are not accessible or revealed to any other person except a substitute.

43. Student's contention regarding this issue is not clear. There is no question that the District provided numerous documents in response to Parents' request for pupil records. However, on February 20, 2009, Student filed a motion asking OAH to order the District to produce “protocols, answer sheets, and other test-related documentation.” In response, the District filed an opposition stating that “[t]he protocols sought by Student are not maintained by the District, and do not exist.” In an order dated March 5, 2009, OAH issued an Order Granting Motion To Produce Limited Test Protocols And Related Documents. That order specified in part as follows:

3. District shall produce to the other party, within five business days from the date of this order, the following documents, to the extent that they are personally identifiable to the Student, and are in the possession of, or under the control of the District or a party who has acted on behalf of the District, in connection with any and all assessments of Student in 2008 [footnote omitted]:
   (a) Standardized testing protocols;
   (b) Test, evaluation, assessment, survey, or inventory answer sheets;
   (c) Read 180 evaluation or assessment data, protocols, and answer sheets;
   (d) Any other test-related documentation, such as test instructions, instruments and question booklets, that are reasonably necessary to explain or interpret the test, evaluation, or assessment results [footnote omitted].

4. In the event that the District does not have any test-related documents as described in Paragraph 3 above, then the District shall file with OAH and serve on the other party a declaration under penalty of perjury from the District’s custodian of records or other administration personnel addressing and explaining the lack of records in each of the four categories set forth above.

44. In response to OAH’s Order Granting Motion To Produce Limited Test Protocols And Related Documents, the District produced a sworn declaration from Dr. Haley, who declared that the District had previously produced all records, documents, or materials in existence as described in the OAH order.8 Dr. Haley’s declaration further stated that data from the school psychologist and occupational therapist had been destroyed, and that no other responsive documents were in existence and in the possession, custody or control of the District. During the hearing, the school psychologist, Dr. Ramah Commanday, confirmed that she had destroyed some notes and raw data from assessments once she had entered the information into the computer, which is standard practice in the District. Student presented no evidence that a district is required to maintain these types documents for any particular
period of time. Nor did Student establish that District destroyed the documents for any purpose other than standard practice.

45. Regarding Student’s pupil records from Read 180, testimony from Ms. Pritchett established that the District had produced only one Lexile test result.9 The District also provided Parents with Read 180 work samples which reflected work Student did in the program. Ms. Pritchett credibly established that, because of the short time period that Student attended the Read 180 program, Student did not generate the typical amount of Read 180 data. Student entered the program while the class was near the end of Unit 3. Ms. Pritchett established that, although Student subsequently completed Unit 4, it would not have been useful to give her the assessment, because it tested material from both units. Hence, the Read 180 data produced was all that existed.

46. Accordingly, the District has established that it complied with its obligation to produce Student’s educational records, and no procedural violation occurred on this basis.

LEGAL CONCLUSIONS

Did the District’s IEP of April 29 and May 16, 2008, deny Student a FAPE through October 13, 2008, by failing to provide Student’s complete educational records when requested by Parents?

15. The parent in a special education due process hearing has the right to examine pupil records. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.613(a) (2006); Ed. Code §§ 56501, subd. (b)(3), 56504.) The parent may examine his or her child’s school records and receive copies of them within five business days after request, and before any IEP meeting or any due process hearing. (Ed. Code §§ 56043, subd. (n); 56504.) The right to inspect and review records includes the right to a response to reasonable requests for explanations and interpretations of the records. (34 C.F.R. § 300.613(b) (2006); Ed. Code § 56504.)

16. Pupil or education records under the IDEA are defined by the federal Family Educational Rights and Privacy Act (FERPA). (20 U.S.C. § 1232; 34 C.F.R. § 99.3 (2006).) Pupil records include any item of information “directly related to an identifiable pupil, other than directory information, which is maintained by a school district or required to be maintained by an employee in the performance of his or her duties whether recorded by handwriting, print, tapes, film, microfilm or other means.” (Ed. Code, §§ 49061, 56504.) Pupil records do not include informal notes related to a pupil compiled by a school officer or employee which remain in the sole possession of the maker, and are not accessible or revealed to any other person except a substitute. (20 U.S.C. § 1232g(4)(b); Ed. Code, § 49061, subd. (b).)

17. Based on Factual Findings 41 to 46, and Legal Conclusions 7 to 8 and 15 to 16, the District complied with its obligation to produce Student’s educational records. Because no procedural violation occurred on this basis, the District did not deny Student a FAPE.
2. Student v. Oakland USD & Oakland USD

Judge: Joy Redmon

LEGAL CONCLUSIONS

14. Student asserts that Great-Aunt requested a copy of his school records, including his cumulative folder, be mailed to her on both September 26, 2012, and December 19, 2012, and that Oakland did not mail the records. Oakland asserts that it timely responded to Great-Aunt’s request by copying his records and making them available for her to pick up at Oakland’s office upon showing proper identification to receive the records.

15. California Education Code section 56504 states in relevant part that, “[t]he parent shall have the right and opportunity to examine all school records of his or her child and to receive copies...within five business days after the request is made by the parent, either orally or in writing.” The Family Educational Rights and Privacy Act, commonly referred to as FERPA, protects the privacy of student education records and imposes restrictions on who has the authority to receive student records. (42 U.S.C. § 1232 et seq.)

16. The question here turns not on whether the District timely copied the records, as it did so within five business days of the request, but on whether Oakland was required to mail a copy to Great-Aunt or if making them available for pick up at Oakland’s office complies with the law. California Education Code section 56504 requires that the parent have an opportunity to receive the records within five business days of the request. It does not impose an obligation to mail the records to the parent. Moreover, Oakland’s requirement that the person receiving the records show identification and demonstrate they have the legal right to receive the records is consistent with the protections imposed by FERPA.

17. In this case, Oakland timely responded to the initial request by copying the records and notifying Great-Aunt that the records were available for her to retrieve at its office and by reconfirming that the records remained available for her to retrieve in response to her second request. As Oakland made the records available in its office within five business days of her two requests, Oakland did not deny Student a FAPE by failing to timely provide Student’s educational records.

3. Student v. San Francisco USD

Judge: Theresa Ravandi

LEGAL CONCLUSIONS

65. Student contends San Francisco failed to timely provide him with a complete copy of his educational records, including daily behavior logs, such that Parent was not able to consider and consent to the December 2014 assessment plan. San Francisco contends that it timely provided Student with his cumulative file upon request and timely responded to a supplemental request. San Francisco argues that behavior point charts do not constitute educational records, but even so, these were routinely provided to Parent on a daily basis, and a summary of the behavior logs was provided to counsel.
66. To guarantee parents the ability to make informed decisions about their child’s education, the IDEA grants parents of a child with a disability the right to examine all relevant records in relation to their child’s special education identification, evaluation, educational placement and receipt of a FAPE. (20 U.S.C. §1415(b)(1); 34 C.F.R. § 300.501(a); Ed. Code, §§ 56501(b)(3) & 56504.) Each participating agency must permit parents to inspect and review any education records relating to their child that are collected, maintained, or used by the agency under this part. (34 C.F.R. §300.613(a).) The agency must comply with a request without unnecessary delay. (Ibid.) Federal regulations require that educational records be provided within 45 days of request, while California law affords parents the right to receive copies of all school records within 5 business days of the request. (Ibid.; Ed. Code, § 56504.) The right to inspect and review education records includes the right receive an explanation and interpretation of the records; the right to receive copies of the records if failure to provide copies would effectively prevent the parent from exercising the right to inspect and review the records; and the right to have a representative inspect and review the records. (34 C.F.R. §300.613(b).)

67. The IDEA does not have a separate definition of educational records, and adopts the Family Educational Rights and Privacy Act definition of education records by reference. (34 C.F.R. § 300.611(b).) In general, educational records are defined as those records which are personally identifiable to the student and maintained by an educational agency. (20 U.S.C § 1232g(a)(4)(A); 34 C.F.R. §§ 99.3 & 300.611(b).) The United States Supreme Court defined the word “maintained” in this context by its ordinary meaning of “preserve” or “retain.” Records are maintained when the agency keeps the records in one place such as “a filing cabinet in a records room or on a permanent secure database” with a single record of access. (Owasso Independent School Dist., No. I-011 v. Falvo, (2002) 534 U.S. 426, 433-34 [122 S.Ct. 934, 151 L.Ed.2d 896] (Owasso); S.A. v. Tulare County Office of Educ. (N.D.Cal. Sept. 24, 2009, No. CV F 08-1215 LJP GSA) 2009 WL 3126322, pp. 5-7 affd. S.A. v. Tulare County Office of Educ. (N.D. Cal. October 6, 2009) 2009 WL 3296653 [school e-mails concerning a student that were not placed in his permanent file were not educational records as they were not maintained by the school district pursuant to Owasso].) Similarly, education records do not include “records of instructional, supervisory, and administrative personnel …which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute.” (20 U.S.C. § 1232g(a)(4)(b)(i); Ed. Code, § 49061, subd. (b).)

68. The Supreme Court further clarified that some records, such as a student’s “homework” or “class work” are not educational records. (Owasso, supra, 534 U.S. 426, 435.) Likewise, a student’s writing sample, daily work, pretests, and personal staff notes are not educational records. (K.C. v. Fulton County Sch. Dist. (N.D. Ga. June 30, 2006, No. 1:03-CV-3501-TWT) 2006 WL 1868348, p. 10.)

69. On December 8, 2014, San Francisco timely responded to Parent’s December 3, 2014 request for a complete copy of Student’s educational file. San Francisco was not required to provide copies of Student’s daily behavior point sheets as these are not educational records maintained by San Francisco with a central point of access. Rather, Mr. Menegat retained a copy of Student’s point sheets in his own files. Even so, these point sheets went home daily, and Mr. Menegat discussed them weekly with Parent. Student did not establish that San Francisco withheld any records subject to disclosure. On January 22, 2015, San Francisco timely provided Parent a summary of Student’s behavior logs and his class work assignments in response to a supplemental records request on January 15, 2015, even though these are not within the definition of educational records. Student did not establish that San Francisco failed to timely produce requested educational records.
30. To guarantee parents the ability to make informed decisions about their child’s education, the IDEA grants parents of a child with a disability the right to examine all relevant records in relation to their child’s special education identification, evaluation, educational placement, and receipt of a FAPE. (20 U.S.C. §1415(b)(1); 34 C.F.R. § 300.501(a); Ed. Code, §§ 56501(b)(3) & 56504.) The district must comply with a request to review records without unnecessary delay and before any meeting regarding an IEP, any due process hearing, or resolution session, and in no case more than 45 days after the request has been made. (34 C.F.R. § 300.613(a).) The right to review records includes the right to receive an explanation or interpretation of information contained therein. (34 C.F.R. § 300.613(b).) Under California law, the parent shall have the right and opportunity to examine all school records of his child and to receive copies within five business days after the request is made by the parent, either orally or in writing. (Ed. Code, §§ 56043, subd. (n), 56501, subd. (b)(3), 56504.)

31. The IDEA does not have a separate definition of educational records, and adopts the Family Educational Rights and Privacy Act definition of education records by reference. (34 C.F.R. § 300.611(b).) In general, educational records are defined as those records which are personally identifiable to the student and maintained by an educational agency. (20 U.S.C § 1232g(a)(4)(A); 34 C.F.R. §§ 99.3; Ed. Code, § 49061, subd. (b) [similarly defines pupil record].) The United States Supreme Court in Owasso Independent School Dist. No. I-011 v. Falvo (2002) 534 U.S. 426 [122 S. Ct. 934, 151 L.Ed.2d 896] (Owasso), after conducting an analysis of FERPA provisions related to education records, defined the word “maintained” in this context by its ordinary meaning of “preserve” or “retain.” Records are maintained when the agency keeps the records in one place with a single record of access. (Id. 534 U.S. 426, 433-434.)

32. In S.A. v. Tulare County Office of Education (E.D.Cal. Sept. 24, 2009, No. CV F 08-1215 LJO GSA) 2009 WL 3126322, pp. 5-7, entry of judgment S.A. v. Tulare County Office of Education (E.D.Cal. October 6, 2009, No. CV F 08-1215 LJO GSA) 2009 WL 3296653, the federal court for the Eastern District of California found that school district e-mails concerning a student that had not been placed in his permanent file were not educational records as defined under FERPA. The court, relying on Owasso, held that the e-mails student requested were not educational records as they were not “maintained” by the school district; therefore, the school district was not required to produce them under a request for student records under the IDEA. (Ibid.)

33. Education records do not include records “which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute.” (20 U.S.C. § 1232g(a)(4)(b)(i); Ed. Code, § 49061, subd. (b).) Federal regulations further clarify that for a record to be excluded from the definition of an educational record pursuant to the “sole possession of the maker” exclusion, that record must be used only as a personal memory aid. (34 C.F.R. § 99.3(b)(1).) Further, the Family Policy Compliance Office within the United States Department of Education, in finding that a district had violated FERPA, determined that this exception was not intended to exclude detailed notes that record direct observations or evaluations of student behavior. (Letter to Baker (Office of Innovation and Improvement, Complaint No. 1251, December 28, 2005 [comprehensive notes of observations and
evaluations by a speech therapist, though kept in the sole possession of the maker, were not used solely as a memory aid and therefore were educational records subject to disclosure).) “School officials may not unilaterally remove records from the protections of FERPA through administrative decisions about where certain records are maintained or how they are categorized.” (Ibid.)

34. Test protocols such as test questions, student answers, evaluator calculation or scoring sheets, and administration instructions, to the extent these are personally identifiable to the student, are educational records that must be provided to parents if requested. (Newport-Mesa Unified School Dist. v. State of Cal. Dept. of Educ. (C.D.Cal. 2005) 371 F.Supp.2d 1170 at pp. 1175, 1179 [providing parents copies of their children’s test protocols constitutes a permissible “fair use” pursuant to federal copyright law]; Letter to Price (OSEP Oct. 13, 2010) 57 IDELR 50 [test protocols with a student’s personally identifiable information are education records and if copyright law conflicts with IDEA’s requirement to provide educational records, districts should seek ways to facilitate inspection including contacting the copyright holder].) Parents have the right to inspect instructional materials and assessments including teacher’s manuals. (Ed. Code, § 49091.10, subd. (a).)

PROVISION OF ASSESSMENT REPORTS

35. Upon completion of an assessment, the district shall provide parents with a copy of the “the evaluation report and the documentation of determination of eligibility.” (20 U.S.C. § 1414(b)(4)(B); 34 C.F.R. § 300.306(a)(2) Ed. Code, § 56329, subd. (a)(3).) The assessment must be completed and an IEP team meeting held within 60 days of receiving consent, exclusive of school vacations in excess of five school days and other specified days. (20 U.S.C. § 1414(a)(1)(C); Ed. Code, §§ 56043, subds. (c) & (f)(1), 56302.1, subd. (a), and 56344, subd. (a).)

36. This issue involves the production of two separate types of documents: the assessment reports, and the documents generated during Ms. Sachs’ behavior assessments. With respect to the assessment reports, Student did not demonstrate that San Mateo-Foster City deprived him of a FAPE by failing to provide Parents advance copies of the assessment reports. Student provided no legal authority that Parents were entitled to receive assessment reports prior to the 60-day date that the IEP team meetings were convened, or should have been convened, to review the assessment results.

37. As legally required, San Mateo-Foster City provided Parents a copy of Student’s initial multidisciplinary assessment report at his initial IEP team meeting which was timely convened on November 6, 2014, within 60 days of having received Parent consent to assess. Even though there is no legal requirement to do so, Ms. Sachs provided Father a copy of her January 2015 behavior assessment the morning of January 8, 2015, just prior to the start of the IEP team meeting. Mother received the behavior assessment and occupational therapy assessment reports at the January 8, 2015 IEP team meeting which was timely convened within 60 days of receiving Parent consent to conduct these additional assessments. Father, therefore, had a copy of both of these assessment reports well in advance of the rescheduled IEP team meeting on January 26, 2015. Pursuant to the April 21, 2015 signed assessment plan, Ms. Sachs completed a behavior reassessment of Student and timely provided Father a copy her draft report within 60 days on June 2, 2015. Parents received all of the assessment reports in a timely manner. Student did not meet his burden of proof that San Mateo-Foster City was required to provide copies of its assessment reports prior to the IEP team meetings held within 60 days of Parents’ consent to assess. As of the time of hearing, San Mateo-Foster City had not scheduled an IEP team meeting to review the results of Ms. Sachs’ second assessment. There was no violation regarding the provision of assessment reports.
38. The analysis is different regarding the documents which were generated during the behavior assessments of Student. In response to Parent’s April 17, and June 23, 2015 record requests, San Mateo-Foster City did not provide Student with a copy of Ms. Sachs’ assessment notes or related records she gathered in preparation for her behavior assessment reports. Its contention that these are not educational records but rather personal notes and records in Ms. Sachs’ sole possession, for her own personal use, and used solely as a memory aid was not persuasive. Ms. Sachs’ notes and the teacher input forms, even though personally maintained, were not used solely as a memory aide in this case.

39. Ms. Sachs conducted two behavior assessments of Student consisting of her expert observation, documentation, analysis of behavior data she personally collected, and analysis of data recorded by Student’s teachers. Observation is critical to any behavior assessment. Ms. Sachs’ notes recorded her observations of Student’s behavior, functional skills, and any impact on learning and included narrative and frequency recording of behavioral data she collected during her assessment of Student. She used her notes to complete the Barriers to Learning Scoring Form. As such, these assessment notes are analogous to test protocols and constitute an educational record. Similarly, the completed teacher input forms stood in the place of testing protocols and are analogous to behavior rating scales. These two records, Ms. Sachs’ notes and the written teacher input reports formed, in large part, the basis for her behavior assessments of Student. Under the circumstances of this case, these documents constitute educational records. Therefore, San Mateo-Foster City’s failure to provide Parents with copies of these records violated their procedural rights. Parents were the only IEP team members without this information which formed the basis for Ms. Sachs’ behavior assessments, findings, and recommendations. Though San Mateo-Foster City had not scheduled an IEP team meeting to review its second behavior assessment at the time of hearing, in March 2015, it named Student in a complaint to defend its initial behavior assessment and in April, Student filed his own complaint challenging, in part, San Mateo-Foster City’s determination that Student did not require individual ABA services. Parents proceeded to hearing on these consolidated matters in August 2015 without the opportunity to review these notes and related assessment records. This violation significantly impeded Parents’ ability to participate in the decision making process and thereby denied Student a FAPE.

40. As discussed in full below, even though the assessor notes and teacher input forms were not produced, the credibility of the underlying January 2015 behavior assessment was not compromised given the consistency between the multiple data points including information provided by Student’s teacher, speech therapist Mr. Loh, his private ABA provider Mr. Forth, and IEP team members including Parents. Moreover, contemporaneous extrinsic written evidence of Student’s functioning in the form of Ms. Flecha’s preschool transition report and her daily progress notes further support the overall reliability of Ms. Sachs’ January 2015 behavior assessment. In addition, Ms. Sachs’ clear recollection at hearing of her personal observations, sound knowledge of Student’s behavior functioning and needs as reported by his teacher and Parents and as documented in his records, and her unwavering testimony on direct and cross examination dispelled any question of the validity of her assessment raised by the missing records. As San Mateo-Foster City proved that its January 2015 behavior assessment was legally compliant, this Decision does not award Student an independent behavior assessment. However, San Mateo-Foster City must provide copies of the assessor notes and teacher input forms to Parents to the extent these documents are personally identifiable to Student and convene an IEP team meeting to explain and interpret these records.
5. Student v. Brentwood USD

Judge: Joy Redmon

October 26, 2015

LEGAL CONCLUSIONS

43. A procedural violation does not constitute a denial of FAPE unless it impeded the child’s right to a FAPE, significantly impeded the parents’ opportunity to participate in the decision-making process regarding the provision of a FAPE to the child, or deprived the Student educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii).) In this case, (with the exception of test protocols and the hit list as discussed separately below) even had Student established that particular documents were not produced; he would not have met the second prong of the analysis.

44. Student established that any perceived harm was not to Parents or Student but to his counsel in not receiving the documents under the theory that some documents may have established IDEA timeline violations. Parents were given the documents, specifically the assessment plans, at the time they were drafted as evidenced by their signed consent. There was no allegation that Parents did not receive notice of their procedural rights related to Student’s IEP evaluation process in 2011, 2013, and 2015. Therefore, Parents were on notice of the potential timeline violations at the time the alleged violation occurred. Student did not establish that his Parents did not receive the documents at the time they were generated. Further, Student failed to meet his burden that any delay in providing records pursuant to Student’s records request impeded Parents’ opportunity to participate in the decision making process regarding the provision of FAPE to Student, or deprived him educational benefit.

45. The exception to the finding above is in relation to the specific documents of test protocols and the hit list. Parents established that prior to hearing they never received copies of either. Test protocols are student records under Education Code section 56504. (Newport Mesa Unified School District v. State of California Department of Education, (C.D.Cal. 2005) 371 F.Supp.2d 1170). Student’s counsel specifically requested the test protocols from the 2015 assessments. They should have been provided to Parents. Multiple IEP team meetings were conducted following Student’s records request and the protocols could contain information to help Parents participate in the decision-making process regarding Student’s receipt of a FAPE. It is determined that failing to provide the test protocols from the 2015 psychoeducational assessment is a procedural violation that rose to the level of a denial of FAPE. Accordingly, the documents must be provided.

46. A photo copy of the hit list was produced by Officer Rucker at nearly the end of a 10-day hearing. The hit list was an item of information directly related to an identifiable pupil, specifically Student, and Officer Rucker established that it had been maintained by Ms. Gonzalez a Brentwood employee. She utilized the hit list in the performance of her duties when she suspended Student for drafting the hit list. Accordingly, the hit list is a pupil record. This document should have been made part of Student’s school records. It was the basis for his disciplinary suspension and a key piece of information necessary and relevant to all members of Student’s IEP team, including Parents. This document was necessary for the team to consider in crafting an appropriate IEP for Student. No explanation was given for why the document was not provided to Parents immediately following the incident, in response to their multiple records requests, and particularly in response to the subpoena. This constituted a procedural violation that led to a substantive denial of FAPE.
6. Student v. San Mateo-Foster City SD  
December 28, 2015  2015050320

Judge: Dena Coggins

LEGAL CONCLUSIONS

38. Student asserts that San Mateo-Foster City denied Student a FAPE by failing to release all of her education records in the form of e-mails pursuant to Student’s request on June 24, 2015. San Mateo-Foster City refutes this claim by arguing that all education records maintained by the District were provided to Student.

39. To guarantee parents the ability to make informed decisions about their child’s education, the IDEA grants parents of a child with a disability the right to examine all education records of the child with respect to the identification, evaluation, educational placement of the child, and receipt of a FAPE. (20 U.S.C. §1415(b)(1); 34 C.F.R. § 300.501(a); Ed. Code, §§ 56501(b)(3) & 56504.) Each participating agency must permit parents to inspect and review any education records relating to their child that are collected, maintained, or used by the agency. (34 C.F.R. §300.613(a).) The agency must comply with a request without unnecessary delay. (Ibid.) Federal regulations require that education records be provided within 45 days of the request, while California law affords parents the right to receive copies of all school records within five business days of the request. (Ibid.; Ed. Code, § 56504.)

40. Pursuant to Parents’ June 24, 2015 records request, San Mateo-Foster City produced Student’s education records, including one e-mail message between Ms. McMichael and other San Mateo-Foster City employees regarding Student. The evidence did not establish that any other e-mails pertaining to Student existed at the time of the request with the exception of e-mails that were already in Parent’s possession.

7. Student v. Folsom Cordova USD & Folsom Cordova USD v. Student  
June 8, 2016  2015110595 & 2015090251

Judge: B. Andrea MileS

LEGAL CONCLUSIONS

59. Parents contend that Folsom Cordova prevented them from meaningfully participating in the IEP process by failing to provide them with protocols, teacher interview reports, and other supporting materials used by Folsom Cordova to prepare Student’s psychoeducational and behavior assessments pursuant to Parents’ request on August 22, 2014, August 26, 2014, September 5, 2014, September 8, 2014, September 9, 2014, September 21, 2014, September 22, 2014, and November 4, 2014. Folsom Cordova contends that it provided Parents all existing student records in response to Parents’ requests. It further argues that Student did not make a request for Student records on September 22, 2014.

60. Education Code section 56504 states in relevant part that, “[t]he parent shall have the right and opportunity to examine all school records of his or her child and to receive copies...within five business days after the request is made by the parent, either orally or in writing.” Education Code section 49061(b) states that a “pupil record means any item of information directly related to an identifiable pupil, other than directory information, that is maintained by a school district or required to be maintained by an employee in the performance of his or her duties whether recorded by handwriting, print, tapes, film, microfilm, or other means.”
61. The right to inspect and review education records under this section includes: (1) the right to a response from the participating agency to reasonable requests for explanations and interpretations of the records; (2) the right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records; and (3) the right to have a representative of the parent inspect and review the records. (See 34 C.F.R. §300.613(b).) All parents have the right to receive copies of all school records within five business days after parents make a request. (Ed. Code, §56504.)

62. Education records under the IDEA are defined by the federal Family Educational Rights and Privacy Act (FERPA). (20 U.S.C. § 1232; 34 C.F.R. § 99.3.) Education records include “records, files, documents, and other materials” containing information directly related to a student, other than directory information, which “are maintained by an educational agency or institution or by a person acting for such agency or institution.” (20 U.S.C. §1232g(a)(4)(A); Ed.Code, § 49061, subd. (b).) Pupil or education records maintained by a school district employee in the performance of his or her duties include those “recorded by handwriting, print, tapes, film, microfilm or other means.” (Ed. Code, §§ 49061, 56504.)

63. The United States Supreme Court in Owasso Ind. School Dist. v. Falvo (2002) 534 U.S. 426 [122 S. Ct. 934, 151 L.Ed.2d 896] (Falvo), after conducting an analysis of FERPA provisions related to education records, determined that not every record relating to a student satisfies the FERPA definition of “education records.” Specifically, the Supreme Court examined the FERPA provision that requires educational institutions to “maintain a record, kept with the education records of each student” (i.e., 20 U.S.C. §1232g(b)(4)(A)), that “list[s] those who have requested access to a student’s education records and their reasons for doing so.” (Falvo, supra, 534 U.S. at p. 434.) The Court concluded that because this single record must be kept with the education records, “Congress contemplated that education records would be kept in one place with a single record of access.” (Id.) The Court further concluded that “[b]y describing a ‘school official’ and ‘his assistants’ as the personnel responsible for the custody of the records, FERPA implies that education records are institutional records kept by a single central custodian, such as a registrar...” (Id. at pp. 434-435.) The Court then found that individual assignments handled by many student graders in their separate classrooms were not student records. (Id.)

64. Education records do not include records “which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute.” (20 U.S.C. §1232g(a)(4)(b)(i); Ed. Code, § 49061, subd. (b).) Federal regulations further clarify that for a record to be excluded from the definition of an educational record pursuant to the “sole possession of the maker” exclusion, that record must be used only as a personal memory aid. (34 C.F.R. § 99.3(b)(1).)

65. Test protocols such as test questions, student answers, evaluator calculation or scoring sheets, and administration instructions, to the extent these are personally identifiable to the student, are educational records that must be provided to parents if requested. (Newport-Mesa Unified School Dist. v. State of Cal. Dept. of Educ. (C.D.Cal. 2005) 371 F.Supp.2d 1170 at pp. 1175, 1179 [providing parents copies of their children’s test protocols constitutes a permissible “fair use” pursuant to federal copyright law]; Letter to Price (OSEP Oct. 13, 2010) 57 IDELR 50 [test protocols with a student’s personally identifiable information are education records and if copyright law conflicts with IDEA’s requirement to provide educational records, districts should seek ways to facilitate inspection including contacting the copyright holder].) Parents have the right to inspect instructional materials and assessments including teacher’s manuals. (Ed. Code, § 49091.10, subd. (a).)
66. Folsom Cordova provided Parents with all of the requested documentation except for teacher emails, Ms. Phinney’s notes on her interview with Student’s classroom teacher, and Ms. Knowles’ notes from her observations of Student. However, Folsom Cordova delayed in providing a portion of the requested student records to Parents. MS. PHINNEY’S NOTES AND TEACHER EMAILS WERE NOT STUDENT RECORDS

67. The notes that Ms. Phinney took when interviewing Ms. Wallace, did not constitute a student record. Her notes remained in her sole possession, were not accessible to another person, and were created as a personal memory aide. (20 U.S.C. § 1232g(a)(4)(b)(i); Ed. Code, § 49061, subd. (b); 34 C.F.R. § 99.3(b)(1).) As such, the failure to provide Ms. Phinney’s notes of the teacher interview does not constitute a procedural violation.

68. Parents requested that Folsom Cordova provide any “teacher emails related to” Student’s “triennial assessment.” Student failed to establish that any emails of that nature existed. Even if those emails had existed, if they had not been contained in Student’s permanent file, then they would not be considered student records under S.A. ex rel. L.A. v. Tulare County Office of Education (N.D. Cal. Sept. 24, 2009) 2009 WL 3126322, affd. S.A. v. Tulare County Office of Education (N.D. Cal. October 6, 2009) 2009 WL 3296653. In that case, the district court found that school district e-mails concerning or personally identifying a student that had not been placed in his permanent file were not educational records as defined under FERPA. The court, citing Falvo, found that Congress contemplated that educational records would be kept in one place with a single record of access to those records. Because the e-mails in question had not been placed in the student’s permanent file and were not “maintained” by the school district, they were considered Student records. Therefore, even had the emails existed, the school district was not required to produce them under a request for student records. MS. KNOWLES’S OBSERVATION NOTES WERE STUDENT RECORDS

69. The Family Policy Compliance Office within the United States Department of Education, in finding that a district had violated FERPA, determined that this exception was not intended to exclude detailed notes that record direct observations or evaluations of student behavior. (Letter to Baker18 (Office of Innovation and Improvement, Complaint No. 1251, December 28, 2005 [comprehensive notes of observations and evaluations by a speech therapist, though kept in the sole possession of the maker, were not used solely as a memory aid and therefore were educational records subject to disclosure].)

70. In this case, Ms. Knowles’s notes from her observations of Student constituted a student record because they were comprehensive notes of Student’s behavior. However, until Parent’s November 4, 2014 records request, Folsom Cordova was not on notice that Parents were requesting those notes. Once Folsom Cordova was on notice, under Education Code section 56504, Folsom Cordova should have provided Parents those notes within five business days. However, as of the date of the hearing, Folsom Cordova had not provided Student with those records. This failure to provide student records constitutes a procedural violation. DELAY IN PROVIDING PROTOCOLS, ANSWER BOOKLETS, AND QUESTIONNAIRES

71. Folsom Cordova provided Parents with the protocols and answer booklet from the academic testing and the questionnaires from the behavior assessment more than the five business days after the request. This delay was due in part to Parents’ confusing and overly broad requests for student records. Additionally, Folsom Cordova had difficulty locating the academic protocols and answer booklets. The delay in providing the student records constitutes a procedural violation under Education Code section 56504.
75. Student alleges that he was denied a FAPE because Folsom Cordova committed the procedural violation of failing to comply with Education Code section 56504. However, a procedural violation only results in a denial of FAPE when it impeded the student’s right to a FAPE, significantly impeded the parent’s opportunity to participate in the IEP process, or caused a deprivation of educational benefit. In this case, Student has specifically alleged that the failure to comply with Parent’s student records requests significantly impeded Parents’ opportunity to participate in IEP process.

76. In this case, Folsom Cordova attempted to cure the procedural defect of the delay in providing Parents with the academic protocols and Student booklets by scheduling a meeting with Parents so that Ms. Woodman, Ms. Phinney, and Ms. Marjerison could review the testing process with Parents in detail. However, Parents declined to participate in such a meeting. Additionally, once Parents received the protocols and answer booklet for the Wechsler that Ms. Woodman administered, Parents could have requested that Ms. Woodman attend any of the continuing IEP team meetings so that they could address the information contained in the protocols or answer booklet. However, Parents never made that request. The delay in providing Parents the protocols and answer booklet did not prevent Parents from participating in the IEP process. As the evidence has shown, Parents vigorously participated in the IEP process during each of the four IEP meetings. Therefore, Student did not meet his burden of proving that the procedural violation impeded Parents from meaningfully participating in the IEP process.

77. Folsom Cordova’s failure to provide Parents with a copy of Ms. Knowles’s observation notes did not prevent Parents from meaningfully participating in the IEP process. Due to the timing of Ms. Knowles observation, the IEP team did not rely on her behavioral observations as much as they relied on the more current progress reports from PALS and the teachers’ observations of Student’s behavior. Despite not being provided Ms. Knowles behavior observation notes, Parents actively participated in the IEP process by voicing their opinions, concerns, and disagreement throughout all four IEP team meetings. Thus, Student did not meet his burden of proving that the procedural violation impeded Parents from meaningfully participating in the IEP process. C, D, & E. PREVENTING PARENTS FROM MEANINGFULLY PARTICIPATING

78. Student alleges that Folsom Cordova denied Parents meaningful participation in the IEP process by being unprepared to discuss and develop new appropriate goals for Student during the October 23, 2014, December 4, 2014, and April 9, 2015 IEP team meetings by demonstrating a lack of knowledge of Student’s progress reports and records regarding his progress towards his academic goals, present levels of performance, and areas of need.

79. Student further alleges that Folsom Cordova prevented Parents from meaningfully participating in the IEP process by preventing Parents from asking IEP team members questions during the August 27, 2014 and April 9, 2015 IEP team meetings and by abruptly ending the April 9, 2015 IEP team meeting.

80. A parent has meaningfully participated in the development of an IEP when the parent is informed of the child’s problems, attends the IEP team meeting, expresses his or her disagreement with the IEP team’s conclusions, and requests revisions in the IEP. (N.L. v. Knox County Schs. (6th Cir. 2003) 315 F.3d 688, 693.) A parent who has an opportunity to discuss a proposed IEP, and whose concerns are considered by the IEP team, has participated in the IEP process in a meaningful way. (Fuhrmann, supra, 993 F.2d at p. 1036.)
81. A preponderance of the evidence supports that Parents vigorously participated in all four IEP team meetings by discussing the proposed IEP and voicing their concerns about the proposed IEP. The approximately 16 hours of time the IEP team spent discussing and developing Student’s IEP both during IEP team meetings and during the goal drafting meeting is evidence that Parents had ample opportunity to participate meaningfully in the IEP process. Parents asked questions, were given answers to their questions, proposed goals and goal modifications that were adopted by Folsom Cordova, and provided information on Student’s present levels of performance. Contrary to Student’s contentions, Parents were active and vociferous participants in the IEP process. Therefore, Student failed to prove that he was denied a FAPE during the 2014-2015 school year because Folsom Cordova prevented Parents from meaningfully participating in the IEP process.

8. Student v. Berkeley USD

January 11, 2018 2017060459

Judge: Alexa Hohensee

Legal Conclusions

27. Student contends that District denied her a FAPE because it failed to include Student’s attendance records and assessment protocols in the educational records provided upon Parent’s request. District contends that it provided Parent with a complete copy of Student’s educational records, and if it had missed a few documents such as attendance records, it would have corrected the oversight if Parent had brought it to District’s attention

29. “Educational records” under the IDEA are defined by the federal statute and Supreme Court decisions to mean institutional records kept by a single central custodian, such as a registrar. (See Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g(a)(4)(A); Ed. Code, § 49061, subd. (b); Owasso Ind. School Dist. v. Falvo (2002) 534 U.S. 426, 434-435 [122 S. Ct. 934, 151 L.Ed.2d 896]) Typical of such records would be registration forms, class schedules, grade transcripts, discipline reports, and the like.” (BRV, Inc. v. Superior Court (2006) 143 Cal.App.4th 742, 751-755.) “[FERPA] was directed at institutional records maintained in the normal course of business by a single, central custodian of the school. (Id. at pp. 751-754.)

30. Educational records under Section 56504 include assessments and assessment protocols that are personally identifiable to the child, and must be disclosed to the parents. (Newport-Mesa Unified Sch. Dist. v. State of Calif. Dept. of Educ. (C.D. Cal. 2005) 371 F.Supp.2d 1170, 1175 (Newport-Mesa).) Copies of assessment protocols include work copyrighted by the assessment test publishers, but provision of protocols to parents under Section 56504 is a fair use of copyrighted material under Title 17 United States Code section 107. (Id. at p. 1179.) School districts may not infringe on this important disclosure protection for parents of special education students from fear of violating federal copyright law, but may minimize the risk of improper use of copies of assessment protocols by parents through reasonable measures, including a nondisclosure or confidentiality agreement. (Ibid.)

33. The weight of the evidence established that District promptly processed Parent’s educational records requests. The absence of attendance records would have been a minor oversight, and readily corrected by a call to District giving them notice that those documents were missing. 34. Test protocols are not routinely maintained in a student’s educational file and, due to the sensitive nature of the test documents and copyright obligations set forth in Newport-Mesa, are often kept in the files of the school psychologist. As with the attendance documents, Parent submitted no evidence that District was
notified upon receipt of educational records that the test protocols were not included, and given an opportunity to promptly remedy any oversight. 35. Parent was given a copy of District’s psychoeducational assessment report with Student’s results on each test instrument at the March 2, 2017 IEP team meeting. A report must be provided to the parent at the IEP team meeting regarding the assessment. (Ed. Code, § 56329, subd. (a)(3).) Ms. Sugahara-Henderson was also at the IEP team meeting to explain and discuss the assessment results, and Parent participated in the discussion. Parent did not request the protocols until well after the IEP team meeting that reviewed the psychoeducational assessment. Even assuming District had a duty to provide Student with a FAPE, which it did not, the failure to provide Parent with protocols in the educational records request response was not a procedural violation that significantly impeded Parent’s opportunity to participate in the IEP development process.
TIMING OF IEP MEETINGS

1. California Education Code Section 56043(e), (f) and (g)

2. California Education Code Section 56341.5


5. Examples of References in OAH Decisions
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§ 56043. Timelines affecting special education programs

Effective: January 1, 2015

Currentness

The primary timelines affecting special education programs are as follows:

(a) A proposed assessment plan shall be developed within 15 calendar days of referral for assessment, not counting calendar days between the pupil's regular school sessions or terms or calendar days of school vacation in excess of five schooldays, from the date of receipt of the referral, unless the parent or guardian agrees in writing to an extension, pursuant to subdivision (a) of Section 56321.

(b) A parent or guardian shall have at least 15 calendar days from the receipt of the proposed assessment plan to arrive at a decision, pursuant to subdivision (c) of Section 56321.

(c) Once a child has been referred for an initial assessment to determine whether the child is an individual with exceptional needs and to determine the educational needs of the child, these determinations shall be made, and an individualized education program team meeting shall occur within 60 days of receiving parental consent for the assessment, pursuant to subdivision (a) of Section 56302.1, except as specified in subdivision (b) of that section, and pursuant to Section 56344.

(d) The individualized education program team shall review the pupil's individualized education program periodically, but not less frequently than annually, pursuant to subdivision (d) of Section 56341.1.

(e) A parent or guardian shall be notified of the individualized education program team meeting early enough to ensure an opportunity to attend, pursuant to subdivision (b) of Section 56341.5. In the case of an individual with exceptional needs who is 16 years of age or younger, if appropriate, the meeting notice shall indicate that a purpose of the meeting will be the consideration of the postsecondary goals and transition services for the individual with exceptional needs, and the meeting notice described in this subdivision shall indicate that the individual with exceptional needs is invited to attend, pursuant to subdivision (e) of Section 56341.5.

(f)(1) An individualized education program required as a result of an assessment of a pupil shall be developed within a total time not to exceed 60 calendar days, not counting days between the pupil's regular school sessions, terms, or days of school vacation in excess of five schooldays, from the date of receipt of the parent's or guardian's written consent for assessment, unless the parent or guardian agrees in writing to an extension, pursuant to Section 56344.
§ 56043. Timelines affecting special education programs, CA EDUC § 56043

(2) A meeting to develop an initial individualized education program for the pupil shall be conducted within 30 days of a determination that the child needs special education and related services pursuant to Section 300.323(c)(1) of Title 34 of the Code of Federal Regulations and in accordance with Section 56344.

(g)(1) Beginning not later than the first individualized education program to be in effect when the pupil is 16 years of age, or younger if determined appropriate by the individualized education program team, and updated annually thereafter, the individualized education program shall include appropriate measurable postsecondary goals and transition services needed to assist the pupil in reaching those goals, pursuant to paragraph (8) of subdivision (a) of Section 56345.

(2) The individualized education program for pupils in grades 7 to 12, inclusive, shall include any alternative means and modes necessary for the pupil to complete the district's prescribed course of study and to meet or exceed proficiency standards for graduation, pursuant to paragraph (1) of subdivision (b) of Section 56345.

(3) Beginning not later than one year before the pupil reaches 18 years of age, the individualized education program shall contain a statement that the pupil has been informed of the pupil's rights under this part, if any, that will transfer to the pupil upon reaching 18 years of age, pursuant to Section 56041.5, subdivision (g) of Section 56345, and Section 300.520 of Title 34 of the Code of Federal Regulations.

(h) Beginning at the age of 16 years or younger, and annually thereafter, a statement of needed transition services shall be included in the pupil's individualized education program, pursuant to Section 56345.1 and Section 1414(d)(1)(A)(i) (VIII) of Title 20 of the United States Code.

(i) A pupil's individualized education program shall be implemented as soon as possible following the individualized education program team meeting, pursuant to Section 300.323(c)(2) of Title 34 of the Code of Federal Regulations and in accordance with Section 56344.

(j) An individualized education program team shall meet at least annually to review a pupil's progress, the individualized education program, including whether the annual goals for the pupil are being achieved, the appropriateness of the placement, and to make any necessary revisions, pursuant to subdivision (d) of Section 56343. The local educational agency shall maintain procedures to ensure that the individualized education program team reviews the pupil's individualized education program periodically, but not less frequently than annually, to determine whether the annual goals for the pupil are being achieved, and revises the individualized education program as appropriate to address, among other matters, the provisions specified in subdivision (d) of Section 56341.1, pursuant to subdivision (a) of Section 56380.

(k) A reassessment of a pupil shall occur not more frequently than once a year, unless the parent and the local educational agency agree otherwise in writing, and shall occur at least once every three years, unless the parent and the local educational agency agree, in writing, that a reassessment is unnecessary, pursuant to Section 56381, and in accordance with Section 1414(a)(2) of Title 20 of the United States Code.

(l) A meeting of an individualized education program team requested by a parent or guardian to review an individualized education program pursuant to subdivision (c) of Section 56343 shall be held within 30 calendar days, not counting days
between the pupil's regular school sessions, terms, or days of school vacation in excess of five schooldays, from the date of receipt of the parent's or guardian's written request, pursuant to Section 56343.5.

(m) If an individual with exceptional needs transfers from district to district within the state, the following are applicable pursuant to Section 56325:

(1) If the child has an individualized education program and transfers into a district from a district not operating programs under the same local plan in which he or she was last enrolled in a special education program within the same academic year, the local educational agency shall provide the pupil with a free appropriate public education, including services comparable to those described in the previously approved individualized education program, in consultation with the parents or guardians, for a period not to exceed 30 days, by which time the local educational agency shall adopt the previously approved individualized education program or shall develop, adopt, and implement a new individualized education program that is consistent with federal and state law, pursuant to paragraph (1) of subdivision (a) of Section 56325.

(2) If the child has an individualized education program and transfers into a district from a district operating programs under the same special education local plan area of the district in which he or she was last enrolled in a special education program within the same academic year, the new district shall continue, without delay, to provide services comparable to those described in the existing approved individualized education program, unless the parent and the local educational agency agree to develop, adopt, and implement a new individualized education program that is consistent with state and federal law, pursuant to paragraph (2) of subdivision (a) of Section 56325.

(3) If the child has an individualized education program and transfers from an educational agency located outside the state to a district within the state within the same academic year, the local educational agency shall provide the pupil with a free appropriate public education, including services comparable to those described in the previously approved individualized education program, in consultation with the parents or guardians, until the local educational agency conducts an assessment as specified in paragraph (3) of subdivision (a) of Section 56325.

(4) In order to facilitate the transition for an individual with exceptional needs described in paragraphs (1) to (3), inclusive, the new school in which the pupil enrolls shall take reasonable steps to promptly obtain the pupil's records, as specified, pursuant to subdivision (b) of Section 56325.

(n) The parent or guardian shall have the right and opportunity to examine all school records of the child and to receive complete copies within five business days after a request is made by the parent or guardian, either orally or in writing, and before any meeting regarding an individualized education program of his or her child or any hearing or resolution session pursuant to Chapter 5 (commencing with Section 56500), in accordance with Section 56504 and Chapter 6.5 (commencing with Section 49060) of Part 27.

(o) Upon receipt of a request from a local educational agency where an individual with exceptional needs has enrolled, a former educational agency shall send the pupil's special education records, or a copy of those records, to the new local educational agency within five working days, pursuant to subdivision (a) of Section 3024 of Title 5 of the California Code of Regulations.
(p) The department shall do all of the following:

(1) Have a time limit of 60 calendar days after a complaint is filed with the state educational agency to investigate the complaint.

(2) Give the complainant the opportunity to submit additional information about the allegations in the complaint.

(3) Review all relevant information and make an independent determination as to whether there is a violation of a requirement of this part or Part B of the federal Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 et seq.).

(4) Issue a written decision pursuant to Section 300.152(a)(5) of Title 34 of the Code of Federal Regulations.

(q) A prehearing mediation conference shall be scheduled within 15 calendar days of receipt by the Superintendent of the request for mediation, and shall be completed within 30 calendar days after the request for mediation, unless both parties to the prehearing mediation conference agree to extend the time for completing the mediation, pursuant to Section 56500.3.

(r) Any request for a due process hearing arising from subdivision (a) of Section 56501 shall be filed within two years from the date the party initiating the request knew or had reason to know of facts underlying the basis for the request, except that this timeline shall not apply to a parent if the parent was prevented from requesting the due process hearing, pursuant to subdivision (j) of Section 56505.

(s) The Superintendent shall ensure that, within 45 calendar days after receipt of a written due process hearing request, the hearing is immediately commenced and completed, including any mediation requested at any point during the hearing process, and a final administrative decision is rendered, pursuant to subdivision (f) of Section 56502.

(t) If either party to a due process hearing intends to be represented by an attorney in the due process hearing, notice of that intent shall be given to the other party at least 10 calendar days before the hearing, pursuant to subdivision (a) of Section 56507.

(u) Any party to a due process hearing shall have the right to be informed by the other parties to the hearing, at least 10 calendar days before the hearing, as to what those parties believe are the issues to be decided at the hearing and their proposed resolution of those issues, pursuant to paragraph (6) of subdivision (e) of Section 56505.

(v) Any party to a due process hearing shall have the right to receive from other parties to the hearing, at least five business days before the hearing, a copy of all documents, including all assessments completed and not completed by that date, and a list of all witnesses and their general area of testimony that the parties intend to present at the hearing, pursuant to paragraph (7) of subdivision (e) of Section 56505.

(w) An appeal of a due process hearing decision shall be made within 90 calendar days of receipt of the hearing decision, pursuant to subdivision (k) of Section 56505.
(x) A complaint filed with the department shall allege a violation of the federal Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 et seq.) or a provision of this part that occurred not more than one year before the date that the complaint is received by the department, pursuant to Section 56500.2 and Section 300.153(c) of Title 34 of the Code of Federal Regulations.

Credits

Current with urgency legislation through Ch. 9 of 2018 Reg.Sess
§ 56341.5. Individualized education program meetings, CA EDUC § 56341.5

(a) Each local educational agency convening a meeting of the individualized education program team shall take steps to ensure that no less than one of the parents or guardians of the individual with exceptional needs are present at each individualized education program meeting or are afforded the opportunity to participate.

(b) Parents or guardians shall be notified of the individualized education program meeting early enough to ensure an opportunity to attend.

(c) The individualized education program meeting shall be scheduled at a mutually agreed-upon time and place. The notice of the meeting under subdivision (b) shall indicate the purpose, time, and location of the meeting and who shall be in attendance. Parents or guardians also shall be informed in the notice of the right, pursuant to Section 300.322(b)(1)(ii) of Title 34 of the Code of Federal Regulations, to bring other people to the meeting who have knowledge or special expertise regarding the individual with exceptional needs, and inform the parents of subdivision (i) of Section 56341 relating to the participation of the infants and toddlers with disabilities service coordinator under Subchapter III (commencing with Section 1431) of the federal Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 et seq.) at the initial individualized education program team meeting for a child previously served under the Subchapter III program.

(d) As part of the participation of an individual with exceptional needs in the development of an individualized education program, as required by federal law, the individual with exceptional needs shall be allowed to provide confidential input to any representative of his or her individualized education program team.

(e) For an individual with exceptional needs, beginning no later than the effective date of the individualized education program in effect when the individual reaches the age of 16 years, or younger if determined appropriate by the individualized education program team, the meeting notice also shall indicate that a purpose of the meeting will be the consideration of the postsecondary goals and transition services for the individual, pursuant to Section 56345.1 and Section 1414(d)(1)(A)(ii)(VIII) of Title 20 of the United States Code, and the meeting notice shall indicate that the individual with exceptional needs is invited to attend. If the pupil does not attend the individualized education program meeting, the local educational agency shall take steps to ensure that the preferences and interests of the pupil are considered in accordance with Section 300.321(b)(2) of Title 34 of the Code of Federal Regulations.
(f) The local educational agency, to the extent appropriate, with the consent of the parents or individual with exceptional needs who has reached the age of majority, and in accordance with Section 300.321(b)(3) of Title 34 of the Code of Federal Regulations, shall invite a representative of any participating agency that is likely to be responsible for providing or paying for transition services.

(g) Pursuant to Section 300.322(c) of Title 34 of the Code of Federal Regulations, if no parent or guardian can attend the meeting, the local educational agency shall use other methods to ensure parent or guardian participation, including individual or conference telephone calls, and consistent with Section 300.328 of Title 34 of the Code of Federal Regulations, the parent or guardian and the local educational agency may agree to use alternative means of meeting participation.

(h) A meeting may be conducted without a parent or guardian in attendance if the local educational agency is unable to convince the parent or guardian that he or she should attend. In this event, the local educational agency shall maintain a record of its attempts to arrange a mutually agreed-upon time and place, such as:

(1) Detailed records of telephone calls made or attempted and the results of those calls.

(2) Copies of correspondence sent to the parents or guardians and any responses received.

(3) Detailed records of visits made to the home or place of employment of the parent or guardian and the results of those visits.

(i) The local educational agency shall take any action necessary to ensure that the parent or guardian understands the proceedings at a meeting, including arranging for an interpreter for parents or guardians with deafness or whose native language is a language other than English.

(j) The local educational agency shall give the parent or guardian a copy of the individualized education program, at no cost to the parent or guardian.

Credits

Current with urgency legislation through Ch. 9 of 2018 Reg.Sess
Joseph Daniel Thomas  
Attorney at Law  
10707 N. state Road 55  
Demotte, Indiana 46310-9671

Dear Mr. Thomas:

This is in response to your letter dated February 15, 2008 to Patricia J. Guard, former Acting Director of the Office of Special Education Programs (OSEP), regarding scheduling meetings of the individualized education program (IEP) Team under Part B of the Individuals with Disabilities Education Act (Part B). Specifically, you ask two questions:

1. Does the Individuals with Disabilities Education Act (IDEA) allow local educational agencies (LEAs) to unilaterally limit the times for conducting IEP meetings to normal “school hours” (e.g., 8:00 a.m. to 3:00 p.m.), or to normal “business hours” (e.g., 8:00 a.m. to 4:30 p.m.), based upon the LEA’s administrative convenience in staffing, such as the work hours the LEA has already agreed to provide teachers in union contracts?

2. If the same LEAs regularly conduct “Parent Teacher Conferences” for parents of children with and without disabilities as late as 7:30 p.m., does the IDEA allow the LEAs to refuse to conduct IEP meetings that late in the evening?

Requirements for parent participation at meetings of their child’s IEP Team, which are found at 34 CFR §300.322, require public agencies to ensure that parents are notified of their child’s IEP Team meeting early enough to ensure they have an opportunity to attend and to schedule such meetings at a “mutually agreed on time and place.” 34 CFR §300.322(a). However, Part B does not address times when public agencies can schedule IEP Team meetings. Although Part B does not prohibit public agencies from scheduling IEP Team meetings in the evening, it does not require that they do so. Therefore, it is not unreasonable for public agencies to schedule meetings of the IEP Team only during regular school hours or regular business hours because it is likely that these times are most suitable for public agency personnel to attend these meetings.

On the other hand, there may be circumstances where a parent cannot attend an IEP Team meeting that is scheduled during the day because their employment situation restricts their availability during school hours or business hours. In such a circumstance, public agencies should be flexible in scheduling IEP Team meetings to accommodate reasonable requests from parents. Where public agencies and parents cannot schedule meetings to accommodate their respective scheduling needs, public agencies must take other steps to ensure parent participation, consistent with 34 CFR §300.322(c). These include individual or conference telephone calls or videoconferencing, consistent with 34 CFR §300.328 (related to alternative means of meeting participation).
You also question whether an LEA, may, by contractual arrangement or collective bargaining agreement, limit the times when public agencies can schedule IEP Team meetings. We assume that these contracts address when public agencies can make their staff members available for attendance at IEP Team meetings, consistent with their other responsibilities. We do not believe that the parent participation provisions for IEP Team meetings restrict public agencies from entering into such contractual arrangements or agreements, specifying that public agency employees will attend meetings of the IEP Team only during regular working hours. Although the terms of such agreements will necessarily vary across agencies and States, public agencies still must ensure that they take other steps to ensure parent participation if the parents are unable to attend during school hours or business hours.

In the situation prompting your inquiry, we recognize that the difficulty arises because the parent’s expert is unable to attend an IEP Team meeting during regular school hours or regular business hours, and the parent believes that their expert possesses important information which must be shared at the meeting. Nonetheless, we do not believe that Part B requires the public agency to schedule the IEP Team meeting outside of regular school hours or regular business hours to accommodate participation of the parents’ expert. In this situation, the parent and public agency could consider using alternative means to ensure that the information of the parents’ expert is communicated to the IEP Team if the public agency is unable, for administrative or contractual reasons, to schedule the IEP Team meeting outside of regular school hours or regular business hours. Even though it may be the practice of this public agency to routinely conduct parent-teacher conferences in the evening, we do not believe that this practice alone would compel the public agency to schedule IEP Team meetings in the evening.

Based on section 607(e) of the IDEA, we are informing you that our response is provided as informal guidance and is not legally binding, but represents an interpretation by the U.S. Department of Education of the IDEA in the context of the specific facts presented.

If you have further questions or concerns, please do not hesitate to contact Lynne Fairfax, of my staff, at 202-245-7337.

Sincerely,

William W. Knudsen
Acting Director
Office of Special Education Programs

cc: Dr. Robert Marra
DOUG C., individually and on behalf of his minor child; Spencer C., a minor child, Plaintiffs–Appellants, v. State of HAWAII DEPARTMENT OF EDUCATION; Kathryn Matayoshi, in her official capacity as Acting Superintendent of Hawaii Public Schools, Defendants–Appellees.

No. 12–15079.


Synopsis

Background: Parent, individually and on behalf of his son, filed action alleging that Hawaii Department of Education deprived child of free appropriate public education (FAPE), and thus violated Individuals with Disabilities Education Act (IDEA), by holding annual individualized education program (IEP) meeting without participation of parent. The United States District Court for the District of Hawaii, Kevin S. Chang, United States Magistrate Judge, granted judgment for defendant. Parent appealed.

Holdings: The Court of Appeals, Paez, Circuit Judge, held that:

[1] decision of Department to prioritize its own representatives' schedules and attendance over attendance of parent and prioritize strict deadline compliance over parental participation in IEP was clearly not reasonable;

[2] after-the-fact meeting was not enough to remedy decision by Department to hold initial IEP meeting, in which they created IEP and changed student's placement, without parent; and

[3] procedural violation of holding IEP meeting without parent who was willing to participate and without IEP team member from private school where student was attending denied free and appropriate public education FAPE.

Reversed and remanded.

Attorneys and Law Firms

*1040 Keith H.S. Peck (argued), Honolulu, HI; and Robert E. Badger, Badger Arakaki, LLC, Honolulu, HI, for Plaintiffs–Appellants.

David M. Louie, Attorney General, and Michelle M.L. Puu (argued) and Holly T. Shikada, Deputy Attorneys General, Honolulu, HI, for Defendants–Appellees.


OPINION

PAEZ, Circuit Judge:

Plaintiff Doug C., individually and on behalf of his son, Spencer C., appeals the district court's judgment finding that the defendant, the Hawaii Department of Education, did not deny Spencer a free appropriate public education ("FAPE"), and thus did not violate the Individuals with Disabilities Education Act ("IDEA"), by holding an annual individualized education program ("IEP") meeting without the participation of a parent. Parental participation in the IEP and educational placement process is central to the IDEA's goal of protecting disabled students' rights and providing each disabled student with a FAPE. 20 U.S.C. § 1400(d); Bd. of Educ. v. Rowley, 458 U.S. 176, 205–06, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). We conclude that the Department violated the IDEA's explicit parental participation requirements. The Department held Spencer's annual IEP meeting without parental participation even though Doug C. did not “affirmatively refuse[] to attend,” but rather actively sought to reschedule the meeting in order to participate. Shapiro v. Paradise Valley Unified Sch. Dist., 317 F.3d 1072, 1078 (9th Cir.2003), superseded on other grounds by 20 U.S.C. § 1414(d)(1)(B). By denying Doug C. the opportunity to participate in the IEP process, the Department denied Spencer a FAPE. See id. at 1079. We have jurisdiction under 28 U.S.C. § 1291, and we reverse.

The IEP meeting in question changed Spencer's placement from Horizons Academy, a private special education facility, to the Workplace Readiness Program at Maui High School. Pending the outcome of these administrative and judicial review proceedings, Doug C. continued Spencer's placement at Horizons Academy at his own expense. We remand to the district court for further proceedings regarding Doug C.'s entitlement to reimbursement of Spencer's private school tuition. Because we conclude that the Department denied Spencer a FAPE, Doug C. is entitled to reimbursement if he can establish that “the private school placement was proper under the Act.” Florence Cnty. Sch. Dist. Four v. Carter, 510 U.S. 7, 15, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993).

I.

Spencer is an 18–year–old student in the Maui District of the Hawaii Department of Education. He was diagnosed with autism at age two. As a result of his condition, the Department determined that Spencer is eligible to receive special education and other related services, and his educational rights are protected by the IDEA. Beginning in fifth grade, Spencer's IEP placed him at a private special education facility, Horizons Academy, at the expense of the Department of Education. The Department held Spencer's annual IEP meeting on November 9, 2010 despite Doug C.'s inability to attend the meeting that day. At that meeting, the Department changed Spencer's educational placement, moving him to a program at Maui High School, his local public school.

The central issue in this case is whether the Department's efforts to include Doug C. in the November IEP meeting are sufficient to meet the requirements of the IDEA. A close review of the events leading up to the IEP meeting is therefore critical. The IEP team and Doug C. first discussed the annual IEP meeting date during a student support meeting in September 2010. Kaleo Waiau, a special education coordinator at Maui High School, testified that Doug C. and members of the education team all agreed that the IEP meeting would be held on October 28. Doug C. testified that he thought that they had only agreed, tentatively, to meet sometime in late October. In any event, Waiau called Doug C. on October 22 to confirm the October 28 meeting. Doug C. stated that he was unavailable that day, and they settled instead on either November 4 or 5 (the testimony on which is inconsistent). Doug C. testified that the November date was also tentative, subject to checking his calendar and confirming. The following day, Doug C. called Waiau to let him know that he was not available on that day, and they settled firmly on November 9 instead.
On the morning of November 9, Doug C. e-mailed Waiau at 7:27 a.m. He explained that he was sick and therefore unable to attend the IEP meeting. He suggested rescheduling the meeting for the following week, on either November 16 or 17. The annual review deadline for Spencer's IEP was Saturday, November 13. According to Waiau, some of the members of the IEP team were not available on Friday, November 12. Therefore, Waiau offered to reschedule for either Wednesday, November 10, or Thursday, November 11, accommodating the other members' schedules while still holding the meeting before the deadline. Doug C. responded that he could possibly participate on either of those days, but could not definitively commit to either day since he was ill and could not guarantee that he would recover in time. Waiau also suggested that Doug C. participate by phone or the Internet. But Doug C. explained that (1) he wanted to be physically present at his son's IEP meeting and (2) he did not feel physically well enough to participate meaningfully through any means that day.

Waiau decided to go forward with the meeting on November 9 as scheduled. He testified that he had already asked “13 people on three separate occasions to change their schedules and cancel other commitments” to schedule the meeting. Therefore, without a firm commitment from Doug C. for one of the two dates he proposed, Waiau refused to reschedule the meeting. Waiau and the IEP team held the meeting without the participation of Doug C. The only Horizons Academy staff member on Spencer's IEP team also did not attend.

With these key participants absent, the IEP team changed Spencer's placement from Horizons Academy to the Workplace Readiness Program at Maui High School. After the meeting, Waiau sent Doug C. the new, completed IEP for his review. The team held a follow-up IEP meeting on December 7 with Doug C. and a staff member from Horizons. At the follow-up meeting, the team reviewed the already completed IEP “line by line.” Waiau testified that Doug C. provided no substantive input, while Doug C. explained that he rejected the IEP in its entirety because he was excluded from the development process. No changes were made to the IEP during the December 7 meeting.

The day before the follow-up IEP meeting, Doug C. filed a request for a due process hearing as provided for by the IDEA. He argued, inter alia, that the lack of parental participation in the IEP meeting denied Spencer a FAPE. After a hearing, the administrative hearing officer issued a decision finding that the Department did not deny Spencer a FAPE and dismissed his claims for relief. The district court affirmed, holding that plaintiffs “failed to show that Defendant did not fulfill its statutory duty to ensure that Doug was afforded an opportunity to participate at the November 9, 2010 IEP meeting.” Doug C. timely appealed.

II.

[1] [2] [3] We review de novo questions of law, including the question of whether an IEP provides a free appropriate public education (FAPE). Shapiro, 317 F.3d at 1076. We review the district court's findings of fact for clear error, even when they are based on an administrative record. Amanda J. v. Clark Cnty. Sch. Dist., 267 F.3d 877, 887 (9th Cir.2001). The deference due to the administrative findings under the IDEA is less than the high standard of deference for judicial review of most agency actions. Id. But we must give “due weight” to administrative findings, particularly when the findings are “thorough and careful.” *1043 R.B. v. Napa Valley Unified Sch. Dist., 496 F.3d 932, 937 (9th Cir.2007) (internal quotation marks and citations omitted).

III.

A.
In order to “ensure that the rights of children with disabilities and parents of such children are protected,” 20 U.S.C. § 1400(d)(1)(B), see also 34 C.F.R. § 300.1(b), the IDEA guarantees a FAPE to children with disabilities, 20 U.S.C. § 1412(a)(1)(A), 34 C.F.R. § 300.101. When analyzing whether an agency provided a student a FAPE, we conduct a two-part inquiry. First, we must consider whether “the State complied with the procedures set forth in the Act.” Amanda J., 267 F.3d at 890 (quoting Rowley, 458 U.S. at 206–07, 102 S.Ct. 3034) (internal quotation marks omitted). Second, we must determine whether the IEP is “reasonably calculated to enable the child to receive educational benefits.” Id. A state must meet both requirements to comply with the obligations of the IDEA. Rowley, 458 U.S. at 207, 102 S.Ct. 3034.

Parental participation in the IEP and educational placement process is critical to the organization of the IDEA. See 20 U.S.C. § 1414(d)(1)(B)(i) (requiring the inclusion of parents on the IEP team); 34 C.F.R. § 300.321(a)(1) (same); 20 U.S.C. § 1415(b)(1) (requiring opportunities for parents “to participate in meetings with respect to identification, evaluation and educational placement of the child”). Indeed, the Supreme Court has stressed that the IDEA’s structure relies upon parental participation to ensure the substantive success of the IDEA in providing quality education to disabled students:

[W]e think that the importance Congress attached to these procedural safeguards cannot be gainsaid. It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process as it did upon the measurement of the resulting IEP against a substantive standard. We think that the congressional emphasis upon full participation of concerned parties throughout the development of the IEP ... demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of 1044 what Congress wished in the way of substantive content in an IEP.

Rowley, 458 U.S. at 205–06, 102 S.Ct. 3034 (citation omitted); see also Schaffer v. Weast, 546 U.S. 49, 53, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005) (“The core of the [IDEA] ... is the cooperative process that it establishes between parents and schools.... The central vehicle for this collaboration is the IEP process.”); Honig v. Doe, 484 U.S. 305, 311, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988) (“Congress repeatedly emphasized throughout the [IDEA] the importance and indeed the necessity of parental participation in both the development of the IEP and any subsequent assessments of its effectiveness.”) (emphasis added).

Echoing the Supreme Court, we have held that parental participation safeguards are “[a]mong the most important procedural safeguards” in the IDEA and that “[p]rocedural violations that interfere with parental participation in the IEP formulation process undermine the very essence of the IDEA.” Amanda J., 267 F.3d at 882, 892. We have explained that parental participation is key to the operation of the IDEA for two reasons: “Parents not only represent the best interests of their child in the IEP development process, they also provide information about the child critical to developing a comprehensive IEP and which only they are in a position to know.” Id. at 882.

In accordance with the foregoing, the regulatory framework of the IDEA places an affirmative duty on agencies to include parents in the IEP process. The public agency “responsible for providing education to children with disabilities,” 34 C.F.R. § 300.33, is required to “take steps to ensure that one or both of the parents of a child with a disability are present at each IEP meeting or are afforded an opportunity to participate” including providing ample notice and “scheduling the meeting at a mutually agreed on time and place.” 34 C.F.R. § 300.322(a). Moreover, if a parent cannot attend, the agency must offer other methods of participation such as video or teleconferencing. 34 C.F.R. §§ 300.322(c),
300.328. Most importantly, a meeting may only be conducted without a parent if “the public agency is unable to convince the parents that they should attend.” § 300.322(d) (emphasis added). And in that circumstance, the agency must keep a detailed record of its attempts to include the parent. Id. In Shapiro, we clarified the limited circumstances under which a public agency can hold an IEP meeting without parental participation. 317 F.3d at 1078. We held that parental “involvement in the ‘creation process’ requires the [agency] to include the [parents in an IEP meeting] unless they affirmatively refused to attend.” Id. (emphasis added).

B.

[6] Doug C. did not “affirmatively refuse[] to attend the meeting,” id., nor could it be said that the Department was “unable to convince” him to attend, 34 C.F.R. § 300.322(d). To the contrary, Doug C. vigorously objected to the Department holding an IEP meeting without him and asked the Department to reschedule the meeting for the following week. In response to the Department's offer to reschedule for either of the following two days, he agreed to try to attend but, understandably, could not firmly commit to a meeting date only one or two days later while he was sick. Despite the foregoing, the Department went forward with the IEP meeting without him, over his repeated objections, and, at that meeting, decided to change Spencer's educational placement for the first time in six years. The Department's actions simply do not accord with the standard we set forth in Shapiro.

*1045 [7] The fact that it may have been frustrating to schedule meetings with or difficult to work with Doug C. (as the Department repeatedly suggests) does not excuse the Department's failure to include him in Spencer's IEP meeting when he expressed a willingness to participate. We have consistently held that an agency cannot eschew its affirmative duties under the IDEA by blaming the parents. See Anchorage Sch. Dist. v. M.P., 689 F.3d 1047, 1055 (9th Cir.2012) (“[P]articipating educational agencies cannot excuse their failure to satisfy the IDEA's procedural requirements by blaming the parents.”); see also Target Range, 960 F.2d at 1485 (holding that the school district could not blame parents' choice to leave an IEP meeting for its own failure to create an IEP with the participation of the appropriate parties). An agency cannot blame a parent for its failure to ensure meaningful procedural compliance with the IDEA because the IDEA's protections are designed to benefit the student, not the parent. As we explained in Amanda J., parental participation is key to providing the student an adequate education because “[a]n IEP which addresses the unique needs of the child cannot be developed if those people who are most familiar with the child's needs are not involved.” 267 F.3d at 892.5 Because the Department's obligation is owed to the child, any alleged obstinance of Doug C. does not excuse the Department's failure to fulfill its affirmative obligation to include Doug C. in the IEP meeting when he expressed a willingness (indeed eagerness) to participate, albeit at a later date. 6

The Department's central argument is that it could not accommodate Doug C.'s request to reschedule because of the impending annual IEP deadline on November 13. Even assuming that the annual deadline should somehow trump parental participation, the Department's argument fails on the facts of this case. Waiau, the coordinator of the IEP meeting, testified that he refused to reschedule the meeting for the Wednesday or Thursday before the deadline because Doug C. could not firmly commit to either of those dates because of his illness, even though Doug C. testified that he said that he likely could attend. Waiau explained that he did not wish to disrupt the other members' schedules without a firm commitment.

This argument may seem reasonable but quickly unravels because, under the IDEA, the attendance of Doug C., Spencer's parent, must take priority over other members' attendance for the reasons discussed above. Indeed, a parent can consent to the absence of other team members at the meeting. 20 U.S.C. § 1414(d)(1)(C). In Shapiro, we clearly held that an agency cannot exclude a parent from an IEP meeting in order to “prioritize[ ] its representatives' schedules.” 317 F.3d at 1078. By refusing to reschedule the meeting for Wednesday or Thursday, Waiau improperly prioritized the schedules of the other members of the team over the attendance of Doug C. Moreover, Waiau also testified that he did not offer Doug C. the option of meeting on the Friday before the annual review deadline because other members of the IEP team
were not available to meet *1046 that day. Once again, the Department improperly prioritized its own representatives' schedules and attendance over the attendance of the parent.

Even if the Department's theory of the case was supported by the facts, the Department's argument that it absolutely could not reschedule the IEP meeting for a date even a few days after the annual deadline in order to include Doug C. is untenable. Waiau's testimony suggests, and the Department's counsel represented at oral argument, that if the annual deadline passed without a new IEP, services would “lapse.” The district court took a similar position. We reject this argument because it is premised on the erroneous assumption that the Department is authorized (let alone required) to cease providing services to a student if his annual IEP review is overdue. The IDEA mandates annual review of a student's IEP. 20 U.S.C. § 1414(d)(4); see also 34 C.F.R. § 300.324(b)(1)(i). However, the Department cites no authority, nor could it, for the proposition that it cannot provide any services to a student whose annual review is overdue.

[8] The more difficult question is what a public agency must do when confronted with the difficult situation of being unable to meet two distinct procedural requirements of the IDEA, in this case parental participation and timely annual review of the IEP. In considering this question, we must keep in mind the purposes of the IDEA: to provide disabled students a free appropriate public education and to protect the educational rights of those students. 20 U.S.C. § 1400(d). It is also useful to consider our standard for determining when a procedural error is actionable under the IDEA. We have repeatedly held that “procedural inadequacies that result in the loss of educational opportunity or seriously infringe the parents' opportunity to participate in the IEP formulation process, clearly result in the denial of a FAPE.” Shapiro, 317 F.3d at 1079; see also Amanda J., 267 F.3d at 892. When confronted with the situation of complying with one procedural requirement of the IDEA or another, we hold that the agency must make a reasonable determination of which course of action promotes the purposes of the IDEA and is least likely to result in the denial of a FAPE. In reviewing an agency's action in such a scenario, we will allow the agency reasonable latitude in making that determination.

In this case, the Department was allegedly confronted with two options: including Doug C. in the meeting and missing the IEP annual deadline by several days or proceeding with the IEP meeting without Doug C. but meeting the annual deadline. As discussed supra, the Supreme Court and this court have both repeatedly stressed the vital importance of parental participation in the IEP creation process. We have further held that delays in meeting IEP deadlines do not deny a student a FAPE where they do not deprive a student of any educational benefit. See A.M. v. Monrovia, 627 F.3d 773, 779 (9th Cir.2010) (“Whether or not Defendant exceeded the thirty-day limit, A.M. suffered no deprivation of educational benefit and therefore has no claim.”). Under the circumstances of this case, the Department's decision to prioritize strict deadline compliance over parental participation was clearly not reasonable.

There may, of course, be circumstances in which accommodating a parent's schedule would do more harm to the student's interest than proceeding without the parent's presence at the IEP. For example, in A.M., it was appropriate for the school to convene an IEP without the parents' participation because the student was new to the school, and therefore did not have any IEP in place, and the student's parents *1047 were unwilling to reschedule for an entire month after having canceled a scheduled IEP review that was itself already almost one month overdue. 627 F.3d at 780. We trust, however, that such circumstances will be rare given the central role parents have in helping to develop IEPs.

[9] Finally, the Department argues that there was no violation here because the Department held a follow-up IEP meeting with Doug C. present on December 7. We rejected a similar argument in Shapiro. We held that where an agency violates the IDEA by producing a new IEP without the participation of the child's parents, “[a]fter-the-fact parental involvement is not enough” because the IDEA contemplates parental involvement in the “creation process.” Shapiro, 317 F.3d at 1078. It is uncontested that, at the time of the December 7 meeting, the new IEP was already completed and adopted. Therefore, the after-the-fact meeting is not enough to remedy the Department's decision to hold the initial IEP meeting, in which they created the IEP and changed Spencer's placement, without Doug C.
C.

We recognize that not every procedural violation results in the denial of a FAPE, but procedural errors “that result in the loss of educational opportunity, or seriously infringe the parents' opportunity to participate in the IEP formulation process” do. *Shapiro*, 317 F.3d at 1079. The failure to include Doug C. in the IEP meeting clearly infringed on his ability to participate in the IEP formulation process. That reason alone is cause to conclude that Spencer was denied a FAPE.

[10] [11] [12] The procedural violation here also denied Spencer a FAPE for the separate reason that it resulted in the denial of an educational opportunity. A procedural error results in the denial of an educational opportunity where, absent the error, there is a “strong likelihood” that alternative educational possibilities for the student “would have been better considered.” *M.L. v. Federal Way Sch. Dist.*, 394 F.3d 634, 657 (9th Cir.2005) (Gould, J. concurring in part and concurring in the judgment). Thus, an IEP team's failure to properly consider an alternative educational plan can result in a lost educational opportunity even if the student cannot definitively demonstrate that his placement would have been different but for the procedural error. See id. Here, there is a strong likelihood that the benefits of placement at Horizons Academy, Doug C.'s preferred placement for his son, would have been more thoroughly considered if Doug C. had been present at the meeting. It is particularly likely that the merits of continuing Spencer's placement at Horizons Academy were not adequately considered in light of the fact that the IEP team member from the Academy was also absent.

Therefore, both because (1) Doug C.’s opportunity to participate was seriously infringed and (2) the procedural violation denied Spencer an educational opportunity by causing the merits of his placement at Horizon Academy to receive insufficient consideration, the Department denied Spencer a FAPE.

IV.

[13] For the foregoing reasons, we reverse the district court's judgment and remand. On remand, the district court must determine whether Doug C. is entitled to reimbursement for the costs of maintaining Spencer at Horizons Academy during the administrative and judicial review proceedings. Parents who place their children in private schools pending review proceedings under the IDEA are entitled to reimbursement if (1) the public placement *violated the IDEA* and (2) “the private school placement was proper under the Act.” *Florence Cnty. Sch. Dist. Four*, 510 U.S. at 15, 114 S.Ct. 361. Spencer's placement at the Workplace Readiness Program at Maui High School violated the IDEA because the placement was a result of the November 9 IEP meeting. Neither the district court nor the administrative hearing officer considered whether Horizons was a proper placement under the Act. Therefore, upon remand, the district court is directed to consider whether Spencer's placement at Horizons Academy was proper under the Act and, if so, order reimbursement for Spencer's private placement during the course of the administrative and judicial proceedings. *Id.; 20 U.S.C. § 1415(i)(2)(C)(iii)* (giving a district court the power to “grant such relief as [it] determines is appropriate”).

[14] We note that a parent's decision to place his child in a private school is “proper” so long as the school the parent selects “provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.” *C.B. ex rel. Baquerizo v. Garden Grove Unified Sch. Dist.*, 635 F.3d 1155, 1159 (9th Cir.2011) (internal quotation marks and citation omitted). This standard is met even if the private school provides “some, but not all” of the students educational needs; the placement need not “maximize the[ ] child's potential.” *Id.* (internal quotation marks, citation, and italics omitted). Where, as here, the private school selected by the parent is the same school that the child has previously attended for several years under IEPs that have been approved by all parties, we think it highly unlikely that the placement does not represent a “proper” placement. Nonetheless, we remand to permit the district court to consider the question. The district court may remand this issue to the state hearing officer to decide in the first instance.
REVERSED and REMANDED.

All Citations


Footnotes

1 Spencer was 15–years–old when the IEP meeting that is the subject of this appeal took place.

2 The facts, drawn from the testimony and other evidence presented at a due process administrative hearing before a state hearing officer, are mostly undisputed.

3 Spencer's mother apparently found the IEP meetings too stressful to attend.

4 Hawaii has fully implemented the purposes, guarantees, and protections of the IDEA into its own regulatory structure. See Haw.Code R. §§ 8–60–1 to 8–60–84; see also § 8–60–1(b) (“This chapter shall be construed as supplemental to, and in the context of, the Individuals With Disabilities Education Act ... and other federal laws and regulations relating to the provision of a free appropriate public education to a student with a disability.”). Hawaii's regulations mirror the language in the IDEA regarding the IDEA's purposes, the guarantee of a FAPE, and the requirement of parent participation. Compare Haw.Code R. § 8–60–1 (purposes), with 34 C.F.R. § 300.1 (same); Haw.Code R. § 8–60–3 (guarantee of FAPE), with 34 C.F.R. § 300.101 (same); Haw.Code R. § 8–60–46 (parent participation), with 34 C.F.R. § 300.322 (same).

5 The Department minimizes the importance of parental participation under the IDEA when it argues that Doug C. would have had little to contribute at the IEP meeting. The Department is in no position to question the value of Doug C.'s input. Congress already answered that question when it prioritized parental participation in the IEP process.

6 Of course, if the parent refuses to attend or is entirely unresponsive to the agency's requests to meet, the agency has a duty to move forward with the IEP process. See, e.g., K.D. v. Dept of Educ., 665 F.3d 1110, 1124 (9th Cir.2011). That is precisely the balance that the IDEA regulations strike, as we recognized in Shapiro.

7 Indeed, under the IDEA's “stay put” provision, a child is typically entitled to remain in his previous educational setting throughout the course of any administrative and judicial proceedings. See 20 U.S.C. § 1415(j). Here, however, Doug C. has not appealed the district court's denial of his motion for a stay put order, so we do not address whether he is entitled to reimbursement on that basis.
REFERENCES IN OAH DECISIONS

1. Tracy USD and San Joaquin County Office of Education v. Student  
   Judge: Michael Barth  
   July 15, 2011  
   2011040279

LEGAL CONCLUSIONS

Presence of Parents at IEP Meetings

7. Federal and State law require that parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. (20 U.S.C. § 1414(d)(1)(B)(i); Ed. Code, §§ 56304, 56342.5.) A school district must ensure that the parent of a student who is eligible for special education and related services is a member of any group that makes decisions on the educational placement of the student. (Ed. Code, § 56342.5.) Among the most important procedural safeguards are those that protect the parents’ right to be involved in the development of their child's educational plan. (Amanda J. v. Clark County Sch. Dist. (9th Cir. 2001) 267 F.3d 877, 882.) Accordingly, at the IEP team meeting, parents have the right to present information in person or through a representative. (Ed. Code, § 56341.1.)

8. A district must notify parents of an IEP team meeting “early enough to ensure that they will have an opportunity to attend,” and it must schedule the meeting at a mutually agreed on time and place. (34 C.F.R. § 300.322(a)(2) (2006)9 ; Ed. Code, §§ 56043, subd. (e); 56341.5, subds. (b),(c).) A district may not conduct an IEP team meeting in the absence of parents unless it is “unable to convince” the parents that they should attend, in which case it must keep a record of its attempts to arrange a mutually agreed on time and place. Those records should include detailed records of telephone calls, correspondence, and visits to the parents’ home or place of employment. (34 C.F.R. § 300.322(d); Ed. Code, § 56341.5, subd. (h); see Shapiro v. Paradise Valley Unified School Dist., No. 69 (9th Cir. 2003) 317 F.3d 1072, 1077-1078.)

Required Members of an IEP Team

9. An IEP team must include at least one parent; a representative of the local educational agency; a regular education teacher of the child if the child is, or may be, participating in the regular education environment; a special education teacher or provider of the child; an individual who can interpret the instructional implications of assessment results, and other individuals who have knowledge or special expertise regarding the pupil; and when appropriate, the student. (20 U.S.C. § 1414(d)(1)(B)(i), (iv-vi); Ed. Code, § 56341, subds. (b)(1), (5-6).)
LEGAL CONCLUSIONS

Student’s Issue – IEP Scheduling and Attendance by Attorney for District

26. Student contends that District failed to cooperate with Parent in scheduling IEP team meetings at mutually agreeable and convenient times and locations. Student further contends that District included District’s attorney at the IEP team meetings of January 26, 2011, and March 25, 2011, when Parent could not have an advocate present. Student asserts that District’s failure deprived Parent of meaningful participation in the IEP decisionmaking process, which amounted to a procedural violation and denial of FAPE. District contends that District staff fully cooperated with Parent in scheduling IEP team meetings. District further contends that Parent never requested a specific location for the IEP meetings, and that District fully cooperated in accommodating Parent and her representatives. District further contends that the facts show that District did not have an attorney attend the January 26, 2011 IEP meeting, and even so, the IDEA does not prohibit District from having its attorney present at IEP meetings.

Applicable Law

27. Federal and State law require that parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. (20 U.S.C. § 1414(d)(1)(B)(i); Ed. Code, §§ 56304, 56342.5.) A district must ensure that the parent of a student who is eligible for special education and related services is a member of any group that makes decisions on the educational placement of the student. (Ed. Code, § 56342.5.) Among the most important procedural safeguards are those that protect the parents’ right to be involved in the development of their child’s educational plan. (Amanda J. v. Clark County Sch. Dist. (9th Cir. 2001) 267 F.3d 877, 882.) Accordingly, at the meeting parents have the right to present information in person or through a representative (Ed. Code, § 56341.1.)

28. A district must notify parents of an IEP meeting “early enough to ensure that they will have an opportunity to attend”, and it must schedule the meeting at a mutually agreed on time and place. (34 C.F.R. § 300.322(a)(2)(2006); Ed. Code, §§ 56043, subd. (e); 56341.5, subds. (b),(c).) A district may not conduct an IEP team meeting in the absence of parents unless it is “unable to convince the parents that they should attend”, in which case it must: ... Keep a record of its attempts to arrange a mutually agreed on time and place, such as-- (1) Detailed records of telephone calls made or attempted and the results of those calls; (2) Copies of correspondence sent to the parents and any responses received; and (3) Detailed records of visits made to the parents’ home or place of employment and the results of those visits. (34 C.F.R. § 300.322(d)(2006); Ed. Code, § 56341.5, subd. (h); see, Shapiro v. Paradise Valley Unified School Dist., No. 69 (9th Cir. 2003) 317 F.3d 1072, 1077-1078.)

29. A parent has meaningfully participated in the development of an IEP when she is informed of her child’s problems, attends the IEP meeting, expresses her disagreement with the IEP team’s conclusions, and requests revisions in the IEP. (N.L. v. Knox County Schs. (6th Cir. 2003) 315 F.3d 688, 693.) A parent who has an opportunity to discuss a proposed IEP, and whose concerns are considered
by the IEP team, has participated in the IEP process in a meaningful way. (Fuhrmann v. East Hanover Bd. of Educ. (3d Cir. 1993) 993 F.2d 1031, 1036.)

30. An IEP team must include at least one parent; a representative of the local educational agency; a regular education teacher of the child if the child is, or may be, participating in the regular education environment; a special education teacher or provider of the child; an individual who can interpret the instructional implications of the assessment results, and other individuals who have knowledge or special expertise regarding the pupil, as invited at the discretion of the district, the parent, and when appropriate, the student. (20 U.S.C. § 1414(d)(1)(B)(i), (iv-vi); Ed. Code, § 56341, subs. (b)(1), (5-6).)

35. When parental non-cooperation obstructs the IEP process, courts usually hold that procedural violations in that process do not deny the student a FAPE. In C.G. v. Five Town Community School Dist. (1st Cir. 2008) 513 F.3d 279, for example, the Court of Appeals held that an IEP was incomplete only because of parents’ obstruction of the IEP process, and if parents had cooperated, the IEP would have been adequate. The procedural error was held harmless.

Analysis of Student’s Issue

36. Based upon the evidence, Parent was not deprived of meaningful participation in the IEP team meetings of January 26, 2011, March 25, 2011, and April 29, 2011, because they were not properly scheduled. Dr. Maugham and Ms. Moeller credibly testified about District’s numerous notices to Parent to attend IEP meetings, which Parent confirmed in writing. The evidence shows that District met all of the requirements under the law in the scheduling of each IEP team meeting during the relevant period in this case. District gave timely notice of each meeting, identifying the time and place of the meetings. Despite Parent’s contention that District intentionally scheduled the meetings at her inconvenience, the evidence overwhelmingly showed otherwise. Parent admitted timely receiving each IEP meeting notice at her address of record, she gave written acknowledgement that she received reasonable notice of the meetings, and she did not recall ever requesting a specific meeting location. Parent’s advocate credibly testified that she requested a special accommodation from District which required that IEP meetings be scheduled at District’s Special Services Center, and that she informed Parent of the arrangement.

37. The evidence establishes that Parent and her attorney tended to be uncooperative in scheduling the IEP meetings. There were several instances where Parent confirmed her attendance and then notified District she would not attend. The circumstances surrounding the scheduling of the March 3, 2011 IEP meeting is an example of her noncooperation. Specifically, the evidence shows that after District received Parent’s written requests on February 11, and 14, 2011 for an IEP meeting, as well as her representation that she would be bringing Carol Behrens as her advocate, District’s attorney notified Ms. Behrens on February 17, 2011, of its offer to schedule the IEP meeting for March 3, 2011, at 9:00 a.m. to conduct Student’s triennial review. District also provided three alternate dates if Parent could not attend on March 3, 2011. Even though Parent responded on February 22, 2011, advising she would attend the March 3, 2011 IEP meeting with her advocate, Parent notified District three days later that her advocate could not attend because of insufficient notice. Three days after that, Parent cancelled the meeting due to the reported hospitalization of her advocate. Despite District’s continuing efforts to accommodate Parent, Parent ultimately refused to sign a waiver of the March 5, 2011 statutory deadline to hold Student’s triennial review, and then Student’s attorney insisted on meeting on March 4, 2011. Yet, on the day of the meeting, Student’s attorney advised District that neither she nor Parent would be attending the meeting, leaving Ms. Behrens to attend the meeting by
speakerphone. However, at the time of the meeting, Ms. Behrens initially requested a delay in the meeting to submit a written request to reschedule the IEP meeting, and then advised that she would not be acting as Parent’s advocate. These actions resulted in the further delay of Student’s triennial review.

38. In addition, Parent engaged in more delaying tactics between March 4, 2011, to March 24, 2011. On March 6, 2011, and March 7, 2011, District received letters from Parent and Ms. Behrens respectively, requesting an IEP meeting on be scheduled on Fridays only. Parent requested March 11, 2011, at 11:00 a.m. District responded and told Parent that March 11, 2011, was not feasible and offered three alternate dates of March 18, 25, and April 2, 2011, at 8:30 a.m. Parent and Ms. Behrens accepted the date of March 25, 2011, but wanted the meeting at 11:00 a.m. instead of 8:30 a.m. On March 14, 2011, District gave notice to Parent scheduling the IEP meeting for March 25, 2011, at 11:00 a.m. Mother confirmed receipt of notice and acknowledged she received reasonable notice and noted she would attend. On March 22, 2011, District received a notice of representation on behalf of Student from Lighthouse Advocacy. Student’s new representative agreed to attend the IEP team meeting scheduled for March 25, 2011, at 11:00 a.m., and informed Parent of the time and place of the meeting. Parent attended this meeting with advocate Huffman but the meeting was continued when Ms. Huffman learned for the first time of additional issues concerning Student’s program. Following the above delays, which were attributable to Parent, the last IEP meeting to complete the triennial review was scheduled for April 29, 2011.

39. In sum, District made every effort to accommodate Parent’s IEP scheduling needs, and Student has failed to show a procedural violation of IDEA on this ground. Based upon the credible testimony of Parent’s advocate Huffman, Dr. Maughan, and Ms. Moeller, the evidence showed that the March 25, 2011 IEP team meeting date was arrived at for Parent’s convenience, and Parent and her advocate attended and fully provided input as team members. The same occurred at the April 29, 2011 IEP meeting, which was scheduled to try to accommodate for Parent’s advocate being unable to make the initial date due to illness. Ultimately, Parent attended alone because her advocate had withdrawn from representation, an event outside the District’s control, which the evidence showed was related to Parent seeking representation from both special education advocates and attorneys. Parent ultimately attended the IEP and provided input of her concern about Student’s behaviors and his progress. The IDEA assumes parents, as well as districts, will cooperate in the IEP process. Here, Parent’s inability to adhere to a mutually agreed upon meeting schedule, changing her representation on at least three occasions, and failing to disclose that she had filed a due process complaint while retaining and going forward with a new advocate, resulted in the delay of completing Student’s triennial review and the offer of a program and services to Student.

40. Student’s further contention that he was deprived of a FAPE because an attorney attended an IEP meeting on behalf of District is equally meritless. Parent testified that District’s attorney did not attend the January 26, 2011 IEP team meeting and she did not have an advocate present. The evidence establishes that District’s attorney only attended the March 25, 2011 IEP team meeting where Student’s advocate was also present. Student presented no evidence or authority to show that District was prohibited from inviting its attorney to attend, particularly when Student’s parent attended with an advocate. Not only is Student’s contention not factually supported, the IDEA did not prohibit District from having its legal representative present. Based upon the evidence, Student failed to meet his burden to show that District violated Parent’s right to meaningful participation in the IEP process by having its attorney present at either the January 26, 2011, or March 25, 2011 IEP team meetings.
Student has failed to meet his burden that District violated his procedural rights to a FAPE on this ground. (Factual Findings 1 and 30 through 50; Legal Conclusions 1 and 27 through 40.)

3. Student v. Mt. Diablo USD

Judge: Deidre Johnson

May 6, 2013 2012110641

LEGAL CONCLUSIONS

After Parental Request

10. A school district must convene an IEP team meeting whenever a parent or teacher requests a meeting to develop, review, or revise the IEP. (Ed. Code § 56343, subd. (c).) [Emphasis added.] Section 56343, subdivision (c) itself does not contain any time deadlines. For an initial assessment, the above specific timelines control.

11. However, where a parent requests an IEP team meeting to review an existing IEP pursuant to Education Code section 56343, subdivision (c), the IEP team meeting must be held within 30 days from the date of receipt of the written request, not counting days between the pupil’s regular school sessions, terms, or days of school vacation in excess of five schooldays. (Ed. Code, § 56343.5.) This provision applies where a pupil already has already been made eligible for special education and has an IEP for review.

Issue 1: Did District deny Student a FAPE for the 2012-2013 school year by failing to timely conduct an IEP team meeting after Parent requested an assessment in May 2012?

14. As set forth in Factual Findings 10 through 40, and Legal Conclusions 5 through 13, after Parent requested an assessment for special education on May 7, 2012, District failed to convene and conduct an IEP team meeting within 60 calendar days thereafter, less specified time periods including summer vacation. An initial 15- day time period tolled the timeline, during which District should have but did not provide a written assessment plan. Given the effective date of parental consent on May 23, 2012, within 30 days of the end of the 2011-2012 school year, District should have conducted the IEP meeting within 30 days of the start of the school year, or on or before Friday, September 28, 2012. District failed to meet the deadline and therefore committed a procedural violation of special education law. Since District did not immediately remedy this violation, it continued on an ongoing basis until District finally conducted an IEP meeting on February 27, 2013, when Student was finally offered special education eligibility, placement and services. Based on the continuing violation, Student’s right to a FAPE was impeded for over five months, and she was deprived of educational benefit. Accordingly, Student established that District’s violation denied her a FAPE.
4. Desert Sands USD v. Student  

Judge: Paul H. Kamoroff  

LEGAL CONCLUSIONS  

MOTHER’S FAILURE TO ATTEND THE IEP MEETINGS  

19. All required IEP team members were present at the IEP meetings, with the exception of Student’s mother. Parents of the child with a disability are critical members of the IEP team. California law requires that the parents be given notice of the meeting early enough to ensure an opportunity to attend. (Ed. Code, § 56341.5, subd. (b).) The law also requires the IEP team meeting to be scheduled at a mutually agreed-upon time and place. (Ed. Code, § 56341.5 (c).)  

20. A district may hold an IEP meeting without a parent in attendance if the district is unable to convince the parent that he or she should attend. (Ed. Code, § 56341.5, subd. (h).) However, if a district holds a meeting without the parent in attendance, it must “maintain a record of its attempts to arrange a mutually agreed-upon time and place” such as detailed records of telephone calls made or attempted, or copies of correspondence sent to the parent. (Ibid.)  

21. In the instant case, Desert Sands made many attempts to hold the December 2013 IEP team meeting with Mother in attendance. Desert Sands attempted to hold the meeting in September 2013, October 2013, and November 2013. In each case, Mother either failed to respond to the IEP team meeting notice or requested that the meeting be postponed. After Mother requested that the November 2013 meeting be postponed, Desert Sands rescheduled the meeting for a date and time suggested by Mother. Despite the fact that Mother had confirmed that she would attend the December 2013 meeting, she failed to do so and provided no explanation for her lack of attendance.  

22. Following the December 2013 IEP meeting, throughout February and March 2014, Desert Sands made frequent attempts schedule an IEP meeting around Mother’s schedule. Desert Sands attempted to hold the meeting in February 2014, March 2014, and on various dates in early April 2014. Mother refused to attend an IEP meeting on any of these dates.  

23. Consequently, Desert Sands showed that it took reasonable steps to include Mother’s participation in the December 3, 2013, and the April 9, 2013 IEP meetings.  

5. Student v. Morgan Hill USD  

Judge: Cole Dalton  

LEGAL CONCLUSIONS  

ANALYSIS AND CONCLUSIONS  

11. District timely held the manifestation review meeting within 10 school days of Student’s last suspension, which occurred on Thursday, May 12, 2016. At that time, Student had accrued 11 days of suspension during the 2015 –2016 school year. The series of removals constituted a pattern based
upon the number of school days missed during the school year, a general pattern of defiance of school authority and rules, and the proximity of removals to one another. As such, the suspensions constituted a change of placement requiring a manifestation review. Further, having determined to hold a manifestation review meeting, District obligated itself to follow the required procedures.

12. Ms. Martinez notified Mother, in Spanish, of the manifestation review meeting set for the following Monday, May 16, 2016. Mother agreed to and attended the meeting. District invited all relevant IEP team members to the meeting, including Student’s case manager and special education teacher Mr. Buechter; Student’s outside counselor Carlos Navarro; the school psychologist Dr. Waxman; the administrator and interpreter Ms. Yabrudy; Student’s general education teacher Mrs. Giesey; Student; and Mother.

13. Unlike an IEP meeting, there is no legal requirement that a general education teacher must attend a manifestation determination meeting, which requires the attendance only of relevant members of the IEP team as determined by the parent and the school district. Once Mrs. Giesey informed District she could not attend the meeting, District properly obtained an excusal. District provided an IEP team member excusal form to Mother at the meeting, which was translated into Spanish by Ms. Yabrudy. Mother agreed to and signed the excusal. Mother did not ask that the meeting be rescheduled to secure the attendance of a general education teacher. At hearing, Student provided no evidence of what Mrs. Giesey’s input would have been or that she had any information that would have changed the outcome of the meeting. Student failed to establish that a general education teacher was a necessary member of the manifestation review team.

14. District also provided Mother with a copy of the procedural rights in her native language of Spanish. Mother attended all of Student’s IEP’s and obtained prior copies of the procedural rights in Spanish. Ms. Yabrudy summarized the procedural rights for Mother at the beginning of the meeting and asked if she had any questions. She had none. Mother initialed the review documents indicating she received a copy of the procedural rights.

21. In summary, Student did not meet his burden of proving that District committed procedural violations related to the manifestation review meeting. District properly notified Mother of the manifestation review meeting in a manner that allowed her to attend, ask questions, provide input, and obtain changes to Student’s IEP as part of the manifestation review process. Further, District provided appropriate translation and interpretation services to Mother, such that she understood the proceedings and actively participated in the meeting.
THE TEN DAY NOTICE REQUIREMENT

1. 20 U.S.C. Section 1412(a)(10)(c)

2. 34 C.F.R. Section 300. 148


4. References from Decisions from California Office of Administrative Hearings

5. Language Used By Local Educational Agencies In Statement of Parent Rights
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§ 1412. State eligibility, 20 USCA § 1412

A State is eligible for assistance under this subchapter for a fiscal year if the State submits a plan that provides assurances to the Secretary that the State has in effect policies and procedures to ensure that the State meets each of the following conditions:

(1) Free appropriate public education

   (A) In general

   A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school.

   (B) Limitation

   The obligation to make a free appropriate public education available to all children with disabilities does not apply with respect to children--

   (i) aged 3 through 5 and 18 through 21 in a State to the extent that its application to those children would be inconsistent with State law or practice, or the order of any court, respecting the provision of public education to children in those age ranges; and
(ii) aged 18 through 21 to the extent that State law does not require that special education and related services under this subchapter be provided to children with disabilities who, in the educational placement prior to their incarceration in an adult correctional facility--

(I) were not actually identified as being a child with a disability under section 1401 of this title; or

(II) did not have an individualized education program under this subchapter.

(C) State flexibility

A State that provides early intervention services in accordance with subchapter III to a child who is eligible for services under section 1419 of this title, is not required to provide such child with a free appropriate public education.

(2) Full educational opportunity goal

The State has established a goal of providing full educational opportunity to all children with disabilities and a detailed timetable for accomplishing that goal.

(3) Child find

(A) In general

All children with disabilities residing in the State, including children with disabilities who are homeless children or wards of the State and children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.

(B) Construction

Nothing in this chapter requires that children be classified by their disability so long as each child who has a disability listed in section 1401 of this title and who, by reason of that disability, needs special education and related services is regarded as a child with a disability under this subchapter.

(4) Individualized education program
An individualized education program, or an individualized family service plan that meets the requirements of section 1436(d) of this title, is developed, reviewed, and revised for each child with a disability in accordance with section 1414(d) of this title.

(5) Least restrictive environment

(A) In general

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

(B) Additional requirement

(i) In general

A State funding mechanism shall not result in placements that violate the requirements of subparagraph (A), and a State shall not use a funding mechanism by which the State distributes funds on the basis of the type of setting in which a child is served that will result in the failure to provide a child with a disability a free appropriate public education according to the unique needs of the child as described in the child’s IEP.

(ii) Assurance

If the State does not have policies and procedures to ensure compliance with clause (i), the State shall provide the Secretary an assurance that the State will revise the funding mechanism as soon as feasible to ensure that such mechanism does not result in such placements.

(6) Procedural safeguards

(A) In general

Children with disabilities and their parents are afforded the procedural safeguards required by section 1415 of this title.
(B) Additional procedural safeguards

Procedures to ensure that testing and evaluation materials and procedures utilized for the purposes of evaluation and placement of children with disabilities for services under this chapter will be selected and administered so as not to be racially or culturally discriminatory. Such materials or procedures shall be provided and administered in the child’s native language or mode of communication, unless it clearly is not feasible to do so, and no single procedure shall be the sole criterion for determining an appropriate educational program for a child.

(7) Evaluation

Children with disabilities are evaluated in accordance with subsections (a) through (c) of section 1414 of this title.

(8) Confidentiality

Agencies in the State comply with section 1417(c) of this title (relating to the confidentiality of records and information).

(9) Transition from subchapter III to preschool programs

Children participating in early intervention programs assisted under subchapter III, and who will participate in preschool programs assisted under this subchapter, experience a smooth and effective transition to those preschool programs in a manner consistent with section 1437(a)(9) of this title. By the third birthday of such a child, an individualized education program or, if consistent with sections 1414(d)(2)(B) and 1436(d) of this title, an individualized family service plan, has been developed and is being implemented for the child. The local educational agency will participate in transition planning conferences arranged by the designated lead agency under section 1435(a)(10) of this title.

(10) Children in private schools

(A) Children enrolled in private schools by their parents

(i) In general

To the extent consistent with the number and location of children with disabilities in the State who are enrolled by their parents in private elementary schools and secondary schools in the school district served by a local educational agency, provision is made for the participation of those children in the program assisted or carried out under this subchapter by providing for such children special education and related services in accordance with the following requirements, unless the Secretary has arranged for services to those children under subsection (f):
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(I) Amounts to be expended for the provision of those services (including direct services to parentally placed private school children) by the local educational agency shall be equal to a proportionate amount of Federal funds made available under this subchapter.

(II) In calculating the proportionate amount of Federal funds, the local educational agency, after timely and meaningful consultation with representatives of private schools as described in clause (iii), shall conduct a thorough and complete child find process to determine the number of parentally placed children with disabilities attending private schools located in the local educational agency.

(III) Such services to parentally placed private school children with disabilities may be provided to the children on the premises of private, including religious, schools, to the extent consistent with law.

(IV) State and local funds may supplement and in no case shall supplant the proportionate amount of Federal funds required to be expended under this subparagraph.

(V) Each local educational agency shall maintain in its records and provide to the State educational agency the number of children evaluated under this subparagraph, the number of children determined to be children with disabilities under this paragraph, and the number of children served under this paragraph.

(ii) Child find requirement

(I) In general

The requirements of paragraph (3) (relating to child find) shall apply with respect to children with disabilities in the State who are enrolled in private, including religious, elementary schools and secondary schools.

(II) Equitable participation

The child find process shall be designed to ensure the equitable participation of parentally placed private school children with disabilities and an accurate count of such children.

(III) Activities

In carrying out this clause, the local educational agency, or where applicable, the State educational agency, shall undertake activities similar to those activities undertaken for the agency’s public school children.
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(IV) Cost

The cost of carrying out this clause, including individual evaluations, may not be considered in determining whether a local educational agency has met its obligations under clause (i).

(V) Completion period

Such child find process shall be completed in a time period comparable to that for other students attending public schools in the local educational agency.

(iii) Consultation

To ensure timely and meaningful consultation, a local educational agency, or where appropriate, a State educational agency, shall consult with private school representatives and representatives of parents of parentally placed private school children with disabilities during the design and development of special education and related services for the children, including regarding--

(I) the child find process and how parentally placed private school children suspected of having a disability can participate equitably, including how parents, teachers, and private school officials will be informed of the process;

(II) the determination of the proportionate amount of Federal funds available to serve parentally placed private school children with disabilities under this subparagraph, including the determination of how the amount was calculated;

(III) the consultation process among the local educational agency, private school officials, and representatives of parents of parentally placed private school children with disabilities, including how such process will operate throughout the school year to ensure that parentally placed private school children with disabilities identified through the child find process can meaningfully participate in special education and related services;

(IV) how, where, and by whom special education and related services will be provided for parentally placed private school children with disabilities, including a discussion of types of services, including direct services and alternate service delivery mechanisms, how such services will be apportioned if funds are insufficient to serve all children, and how and when these decisions will be made; and

(V) how, if the local educational agency disagrees with the views of the private school officials on the provision of services or the types of services, whether provided directly or through a contract, the local educational agency shall provide to the private school officials a written explanation of the reasons why the local educational agency chose not to provide services directly or through a contract.
(iv) Written affirmation

When timely and meaningful consultation as required by clause (iii) has occurred, the local educational agency shall obtain a written affirmation signed by the representatives of participating private schools, and if such representatives do not provide such affirmation within a reasonable period of time, the local educational agency shall forward the documentation of the consultation process to the State educational agency.

(v) Compliance

(I) In general

A private school official shall have the right to submit a complaint to the State educational agency that the local educational agency did not engage in consultation that was meaningful and timely, or did not give due consideration to the views of the private school official.

(II) Procedure

If the private school official wishes to submit a complaint, the official shall provide the basis of the noncompliance with this subparagraph by the local educational agency to the State educational agency, and the local educational agency shall forward the appropriate documentation to the State educational agency. If the private school official is dissatisfied with the decision of the State educational agency, such official may submit a complaint to the Secretary by providing the basis of the noncompliance with this subparagraph by the local educational agency to the Secretary, and the State educational agency shall forward the appropriate documentation to the Secretary.

(vi) Provision of equitable services

(I) Directly or through contracts

The provision of services pursuant to this subparagraph shall be provided--

(aa) by employees of a public agency; or

(bb) through contract by the public agency with an individual, association, agency, organization, or other entity.
(II) Secular, neutral, nonideological

Special education and related services provided to parentally placed private school children with disabilities, including materials and equipment, shall be secular, neutral, and nonideological.

(vii) Public control of funds

The control of funds used to provide special education and related services under this subparagraph, and title to materials, equipment, and property purchased with those funds, shall be in a public agency for the uses and purposes provided in this chapter, and a public agency shall administer the funds and property.

(B) Children placed in, or referred to, private schools by public agencies

(i) In general

Children with disabilities in private schools and facilities are provided special education and related services, in accordance with an individualized education program, at no cost to their parents, if such children are placed in, or referred to, such schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this subchapter or any other applicable law requiring the provision of special education and related services to all children with disabilities within such State.

(ii) Standards

In all cases described in clause (i), the State educational agency shall determine whether such schools and facilities meet standards that apply to State educational agencies and local educational agencies and that children so served have all the rights the children would have if served by such agencies.

(C) Payment for education of children enrolled in private schools without consent of or referral by the public agency

(i) In general

Subject to subparagraph (A), this subchapter does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility.
(ii) **Reimbursement for private school placement**

If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

(iii) **Limitation on reimbursement**

The cost of reimbursement described in clause (ii) may be reduced or denied--

(I) if--

(aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(bb) 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in item (aa);

(II) if, prior to the parents’ removal of the child from the public school, the public agency informed the parents, through the notice requirements described in section 1415(b)(3) of this title, of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for such evaluation; or

(III) upon a judicial finding of unreasonableness with respect to actions taken by the parents.

(iv) **Exception**

Notwithstanding the notice requirement in clause (iii)(I), the cost of reimbursement--

(I) shall not be reduced or denied for failure to provide such notice if--
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(aa) the school prevented the parent from providing such notice;

(bb) the parents had not received notice, pursuant to section 1415 of this title, of the notice requirement in clause (iii)(I); or

(cc) compliance with clause (iii)(I) would likely result in physical harm to the child; and

(II) may, in the discretion of a court or a hearing officer, not be reduced or denied for failure to provide such notice if--

(aa) the parent is illiterate or cannot write in English; or

(bb) compliance with clause (iii)(I) would likely result in serious emotional harm to the child.

(11) State educational agency responsible for general supervision

(A) In general

The State educational agency is responsible for ensuring that--

(i) the requirements of this subchapter are met;

(ii) all educational programs for children with disabilities in the State, including all such programs administered by any other State agency or local agency--

(I) are under the general supervision of individuals in the State who are responsible for educational programs for children with disabilities; and

(II) meet the educational standards of the State educational agency; and

(iii) in carrying out this subchapter with respect to homeless children, the requirements of subtitle B of title VII of the
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McKinney-Vento Homeless Assistance Act (42 U.S.C. 11431 et seq.) are met.

(B) Limitation

Subparagraph (A) shall not limit the responsibility of agencies in the State other than the State educational agency to provide, or pay for some or all of the costs of, a free appropriate public education for any child with a disability in the State.

(C) Exception

Notwithstanding subparagraphs (A) and (B), the Governor (or another individual pursuant to State law), consistent with State law, may assign to any public agency in the State the responsibility of ensuring that the requirements of this subchapter are met with respect to children with disabilities who are convicted as adults under State law and incarcerated in adult prisons.

(12) Obligations related to and methods of ensuring services

(A) Establishing responsibility for services

The Chief Executive Officer of a State or designee of the officer shall ensure that an interagency agreement or other mechanism for interagency coordination is in effect between each public agency described in subparagraph (B) and the State educational agency, in order to ensure that all services described in subparagraph (B)(i) that are needed to ensure a free appropriate public education are provided, including the provision of such services during the pendency of any dispute under clause (iii). Such agreement or mechanism shall include the following:

(i) Agency financial responsibility

An identification of, or a method for defining, the financial responsibility of each agency for providing services described in subparagraph (B)(i) to ensure a free appropriate public education to children with disabilities, provided that the financial responsibility of each public agency described in subparagraph (B), including the State medicaid agency and other public insurers of children with disabilities, shall precede the financial responsibility of the local educational agency (or the State agency responsible for developing the child’s IEP).

(ii) Conditions and terms of reimbursement

The conditions, terms, and procedures under which a local educational agency shall be reimbursed by other agencies.
(iii) Interagency disputes

Procedures for resolving interagency disputes (including procedures under which local educational agencies may initiate proceedings) under the agreement or other mechanism to secure reimbursement from other agencies or otherwise implement the provisions of the agreement or mechanism.

(iv) Coordination of services procedures

Policies and procedures for agencies to determine and identify the interagency coordination responsibilities of each agency to promote the coordination and timely and appropriate delivery of services described in subparagraph (B)(i).

(B) Obligation of public agency

(i) In general

If any public agency other than an educational agency is otherwise obligated under Federal or State law, or assigned responsibility under State policy pursuant to subparagraph (A), to provide or pay for any services that are also considered special education or related services (such as, but not limited to, services described in section 1401(1) relating to assistive technology devices, 1401(2) relating to assistive technology services, 1401(26) relating to related services, 1401(33) relating to supplementary aids and services, and 1401(34) of this title relating to transition services) that are necessary for ensuring a free appropriate public education to children with disabilities within the State, such public agency shall fulfill that obligation or responsibility, either directly or through contract or other arrangement pursuant to subparagraph (A) or an agreement pursuant to subparagraph (C).

(ii) Reimbursement for services by public agency

If a public agency other than an educational agency fails to provide or pay for the special education and related services described in clause (i), the local educational agency (or State agency responsible for developing the child’s IEP) shall provide or pay for such services to the child. Such local educational agency or State agency is authorized to claim reimbursement for the services from the public agency that failed to provide or pay for such services and such public agency shall reimburse the local educational agency or State agency pursuant to the terms of the interagency agreement or other mechanism described in subparagraph (A)(i) according to the procedures established in such agreement pursuant to subparagraph (A)(ii).

(C) Special rule

The requirements of subparagraph (A) may be met through--
(i) State statute or regulation;

(ii) signed agreements between respective agency officials that clearly identify the responsibilities of each agency relating to the provision of services; or

(iii) other appropriate written methods as determined by the Chief Executive Officer of the State or designee of the officer and approved by the Secretary.

(13) Procedural requirements relating to local educational agency eligibility

The State educational agency will not make a final determination that a local educational agency is not eligible for assistance under this subchapter without first affording that agency reasonable notice and an opportunity for a hearing.

(14) Personnel qualifications

(A) In general

The State educational agency has established and maintains qualifications to ensure that personnel necessary to carry out this subchapter are appropriately and adequately prepared and trained, including that those personnel have the content knowledge and skills to serve children with disabilities.

(B) Related services personnel and paraprofessionals

The qualifications under subparagraph (A) include qualifications for related services personnel and paraprofessionals that--

(i) are consistent with any State-approved or State-recognized certification, licensing, registration, or other comparable requirements that apply to the professional discipline in which those personnel are providing special education or related services;

(ii) ensure that related services personnel who deliver services in their discipline or profession meet the requirements of clause (i) and have not had certification or licensure requirements waived on an emergency, temporary, or provisional basis; and

(iii) allow paraprofessionals and assistants who are appropriately trained and supervised, in accordance with State
law, regulation, or written policy, in meeting the requirements of this subchapter to be used to assist in the provision of special education and related services under this subchapter to children with disabilities.

(C) Qualifications for special education teachers

The qualifications described in subparagraph (A) shall ensure that each person employed as a special education teacher in the State who teaches elementary school, middle school, or secondary school—

(i) has obtained full State certification as a special education teacher (including participating in an alternate route to certification as a special educator, if such alternate route meets minimum requirements described in section 2005.56(a)(2)(ii) of title 34, Code of Federal Regulations, as such section was in effect on November 28, 2008), or passed the State special education teacher licensing examination, and holds a license to teach in the State as a special education teacher, except with respect to any teacher teaching in a public charter school who shall meet the requirements set forth in the State’s public charter school law;

(ii) has not had special education certification or licensure requirements waived on an emergency, temporary, or provisional basis; and

(iii) holds at least a bachelor’s degree.

(D) Policy

In implementing this section, a State shall adopt a policy that includes a requirement that local educational agencies in the State take measurable steps to recruit, hire, train, and retain personnel who meet the applicable requirements described in this paragraph to provide special education and related services under this subchapter to children with disabilities.

(E) Rule of construction

Notwithstanding any other individual right of action that a parent or student may maintain under this subchapter, nothing in this paragraph shall be construed to create a right of action on behalf of an individual student for the failure of a particular State educational agency or local educational agency staff person to meet the applicable requirements described in this paragraph, or to prevent a parent from filing a complaint about staff qualifications with the State educational agency as provided for under this subchapter.

(15) Performance goals and indicators

The State—
(A) has established goals for the performance of children with disabilities in the State that--

(i) promote the purposes of this chapter, as stated in section 1400(d) of this title;

(ii) are the same as the State’s long-term goals and measurements of interim progress for children with disabilities under section 6311(c)(4)(A)(i) of this title;

(iii) address graduation rates and dropout rates, as well as such other factors as the State may determine; and

(iv) are consistent, to the extent appropriate, with any other goals and standards for children established by the State;

(B) has established performance indicators the State will use to assess progress toward achieving the goals described in subparagraph (A), including measurements of interim progress for children with disabilities under section 6311(c)(4)(A)(i) of this title; and

(C) will annually report to the Secretary and the public on the progress of the State, and of children with disabilities in the State, toward meeting the goals established under subparagraph (A), which may include elements of the reports required under section 6311(h) of this title.

(16) Participation in assessments

(A) In general

All children with disabilities are included in all general State and districtwide assessment programs, including assessments described under section 6311 of this title, with appropriate accommodations and alternate assessments where necessary and as indicated in their respective individualized education programs.

(B) Accommodation guidelines

The State (or, in the case of a districtwide assessment, the local educational agency) has developed guidelines for the provision of appropriate accommodations.
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(C) Alternate assessments

(i) In general

The State (or, in the case of a districtwide assessment, the local educational agency) has developed and implemented guidelines for the participation of children with disabilities in alternate assessments for those children who cannot participate in regular assessments under subparagraph (A) with accommodations as indicated in their respective individualized education programs.

(ii) Requirements for alternate assessments

The guidelines under clause (i) shall provide for alternate assessments that--

(I) are aligned with the challenging State academic content standards under section 6311(b)(1) of this title and alternate academic achievement standards under section 6311(b)(1)(E) of this title; and

(II) if the State has adopted alternate academic achievement standards permitted under section 6311(b)(1)(E) of this title, measure the achievement of children with disabilities against those standards.

(iii) Conduct of alternate assessments

The State conducts the alternate assessments described in this subparagraph.

(D) Reports

The State educational agency (or, in the case of a districtwide assessment, the local educational agency) makes available to the public, and reports to the public with the same frequency and in the same detail as it reports on the assessment of nondisabled children, the following:

(i) The number of children with disabilities participating in regular assessments, and the number of those children who were provided accommodations in order to participate in those assessments.

(ii) The number of children with disabilities participating in alternate assessments described in subparagraph (C)(ii)(I).
(iii) The number of children with disabilities participating in alternate assessments described in subparagraph (C)(ii)(II).

(iv) The performance of children with disabilities on regular assessments and on alternate assessments (if the number of children with disabilities participating in those assessments is sufficient to yield statistically reliable information and reporting that information will not reveal personally identifiable information about an individual student), compared with the achievement of all children, including children with disabilities, on those assessments.

(E) Universal design

The State educational agency (or, in the case of a districtwide assessment, the local educational agency) shall, to the extent feasible, use universal design principles in developing and administering any assessments under this paragraph.

(17) Supplementation of State, local, and other Federal funds

(A) Expenditures

Funds paid to a State under this subchapter will be expended in accordance with all the provisions of this subchapter.

(B) Prohibition against commingling

Funds paid to a State under this subchapter will not be commingled with State funds.

(C) Prohibition against supplantation and conditions for waiver by Secretary

Except as provided in section 1413 of this title, funds paid to a State under this subchapter will be used to supplement the level of Federal, State, and local funds (including funds that are not under the direct control of State or local educational agencies) expended for special education and related services provided to children with disabilities under this subchapter and in no case to supplant such Federal, State, and local funds, except that, where the State provides clear and convincing evidence that all children with disabilities have available to them a free appropriate public education, the Secretary may waive, in whole or in part, the requirements of this subparagraph if the Secretary concurs with the evidence provided by the State.

(18) Maintenance of State financial support

(A) In general
The State does not reduce the amount of State financial support for special education and related services for children with disabilities, or otherwise made available because of the excess costs of educating those children, below the amount of that support for the preceding fiscal year.

(B) Reduction of funds for failure to maintain support

The Secretary shall reduce the allocation of funds under section 1411 of this title for any fiscal year following the fiscal year in which the State fails to comply with the requirement of subparagraph (A) by the same amount by which the State fails to meet the requirement.

(C) Waivers for exceptional or uncontrollable circumstances

The Secretary may waive the requirement of subparagraph (A) for a State, for 1 fiscal year at a time, if the Secretary determines that--

(i) granting a waiver would be equitable due to exceptional or uncontrollable circumstances such as a natural disaster or a precipitous and unforeseen decline in the financial resources of the State; or

(ii) the State meets the standard in paragraph (17)(C) for a waiver of the requirement to supplement, and not to supplant, funds received under this subchapter.

(D) Subsequent years

If, for any year, a State fails to meet the requirement of subparagraph (A), including any year for which the State is granted a waiver under subparagraph (C), the financial support required of the State in future years under subparagraph (A) shall be the amount that would have been required in the absence of that failure and not the reduced level of the State’s support.

(19) Public participation

Prior to the adoption of any policies and procedures needed to comply with this section (including any amendments to such policies and procedures), the State ensures that there are public hearings, adequate notice of the hearings, and an opportunity for comment available to the general public, including individuals with disabilities and parents of children with disabilities.
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(20) Rule of construction

In complying with paragraphs (17) and (18), a State may not use funds paid to it under this subchapter to satisfy State-law mandated funding obligations to local educational agencies, including funding based on student attendance or enrollment, or inflation.

(21) State advisory panel

(A) In general

The State has established and maintains an advisory panel for the purpose of providing policy guidance with respect to special education and related services for children with disabilities in the State.

(B) Membership

Such advisory panel shall consist of members appointed by the Governor, or any other official authorized under State law to make such appointments, be representative of the State population, and be composed of individuals involved in, or concerned with, the education of children with disabilities, including--

(i) parents of children with disabilities (ages birth through 26);

(ii) individuals with disabilities;

(iii) teachers;

(iv) representatives of institutions of higher education that prepare special education and related services personnel;

(v) State and local education officials, including officials who carry out activities under subtitle B of title VII of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11431 et seq.);

(vi) administrators of programs for children with disabilities;

(vii) representatives of other State agencies involved in the financing or delivery of related services to children with
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disabilities;

(viii) representatives of private schools and public charter schools;

(ix) not less than 1 representative of a vocational, community, or business organization concerned with the provision of transition services to children with disabilities;

(x) a representative from the State child welfare agency responsible for foster care; and

(xi) representatives from the State juvenile and adult corrections agencies.

(C) Special rule

A majority of the members of the panel shall be individuals with disabilities or parents of children with disabilities (ages birth through 26).

(D) Duties

The advisory panel shall--

(i) advise the State educational agency of unmet needs within the State in the education of children with disabilities;

(ii) comment publicly on any rules or regulations proposed by the State regarding the education of children with disabilities;

(iii) advise the State educational agency in developing evaluations and reporting on data to the Secretary under section 1418 of this title;

(iv) advise the State educational agency in developing corrective action plans to address findings identified in Federal monitoring reports under this subchapter; and

(v) advise the State educational agency in developing and implementing policies relating to the coordination of
services for children with disabilities.

(22) Suspension and expulsion rates

(A) In general

The State educational agency examines data, including data disaggregated by race and ethnicity, to determine if significant discrepancies are occurring in the rate of long-term suspensions and expulsions of children with disabilities--

(i) among local educational agencies in the State; or

(ii) compared to such rates for nondisabled children within such agencies.

(B) Review and revision of policies

If such discrepancies are occurring, the State educational agency reviews and, if appropriate, revises (or requires the affected State or local educational agency to revise) its policies, procedures, and practices relating to the development and implementation of IEPs, the use of positive behavioral interventions and supports, and procedural safeguards, to ensure that such policies, procedures, and practices comply with this chapter.

(23) Access to instructional materials

(A) In general

The State adopts the National Instructional Materials Accessibility Standard for the purposes of providing instructional materials to blind persons or other persons with print disabilities, in a timely manner after the publication of the National Instructional Materials Accessibility Standard in the Federal Register.

(B) Rights of State educational agency

Nothing in this paragraph shall be construed to require any State educational agency to coordinate with the National Instructional Materials Access Center. If a State educational agency chooses not to coordinate with the National Instructional Materials Access Center, such agency shall provide an assurance to the Secretary that the agency will provide instructional materials to blind persons or other persons with print disabilities in a timely manner.
(C) Preparation and delivery of files

If a State educational agency chooses to coordinate with the National Instructional Materials Access Center, not later than 2 years after December 3, 2004, the agency, as part of any print instructional materials adoption process, procurement contract, or other practice or instrument used for purchase of print instructional materials, shall enter into a written contract with the publisher of the print instructional materials to--

(i) require the publisher to prepare and, on or before delivery of the print instructional materials, provide to the National Instructional Materials Access Center electronic files containing the contents of the print instructional materials using the National Instructional Materials Accessibility Standard; or

(ii) purchase instructional materials from the publisher that are produced in, or may be rendered in, specialized formats.

(D) Assistive technology

In carrying out this paragraph, the State educational agency, to the maximum extent possible, shall work collaboratively with the State agency responsible for assistive technology programs.

(E) Definitions

In this paragraph:

(i) National Instructional Materials Access Center

The term “National Instructional Materials Access Center” means the center established pursuant to section 1474(e) of this title.

(ii) National Instructional Materials Accessibility Standard

The term “National Instructional Materials Accessibility Standard” has the meaning given the term in section 1474(e)(3)(A) of this title.

(iii) Specialized formats
The term “specialized formats” has the meaning given the term in section 1474(e)(3)(D) of this title.

(24) Overidentification and disproportionality

The State has in effect, consistent with the purposes of this chapter and with section 1418(d) of this title, policies and procedures designed to prevent the inappropriate overidentification or disproportionate representation by race and ethnicity of children as children with disabilities, including children with disabilities with a particular impairment described in section 1401 of this title.

(25) Prohibition on mandatory medication

(A) In general

The State educational agency shall prohibit State and local educational agency personnel from requiring a child to obtain a prescription for a substance covered by the Controlled Substances Act (21 U.S.C. 801 et seq.) as a condition of attending school, receiving an evaluation under subsection (a) or (c) of section 1414 of this title, or receiving services under this chapter.

(B) Rule of construction

Nothing in subparagraph (A) shall be construed to create a Federal prohibition against teachers and other school personnel consulting or sharing classroom-based observations with parents or guardians regarding a student’s academic and functional performance, or behavior in the classroom or school, or regarding the need for evaluation for special education or related services under paragraph (3).

(b) State educational agency as provider of free appropriate public education or direct services

If the State educational agency provides free appropriate public education to children with disabilities, or provides direct services to such children, such agency--

(1) shall comply with any additional requirements of section 1413(a) of this title, as if such agency were a local educational agency; and

(2) may use amounts that are otherwise available to such agency under this subchapter to serve those children without regard to section 1413(a)(2)(A)(i) of this title (relating to excess costs).
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(c) Exception for prior State plans

(1) In general

If a State has on file with the Secretary policies and procedures that demonstrate that such State meets any requirement of subsection (a), including any policies and procedures filed under this subchapter as in effect before the effective date of the Individuals with Disabilities Education Improvement Act of 2004, the Secretary shall consider such State to have met such requirement for purposes of receiving a grant under this subchapter.

(2) Modifications made by State

Subject to paragraph (3), an application submitted by a State in accordance with this section shall remain in effect until the State submits to the Secretary such modifications as the State determines necessary. This section shall apply to a modification to an application to the same extent and in the same manner as this section applies to the original plan.

(3) Modifications required by the Secretary

If, after the effective date of the Individuals with Disabilities Education Improvement Act of 2004, the provisions of this chapter are amended (or the regulations developed to carry out this chapter are amended), there is a new interpretation of this chapter by a Federal court or a State’s highest court, or there is an official finding of noncompliance with Federal law or regulations, then the Secretary may require a State to modify its application only to the extent necessary to ensure the State’s compliance with this subchapter.

(d) Approval by the Secretary

(1) In general

If the Secretary determines that a State is eligible to receive a grant under this subchapter, the Secretary shall notify the State of that determination.

(2) Notice and hearing

The Secretary shall not make a final determination that a State is not eligible to receive a grant under this subchapter until after providing the State--

(A) with reasonable notice; and
(B) with an opportunity for a hearing.

(e) Assistance under other Federal programs

Nothing in this chapter permits a State to reduce medical and other assistance available, or to alter eligibility, under titles V and XIX of the Social Security Act with respect to the provision of a free appropriate public education for children with disabilities in the State.

(f) By-pass for children in private schools

(1) In general

If, on December 2, 1983, a State educational agency was prohibited by law from providing for the equitable participation in special programs of children with disabilities enrolled in private elementary schools and secondary schools as required by subsection (a)(10)(A), or if the Secretary determines that a State educational agency, local educational agency, or other entity has substantially failed or is unwilling to provide for such equitable participation, then the Secretary shall, notwithstanding such provision of law, arrange for the provision of services to such children through arrangements that shall be subject to the requirements of such subsection.

(2) Payments

(A) Determination of amounts

If the Secretary arranges for services pursuant to this subsection, the Secretary, after consultation with the appropriate public and private school officials, shall pay to the provider of such services for a fiscal year an amount per child that does not exceed the amount determined by dividing--

(i) the total amount received by the State under this subchapter for such fiscal year, by

(ii) the number of children with disabilities served in the prior year, as reported to the Secretary by the State under section 1418 of this title.

(B) Withholding of certain amounts
Pending final resolution of any investigation or complaint that may result in a determination under this subsection, the Secretary may withhold from the allocation of the affected State educational agency the amount the Secretary estimates will be necessary to pay the cost of services described in subparagraph (A).

(C) Period of payments

The period under which payments are made under subparagraph (A) shall continue until the Secretary determines that there will no longer be any failure or inability on the part of the State educational agency to meet the requirements of subsection (a)(10)(A).

(3) Notice and hearing

(A) In general

The Secretary shall not take any final action under this subsection until the State educational agency affected by such action has had an opportunity, for not less than 45 days after receiving written notice thereof, to submit written objections and to appear before the Secretary or the Secretary’s designee to show cause why such action should not be taken.

(B) Review of action

If a State educational agency is dissatisfied with the Secretary’s final action after a proceeding under subparagraph (A), such agency may, not later than 60 days after notice of such action, file with the United States court of appeals for the circuit in which such State is located a petition for review of that action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The Secretary thereupon shall file in the court the record of the proceedings on which the Secretary based the Secretary’s action, as provided in section 2112 of Title 28.

(C) Review of findings of fact

The findings of fact by the Secretary, if supported by substantial evidence, shall be conclusive, but the court, for good cause shown, may remand the case to the Secretary to take further evidence, and the Secretary may thereupon make new or modified findings of fact and may modify the Secretary’s previous action, and shall file in the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

(D) Jurisdiction of court of appeals; review by United States Supreme Court
Upon the filing of a petition under subparagraph (B), the United States court of appeals shall have jurisdiction to affirm the action of the Secretary or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

CREDIT(S)


Footnotes

1 So in original.

20 U.S.C.A. § 1412, 20 USCA § 1412
Current through P.L. 115-140.
Sec. 300.148 Placement of children by parents when FAPE is at issue

(a) General. This part does not require an LEA to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made FAPE available to the child and the parents elected to place the child in a private school or facility. However, the public agency must include that child in the population whose needs are addressed consistent with §§300.131 through 300.144.

(b) Disagreements about FAPE. Disagreements between the parents and a public agency regarding the availability of a program appropriate for the child, and the question of financial reimbursement, are subject to the due process procedures in §§300.504 through 300.520.

(c) Reimbursement for private school placement. If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private preschool, elementary school, or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate. A
parental placement may be found to be appropriate by a hearing officer or a court even if it
does not meet the State standards that apply to education provided by the SEA and LEAs.
(d)(/idea/regs/b/b/300.148/d) Limitation on reimbursement. The cost of reimbursement
described in paragraph (c) of this section may be reduced or denied—

(1)(/idea/regs/b/b/300.148/d/1) If—

(i)(/idea/regs/b/b/300.148/d/1/i) At the most recent IEP Team meeting that the
parents attended prior to removal of the child from the public school, the parents
did not inform the IEP Team that they were rejecting the placement proposed by the
public agency to provide FAPE to their child, including stating their concerns and
their intent to enroll their child in a private school at public expense; or

(ii)(/idea/regs/b/b/300.148/d/1/ii) At least ten (10) business days (including any
holidays that occur on a business day) prior to the removal of the child from the
public school, the parents did not give written notice to the public agency of the
information described in paragraph (d)(1)(i) of this section;

(2)(/idea/regs/b/b/300.148/d/2) If, prior to the parents’ removal of the child from the
public school, the public agency informed the parents, through the notice requirements
described in §300.503(a)(1), of its intent to evaluate the child (including a statement of the
purpose of the evaluation that was appropriate and reasonable), but the parents did not
make the child available for the evaluation; or

(3)(/idea/regs/b/b/300.148/d/3) Upon a judicial finding of unreasonableness with respect
to actions taken by the parents.

(e)(/idea/regs/b/b/300.148/e) Exception. Notwithstanding the notice requirement in paragraph
(d)(1) of this section, the cost of reimbursement—

(1)(/idea/regs/b/b/300.148/e/1) Must not be reduced or denied for failure to provide the
notice if—

(i)(/idea/regs/b/b/300.148/e/1/i) The school prevented the parents from providing
the notice;

(ii)(/idea/regs/b/b/300.148/e/1/ii) The parents had not received notice, pursuant to
§300.504, of the notice requirement in paragraph (d)(1) of this section; or

(iii)(/idea/regs/b/b/300.148/e/1/iii) Compliance with paragraph (d)(1) of this section
would likely result in physical harm to the child; and

(2)(/idea/regs/b/b/300.148/e/2) May, in the discretion of the court or a hearing officer, not
be reduced or denied for failure to provide this notice if—

(i)(/idea/regs/b/b/300.148/e/2/i) The parents are not literate or cannot write in
English; or

(ii)(/idea/regs/b/b/300.148/e/2/ii) Compliance with paragraph (d)(1) of this section
would likely result in serious emotional harm to the child.
602 Fed.Appx. 563

This case was not selected for publication in West’s Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of Appeals 3rd Cir. App. I, IOP 5.1, 5.3, and 5.7.

United States Court of Appeals,
Third Circuit.

W.D., individually; W.D. on behalf of W.C.D., Appellant
v.

WATCHUNG HILLS REGIONAL HIGH SCHOOL BOARD OF EDUCATION.

No. 14–1733.

Submitted Under Third Circuit

Filed: March 6, 2015.

Synopsis

Background: Father of learning disabled student filed suit against school district seeking tuition reimbursement under Individuals with Disabilities Education Act (IDEA) for son’s private school placement, and asserting claim for violation of procedural due process. The United States District Court for the District of New Jersey, Anne E. Thompson, J., 2014 WL 793459, granted school district summary judgment. Father appealed.

Holdings: The Court of Appeals, Jordan, Circuit Judge, held that:

[1] father’s failure to provide school with timely written notice of son’s removal from school precluded claim for private school tuition reimbursement, and

[2] father was not denied opportunity to meaningfully participate in individual education plan (IEP).

Affirmed.

West Headnotes (2)

[1] Education—Tuition reimbursement

Father’s failure to provide written notice to school district of his intent to unilaterally remove his son from public school at least ten business days prior to removal precluded his claim for tuition reimbursement for the child’s private school placement, based on school’s failure to provide free appropriate public education (FAPE) under IDEA, since in doing so, father had denied public school a good faith opportunity to meet its obligations under the Act. Individuals with Disabilities Education Act, § 612(a)(10)(C)(iii)(I, III), 20 U.S.C.A. § 1412(a)(10)(C)(iii)(I, III).
Father of learning disabled student was not denied an opportunity to meaningfully participate in his son’s education plan, in violation of IDEA, despite his claim that school failed to provide him with both the specific instructional methodologies to be used in carrying out his son’s individual education plan (IEP) objectives, and information about the qualifications of his son’s teachers and other service providers; school explained to father at IEP meeting about the reading program that would be used, it noted that the program involved a research-based methodology that emphasized phonics skills and reading comprehension, and specified that it would be taught by a certified special education teacher, and although school’s finalized IEP contained a written offer for the father to personally observe the proposed program, he declined to do so. Individuals with Disabilities Education Act, § 601 et seq., 20 U.S.C.A. § 1400 et seq.

3 Cases that cite this headnote
also followed an Individualized Education Program (“IEP”) tailored to meet his educational needs. In anticipation of W.C.D.’s move from middle school to high school, members of a transition IEP team, a group that included school officials, met with W.D. on March 28, 2012 to review and revise W.C.D.’s IEP for the rest of eighth grade and ninth grade. During that meeting, W.D. expressed concern regarding W.C.D.’s poor progress in school, but no change to the IEP was proposed. In June 2012, W.D. obtained an undated neuropsychological evaluation of W.C.D. by Kathleen Bergeson, Ph.D., who concluded that W.C.D.’s disabilities were not being adequately addressed at his current school. Based on that evaluation, on July 10, 2012, W.D. submitted an application for W.C.D. to attend “The Forman School,” a private college preparatory boarding school in Litchfield, Connecticut, where W.D. believed his son’s needs would be better addressed. On August 7, 2012, W.C.D. was accepted to The Forman School, and less than a week later, on August 13, 2012, W.D. signed an enrollment agreement and paid the tuition to secure a place for W.C.D. in the fall. On August 24, 2012, W.D. sent a letter through his attorney to Watchung Hills, stating his intent to obtain private placement for his son and to seek tuition reimbursement from Watchung Hills. Soon after, on September 5, 2012, W.D.’s attorney sent another letter to Watchung Hills, enclosing a copy of Dr. Bergeson’s June evaluation report.

In response to the August 24 letter, the IEP team met with W.D. on September 7, 2012. During that meeting, the IEP team suggested adding a “Developmental Reading Program” to the IEP and provided general information about the program. Even though W.C.D. was already enrolled in The Forman School, W.D. requested more specific information about the proposed program—namely, the name of the reading program being used, whether the program provided training or certification, and if so, whether the person assigned to implement the program had received such training or certification. Members of the IEP team, however, only responded that the program would be “research-based,” focused on “phonics skills and comprehension,” and taught by a “certified teacher.” (App. at 83.) During the course of the meeting, Watchung Hills learned that W.C.D. was, at that very time, attending The Forman School’s orientation program. Soon after that revelation, Watchung Hills terminated the meeting. Nevertheless, on September 21, 2012, Watchung Hills sent W.D. a finalized IEP, which incorporated some of Dr. Bergeson’s recommendations, and offered W.D. the opportunity to personally observe the proposed in-district program. There is no evidence that W.D. ever took advantage of that offer. Instead, W.C.D. began classes at The Forman School on September 10, 2012, and has remained there since.

*566 On October 11, 2012, W.D. filed a request for a due process hearing with the New Jersey Department of Education, seeking reimbursement for the cost of W.C.D.’s private school placement. W.D. also claimed that his procedural rights were violated under the IDEA and that W.C.D. was denied a “free appropriate public education” (“FAPE”) because Watchung Hills refused to share basic information regarding the reading program. At a hearing before the New Jersey Office of Administrative Law, an Administrative Law Judge (“ALJ”) dismissed W.D.’s claims for reimbursement on the grounds that the notice letter was untimely, and further dismissed the procedural violation claim on the grounds that W.D. did not have a right to the requested information. W.D. appealed the ALJ’s decision to the District Court, which affirmed the ruling on both points and granted summary judgment in favor of Watchung Hills. W.D. timely appealed. 1

II. Discussion
W.D. argues that the District Court erred in dismissing his reimbursement claim based on his alleged failure to comply with the IDEA’s notice requirements before considering the merits of his FAPE claim. He also argues it was error to conclude that his procedural rights were not violated when—in his view—Watchung Hills refused him a meaningful opportunity to participate in the IEP decision-making process. Neither contention is meritorious.


“[T]he IDEA authorizes reimbursement for the cost of private special-education services when a school district fails to provide a FAPE and the private-school placement is appropriate....” Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 247, 129 S.Ct. 2484, 174 L.Ed.2d 168 (2009). “Even where a District is found to be in violation of... [t]he IDEA and private school
placement is deemed appropriate,” though, “courts retain discretion to reduce the amount of a reimbursement award if the equities so warrant.” C.H. v. Cape Henlopen Sch. Dist., 606 F.3d 59, 71 (3d Cir. 2010) (internal quotation marks omitted). Indeed, the statute itself provides that reimbursement may be reduced or denied in certain circumstances, such as when parents have failed to provide written notice to the school of their intent to unilaterally remove the student and seek reimbursement at least 10 business days prior to removal, 20 U.S.C. § 1412(a)(10)(C)(iii)(I)(bb), or when a judicial body finds the parental actions unreasonable, id. § 1412(a)(10)(C)(iii)(III).

[1] Here, W.D. did not follow the notice requirements set out in the statute and thus the District Court did not err in denying his reimbursement claim. W.D. notified Watchung Hills of his intent to remove his son from the school district less than 10 business days prior to W.C.D. starting orientation at The Forman School, and several days after W.D. had enrolled W.C.D. in that school and paid the first year’s tuition. We, and other courts, have previously denied reimbursement when, as in this instance, the parent fails to satisfy the “obligation to cooperate and assist in the formulation of an IEP, and ... to timely notify the District of [the] intent to seek private school tuition reimbursement.” Cape Henlopen, 606 F.3d at 72 (“The IDEA was not intended to fund private school tuition for the children of parents who have not first given the public school a good faith opportunity to meet its obligations.”); see also Patricia P. v. Bd. of Educ. of Oak Park, 203 F.3d 462, 469 (7th Cir. 2000) (noting that courts “look harshly upon any party’s failure to reasonably cooperate with another’s diligent execution of their rights and obligations under IDEA”).

W.D. contends that the District Court erred by treating his inadequate notice of removal as a complete bar to his reimbursement claim, without first evaluating whether Watchung Hills had denied his son a FAPE. As W.D. sees it, the District Court thus failed to properly consider all relevant factors—such as the merits of his FAPE claim or the propriety of Watchung Hills’s conduct—to determine whether equitable considerations favor reimbursement. But W.D.’s argument is unpersuasive because the IDEA and its implementing regulations allow for the denial of reimbursement—regardless of the school district’s conduct—if, as in this case, a parent does not provide timely notice of removal. 4 20 U.S.C. § 1412(a)(10)(C)(iii)(I)(bb). The District Court therefore did not err in dismissing W.D.’s reimbursement claim.

[2] W.D. also argues that his procedural rights under the IDEA were violated when Watchung Hills refused to adequately respond to his inquiries regarding the methodology that would be used in the Developmental Reading Program and the related teacher qualifications. He contends that without such basic information about the reading program, W.D. was denied “an opportunity for meaningful input into all decisions” affecting his son’s education. Susquenita Sch. Dist. v. Raelee S., 96 F.3d 78, 82 (3d Cir. 1996) (quoting Honig v. Doe, 484 U.S. 305, 311, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988)).

That argument falls short because W.D. has not shown any violation of a specific IDEA provision or regulation. As noted in the Federal Register, “nothing in [the IDEA] ... requires an IEP to include specific instructional methodologies... The Department[ of Education]’s long-standing position on including instructional methodologies in a child’s IEP is that it is an IEP Team’s decision.” 71 Fed.Reg. 46,540, 46,665 (August 14, 2006). Similarly, with some limited exceptions not applicable here, “nothing in [the IDEA] ... require[s] schools ... to provide parents with information about the qualification of their child’s teachers and other service providers.” Id. at 46,561.

W.D. was not denied an opportunity to meaningfully participate in W.C.D.’s education plan. At the IEP meeting, Watchung Hills advised W.D. that the Developmental Reading Program would use a research-based methodology, would be taught by a certified special education teacher, and would emphasize phonics skills and reading comprehension. Furthermore, the finalized IEP that Watchung Hills offered after the September 7, 2012 meeting contained a written offer for W.D. to personally observe the proposed in-district program—an offer that W.D. apparently declined. Thus, W.D. has not sufficiently alleged any procedural violation of the IDEA nor a denial of a FAPE for his son. See Bayonne, 602 F.3d at 565 (“A procedural violation is actionable under the IDEA only if it results in a loss of educational opportunity for the student, seriously deprives parents of their participation rights, or causes a deprivation of educational benefits.”).

III. Conclusion
For the foregoing reasons, we will affirm the District Court’s grant of summary judgment for Watchung Hills.
Footnotes

1 In support of W.D.’s position that his procedural rights under the IDEA were violated, the Advocates for Children of New Jersey, Disability Rights New Jersey, the Education and Health Law Clinic at the Rutgers University School of Law—Newark, the Education Law Center, and the Statewide Parent Advocacy Network of New Jersey collectively submitted an amicus curiae brief. The New Jersey Chapter of the International Dyslexia Association also submitted an amicus curiae brief in support of W.D.

2 The District Court had jurisdiction under 20 U.S.C. § 1415(i)(3) and we have jurisdiction pursuant to 28 U.S.C. § 1291. “When considering an appeal from a state administrative decision under the IDEA, district courts apply a nontraditional standard of review, sometimes referred to as ‘modified de novo’ review. Under this standard, a district court must give ‘due weight’ and deference to the findings in the administrative proceedings.” D.S. v. Bayonne Bd. of Educ., 602 F.3d 553, 564 (3d Cir.2010) (citations omitted). “We, in turn, review the District Court’s factual findings for clear error ... [and] exercise plenary review over the legal standards applied by the District Court and over its legal conclusions.” Mary T. v. Sch. Dist. of Phila., 575 F.3d 235, 241–42 (3d Cir.2009). Insofar as W.D. contends that we should apply a non-deferential standard of review because the ALJ did not hold an evidentiary hearing or hear live testimony, he cites no case law for support and, in fact, we have suggested otherwise. See Bayonne, 602 F.3d at 564 (implying that, even when an ALJ does not hear live testimony, a district court exercises modified de novo review). If we were to apply the more stringent review advocated by W.D., however, our decision today would be the same.

3 Before the ALJ, W.D. argued that he provided timely notice when he sent the August 24, 2012 letter because W.C.D. was not “removed” until either September 10, 2012 (the first day of class at The Forman School), or, alternatively, September 11, 2012 (the first day of class at Watchung Hills). Although W.D. makes that same argument in his reply brief, he makes only conclusory references to timeliness in his opening brief. To the extent that W.D. has not forfeited the argument, we are satisfied, as was the District Court, that the ALJ properly determined that W.D. did not provide adequate notice to Watchung Hills, regardless of whether we adopt a broad or narrow interpretation of “removal.”

As the record shows, W.D. signed an enrollment agreement with The Forman School on August 13, 2012, which stated, “By signing this Forman School Agreement I enroll [W.C.D.] in the 9th grade as a boarding student for the 2012–2013 academic school year at The Forman School, Inc.” (App. at 370.) The record further shows that, on August 16, 2012, W.D. paid the full first-year tuition of $61,700 to The Forman School. We agree with the ALJ that “[b]ased on the timeline of events in this case, the written notice to [Watchung Hills] was a fait accompli .... The tardy written notice only advised of an accomplished placement as opposed to serving as notice of intent to place....” (App. at 105.) We further agree with the ALJ’s conclusion that, “[e]ven if [W.D.] had not foreclosed the possibility of his son’s return to Watchung, the available evidence strongly supports the conclusion that W.D. was very unlikely to do so unless he felt the respondent made a better offer than Forman, something the IDEA does not require.” (App. at 106.)

Contrary to W.D.’s assertion, the United States District Court for the District of Maryland’s decision in Sarah M. v. Weast, 111 F.Supp.2d 695 (D.Md.2000), does not compel a different result. In Weast, the District Court held that “removal” ... refers to the actual physical removal of the child from public school” and thus notice must be given 10 business days before the date on which the child is “physically placed in private school.” Id. at 701; see also 3 Americans with Disabilities: Practice & Compliance Manual § 11:115 (updated 2015) (adopting Weast’s interpretation of “removal”). Even if we were to agree with that interpretation of “removal”—and we do not need to go that far in this case—W.C.D. was physically placed in The Forman School on September 6, 2012 when he was attending the private school’s orientation. Because section 1412(a)(10)(C)(iii)(I)(bb) of title 20 requires notice of at least 10 business days (including holidays), W.D.’s August 24, 2012 letter was still untimely.

4 We do not hold that a parent’s failure to provide timely notice of removal to a school district will, in every situation, bar tuition reimbursement. There may be circumstances in which a balance of the equities supports tuition reimbursement despite a parent’s untimely notice of removal, but we agree, as did the District Court, with the ALJ’s assessment that W.D. was not entitled to tuition reimbursement. While it would have been preferable for the ALJ to explicitly weigh the equities, the record here reflects that W.D. engaged in an after-the-fact effort to excuse his inadequate notice by questioning the school district’s proffered IEP, and, given the totality of the record, that is sufficient both to explain and sustain the ALJ’s determination.

* This disposition is not an opinion of the full court and, pursuant to I.O.P. 5.7, does not constitute binding precedent.
317 Ed. Law Rep. 596
REFERENCES IN OAH DECISIONS

1. Student v. Hayward Unified School District  
   Judge: Penelope S. Pahl  
   May 10, 2017  2017020096

LEGAL CONCLUSIONS

32. Reimbursement for a placement may be reduced or denied if a parent fails to give a district 10 days’ notice of their intention to place their child in a private placement and seek reimbursement. (20 U.S.C. §1412(a)(10)(C)(ii)(I)(bb); 34 C.F.R. § 300.148 (d)(1)(ii); Ed. Code § 56176 subd. (b).) Mother testified that she believed the notice was provided. No evidence contradicting this was presented by Hayward. Nor did Hayward argue in its closing brief that a lack of a 10 day notice should preclude or reduce reimbursement of the tuition being paid for Happy Days preschool.

33. District has not asserted prejudice due to a lack of a 10-day notice. The issue is, therefore, deemed waived. However, even if it was not waived, no evidence was presented demonstrating that Hayward, at any time, intended to offer Student a place in an inclusion classroom. Testimony at hearing focused solely on Hayward’s belief that Student’s needs could only be met in a segregated class. It is true that, after Mother verbally notified them of her intent to place Student in another school, Hayward offered the opportunity for Student to move into a different but also segregated class that began earlier in the day. However, that did not remedy the violation of the requirement that Hayward offer Student an educational placement in the least restrictive setting allowing Student the opportunity to be educated with his typically developing peers to the maximum extent possible.

2. Student v. Laguna Beach Unified School District  
   Judge: Laurie Gorsline  
   August 29, 2016  2016030723

REMEDIES

1. Student prevailed on Issue 1 by proving that District failed to timely hold an IEP team meeting prior to January 8, 2016, thereby significantly impeding Parents’ opportunity to participate in the decision making process. As a remedy, Student requested reimbursement for the cost of: (1) tuition at Prentice since Student began attending Prentice at a rate of $2,010 per month through May 31, 2016; (2) speech and language services, occupational therapy, and Chromebook which totaled $3,620 through May 31, 2016; (3) an order that District fund Prentice until such time as District provides a FAPE; and (4) an order that District provide transportation between the family home and Prentice. District argues that Student is not entitled to reimbursement because Prentice was not an appropriate placement, and Student did not provide the requisite 10-day notice prior to placing Student at Prentice.

6. Father sought an IEP from District by enrolling Student at District and requesting an IEP from District. After obtaining Student’s records, on September 30, 2015 District made an interim IEP offer without obtaining any input from Parents and disregarding Parent’s request for an IEP team meeting. On October 14, 2015, Parents gave District a 10-day notice that Parents disagreed with District’s offer and that they would place Student at Prentice and seek reimbursement from District for the cost of tuition at Prentice as well as the cost of educational services and transportation expenses. On January 8, 2016, District offered Student an IEP, the appropriateness of which is no longer an issue in this case. Parents paid Prentice $2,010
per month in tuition and $734 for speech and language services for the period between October 28, 2015 and January 8, 2016.

9. District’s failure to timely hold an IEP team meeting significantly impeded Parents’ opportunity to participate in the decision making process. Student established that District was required to convene an IEP team meeting by no later than October 28, 2015, but did not convene an IEP meeting until January 8, 2016. On November 30, 2015, District offered to convene an IEP team meeting on December 14, 2015, and then later rescheduled it for January 8, 2016. However, the evidence did not establish this delay was the result of unreasonable conduct on the part of Parents. Parents are not entitled to any reimbursement for Prentice tuition or services provided to Student prior to the effective date of their October 14, 2015 10-day notice, i.e., October 28, 2015, nor after the IEP meeting was ultimately held, as discussed below. Accordingly, Student is entitled to reimbursement for the cost of tuition for the time Student attended Prentice from October 28, 2015 through January 8, 2016 in the sum of $4,757.

3. Student v. Sequoia Union High School
District
Judge: Robert G. Martin

SUMMARY OF DECISION

Student contends that District failed in its obligation to identify, locate, assess, and offer her a FAPE during the 2012-2013 school year while she attended a private high school located within District. Student further contends that District failed to offer her an appropriate placement for the 2013-2104 and 2014-2015 school years that satisfied her advanced academic needs, while addressing her unique disabilities, when she re-enrolled in District after attending private school. Parents seek reimbursement for the costs of parentally-placing Student in a state-certified non-public school and residential treatment program in 2013-2014, and in a private day school in 2014-2014, due to District’s failure to offer Student a FAPE. District contends that District satisfied its obligations towards Student, and that in any event, Parents are not entitled to reimbursement because they failed to provide requisite 10-day notice to District before parentally-placing Student in the non-public school and the private school.

FACTUAL FINDINGS

66. On December 18, 2013, Parents wrote District:
“to inform you of our intent to continue Student’s placement at Alpine Academy. We do not believe that the district’s offer of placement in the STARS 2 program constitutes FAPE, nor does it adequately address [Student’s] significant safety needs. Please consider this letter our 10-day notice of intent to place [Student] at Alpine Academy and to reserve the right to seek reimbursement for the private placement at a future date.”

REMEDIES

1. Student prevailed on Issues 1(b), 2, 3(a), 3(c) and 3(d). District prevailed on issues 1(a), 3(b), 4(b), 5(a), 5(b), 5(c), and 6. Issue 4(a) was not decided. As a remedy with respect to the issues on which Student prevailed, Student requests that District reimburse Parents for costs they incurred to: (i) privately-place Student at Alpine Academy, including tuition, room and board, therapy and related transportation including transportation for family visits and therapy. District disagrees, and contends that Student is not entitled to
reimbursement because Parents failed to give the required 10-day notice to District of their intention to privately-place Student at Alpine Academy, and because Parents repeatedly rejected District’s offer of placement for the 2013-2014 school year, even rejecting the offer before it was made.

8. Here, Parents did not give District 10-day notice that they would be privately-placing Student at Alpine Academy on July 19, 2013. Parents placed Student at Alpine based on the advice of psychologists O’Keefe and Schueler, both of whom recommended that Student transition from her Second Nature wilderness program into a therapeutic boarding school. Dr. Schuler, who was Student’s therapist at Second Nature, believed that Student might relapse into depressive symptoms, anxiety, withdrawal, and emotional reactivity if she were to return to her home environment. Dr. O’Keefe, who had assessed Student, believed that a therapeutic boarding school would help Student develop necessary skills to work through her emotional issues in a healthy manner. Alpine Academy is a non-public school certified by the State of California to treat emotionally-disturbed adolescents, and District, which invited members of Alpine’s staff to participate in her June 27, 2014 IEP, did not contend that it failed to address Student’s needs and provide educational benefit.

Judge Clifford H. Woosley

REMEDIES

9. Parents also failed to give District the required 10-day notice before removing Student from District and privately placing him at Discovery Ranch. On May 19, 2014, their attorney alluded to the possibility of private placement in a letter to District but did not affirmatively notify District that Parents were privately placing. Student stopped attending Twain on May 21, 2014. Student enrolled at Discovery Ranch on May 23, 2014. The first time Parents notified District of the private placement in writing was through their attorney on May 27, 2014. District then offered to further assess Student on June 3, 2014, when it provided Father with an assessment plan.

5. Student v. Tamalpais Union High School August 3, 2012 2012030595
District
Judge: Clara L. Slifkin

FACTUAL FINDINGS

72. District decreased its offer of mental health services to 50-minutes a week of individual therapy as needed; 50-minutes a week of family therapy as needed; and no group therapy. District offered to change blended classroom from Tam to Redwood High School (Redwood) which is at a higher functioning level and more structured. Parents’ disagreed and presented an attorney letter giving a 10-day notice of unilateral placement at a RTC, Heritage. However, Parents agreed to first try local mediation.
6. Student v. Oakdale Joint Unified School District  
Judge: Troy K. Taira  

FACTUAL FINDINGS  

62. Parents notified District on October 19, 2011, of their intent to remove Student from public school and to enroll her in a private school in Modesto. Two days later, Parents removed Student from District, essentially denying District eight business days of notice. Therefore, Parents did not provide the required 10 day notice to District of their intent to remove Student from public school and place her in a private school at public expense. However, there was no prejudice to District. District had adequate notice from the September 30, 2011 IEP team meeting that Parents were dissatisfied with Student’s placement and wanted Student in a general education class. Father’s emails to District staff on October 12 and 14, 2011, with concerns over Student’s placement reinforced adequate notice to District.  

LEGAL CONCLUSIONS  

23. Pursuant to Factual Findings 45 through 47 and Legal Conclusions 19 through 22, Parents did not provide the required 10 day notice to District of their intent to remove Student from public school and place her in a private school at public expense. Therefore, Parents should not be reimbursed for the costs of the initial placement at Big Valley in October 2011. However, their actions to remove Student only two days after providing notice and their failure to respond to District’s offer for an IEP team meeting did not deprive District of the opportunity to address Parent’s concerns. The evidence established that Student’s placement at Big Valley, and the supplementary services provided by Parents, addressed her needs and that Student benefitted from that placement. Therefore, Parents are entitled to reimbursement for the cost of tuition and travel to and from Big Valley, and supplemental private speech and occupational therapy services from November 11, 2011, the day after the proposed IEP team meeting, as set out in Factual Findings 48 though 65.  

7. Student v. Downey Unified School District  
Judge: Stella L. Owens Murrell  

FACTUAL FINDINGS  

46. Parents also obtained input from Dr. Narashimhan who concurred with Dr. Woods’ findings and recommendations for placement of Student. Parents timely notified District by letter dated July 16, 2008, of their intention to place Student at Village Glen starting September 8, 2008. The letter gave the District a 10-day notice of a unilateral placement and requested reimbursement for such placement. The letter was hand-delivered
by Father to Unsworth Elementary School where Student was to have attended summer school.

8. Student v. Fullerton Joint Union High School District 
   Judge: Timothy L. Newlove

FACTUAL FINDINGS

45. On Monday, January 25, 2010, the District received a letter, dated January 23, 2010, prepared and sent by an Advocate representing Parents. The letter stated, in part: “It is my understanding that parents have attempted on numerous occasions to seek assistance for (Student) at Sonora High School. To date, no meetings or interventions have occurred. We believe (Student) is currently underserved and that his social/emotional needs in the educational environment are not being met.” The letter gave the District a 10-day notice of a unilateral placement and requested reimbursement for such placement. The letter did not identify the unilateral placement. The letter also requested that the District make a referral on behalf of Student to the Orange County Health Care Agency (OCHCA) which is the governmental entity that provides mental health services for residents of Orange County, California.

LEGAL CONCLUSIONS

Issue No. 5: Did the District deny Student a FAPE by not providing prior written notice after Parents sent the District a 10-day notice of unilateral placement in January 2010?

57. In a letter dated January 23, 2010, the Advocate representing Parents gave the District a “10 day notice of unilateral placement” of Student. (Factual Finding, ¶ 45.) The 10-day notice of a unilateral placement gives a school district the opportunity to correct a possible oversight concerning a pupil, and thereby eliminates a reason for an administrative tribunal or reviewing court to reduce an award of reimbursement in the event that there is a finding that the school district denied the child a FAPE. (20 U.S.C. § 1412(a)(10)(C)(iii)(I)(bb); 34 C.F.R. § 300.148(d)(1)(ii)(2006); Ed. Code, § 56176, subd. (b).)

58. Student contends that the District failed to follow the receipt of the letter containing the 10-day notice of unilateral placement with “prior written notice.” Student further contends that the failure to provide such prior written notice had the result of Parents funding Student’s placement at Heritage.

   Judge: Charles Marson

ISSUES

The 10-day notice of unilateral placement
107. Reimbursement for private school expenses may be reduced or denied if a parent fails to give the district written notice of unilateral placement at least 10 business days prior to the removal of the child from the public school. The Baden TDS began SY 2007-2008 on August 23, 2007. On September 6, 2007,
Father’s attorney faxed to the District a notice of unilateral placement in Mid-Peninsula. The District argues that reimbursement should be reduced or denied because the notice was tardy.

108. The timing of Father’s notice to the District that he would place his son in Mid-Peninsula does not justify reduction or denial of reimbursement. The notice was given within ten business days of the start of school at Baden and before the start of school at Mid-Peninsula. Much of Father’s efforts in August had been directed to his unsuccessful attempt to visit Baden. To the extent that such a notice gives a district a chance to make, or persuade a parent to accept, an offer of FAPE, the District had already had ample opportunity to do so. The District identifies no way in which its interests were prejudiced by the timing of the notice. In any event, the regulation on which the District relies applies only when a parent withdraws a child from a public school, which was not the case here.

10. Student v. Anaheim Union High School  
   District & Orange County Health Care Agency  
   Judge: Clara L. Slifkin  
   November 16, 2007 2007030776

FACTUAL FINDINGS

89. Parents did not give OCHA’s intensive program including its WRAP team, the TBS coach, group therapy and the interim program at Gilbert an opportunity to see if all of these supports would enable and motivate Student to improve his behavior so that he would be able access his education. Student was enrolled at Gilbert for only 10 days when Parents withdrew him from Gilbert and on November 17, 2006, placed him at Eagle Ranch. The incident that precipitated Parents’ unilateral placement of Student involved Student’s mother following the school bus, observing Student enter and then quickly exit school and get into a car containing adults that she believed were gang members. However, mother testified that Student returned to school almost immediately. She was unable to explain why she believed they were gang members. When mother confronted these alleged gang members, about driving her son away from campus, they apologized for taking her son. Parents removed Student primarily because of his association with alleged gang members and their inability to control Student. The ALJ finds that this incident and Parents’ concerns described in Factual Finding 85 are not sufficient to conclude that Student’s interim placement at Gilbert would likely result in physical or emotional harm to Student. Thus, Parents should have complied with the 10 day notice requirement in order to be reimbursed for the costs of a private school.
INTRODUCTION

The teachers, administrators, and staff of the Los Angeles Unified School District believe in the equal worth and dignity of all students and are committed to educate all students to their maximum potential. It is our mission to maximize learning for all students within an inclusive environment so that each student will contribute to and benefit from our diverse society.

This guide provides you with the information you need to understand the special education process. It explains your rights, the rights of your child, and how to exercise them under the Federal Individuals with Disabilities Education Act and the California Education Code.

The guide also serves as your notice of procedural safeguards required to be provided to you by Federal and State law. You will receive a copy once a school year and:

- The first time your child is referred for a special education assessment or the first time you request an evaluation.
- Each time you are given an assessment plan to evaluate your child.
- The first time you file a State complaint, request mediation only, or request a due process hearing in a school year.
- Whenever a decision is made to take a disciplinary action that constitutes a change in placement.
- When you revoke consent for continued provision of special education and related services for your child.
- When you ask for a copy.

Please refer to the Table of Contents to find the information that you need. We hope this guide will help you work with your school and the District to provide the most appropriate education for your child.
Disability-based harassment is intimidation or abusive behavior toward a student based on disability that creates a hostile environment by interfering with or denying a student’s participation in or receipt of benefits in the District’s programs or activities. Harassing conduct may take many forms, including verbal acts and name-calling, as well as nonverbal behavior, such as graphic and written statements, or conduct that is physically threatening, harmful, or humiliating. In order to rise to the level of unlawful discrimination, the conduct must be unwelcome, severe or pervasive, and unreasonably disruptive of an individual’s educational or work environment or must create a hostile educational or work environment.

INFORMATION ABOUT REIMBURSEMENT FOR PRIVATE SCHOOL PLACEMENT WITHOUT CONSENT OF OR REFERRAL BY THE DISTRICT

The District is not required to pay for the private school education, including special education services, of a child with disabilities if the District made available to the child appropriate special education services at a District school, but you chose to place your child in a private school or facility. If your child previously received special education services at a District school and you enrolled your child in a private school without the consent of or referral by the District, a court or a due process hearing officer may require that the District reimburse the parents for the private school placement if the District did not make the appropriate special education services available to the child in a timely manner prior to the child’s enrollment in the private school.

Reimbursement may be reduced or denied if you did not give the District notice that:

- You were rejecting the District's placement;
- What your concerns were regarding the placement; and
- Your intent to enroll your child in a private school and request reimbursement from the District.

You must provide this notice to the IEP team at an IEP meeting prior to removing your child from public school, or you must provide the notice to the District in writing at least ten (10) business days prior to removing your child from public school.

Reimbursement may be reduced or denied if, prior to placing the child in private school, the District appropriately gave the child's parents notice of its intent to assess the child, but the parents did not make their child available for such assessment. The court may also reduce or deny reimbursement if it finds that the parents’ actions were unreasonable.

Reimbursement will not be reduced or denied for failure to provide notice if you are illiterate and cannot write in English, providing notice would result in physical or serious emotional harm to the child, or the school prevented you from providing notice.

INFORMATION ABOUT DISCIPLINE

Students with disabilities are expected to follow the codes of conduct specified in the District’s Parent Student Handbook. You should review the codes of conduct with your child so that he/she is aware of what behavior is expected at school. If your child is having behavioral problems at school, either you or school personnel may request an IEP team meeting to discuss appropriate instruction, behavioral support techniques, and/or behavioral supports that may assist in improving your child’s behavior. If the behavior is serious, either you or school personnel may request a Functional Behavior Assessment (FBA). Findings from the FBA may be used to develop or modify a Behavior Support Plan.

School personnel may remove a child with a disability who violates a code of student conduct from their current placement to an appropriate interim alternative educational setting (IAES), another setting, or suspension, for not more than ten (10) school days. If school personnel recommend a change in placement (e.g., suspension, IAES, or expulsion that would exceed ten (10) school days), an IEP team meeting will be held as soon as possible, but no later than within ten (10) school days, to determine whether the behavior that gave rise to the violation of the school code was a manifestation of the child’s disability. Under the IDEA, a child’s conduct is a manifestation of his or her disability if: (1) the conduct was caused by, or had a direct and substantial relationship to, the child’s disability; or (2) the conduct was the direct result of the District’s failure to implement the child’s IEP.
Dear Parent(s)/Guardian(s)/Pupil:

This notice is provided to you because your child is being considered for possible placement or is currently enrolled in a special education program. This notice is also provided for children who are entitled to these rights at age 18. If your child is being referred for special education and all options of the general education program have been considered, and where appropriate utilized, for your child, you have the right to initiate a referral for special education.

In California, special education is provided to children with disabilities between birth and twenty-one years of age. Federal and state laws protect you and your child throughout the procedures for evaluation and identification of special education placement and services. Parents of children with disabilities have the right to participate in the individual education program process, including development of the IEP, and be informed of the availability of a free appropriate public education and of all available alternative programs, including public and nonpublic programs.

You have the right to receive this notice in your primary/native language or other mode of communication (i.e., sign language or Braille), unless it is clearly not feasible to do so. These rights may also be translated orally to you if your primary/native language is not a written language. This notice will be given to you only one time a year, or upon: (1) your request; (2) the initial referral of your child for a special education evaluation; (3) reevaluation of your child; (4) removal of your child for violating a school code of conduct that constitutes a change in placement; (5) filing of a state complaint; and (6) receipt of a request for a due process hearing. If available, a copy of these procedural safeguards may also be accessible on your district’s website and may be sent to you, upon your request, by electronic mail. Please check with your local school district to determine if this option is available.

The definitions below will help you understand the statement of rights. Should you need further information regarding the contents or use of this guide, you may contact your school district of residence Special Education Director, whose telephone number is on the last page of this document.

Definitions

Children with Disabilities: The Individuals with Disabilities Education Act ("IDEA") defines “children with disabilities” as including children with intellectual disabilities, hearing impairments including deafness, speech or language impairments, visual impairments including blindness, emotional disturbance, orthopedic impairments, autism,
What are the rules relating to my decision to unilaterally place my child in a private school?

The IDEA does not require an LEA to pay for the cost of education, including special education and related services, of your child with a disability at a private school or facility if the LEA made a FAPE available to your child and you choose to place the child in a private school or facility. However, the school district where the private school is located must include your child in the population whose needs are addressed under the IDEA provisions regarding children who have been placed by their parents in a private school under 34 CFR §§300.131 through 300.144.

The reimbursement to a parent for placement of a child in a private school or agency may be ordered by a hearing officer or court when it is determined that the LEA did not provide a FAPE to the child in a timely manner prior to the enrollment and that the private placement is appropriate. Reimbursement may be reduced if, at the most recent IEP team meeting prior to removing the child from public school, the parent failed to inform the LEA that they were rejecting the proposed placement and of their intent to place their child in a private school at public expense, or if the parent failed to provide that information in writing to the LEA at least 10 business days prior to the removal of the child from public school. Reimbursement may also be reduced if, prior to the removal of the child from public school, the LEA informed the parent of its intent to evaluate the child, and parent refused to permit or did not make the child available for the evaluation. Reimbursement may also be reduced if a court finds that your actions were unreasonable.

Reimbursement cannot be reduced if the LEA prevented the parent from giving notice; the parent had not received notice of the requirements to provide notice to the LEA as described above; or if compliance with the notice requirement would likely result in the physical harm to the child. The cost of reimbursement may or may not be reduced, at the discretion of the court or hearing officer, if the parent is not literate or cannot write in English, or compliance with the notice requirement would likely result in serious emotional harm to the child.

Under what circumstances will a surrogate parent be appointed for a child?

In order to protect the rights of a child, within 30 days of the LEA’s determination that a child is in need of a surrogate parent, the LEA will appoint a surrogate parent for a child if:

1. The child has been made a dependent or ward of the court, the court has specifically limited the right of the parent or guardian to make educational decisions for the child, and the child has no responsible parent or guardian to represent him or her; or

2. The child is not a ward or dependent of the court and no parent or guardian can be located, or there is no caretaker of the child or the child is an unaccompanied homeless youth.
DISTRICT FILINGS AGAINST STUDENTS

I. 34 C.F.R. Section 300.507

Provides that either the parent or public agency may file a due process complaint on the identification, evaluation or educational placement of child with a disability.

II. California Education Code Section 56346

III. I.R. v. Los Angeles Unified School District, 805 F.3d 1164 (9th Cir. 2015)

Copy of decision found in Ninth Circuit Cases section of the materials along with references in OAH decisions to the case.

Court held that failure of District to file against the family as to the portions of the IEP to which the family had failed to agree, and to do so in a “timely” manner denied student FAPE as matter of procedural violation. Timely was discussed by the Court as a filing being done with reasonable promptness.

IV. District of Columbia v. Jeppsen, 514 F.3d 1287 (D.C.Cir. 2008)
§ 56346. Informed consent of parents before provision of special education and related services to child; failure to provide consent in whole or part; revocation of consent; due process hearing

Effective: January 1, 2011
Currentness

(a) A public agency, as defined in Section 56028.5, that is responsible for making a free appropriate public education and related services to the child with a disability under this part shall seek to obtain informed consent from the parent of the child before providing special education and related services to the child pursuant to Section 1414(a)(1)(D)(i)(II) of Title 20 of the United States Code. The public agency shall make reasonable efforts to obtain informed consent from the parent for the initial provision of special education and related services to the child in accordance with Section 300.300(b)(2) of Title 34 of the Code of Federal Regulations.

(b) If the parent of the child fails to respond or refuses to consent to the initiation of services pursuant to subdivision (a), the public agency shall not provide special education and related services to the child by utilizing the procedures in Section 1415 of Title 20 of the United States Code or the procedures in subdivision (e) of Section 56506 in order to obtain agreement or a ruling that the services may be provided to the child.

(c) If the parent of the child refuses to consent to the initial provision of special education and related services, or the parent fails to respond to a request to provide the consent, both of the following are applicable:

(1) The public agency shall not be considered to be in violation of the requirement to make available a free appropriate public education to the child for the failure to provide the child with the special education and related services for which the public agency requests consent.

(2) The public agency shall not be required to convene an individualized education program team meeting or develop an individualized education program under this part for the child for the special education and related services for which the public agency requests consent.

(d)(1) Pursuant to Section 300.300(b)(4) of Title 34 of the Code of Federal Regulations, if the parent or guardian of a child submits a written revocation of his or her consent pursuant to this section at any time subsequent to the initial provision of special education and related services to the child, the public agency shall not do either of the following:
§ 56346. Informed consent of parents before provision of..., CA EDUC § 56346

(A) Continue to provide special education and related services to the child, but shall provide prior written notice to the child's parent or guardian in accordance with Section 56500.4 before ceasing the provision of the special education and related services.

(B) Use the procedural safeguards specified in Chapter 5 (commencing with Section 56500), including mediation and the due process complaint procedures, to obtain agreement or a ruling that the services may be provided to the child.

(2) A public agency shall be deemed in compliance with the requirement to make a free appropriate public education available to a child if the agency ceases to provide the child with further special education and related services pursuant to this subdivision. A public agency is not required to convene an individualized education program team meeting or develop an individualized education program pursuant to this article for the child for further provision of special education and related services.

(e) If the parent of the child consents in writing to the receipt of special education and related services for the child but does not consent to all of the components of the individualized education program, those components of the program to which the parent has consented shall be implemented so as not to delay providing instruction and services to the child.

(f) With the exception of a parent of a child who fails to respond pursuant to subdivision (b), or refuses to consent to services pursuant to subdivision (b), if the public agency determines that the proposed special education program component to which the parent does not consent is necessary to provide a free appropriate public education to the child, a due process hearing shall be initiated in accordance with Section 1415(f) of Title 20 of the United States Code. If a due process hearing is held, the hearing decision shall be the final administrative determination and shall be binding upon the parties. While a resolution session, mediation conference, or due process hearing is pending, the child shall remain in his or her current placement, unless the parent and the public agency agree otherwise.

(g) In accordance with Section 300.300(d)(4)(i) of Title 34 of the Code of Federal Regulations, if the parent of a child who is home schooled or placed in a private school by the parents at their own expense does not provide consent for the initial assessment or the reassessment, or the parent fails to respond to a request to provide consent, the public agency shall not use the consent override procedures described in Section 300.300(a)(3) and (c)(1) of Title 34 of the Code of Federal Regulations. The public agency is not required to consider the child as eligible for services under Article 5.6 (commencing with Section 56170) of Chapter 2.

Credits

Current with urgency legislation through Ch. 9 of 2018 Reg.Sess
§ 300.507 Filing a due process complaint.

Effective: October 13, 2006

Currentness

(a) General.

(1) A parent or a public agency may file a due process complaint on any of the matters described in § 300.503(a) (1) and (2) (relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child).

(2) The due process complaint must allege a violation that occurred not more than two years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the due process complaint, or, if the State has an explicit time limitation for filing a due process complaint under this part, in the time allowed by that State law, except that the exceptions to the timeline described in § 300.511(f) apply to the timeline in this section.

(b) Information for parents. The public agency must inform the parent of any free or low-cost legal and other relevant services available in the area if—

(1) The parent requests the information; or

(2) The parent or the agency files a due process complaint under this section.

(Approved by the Office of Management and Budget under control number 1820–0600)

(Authority: 20 U.S.C. 1415(b)(6))

SOURCE: 71 FR 46755, Aug. 14, 2006; 72 FR 17781, April 9, 2007; 80 FR 23666, April 28, 2015; 82 FR 29759, June 30, 2017; 82 FR 31912, July 11, 2017, unless otherwise noted.

Notes of Decisions (37)

Current through April 5, 2018; 83 FR 14604.

End of Document

Synopsis

Background: District of Columbia sought review under Individuals with Disabilities Education Act (IDEA) of administrative hearing officer's determination that District's proposed change of placement of student with profound hearing loss disability from general inclusion education setting in private school to special education setting in public school with program for hearing impaired was not appropriate. District moved for summary judgment and parent of student moved to dismiss and for attorney fees. The United States District Court for the District of Columbia, Richard J. Leon, J., 468 F.Supp.2d 107, held that district's action was rendered moot by settlement agreement with parent and award of attorney fees was not warranted. Parent appealed.

[Holding:] The Court of Appeals, Ginsburg, Chief Judge, held that parent was eligible for attorney fees as “prevailing party” under the IDEA.

Remanded.

*1288 Appeal from the United States District Court for the District of Columbia (No. 05cv01309).

Attorneys and Law Firms

Paul S. Dalton argued the cause and filed the briefs for appellants. William E. Houston entered an appearance.

Mary T. Connelly, Assistant Attorney General, Office of Attorney General for the District of Columbia, argued the cause for appellee. With her on the brief were Linda J. Singer, Attorney General at the time the brief was filed, Todd S. Kim, Solicitor General, and Edward E. Schwab, Deputy Solicitor General.

Before: GINSBURG, Chief Judge, and ROGERS and BROWN, Circuit Judges.

Opinion

Opinion for the Court filed by Chief Judge GINSBURG.

GINSBURG, Chief Judge:
The district court dismissed as moot the District of Columbia’s suit against Carolyn Jeppsen and denied her application for attorneys’ fees for want of jurisdiction. We hold she was eligible for attorneys’ fees as the “prevailing party” within the meaning of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 et seq.

I. Background

Jeppsen's daughter, M.J., has a hearing disability on account of which she attended a private school at public expense pursuant to the IDEA. In 2003 the District of Columbia Public Schools initiated a program for the hearing impaired and in the fall of 2004 sought to move M.J. into the public school system. Jeppsen petitioned for a “due process hearing,” as provided in 20 U.S.C. § 1415(f), to contest the move. When the hearing officer ruled that the District may not move M.J. to a public school, the District sought review by filing this suit against Jeppsen in the district court. See 20 U.S.C. § 1415(i)(2) (according right of action in federal court to persons “aggrieved” by IDEA administrative proceeding). The complaint sought declaratory relief, “reasonable costs and expenses, including attorneys' fees,” and “any other relief that this Court deems just.”

In the fall of 2005, during the pendency of this action, the District again sought to move M.J. into the public school system. In January 2006 Jeppsen received another due process hearing, in the course of which the parties entered into a settlement agreement that the hearing officer incorporated into an order in favor of Jeppsen.

Jeppsen then moved to dismiss the instant action on the ground that the court could give the District no meaningful relief. The District had agreed to pay for M.J. to remain in private school during the 2005–06 school year, and Jeppsen argued the District's case was moot with respect to the prior school year, which had ended, and premature with respect to the next school year, by which M.J.'s needs may have changed. Jeppsen also sought attorneys' fees as the “prevailing party” under the IDEA. The District opposed Jeppsen's motion for dismissal, arguing the case was not moot with regard to the 2004–05 academic year because its complaint was broad enough for it to claim reimbursement of the tuition the District had paid for that year and the dispute was capable of repetition.

The district court, holding the IDEA does not authorize a school district to recover tuition or other expenses from a parent, concluded “there is no ‘effectual relief’ available to plaintiff” and dismissed the case as moot. 468 F.Supp.2d 107, 111–12 (2006). The court then held it lacked jurisdiction to award attorneys' fees to Jeppsen because it had dismissed the case for want of jurisdiction. Id. at 112–13.

II. Analysis

Jeppsen argues she is eligible for attorneys' fees because, having moved successfully to dismiss the case against her, she was the “prevailing party” in the district court. The District of Columbia first defends the district court's view that it lacked jurisdiction to award attorneys' fees because it had dismissed the action as moot. Alternatively, the District argues that under Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources, 532 U.S. 598, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001), a defendant who obtains a dismissal not based upon the merits of the case has not “prevailed” within the meaning of the IDEA. We address both propositions de novo. Trudeau v. FTC, 456 F.3d 178, 183 (D.C.Cir.2006) (subject matter jurisdiction of district court); Edmonds v. FBI, 417 F.3d 1319, 1322 (D.C.Cir.2005) (whether a “prevailing party”).

A. Jurisdiction of the District Court

Citing cases that hold a plaintiff's interest in attorneys' fees ordinarily does not confer Article III standing, e.g., Lewis v. Cont'l Bank Corp., 494 U.S. 472, 480, 110 S.Ct. 1249, 108 L.Ed.2d 400 (1990); Moseley v. Bd. of Educ., 483 F.3d 689,
694 (10th Cir.2007), the District argues the district court did not have Article III jurisdiction to award fees to Jeppsen in this case, which is moot as to the merits and therefore not within the jurisdiction of the court. The cases upon which the District relies, however, support only a narrower proposition: Article III requires that the requested remedy redress the “injury in fact” of which a plaintiff complains, see Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992); when intervening events have mooted the plaintiff's underlying claim, the plaintiff's continuing interest in attorney's fees does not support her continued standing to pursue the underlying claim. Lewis, 494 U.S. at 480, 110 S.Ct. 1249; see also Liu v. INS, 274 F.3d 533, 536 (D.C.Cir.2001).

In addition to its constitutional argument, the District argues the court lacks statutory subject matter jurisdiction to award fees. The District points to Keene Corp. v. Cass, 908 F.2d 293, 298 (9th Cir.1990), in which the Eighth Circuit held a district court may not award attorneys' fees to a defendant who obtains the dismissal for want of jurisdiction of an action under 42 U.S.C. § 1983, on the ground that § 1988, the applicable fee-shifting provision, “does not by its terms confer subject matter jurisdiction upon federal courts.” We note the circuits are divided over whether a district court may award attorneys' fees to the defendant in a case over which the court lacks subject matter jurisdiction. Compare Primax Recoveries, Inc. v. Gunter, 433 F.3d 515, 520 (6th Cir.2006) (“court without subject-matter jurisdiction over an ERISA action lacks the authority to award attorney's fees”), Branson v. Nott, 62 F.3d 287, 293 (9th Cir.1995), and W.G. ex rel. D.G. v. Senatore, 18 F.3d 60, 64–65 (2d Cir.1994), with United States ex rel. Grynb erg v. Praxair, Inc., 389 F.3d 1038, 1055–58 (10th Cir.2004), and Citizens for a Better Env't v. Steel Co., 230 F.3d 923, 927–28 (7th Cir.2000). See also Wendt v. Leonard, 431 F.3d 410, 414 (4th Cir.2005) (finding no need to address this issue). As we explain in the next section, however, this case gives us no occasion to decide whether a defendant who obtains a dismissal for want of jurisdiction may be awarded attorneys' fees absent a statute conferring subject matter jurisdiction over her fee petition.

*1290* B. “Prevailing Party” Status

The District relies upon Buckhannon, 532 U.S. 598, 121 S.Ct. 1835, 149 L.Ed.2d 855, for the proposition that a party does not “prevail” unless it succeeds upon the merits of the case. In Buckhannon the Supreme Court rejected the “catalyst theory,” according to which a plaintiff prevailed if its lawsuit brought about the desired change in the defendant's conduct without the court ordering the defendant to change its ways—that is, without what the Supreme Court described as a “judicially sanctioned change in the legal relationship of the parties.” Id. at 605, 121 S.Ct. 1835. Prior to Buckhannon we had held a defendant prevailed when it obtained a dismissal for improper venue. Noxell Corp. v. Firehouse No. 1 Bar–B–Que Rest., 771 F.2d 521, 525 (D.C.Cir.1985) (defendant “achieved an enduring victory” in that plaintiff “is forever barred from reinstituting the action in the District of Columbia”); see also Moten v. Bricklayers, Masons & Plasterers Intl' Union, 543 F.2d 224, 239 (D.C.Cir.1976) (per curiam) (appellee who secures dismissal for want of jurisdiction of appeal by intervenor is “prevailing party” under 42 U.S.C. § 2000e–5(k)). In the District's view, Noxell does not survive Buckhannon.

Under Buckhannon it is clear that a plaintiff “prevails” only upon obtaining a judicial remedy that vindicates its claim of right. See Select Milk Producers, Inc. v. Johanns, 400 F.3d 939, 948 (D.C.Cir.2005) (plaintiff whose “claim was fully vindicated by the court-ordered” preliminary injunction, although not a final determination on merits, is “prevailing party” under Buckhannon). On the other hand, a defendant might be as much rewarded by a dispositive order that forever forecloses the suit on a procedural or remedial ground as by a favorable judgment on the merits. See Dozier v. Ford Motor Co., 702 F.2d 1189, 1191 (D.C.Cir.1983) (res judicata precludes relitigating issue whether amount in controversy exceeds minimum required for jurisdiction under 28 U.S.C. § 1332). A ruling on a jurisdictional ground, that the action fails either in law or in fact, might give the defendant all it could receive from a judgment on the merits. Be that as it may, this court has not addressed whether, in light of Buckhannon, a defendant “prevails” when the case against it is dismissed for want of jurisdiction.

Prior to Buckhannon, the courts of appeals had divided on the issue whether a defendant “prevails” upon obtaining a judicial order dismissing the plaintiff's case for want of jurisdiction. Compare Steel Co., 230 F.3d at 929–30 (“when a dismissal for want of jurisdiction forecloses the plaintiff's claim, the defendant is the ‘prevailing party’ ”) because such a
dismissal is “an entitlement not to have any change in legal relations”), with Figueroa v. Buccaneer Hotel Inc., 188 F.3d 172, 183 n. 15 (3d Cir.1999) (contra), and Keene Corp., 908 F.2d at 298. Within the Ninth Circuit, compare Elks National Foundation v. Weber, 942 F.2d 1480, 1485 (1991) (defendant may “prevail” on jurisdictional ground), with Branson, 62 F.3d at 293 (contra). Since Buckhannon, two courts of appeals have held that a defendant “prevails” only if it succeeds on the merits. Torres–Negron v. J & N Records, LLC, 504 F.3d 151, 164–65 (1st Cir.2007); Dattner v. Conagra Foods, Inc., 458 F.3d 98, 101–02 (2d Cir.2006). The Tenth Circuit, on the other hand, adopted the reasoning of the Seventh Circuit in Steel Co. without citing Buckhannon, see Grynberg, 389 F.3d at 1056–58, and Steel Co., like Buckhannon, relied upon Texas State Teachers Ass'n v. Garland Independent School District, 489 U.S. 782, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989), in deciding whether a party “prevails.” Steel Co. held the defendant *1291 had “prevailed” because it obtained a judicial order resulting in a “material alteration of the legal relationship of the parties,” 230 F.3d at 929; Buckhannon held that a plaintiff does not prevail even though its action has caused the defendant to change its primary conduct, because the plaintiff does not thereby obtain a “judicially sanctioned change in the legal relationship of the parties.” Buckhannon, 532 U.S. at 604–05, 121 S.Ct. 1835.

[2] We need not enter the lists in this apparent conflict among the circuits in order to resolve the instant dispute. Recall the district court dismissed this action for want of jurisdiction only after holding not only that the District's action for declaratory relief had become moot when the school year ended but also that the IDEA did not create a right of action against a parent for the recovery of tuition or other monies the District had expended for private schooling. The latter ruling was a judgment on the merits, not a holding that the court lacked jurisdiction; the court held the District's claim failed because it was contrary to the statute.*

III. Conclusion

Because the dismissal of the District's case, properly understood, was a decision on the merits, it raises no doubt about the district court's jurisdiction to award attorneys' fees. On the merits, even if Buckhannon overruled Noxell, it is clear Jeppsen has “prevailed” in an “action or proceeding brought under” § 1415. 20 U.S.C. § 1415(i)(3)(B)(i)(I). Accordingly we remand the case to the district court in order that it may decide whether, “in its discretion,” id., to award Jeppsen attorneys' fees.

So ordered.

All Citations


Footnotes

* Although Jeppsen does not argue the district court dismissed the District's case on the merits, she does argue that, because the district court held the District's claim for reimbursement failed, she “prevailed” in the district court; we are bound by neither the district court's nor the parties' characterization of the dismissal. Cf. Fund for Animals, Inc. v. U.S. Bureau of Land Mgmt., 460 F.3d 13, 18 n. 4 (D.C.Cir.2006) (district court's characterization of dismissal based upon APA as jurisdictional “of no consequence,” as court of appeals may affirm “dismissal under Rule 12(b)(1) ... pursuant to Rule 12(b)(6)”).
LEGAL REPRESENTATION
FOR EDUCATION AND ESTATE MATTERS

1. 20 U.S.C. § 1415 (i)(3)


4. Barlow–Gresham Union High Sch. Dist. No. 2 v. Mitchell, 940 F.2d 1280, 1285 (9th Cir.1991)


6. Estate Considerations for Students with Special Needs
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§ 1415. Procedural safeguards, 20 USCA § 1415 (i)(3)

(3) Jurisdiction of district courts; attorneys' fees

(A) In general

The district courts of the United States shall have jurisdiction of actions brought under this section without regard to the amount in controversy.

(B) Award of attorneys' fees

(i) In general

In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs--

(I) to a prevailing party who is the parent of a child with a disability;

(II) to a prevailing party who is a State educational agency or local educational agency against the attorney of a parent who files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation; or

(III) to a prevailing State educational agency or local educational agency against the attorney of a parent, or against the parent, if the parent's complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.

(ii) Rule of construction

Nothing in this subparagraph shall be construed to affect section 327 of the District of Columbia Appropriations Act, 2005.

(C) Determination of amount of attorneys' fees

Fees awarded under this paragraph shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection.

(D) Prohibition of attorneys' fees and related costs for certain services

(i) In general

Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under this section for services performed subsequent to the time of a written offer of settlement to a parent if--
(I) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins;

(II) the offer is not accepted within 10 days; and

(III) the court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.
THE HONORABLE ZACKERY P. MORAZZINI, DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE OF THE OFFICE OF ADMINISTRATIVE HEARINGS, has requested an opinion on the following questions:

1. Does the Administrative Procedure Act (Gov. Code, §§ 11340-11529) authorize a party to a proceeding conducted by the Office of Administrative Hearings to be represented by a person who is not an active member of the California State Bar?

2. Does title 20 United States Code section 1415(h)(1), or its implementing regulations, or California Education Code section 56505, subdivision (e)(1), authorize a party to a special education “due process hearing” to be represented by a person who is not an active member of the California State Bar?
CONCLUSIONS

1. The Administrative Procedure Act does not, in itself, authorize a party to a proceeding conducted by the Office of Administrative Hearings to be represented by a person who is not an active member of the California State Bar.

2. Neither title 20 United States Code section 1415(h)(1), nor its implementing regulations, nor California Education Code section 56505, subdivision (e)(1), authorizes a party to a special education “due process hearing” to be represented by a person who is not an active member of the California State Bar.

ANALYSIS

The Office of Administrative Hearings (OAH) is an entity within the Department of General Services. It is a “quasi-judicial tribunal that hears administrative disputes.” OAH provides administrative law judges to conduct hearings for more than 1,500 state and local government agencies. Among its adjudicative responsibilities under the Administrative Procedure Act, the OAH provides mediators and administrative law judges from its Special Education Division to conduct proceedings related to special education disputes under contract with the Department of Education.

Question 1

The first question is whether the provisions of the Administrative Procedure Act (APA) authorize a party in an administrative proceeding conducted by the OAH to be represented by a person who is not an active member of the California State Bar. We conclude that the APA does not, in itself, authorize such representation.

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1 Gov. Code, § 11370.2.
3 Id.
4 The Administrative Procedure Act comprises chapter 3.5 (commencing with section 11340), chapter 4 (commencing with section 11370), chapter 4.5 (commencing with section 11400), and chapter 5 (commencing with section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.
5 See Ed. Code, §§ 56505 (state “due process” hearing); 56504.5, subd. (a) (contracts for mediation and due process hearings); see also Dept. of General Services, Office of Administrative Hearings, CDE Agreement No. CN140144, http://www.documents.dgs.ca.gov/oah/SE/Scopeofwork%202014-15.pdf.
The focus of our analysis is on the “administrative adjudication” provisions of the APA, which are in chapters 4.5 and 5 of the Act. For purposes of the APA, an “adjudicative proceeding” is “an evidentiary hearing for determination of facts pursuant to which an agency formulates and issues a decision.” Whenever an adjudicative proceeding is required by the federal or state constitution, or by federal or state statute, the proceeding is governed by the APA. Chapter 4.5 of the APA sets out an overarching scheme that applies to all administrative proceedings governed by the APA, including the “Administrative Adjudication Bill of Rights.” Certain proceedings are, by statute, expressly made subject to the “formal” procedures of chapter 5 of the APA. In general, each agency that affords administrative hearings may determine its own hearing procedures, with reference to both the APA and to statutes applicable to that agency.

Chapter 5 proceedings bear many of the attributes of a civil trial, including discovery, prehearing conferences, motions, settlement conferences, and amicus briefs. Except when expressly provided otherwise, a formal proceeding under Chapter 5 is conducted by an Administrative Law Judge from the OAH.

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6 See Gov. Code, § 11400, subd. (a).
7 Gov. Code, § 11405.20.
8 See Gov. Code, §§ 11425.10–11425.60; see also California Youth Authority v. State Personnel Bd. (2002) 104 Cal.App.4th 575, 590 [Bill of Rights sets minimum due process and public interest requirements for Chapter 4.5 hearings].
9 Chapter 5 procedures are also subject to the overarching governance of chapter 4.5. (Gov. Code, § 11410.50.)
10 Gov. Code, § 11415.10.
11 See, e.g., Gov. Code, §§ 11507.6, 11507.7, 11511.
12 Gov. Code, § 11511.5.
14 Gov. Code, § 11511.7.
16 E.g., Gov. Code, § 11502; cf. Bus. & Prof. Code, § 24300, subd. (d) (director of Department of Alcoholic Beverage Control may appoint ALJs for Chapter 5 proceedings).
17 Agencies may also contract with OAH to conduct adjudicative proceedings. (See, e.g., Hayes v. California Dept. of Developmental Services (2006) 138 Cal.App.4th 1523, 1530, fn. 2 (Department of Developmental Services); Gov. Code, § 27727 [local governmental entities].)
We are advised that parties to proceedings conducted by the OAH sometimes seek to be represented by a person who is not a member of the California State Bar, giving rise to the question whether representation by a nonlawyer is authorized by the APA.

The representation of another before a governmental entity has historically been regarded as the “practice of law.”\(^{18}\) Under the State Bar Act, it is unlawful to practice law in this state unless one is a member of the California State Bar or is otherwise authorized by statute or court rule to engage in the practice of law.\(^{19}\) Although the Legislature has refrained from closely defining what constitutes the practice of law,\(^{20}\) courts have construed the term to include “the doing and performing services in a court of justice in any matter depending therein throughout its various stages and in conformity with the adopted rules of procedure,” and, even more broadly, “legal advice and legal instrument and contract preparation, whether or not these subjects were rendered in the course of litigation.”\(^{21}\)

While courts are careful to guard their constitutional prerogative to determine the qualifications of those who may practice before them,\(^{22}\) they have generally deferred to the discretion of the Legislature or the executive branch where administrative

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\(^{19}\) Bus. & Prof. Code, §§ 6125, 6126, subd. (a). For purposes of this opinion, the term “nonlawyer” or “unlicensed” includes lawyers who are licensed to practice law in other states or jurisdictions but are not active members of the California State Bar. The prohibition against the practice of law without membership in the California State Bar or authorization by statute applies equally to lay persons and to out-of-state attorneys. (*Birbrower, Montalbano, Cordon & Frank v. Superior Court* (1998) 17 Cal.4th 119, 130-132 (*Birbrower*).

\(^{20}\) *Birbrower, supra*, 17 Cal.4th at p. 128. However, the Legislature has specified circumstances in which activities that are commonly performed by licensed attorneys may be performed by persons who are not members of the California State Bar. (See, e.g., Bus. & Prof. Code, §§ 6450 [paralegals], 22440 et seq. [immigration consultants]; Code Civ. Proc., § 1297.351 [international commercial disputes].

\(^{21}\) *Birbrower, supra*, 17 Cal.4th at p. 128, internal quotation marks and citations omitted.

adjudications are concerned, subject to “judicial inquiry as to [the] propriety and reasonableness” of such regulations.\textsuperscript{23} Thus, the Supreme Court has acknowledged that, in the context of workers’ compensation administrative proceedings, the Legislature has created an exception to the general prohibition against the practice of law by those who are not members of the California State Bar,\textsuperscript{24} and the Court has recognized this to be a valid legislative policy choice.\textsuperscript{25} The Court has also recognized that the Public Utilities Commission, an administrative agency, may lawfully give parties the choice of being represented by a nonlawyer in adjudicatory proceedings before the Commission.\textsuperscript{26}

From time to time, the Legislature has determined that, in selected administrative proceedings, a party may choose to be represented by a nonlawyer.\textsuperscript{27} Likewise, several administrative agencies have chosen to give parties the option of lay representation.\textsuperscript{28}

But the question posed here is whether the APA \textit{itself} authorizes a party to be represented by a nonlawyer in an administrative proceeding. We conclude that it does not. Unlike the statutes and administrative regulations that expressly allow parties to choose to be represented by a nonlawyer, the APA does not reflect any particular policy

\textsuperscript{23} See \textit{Eagle Indem. Co. v. Industrial Acc. Commission of Cal.} (1933) 217 Cal. 244, 247 (\textit{Eagle}).

\textsuperscript{24} \textit{Eagle, supra}, at p. 248.

\textsuperscript{25} See \textit{id.} at p. 249.

\textsuperscript{26} \textit{Consumers Lobby Against Monopolies v. Public Utilities Commission} (1979) 25 Cal.3d 891, 913-914.

\textsuperscript{27} See Lab. Code, §§ 1151.3 (Agricultural Labor Relations Board), 5700 (Workers Compensation Appeals Board); Unemp. Ins. Code, § 1957 (Unemployment Insurance Appeals Board); Welf. & Inst., Code, § 4701, subd. (f)(3) (Dept. of Development Services); Welf. & Inst. Code, § 10950, subd. (a) (Dept. of Social Welfare); see also Ed. Code, § 48918, subd. (b)(5) (school expulsion); Rev. & Tax Code, § 19084, subd. (a)(4) (Franchise Tax Board).

\textsuperscript{28} See Cal. Code Regs., tit. 2, §§ 52.9 (State Personnel Board), 617.3, subd. (a) (Victim Compensation and Government Claims Board), 1187.8 (Commission on State Mandates); tit. 4, § 12060, subd. (j) (Gambling Control Commission); tit. 8, §§ 232.09, subd. (a) (California Apprenticeship Council), 378 (Occupational Safety & Health Appeals Board), 424.3, subd. (a) (Occupational Safety and Health Standards Board), 17209 (Dept. of Industrial Relations prevailing wage cases); tit. 10, § 2661.1, subd. (a) (Insurance Commissioner rate proceedings); tit. 17, §§ 60055.3, subd. (a), 60060.3, 60065.3 (Air Resources Board); tit. 22, §§ 2051-8, subd. (c)(3)(A) (Employment Development Department), 120222, subd. (a) (Dept. of Child Support Services); tit. 25, § 7637 (Office of Migrant Services).
choice on the subject. The Legislature appears to have left the decision whether to permit lay representation to the discretion of each administrative agency wherever the agency is given discretion to tailor its own procedures. But no discretion is afforded in those cases where Chapter 5 formal procedures are required. The notice of hearing that is required to be given to respondents in Chapter 5 proceedings states:

You may be present at the hearing. You have the right to be represented by an attorney at your own expense. You are not entitled to the appointment of an attorney to represent you at public expense. You are entitled to represent yourself without legal counsel. . . .

Absent from this enumeration is any reference to a party’s right to be represented by someone other than an attorney. This is not surprising. As noted earlier, Chapter 5 proceedings have many of the attributes of civil trials and, therefore, can reasonably be said to call for “the application of legal knowledge and technique.”

Because the Legislature has, in other statutes, expressly authorized lay representation of parties, the absence of any such authorization in the APA is especially significant. As it stands, in those proceedings required by statute to be conducted under Chapter 5, no lay representation is authorized. In other administrative proceedings, the

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30 See Gov. Code, §§ 11425.10-11425.60; 11501, subd. (b).
31 See Gov. Code, § 11415.10, subd. (a).
32 Gov. Code, § 11509.
34 Baron v. City of Los Angeles, supra, 2 Cal.3d at p. 543.
availability of lay representation is left to the discretion of the administrative agency, consistent with the public policies underlying the State Bar Act. In light of the strong public-protection policy expressed by the State Bar Act, we are not free to infer that the APA holds an unspoken exception to the prohibition against the unlicensed practice of law.

We conclude that the Administrative Procedure Act does not, in itself, authorize a party to be represented in an administrative hearing by a person who is not an active member of the California State Bar.

**Question 2**

The second question is whether title 20 United States Code section 1415(h)(1), or its implementing regulations, or California Education Code section 56505, authorizes a party to a special education “due process hearing” to be represented by a person who is not an active member of the California State Bar. We conclude that they do not.

The federal Individuals with Disabilities Education Act (IDEA) regulates states’ provision of special education to students with disabilities. As a condition to receiving federal funds under IDEA, California has agreed to comply with IDEA’s substantive provisions and procedural protections.

IDEA allows a party to make a claim relating to “the identification, evaluation, or educational placement” of a child with disabilities, or to “the provision of a free appropriate public education” for the child. Such complaints may be resolved

36 Bus. & Prof. Code, § 6001.1 (protection of public is highest priority for Bar); see Birbrower, supra, 17 Cal.4th at p. 136; Gerhard v. Stephens (1968) 68 Cal.2d 864, 918.

37 It is argued that certain APA provisions refer to nonlawyer representation and therefore should be construed to constitute explicit authorization for such representation (see, e.g., Benninghoff, supra, 136 Cal.App.4th at pp. 66-67 & fn. 3 [noting similar claim]), but we do not agree. While some provisions of the APA implicitly recognize that a nonlawyer may represent a party (e.g., Gov. Code, §§ 11440.20 [service of notice], 11440.60, subd. (c) [submitting written communication to agency], 11455.30 [bad faith], 11520, subd. (b) [attorney fees]), we believe that the implicit recognition of nonlawyer representation that is reflected in the APA merely reflects that express authorization for lay representation occurs in statutes and regulations other than the APA itself.


through mediation or through a “due process hearing.” Under state law, due process hearings are conducted according to regulations adopted by the state Board of Education. In a due process hearing, the parties have a right to be “accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities.” We now consider whether—under federal law (IDEA) or its implementing California law (Education Code section 56505)—a party is entitled to be represented by an expert adviser rather than by an attorney.

Looking first at IDEA section 615(h)(1) (20 U.S.C. § 1415(h)(1)), we conclude that it does not create an entitlement to lay representation in a due process hearing. For a number of years, the United States Department of Education assumed that this federal statute authorized lay representation, until the Department reconsidered the question in 2008 and concluded that Congress more likely had intended to leave the issue of lay representation to the States. The applicable federal regulation, updated in 2008, states, “[W]hether parties have the right to be represented by non-attorneys at due process hearings is determined under State law.” Finding no court holding to the contrary, we conclude that IDEA does not, in itself, authorize a party to be represented in a due process hearing by a person who is not an attorney.

That brings us to the California Education Code. In 1980, the Legislature enacted Education Code section 56505, using language that echoes the IDEA provisions phrase for phrase. Section 56505 has not been amended since 2008, when the U.S. Department of Education revised its regulations and left it to the states to decide for themselves whether to permit lay representation in IDEA hearings. California has not adopted any rule or statute to enable lay representation in special education proceedings. Therefore, we conclude that there is no entitlement to lay representation in special education due process hearings.

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42 Ed. Code, § 56505, subd. (a).
43 20 U.S.C. § 1415(h)(1); see also Ed. Code, § 56505, subd. (e)(1).
46 Cf. 45 C.F.R. § 205.10(a)(3)(iii) (2017) (applicants or recipients of federal public assistance “may be represented by an authorized representative, such as legal counsel, relative, friend, or other spokesman, or he may represent himself”).
By no means do we suggest that consultants and other lay advocates are barred from due process hearings. The law clearly states that, in addition to counsel, a party has “a right to be accompanied and advised by . . . individuals with special knowledge or training relating to the problems of individuals with exceptional needs.” We conclude only that parties to special education due process hearings do not have a right to have their legal interests represented by a nonlawyer. In other words, a nonlawyer may not engage in the practice of law in special education due process hearings.

Accordingly, we conclude that neither title 20 United States Code section 1415(h)(1), nor its implementing regulations, nor California Education Code section 56505, subdivision (e)(1), authorizes a party in a special education due process hearing to be represented by a person who is not an active member of the California State Bar.

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48 Ed. Code, § 56505, subd. (e)(1).

49 Cf. Kerr & St. Hill, *Mediation of Special Education Disputes in Pennsylvania* (2012) 15 U.Pa. J.L. & Soc. Change 179, 193 [“A lay advocate's strength lies in having an intimate knowledge of the individual educational needs of the child. However, this does not necessarily correspond with successfully navigating mediation. Full engagement in mediation also requires a skill-set that focuses on knowledge of the law and negotiation skills, which is often better suited for an attorney”].
Parents who prevailed at administrative hearing brought action against school district to recover attorney fees, costs, and expenses under the Handicapped Children's Protection Act. The United States District Court for the Northern District of California, John P. Vukasin, Jr., J., ruled against parents, and they appealed. The Court of Appeals, Chambers, Circuit Judge, held that parents were entitled to fees, costs, and expenses.

Reversed.

Opinion 886 F.2d 1558, Superseded.

Attorneys and Law Firms

*975 Michael A. Zatopa and Richard M. Pearl, San Francisco, Cal., for plaintiffs-appellants.

Thomas F. Casey, III, County Counsel, by Diane E. Finkelstein, Deputy, San Mateo, Cal., for defendant-appellee.

Appeal from the United States District Court for the Northern District of California.

Before CHAMBERS and WIGGINS, Circuit Judges, and BREWSTER, * District Judge.

Opinion

CHAMBERS, Circuit Judge:

At the outset, we change for this opinion the caption to “McSomebodies, et al., v. Burlingame Elementary School District”. We do this because the case involves a very young school child, and we do not think his name should be bound up for posterity in buckram. He may very well recover from his infirmities.

At issue here is the tail of the dog: attorney's fees against Burlingame Elementary School District.

Preceding this attorney's fees business, the defendant had been treating the child with certain efforts at the school house. Then, for a while, he was placed in the Hart Day School. That did not do very much for him. His parents requested placement of the boy in a residential setting. The School District refused.
An administrative hearing was held which resulted in a ruling in favor of the plaintiffs. The School District did not appeal. After the administrative decision, plaintiffs asked for attorney's fees, costs and expenses, and were denied.


The plaintiffs filed an original suit, not an appeal in the U.S. District Court for the Northern District of California. That court ruled against plaintiffs.

On appeal we reverse, holding that the plaintiffs may recover attorney's fees and appropriate costs plus expenses. See Duane M. v. Orleans Parish School Board, 861 F.2d 115 (5th Cir.1988), and Eggers v. Bullitt County School District, 854 F.2d 892 (6th Cir.1988).

Of course, our trial court, at the time of its decision, did not have the plethora of cases now available.

REVERSED for proceedings consistent with our decision.

The panel elects to adhere to its decision of October 3, 1989, choosing the dissenting opinion of Judge Edwards in Moore v. District of Columbia, 886 F.2d 335 (D.C.Cir.1989) as representing the majority of the several other circuits that have spoken on the issues of our case.

All Citations

897 F.2d 974, 59 Ed. Law Rep. 326

Footnotes

* The Honorable Rudi M. Brewster, United States District Judge for the Southern District of California, sitting by designation.
940 F.2d 1280
United States Court of Appeals, Ninth Circuit.


No. 90–35148.

Synopsis
School district brought action against parents of handicapped student to determine whether student should remain in classroom setting or be tutored privately. Claim was settled and the United States District Court for the District of Oregon, Owen M. Panner, J., awarded parents attorney fees as prevailing parties. School district appealed. The Court of Appeals, Hug, Circuit Judge, held that: (1) Handicapped Children's Protection Act allows attorney fees to be awarded when settlement is reached prior to due process hearing, provided that parents establish that they are prevailing parties, and (2) parents were “prevailing parties” entitled to recover attorney fees.

Affirmed.

Attorneys and Law Firms

*1281 Timothy R. Volpert, Davis, Wright, Tremaine, Portland, Or., for plaintiff-appellant.

Elam Lantz, Jr., Oregon Advocacy Center, Portland, Or., for defendants-appellees.

Appeal from the United States District Court for the District of Oregon.

*1282 Before HUG, and D.W. NELSON, Circuit Judges, and WALKER,* District Judge.

Opinion

HUG, Circuit Judge:

Barlow–Gresham Union High School (“Barlow–Gresham”) appeals the district court's order requiring it to pay attorneys' fees to the parents of Wesley Mitchell, a handicapped student. The fee award, authorized by the Handicapped Children's Protection Act of 1986 (“HCPA”), 20 U.S.C. § 1415(c)(4)(B), followed the settlement of an action brought to determine whether Wesley should remain in the classroom setting or be tutored privately.

The action was brought by the school district against Wesley and his parents under the Education for All Handicapped Children Act (“EAHC”), 20 U.S.C. § 1400 et seq. The school district sought an injunction authorizing it to keep Wesley from attending school on the school grounds for the remainder of the 1988–89 academic year. Prior to a final ruling on the merits, the parties settled the case at the administrative level. Subsequently, in response to a petition by the Mitchells, the district court granted their request for attorneys' fees for $18,624. Barlow–Gresham appeals the award of attorneys' fees. We affirm.
I.

Facts and Procedural Background

During the 1988–1989 school year, Wesley Mitchell (“Wesley”) was a 19-year-old student at Barlow–Gresham. He lived with his parents, Bari and Michael Mitchell. Wesley has severe epilepsy along with related behavior and learning problems. Accordingly, Wesley is eligible for special education under the handicapping condition of “other health impaired children” pursuant to 20 U.S.C. § 1401(a)(1). He was instructed in accordance with his own individualized education program (“IEP”).

During January 1989, Wesley assaulted two students and an employee of the Multnomah County Education Services District. On January 31, 1989, the day of the second assault, Wesley was suspended from school for five days as authorized by school district policy and state and federal law. Subsequently, the school district assembled a multi-disciplinary team to assess the situation. The multi-disciplinary team concluded that the behavior may be related to Wesley's handicapped condition. As such, the school district was precluded from automatically expelling Wesley as it would constitute a “change in placement” in violation of 20 U.S.C. § 1415(e)(3) (stay-put provision). However, the school district sought injunctive relief in order to change placement prior to exhausting administrative remedies pursuant to 20 U.S.C. § 1415(e)(2). In order to enjoin the student from attending school, there needs to be a showing that the student's current placement is substantially likely to result in injury to himself or others.

In reliance on this procedure, the school district filed an action in federal court on February 2, 1989. It sought an injunction removing Wesley from his regular classroom, the hallways and the common areas of the school. Initially, in its complaint, the school district sought a temporary restraining order, preliminary and permanent injunctive relief prohibiting the Mitchells from enrolling Wesley in the educational program for the balance of the school year and authorizing termination of services by the school district. The district court granted the temporary restraining order, thereby extending the five-day suspension to February 8, 1989. The court set that date to hear the school district's motion for a preliminary injunction.

Also on February 2, 1989, prior to filing the complaint, the school district provided the Mitchells with the statutorily required prior notice of change in placement (prior notice). 20 U.S.C. § 1415(b)(1)(E). The prior notice stated that Wesley's educational placement would be changed from his IEP at the high school to individual tutoring at the school district's Central Administrative Office. He was to be transported to and from the school by cab and the tutoring was not to exceed ten hours per week. The following day, the Mitchells objected to the school district's proposed change in placement and requested a due process hearing authorized by 20 U.S.C. § 1415(b)(2).

At the February 8, 1989 preliminary injunction hearing, the school district amended its complaint. Rather than requesting a termination of educational services, the district stated that it sought to continue instruction but not on campus during the interim period—the period prior to the administrative due process hearing. Rather, it sought instruction for Wesley at the district's Central Administrative Offices as indicated in the prior notice.

After an extensive evidentiary hearing, the district judge found that Wesley did present a substantial likelihood of danger to himself or others. However, in light of the parties' stipulation to the order giving the school district temporary authorization to provide Wesley with ten hours per week of one-on-one instruction at the school district Central Administrative Offices, the district judge issued a stipulated Temporary Restraining Order (“TRO”). The stipulated TRO prohibited Wesley from returning to his current placement and ordered the school district to provide placement at the Central Administrative Offices pending the outcome of the administrative hearing. Further, the Mitchells were ordered to appear on February 21, 1989 to report on the progress of negotiations regarding compromise of the underlying
complaint, the status of the administrative hearing process and to show cause why preliminary and permanent injunctive relief should not be granted against them.

At the February 21, 1989 hearing, the parties indicated to the court that the administrative proceeding to review Wesley's placement had been initiated. Also, the parties agreed to continue his current placement while the administrative process was pending. Accordingly, the district judge denied the motion for the preliminary injunction and dissolved the existing stipulated TRO. Instead, the judge issued a stipulated order which indicated that the parties had agreed that Wesley would continue in his current placement at the Central Administrative Offices.

On February 23, 1989, the Mitchells filed an answer and counterclaim for declaratory and injunctive relief and attorneys' fees. The Mitchells sought to have Wesley returned to Barlow–Gresham.

Nearly three months later, the administrative hearing convened. After opening arguments were heard, the hearing officer granted the school district's request for a continuance, first to May 22, 1989, and then again to June 30, 1989. Prior to the June 30 hearing date, the parties reached an agreement. Pursuant to an IEP recommendation made by the school district's multi-disciplinary team, the parties agreed to Wesley's placement in a newly created program at the high school with two other students.

The administrative hearing officer issued a Stipulated Order of Dismissal of the Due Process Hearing on June 28, 1989. The order of dismissal reflected the parties' agreement that the school district implement a special education program for Wesley in accordance with the IEP. On July 27, 1989, the district court entered an order of dismissal as well. It was a stipulated order dismissing the action without prejudice, based on the settlement reached. The settlement agreement as well as the respective orders of dismissal were silent as to attorneys' fees.

Subsequently, the Mitchells filed an application for attorneys' fee in the amount of $18,624. Finding the Mitchells to be the prevailing party within the meaning of 20 U.S.C. § 1415(e)(4) and the fees to be reasonable, the district judge granted the petition in full. The school district filed a timely appeal from that order.

*1284 II.

Availability of Attorneys' Fees


In 1986, Congress amended the Education of the Handicapped Act with the HCPA in order to provide attorneys' fees for parents in certain circumstances. See Pub.L. No. 99–372, 100 Stat. 796 (codified at 20 U.S.C. § 1415(e)(4)(B) (1982 & Supp.1988)). Section 1415(e)(4)(B) provides: “In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a handicapped child or youth who is the prevailing party.”
The clear language of section 1415(e)(4)(B) contemplates an award of attorneys' fees at the administrative level. The provision specifically refers to “any action or proceeding brought.” Further, this circuit has held that parents who prevail at the administrative hearing are entitled to attorneys' fees under the HCPA. See McSomebodies (No. 1) v. Burlingame Elementary School Dist., 897 F.2d 974, 975 (9th Cir.1989); accord Moore v. District of Columbia, 907 F.2d 165 (D.C.Cir.) (en banc), cert. denied, 498 U.S. 998, 111 S.Ct. 556, 112 L.Ed.2d 563 (1990); Mitten v. Muscogee County School Dist., 877 F.2d 932 (11th Cir.1989), cert. denied, 493 U.S. 1072, 110 S.Ct. 1117, 107 L.Ed.2d 1024 (1990); Duane M. v. Orleans Parish School Bd., 861 F.2d 115 (5th Cir.1988); Eggers v. Bullitt County School Dist., 854 F.2d 892, 898 (6th Cir.1989).

[2] This circuit has not yet confronted the exact question presented in this case concerning whether section 1415(e)(4)(B) provides for attorneys' fees to be awarded when settlement is reached prior to the due process hearing. Thus far, the only circuit to deal directly with this issue is the Fifth Circuit in Shelly C. v. Venus Indep. School Dist., 878 F.2d 862 (5th Cir.1989), cert. denied, 493 U.S. 1024, 110 S.Ct. 729, 107 L.Ed.2d 748 (1990). There, the court upheld the award of attorneys' fees following settlement of a suit over an individualized education program.

Here, the school district cites Dodds v. Simpson, 1987–88 EHLR Dec. 559:320, 1987 WL 49461 (D.Or.) (No. 84–6415–PA) (“Dodds II”), as being dispositive of this issue. In Dodds II, there was a dispute between the school district and the parents of a handicapped child with respect to whether the child was eligible for special education. Id. at 321. The parties settled the dispute prior to an administrative hearing. The settlement stipulated that the student had learning disabilities and would receive special education. Id. Thereafter, the Dodds filed a lawsuit seeking damages for violations of the child's civil rights and attorneys' fees. A jury found for the defendant school district. Notwithstanding the jury verdict in favor of the school district, the plaintiffs moved for attorneys' fees. Id. at 322.

The district court in Dodds II assumed, without deciding, that it had discretion to award fees to a party who obtained the relief sought through settlement prior to an administrative hearing. Id. However, based on the circumstances of that case, the court declined to award such fees and costs, finding that under the circumstances it would create a disincentive for such prehearing settlements. Id.

The district court in this case distinguished Dodds II on the basis of its specific facts. It determined that although the case settled prior to an administrative hearing, that fact would not prohibit attorneys' fees. Barlow–Gresham Union High School Dist. No. 2 v. Mitchell, CV 89–122–PA, op. 6–7 (D.Or. Dec. 18, 1989).

We agree with the district court and conclude that section 1415(e)(4)(B) allows the prevailing parents to recover attorneys' fees when settlement is reached prior to the due process hearing. The parents must, however, establish that they are the prevailing parties.

III.

Prevailing Party Determination

[3] The school district contends that the district court erred when it compared the prior notice issued by the school district to the stipulated order issued by the administrative hearing officer to determine that the Mitchells were the prevailing party. Rather, the school district contends instead that the court should compare relative positions of the parties in the negotiations hearing as compared to their settlement positions. The district court compared the “notice” given by the school district, pursuant to 20 U.S.C. § 1415(b)(1)(C), to the stipulated order. The stipulated order provided that (1) the parents' request for a due process hearing would be dismissed; and (2) the school district would implement a special education program for Wesley in a classroom, on the school grounds, with two other students. The district court stated:
When this action was filed, Barlow/Gresham insisted that Wesley be completely excluded from school grounds in a one-on-one academic program. When this action settled, Wesley's placement was in a special room with other students and several adults, on school grounds.


The determination by the district court that the Mitchells were the prevailing party for the purpose of awarding attorneys' fees is a factual determination that will not be set aside absent clear error. *Sablan v. Department of Fin. of N. Mariana Islands, 856 F.2d 1317, 1324 (9th Cir.1988)* (under 42 U.S.C. § 1988). We conclude there was no clear error.

**IV. Special Circumstances**

Finally, the school district argues that the district court erred when it determined that there were no special circumstances sufficient to justify the denial of attorneys' fees. The school district maintains that an award of attorneys' fees to the Mitchells would effectively penalize it “for its exemplary behavior in response to the life threatening emergency posed by Wesley's violent behavior.” In addition, the school district contends that an award in this case would create a disincentive to settlement. Accordingly, the school district asserts that the “special circumstances” of this case render the award unjust and therefore the award must be set aside.

[4] [5] Ordinarily, a prevailing party should recover attorneys' fees unless “special circumstances would render such an award unjust.” See *Abu–Sahyun v. Palo Alto Unified School District, 843 F.2d 1250, 1252 (9th Cir.1988); Planned Parenthood v. State of Arizona, 789 F.2d 1348, 1354 (9th Cir.1986).* To determine whether or not special circumstances exist, the court must consider two factors: (1) whether awarding fees would further the congressional purpose in enacting the EHA, and (2) the balance of the equities. See *Abu–Sahyun, 843 F.2d at 1253.*

*1286* The congressional purpose for enacting the EHA can be found at 20 U.S.C. § 1400(c). It provides that:

the purpose of [the EHA is] to assure that all handicapped children have available to them ... a free appropriate education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children.


This Act was amended in 1986 to provide attorneys' fees for prevailing parents. See *Pub.L. No. 99–372, § 2, 100 Stat. 796 (1986)* (codified at 20 U.S.C. § 1415(e)(4)(B)). The amendment was intended to overrule legislatively *Smith v. Robinson, 468 U.S. 992, 104 S.Ct. 3457, 82 L.Ed.2d 746 (1984)*, and was to be made retroactive to the day before the court announced its decision in that case. See *Abu–Sahyun, 843 F.2d at 1252.* In *Smith*, the Court held that attorneys' fees were not available in suits brought to enforce those rights because the statute contained no provisions for fees. *Id.*

Clearly, the congressional intent with regard to the EHA and the HCPA was to provide parents of handicapped children a substantive right that could be enforced through the procedural mechanisms in the Act, including a right to attorneys' fees if the parents prevail. Therefore, the school district argues only the second prong of the special circumstances test: the balance of the equities.
In *Teitelbaum v. Sorenson*, 648 F.2d 1248, 1250 (9th Cir.1981), we reiterated our position that good faith by itself is not a special circumstance justifying a denial of attorneys' fees. We stated that “attorney fees awards are not designed to penalize defendants, but are rather to encourage injured individuals to seek judicial relief.” *Id.* at 1251. The school district properly utilized the mechanisms available to it to diffuse a very difficult situation. However, in so doing, it attempted to effect a permanent unilateral change in Wesley's placement. Both the prior notice and the complaint clearly indicated this intent. We recognize that the complaint was subsequently amended by the school district to indicate that the individualized tutoring was to be only an interim placement. Nonetheless, it initially sought to terminate all services by the school district. Further, the prior notice indicated an intent to change permanently Wesley's placement and it was never amended. Under the circumstances of this case, we cannot say that the district court abused its discretion when it found no special circumstances sufficient to justify the denial of attorneys' fees.

V.

**Attorneys' Fees on Appeal**

Although the school district did not address this issue, the Mitchells' request their reasonable attorneys' fees for this appeal pursuant to 20 U.S.C. § 1415(e)(4)(B).

In this circuit, *section 1988* fees are ordinarily available to compensate attorneys for successful litigation of their fee applications, including work on appeal. See *Cunningham v. County of Los Angeles*, 879 F.2d 481, 490 (9th Cir.1988), cert. denied, 493 U.S. 1035, 110 S.Ct. 757, 107 L.Ed.2d 773 (1990). We conclude that the Mitchells are entitled to recover their reasonable attorneys' fees on this appeal.

AFFIRMED.

**All Citations**

940 F.2d 1280, 69 Ed. Law Rep. 203

**Footnotes**

* Hon. Vaughn R. Walker, United States District Judge for the Northern District of California, sitting by designation.

1. It is important to note that the portion of the stipulated order that read “[i]t appearing that the above captioned case has been fully compromised and settled” was crossed out and initialed by the parties.

2. The Supreme Court has resolved this issue with respect to 42 U.S.C. § 1988. In *Maher v. Gagne*, 448 U.S. 122, 129, 100 S.Ct. 2570, 2574, 65 L.Ed.2d 653 (1980), the Court held that although respondent prevailed through settlement, rather than through litigation, that fact will not preclude her from claiming attorneys' fees as the “prevailing party” within the meaning of *section 1988*. However, *Maher* applied to an action that was settled while it was pending in court.

3. We note that Judge Panner was the presiding judge in both *Dodds II* and the instant case.

474 F.3d 1165
United States Court of Appeals,
Ninth Circuit.

P.N., parent of T.N., a minor, Plaintiff–Appellant,
v.
SEATTLE SCHOOL DISTRICT, NO. 1, Defendant–Appellee.

No. 04–36141.

| Argued and Submitted June 9, 2006. |

Synopsis

Background: Student's parent filed action under Individuals with Disabilities Education Act (IDEA) to recover attorney fees incurred in resolving a conflict with school district over student's education. The United States District Court for the Western District of Washington, John C. Coughenour, Chief Judge, determined that parent was not a prevailing party entitled to fee award. Parent appealed.

[holding:] The Court of Appeals, Callahan, Circuit Judge, held that parent, who resolved her differences through a settlement agreement, which did not receive any judicial imprimatur, was not a prevailing party entitled to recover attorney fees under IDEA.

Affirmed.

Attorneys and Law Firms

*1166 Charlotte Cassady, Seattle, WA, for the plaintiff-appellant.

Lawrence B. Ransom and Tracy M. Miller, Karr Tuttle Campbell, Seattle, WA, for the defendant-appellee.

Appeal from the United States District Court for the Western District of Washington; John C. Coughenour, Chief Judge, Presiding. D.C. No. CV–04–00258–JCC.

Before DAVID R. THOMPSON, A. WALLACE TASHIMA, and CONSUELO M. CALLAHAN, Circuit Judges.

Opinion

ORDER AMENDING OPINION AND AMENDED OPINION

CALLAHAN, Circuit Judge.

ORDER
Our opinion filed August 15, 2006, is amended to include the following at the end of footnote 7.

We further note that 20 U.S.C. § 1415 was amended subsequent to the underlying events in this case. We have no occasion to consider whether these amendments alter the statutory requirements for an award of attorneys' fees under the IDEA.

*1167 With the filing of the amended opinion, Judges Thompson, Tashima, and Callahan vote to deny the petition for rehearing, and the petition for rehearing is denied.

The full court has been advised of the suggestion for rehearing en banc, and no judge has requested a vote on rehearing en banc, the petition for rehearing en banc is denied. FED. R. APP. P. 35.

No further petition for rehearing will be entertained.

OPINION

P.N., plaintiff-appellant, filed an action under the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. § 1400 et seq., to recover attorneys' fees incurred in resolving a conflict with the Seattle School District (“SSD”) over her child's education. The conflict was resolved by a settlement agreement signed only by the parties. The district court held that P.N. was not a prevailing party, and thus, not entitled to attorneys' fees under the IDEA because the settlement agreement lacked any judicial imprimatur. We affirm. We hold, consistent with our own precedent and decisions by our sister circuits, that (a) the definition of “prevailing party” set forth by the Supreme Court in Buckhannon Bd. & Care Home, Inc. v. W. Va. Dept' of Health & Human Res., 532 U.S. 598, 600, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001), applies to the IDEA's attorneys' fees provision, (b) the determination that a parent is a prevailing party requires that there be some judicial sanction of the settlement agreement, and (c) there is no judicial imprimatur of the settlement agreement in this case.

I

[1] [2] The IDEA seeks “to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living.” 20 U.S.C. § 1400(d)(1)(A). To implement the IDEA, schools must prepare a written Individualized Education Program (“IEP”) for each disabled child. 20 U.S.C. § 1414(d); Ojai Unified Sch. Dist. v. Jackson, 4 F.3d 1467, 1469 (9th Cir.1993). “[T]he IEP sets out the child's present educational performance, establishes annual and short-term objectives for improvements in that performance, and describes the specially designed instruction and services that will enable each child to meet these objectives.” Honig v. Doe, 484 U.S. 305, 311, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988). The statute guarantees parents of disabled children an opportunity to participate in the identification, evaluation, and placement process. 20 U.S.C. §§ 1414(d)(1)(B)(i), 1415(b)(1). Parents who object to their child's “identification, evaluation, or educational placement,” or have a complaint regarding the provision of a free appropriate public education for their child, can file an administrative complaint and are entitled to an impartial due process hearing. Id. §§ 1415(b)(6), (f)(1); Ojai, 4 F.3d at 1469. At the due process hearing, parents have a right to be accompanied and advised by counsel, present evidence, and confront, cross-examine, and compel the attendance of witnesses. 20 U.S.C. § 1414(h). Parents aggrieved by a hearing officer's findings and decision can file a civil action in either federal or state court. Id. § 1415(i)(2); Ojai, 4 F.3d at 1469.
The IDEA also provides that the parents of a child with a disability who is the “prevailing party” may be awarded reasonable attorneys' fees. 20 U.S.C. § 1415(i)(3)(B). Here, we are called upon to determine the legal definition of “prevailing party” as used in 20 U.S.C. § 1415(i)(3)(B), and whether P.N. meets this legal definition.

For many years, P.N.'s child, T.N., experienced difficulty in school, and P.N. repeatedly asked the SSD to evaluate T.N. for learning disabilities and to provide appropriate special education. When SSD failed to do so, P.N. obtained a psychological evaluation and enrolled T.N. in a private school. In March 2003, P.N. hired an attorney to represent her in attempting to obtain special education for T.N. from SSD and reimbursement for the costs of psychological evaluation and private schooling.

Over the next seven months P.N. and her attorney corresponded and met with SSD personnel. By the end of September 2003, SSD had agreed to fund T.N.'s placement in the private school for the summer of 2003 and for the 2003–2004 school year on a part-time basis, but had not agreed to reimburse P.N. for the expenses associated with T.N.'s private evaluation and his enrollment in the private school from March through June 2004.

In November 2003, P.N., through counsel, requested a due process hearing under the IDEA. In early January 2004, the parties entered into a settlement agreement whereby SSD agreed to reimburse P.N. for the costs associated with T.N.’s psychological evaluation and attendance at the private school. The settlement agreement expressly reserved “any issue of attorneys' fees and costs.” On January 23, 2004, the administrative law judge, at P.N.'s request, dismissed the due process hearing proceeding.

On February 4, 2004, P.N. filed in this action for the recovery of attorneys' fees and costs under the IDEA. She sought $13,653.00 in attorneys' fees incurred in the due process proceedings and attorneys' fees and costs incurred in the federal action to recover fees. In October 2004, the district court denied P.N.'s summary judgment motion for attorneys' fees and subsequently dismissed P.N.'s claims with prejudice. P.N. filed a timely notice of appeal.

Although we review a district court's denial of attorneys' fees and costs for an abuse of discretion, any elements of legal analysis and statutory interpretation underlying the district court's attorneys' fees decision are reviewed de novo, and factual findings underlying the district court's decision are reviewed for clear error. Carbonell v. I.N.S., 429 F.3d 894, 897 (9th Cir.2005); Barrios v. Cal. Interscholastic Fed'n, 277 F.3d 1128, 1133 (9th Cir.2003).

A. P.N., as an alleged prevailing party, was entitled to file an action for attorneys' fees under the IDEA

[3] P.N.’s complaint specifically sought only attorneys' fees and costs under the IDEA. Although it was revised in 2004, 20 U.S.C. § 1415(i)(3)(B) continues to provide that the court may, in its discretion, award reasonable attorneys' fees as part of costs to a prevailing party who is a parent of a child with a disability.2

We have held that the phrase “action or proceeding brought under this section” in 20 U.S.C. § 1415(i)(3)(B) authorizes the filing of a complaint by a prevailing party seeking only attorneys' fees and costs. In Lucht v. Molalla River Sch. Dist., 225 F.3d 1023, 1025 (9th Cir.2000), parents of an autistic son complained to the school district that their
son was not receiving the special education benefits to which he was entitled under the IDEA. *Id.* After the parents filed a complaint with the state Department of Education pursuant to the state's Complaint Review Procedure, the parents prevailed upon the school district to complete a revised IEP for their son. The parents then filed an action in a district court seeking to recover attorneys' fees. *Id.* The district court granted the parents' request for attorneys' fees and the school district appealed. *Id.* On appeal we addressed whether 20 U.S.C. § 1415(i)(3)(B) authorized an action solely for attorneys' fees, and concluded:

Although we have not expressly so held before today, our prior cases imply that the district court has jurisdiction over a case in which fees are sought although liability is established outside the district court proceeding itself. *See Barlow–Gresham Union High Sch. Dist. No. 2 v. Mitchell, 940 F.2d 1280, 1285 (9th Cir.1991)* (allowing “the prevailing parents to recover attorneys' fees when settlement is reached prior to the due process hearing”); *McSomebodies v. Burlingame Elementary Sch. Dist., 897 F.2d 974 (9th Cir.1989)* (awarding the parents of a disabled child attorney fees incurred in an administrative due process hearing under the Handicapped Children's Protection Act [the predecessor of the IDEA]). *Id.* at 1026. Accordingly, we hold that the IDEA authorizes an action solely to recover attorneys' fees and costs, even if there has been no administrative or judicial proceeding to enforce a student's rights under the IDEA. *See Barlow–Gresham, 940 F.2d at 1285* (“We ... conclude that [the predecessor of § 1415(i)(3)(B)] allows the prevailing parents to recover attorneys' fees when settlement is reached prior to the due process hearing.”). We turn next to defining “prevailing party.”

**B. The Supreme Court has defined “prevailing party” to require a judicial imprimatur of the material alteration of the parties' legal relationship**

_The critical question is whether P.N. is a “prevailing party” and thus eligible for an award of attorneys' fees as part of costs under the IDEA._ The term was addressed by the Supreme Court in *Buckhannon*. 532 U.S. at 600, 121 S.Ct. 1835. There, the plaintiffs challenged a West Virginia law requiring all residents of residential board and care homes to be capable of moving themselves away from imminent danger, such as a fire. *Id.* at 600–01, 121 S.Ct. 1835. The plaintiffs sought declaratory and injunctive relief under the Fair Housing Amendments Act (“FHAA”) and the Americans with Disabilities Act (“ADA”). *Id.* While the case was pending, *1170* the West Virginia state legislature eliminated the self-preservation requirement, thus rendering plaintiffs' action moot. *Id.* at 601. Plaintiffs, nonetheless, sought attorneys' fees as the “prevailing party” under the FHAA and the ADA. They argued that they were entitled to attorney's fees under the 'catalyst theory,’ which posited that a plaintiff was a 'prevailing party’ if he or she achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct.” *Id.* Although most of the circuits had recognized the “catalyst theory,” the Fourth Circuit rejected it. The Supreme Court granted certiorari and affirmed the Fourth Circuit. *Id.* at 602., 121 S.Ct. 1835

The Court's opinion commenced by noting that under the American Rule, parties are ordinarily required to bear their own attorneys' fees, but that Congress has authorized the award of attorneys' fees to prevailing parties under numerous statutes. *Id.* Referring to Black's Law Dictionary, the Court commented that a “prevailing party” is “one who has been awarded some relief by the court” and that this view “can be distilled from our prior cases.” *Id.* at 603, 121 S.Ct. 1835.

The Court recognized that in addition to judgments on the merits, “settlement agreements enforced through a consent decree may serve as the basis for an award of attorney's fees.” *Id.* at 604, 121 S.Ct. 1835. This is because although a consent decree does not always include an admission of liability, it nonetheless is a court-ordered change in the legal relationship between the parties. *Id.* The Court observed that several of its prior decisions “establish that enforceable judgments on the merits and court-ordered consent decrees create the 'material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees.” *3 Id.* (quoting *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792–93, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989)).
The Court held that the “catalyst theory” was too broad because it “allows an award where there is no judicially sanctioned change in the legal relationship of the parties.” Id. at 605, 121 S.Ct. 1835. It reasoned that a “defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial imprimatur on the change.” Id. The Court reinforced the need for a judicial imprimatur by noting:

We have only awarded attorney's fees where the plaintiff has received a judgment on the merits, see, e.g., Farrar, supra, at 112, 113 S.Ct. 566, ... or obtained a court-ordered consent decree, Maher, supra, at 129–130[100 S.Ct. 2570, 65 L.Ed.2d 653], ...—we have not awarded attorney's fees where the plaintiff has secured the reversal of a directed verdict, see *1171 Hanrahan, 446 U.S. [754,] at 759, 100 S.Ct. 1987, 64 L.Ed.2d 670, ... [1980], or acquired a judicial pronouncement that the defendant has violated the Constitution unaccompanied by “judicial relief,” Hewitt, supra, at 760[107 S.Ct. 2672, 96 L.Ed.2d 654], ... (emphasis added). Never have we awarded attorney's fees for a nonjudicial “alteration of actual circumstances.” Post, at 1856 (dissenting opinion).... We cannot agree that the term “prevailing party” authorizes federal courts to award attorney's fees to a plaintiff who, by simply filing a nonfrivolous but nonetheless potentially meritless lawsuit (it will never be determined), has reached the “sought-after destination” without obtaining any judicial relief. Post, at 1856 (internal quotation marks and citation omitted).

Id. at 605–06, 121 S.Ct. 1835.

The Court was not impressed with the argument that legislative history supported a broad reading of “prevailing party.” Id. at 607, 121 S.Ct. 1835. It doubted “that legislative history could overcome what we think is the rather clear meaning of ‘prevailing party’—the term actually used in the statute.” Id. Indeed, the Court observed that the legislative history cited by petitioners was “at best ambiguous,” and that in view of the American Rule, attorney's fees would not be awarded absent “explicit statutory authority.” Id. The opinion concluded with the Court reiterating that a “request for attorneys' fees should not result in a second major litigation,” and noting that it had “avoided an interpretation of the fee-shifting statutes that would have spawned a second litigation of significant dimension.” Id. at 609, 121 S.Ct. 1835 (internal quotation marks and citations omitted).

C. We have adopted Buckhannon's definition of “prevailing party” for IDEA cases

Any questions as to whether we would apply Buckhannon's definition of “prevailing party” to actions brought under the IDEA have been dispelled by our decisions in Shapiro v. Paradise Valley Unified Sch. Dist., 374 F.3d 857, 865 (9th Cir.2004), and Carbonell v. INS, 429 F.3d 894, 899 (9th Cir.2005).

In Shapiro, plaintiffs filed an action in a district court under the IDEA. The district court eventually granted plaintiffs some of the attorneys' fees they requested, and plaintiffs appealed. 374 F.3d at 861. In affirming the district court's award of attorneys' fees, we followed a “consistent line of precedent from our own and other circuits” and concluded that “Buckhannon's definition of ‘prevailing party’ applies to the IDEA's attorneys' fees provision. 20 U.S.C. § 1415(i)(3)(B).” Id. at 865. We held that “[e]ssentially, in order to be considered a prevailing party after Buckhannon, a plaintiff must not only achieve some material alteration of the legal relationship of the parties, but that change must also be judicially sanctioned.” Shapiro, 374 F.3d at 865 (quoting Roberson v. Giuliani, 346 F.3d 75, 79 (2d Cir.2003)) (internal quotation marks omitted, emphasis added). Our determination that Buckhannon's definition of “prevailing party” applies to the attorneys' fees provision of the IDEA is in accord with decisions of other circuit courts. 4

*1172 P.N. attempts to distinguish Shapiro by noting that in Barrios, 277 F.3d at 1134, we commented that a plaintiff who had entered into a private settlement was a prevailing party in his action under the ADA. P.N. points out that in Barrios we characterized as dictum the judicial sanction component of Buckhannon's definition of prevailing party. 5 This characterization, however, was itself dictum as the settlement in Barrios was clearly judicially enforceable. 6 Id. (“Given
that Barrios can enforce the terms of the settlement agreement against the [defendants], the district court correctly concluded that Barrios was the ‘prevailing party’ in his civil rights litigation.”).

The suggestion that we have declined to accept the definition of “prevailing party” as requiring some judicial imprimatur is foreclosed by our decision in Carbonell, 429 F.3d 894. In Carbonell, the plaintiff appealed from the district court's denial of attorneys' fees under the Equal Access to Justice Act, contending that he qualified as a prevailing party because he had obtained a court order incorporating a voluntary stipulation which awarded him a substantial portion of the relief he sought. Id. at 895. The district court denied attorneys' fees, citing Buckhannon. Id. at 898.

We vacated and remanded. We held that under Buckhannon, for a litigant to be a “prevailing party” for the purpose of awarding attorneys' fees, he must meet two criteria: “he must achieve a 'material alteration of the legal relationship of the parties,' ” and “that alteration must be 'judicially sanctioned.' ” Id. at 898 (quoting Buckhannon, 532 U.S. at 604–05, 121 S.Ct. 1835). We rejected any overly narrow interpretation of “judicial action sufficient to convey prevailing party status,” id., but concluded:

[I]n recognizing that a litigant can “prevail” for the purpose of awarding attorney's fees as a result of judicial action other than a judgment on the merits or a consent decree (provided that such action has sufficient “judicial imprimatur”), this court is in agreement with the vast majority of other circuits that have considered this issue since Buckhannon.

Id. at 899 (emphasis added).

In support of our conclusion we cited Pres. Coal. v. Fed. Transit Admin., 356 F.3d 444, 452 (2d Cir.2004) (“Buckhannon does not limit fee awards to enforceable judgments on the merits or to consent decrees.”), LaGrange, 349 F.3d at 478 (“Buckhannon held that to be a ‘prevailing party’ a litigant must have obtained a judgment on the merits, a consent decree, or some similar form of judicially sanctioned relief.”), Truesdell v. Phila. Hous. Auth., 290 F.3d 159, 165 (3d Cir.2002) *1173 (“We do not agree with the District Court's conclusion that the parties' settlement was an inappropriate basis for an award of attorney's fees.” (emphasis in original)), Am. Disability Ass'n, Inc. v. Chmielarz, 289 F.3d 1315, 1319 (11th Cir.2002) (“[T]he district court [s interpretation of] Buckhannon to stand for the proposition that a plaintiff could be a ‘prevailing party’ only if it achieved one of those two results ... is overly narrow.”), and Smyth v. Rivero, 282 F.3d 268, 281 (4th Cir.2002) (“We doubt that the Supreme Court's guidance in Buckhannon was intended to be interpreted so restrictively as to require that the words 'consent decree' be used explicitly.”).

[5] Thus, although there may remain some uncertainty as to what might constitute a “judicial imprimatur,” the existence of some judicial sanction is a prerequisite in this circuit for a determination that a plaintiff is a “prevailing party” and entitled to an award of attorneys' fees as part of costs under the IDEA.

Again, our position is in accord with the position taken by our sister circuits. The First Circuit noted that at the core of the Supreme Court's reasoning was the concept of judicial imprimatur without which “a federal court may be unable to retain jurisdiction so it can oversee execution of the settlement.” Doe, 358 F.3d at 24. The Third Circuit observed that the Buckhannon court “concluded that in order to be a ‘prevailing party,’ a party must be ‘successful’ in the sense that it has been awarded some relief by a court.” John T., 318 F.3d at 556 (emphasis in original). The Seventh Circuit has held that central to Buckhannon's conclusion “was its finding that the term ‘prevailing party’ was ‘a legal term of art’ which signified that the party had been granted relief by a court.” LaGrange, 349 F.3d at 474.

D. There is no judicial imprimatur of the settlement agreement

[6] Although P.N. can show the material alteration necessary to meet the first prong of the prevailing party test, the settlement agreement did not receive any judicial imprimatur. The document is entitled “Settlement Agreement and Waiver and Release of Claims,” and does not appear to contemplate any judicial enforcement. The agreement does
reserve “any issue of attorneys' fees and costs.” This matter, however, was not referred to any court, but was “left for resolution by methods other than by this Agreement and Release.” Thus, when P.N. filed this action two weeks after the administrative law judge dismissed the due process proceeding, there was nothing that could be construed as a “judicial sanction” of the agreement and nothing to suggest that any judicial imprimatur was contemplated.  

V

Through the IDEA, P.N. secured some special education benefits for her child from SSD. Accordingly, P.N. meets the first prong of the test for prevailing party; P.N. achieved a material alteration of the legal relationship of the parties. However, P.N. resolved her differences with SSD through a settlement agreement and there is nothing in the record that we can construe as a judicial sanction of that agreement. Accordingly, we are constrained by the Supreme Court's opinion in Buckhannon, and our decisions in Carbonell and Shapiro, to hold that P.N. is not a “prevailing party” as that term is used in 20 U.S.C. § 1415(i)(3)(B), and thus not entitled under that statute to attorneys' fees as part of costs. The district court's dismissal of P.N.'s action is

AFFIRMED.

All Citations

Footnotes
1 20 U.S.C. § 1415(i)(2)(A) provides:
   Any party aggrieved by the findings and decision made under subsection (f) or (k) of this section who does not have the right to an appeal under subsection (g) of this section, and any party aggrieved by the findings and decision made under this subsection, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States, without regard to the amount in controversy.
2 In February 2004, when P.N. filed her action, 20 U.S.C. § 1415(i)(3)(B) provided that:
   In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents of a child with a disability who is the prevailing party.
   (A) In general
   The district courts of the United States shall have jurisdiction of actions brought under this section without regard to the amount in controversy.
   (B) Award of attorneys' fees
   (i) In general
   In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs—
   (I) to a prevailing party who is the parent of a child with a disability;....
3 The Court further commented:
We have subsequently characterized the Maher [v. Gagne, 448 U.S. 122, 100 S.Ct. 2570, 65 L.Ed.2d 653 (1980)] opinion as also allowing for an award of attorney's fees for private settlements. See Farrar v. Hobby, [506 U.S. 103, 113 S.Ct. 566, 121 L.Ed.2d 494.] at 111, ... [1992]; Hewitt v. Helms, [482 U.S. 755, 107 S.Ct. 2672, 96 L.Ed.2d 654.] at 760, ... [1987]. But this dictum ignores that Maher only “held that fees may be assessed ... after a case has been settled by the entry of a consent decree.” Evans v. Jeff D., 475 U.S. 717, 720, 106 S.Ct. 1531, 89 L.Ed.2d 747 (1986). Private settlements do not entail the judicial approval and oversight involved in consent decrees. And federal jurisdiction to enforce a private
contractual settlement will often be lacking unless the terms of the agreement are incorporated into the order of dismissal. See *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994).

4 See *Doe v. Boston Pub. Sch.*, 358 F.3d 20, 30 (1st Cir. 2004) (holding that *Buckhannon* applies to the IDEA and that IDEA plaintiffs who achieve their desired result via private settlement may not, in the absence of a judicial *imprimatur*, be considered “prevailing parties”); *J.C. v. Reg'l Sch. Dist. 10*, 278 F.3d 119, 125 (2d Cir. 2002) (holding that *Buckhannon* governs plaintiff's claims pursuant to the IDEA); *John T. v. Del. County Intermediate Unit*, 318 F.3d 545, 555 (3d Cir. 2003) (holding that *Buckhannon* applies to the IDEA's fee-shifting provision); *T.D. v. LaGrange Sch. Dist. No. 102*, 349 F.3d 469, 478 (7th Cir. 2003) (holding that *Buckhannon* is applicable to the IDEA); and *Alegria v. Dist. of Columbia*, 391 F.3d 262, 263 (D.C. Cir. 2004) (holding *Buckhannon* applies to the IDEA's fee-shifting provisions).

In a footnote, after observing that following *Buckhannon* we had rejected the catalyst theory, we wrote:

While dictum in *Buckhannon* suggests that a plaintiff “prevails” only when he or she receives a favorable judgment on the merits or enters into a court supervised consent decree, 121 S.Ct. at 1840 n. 7, we are not bound by that dictum, particularly when it runs contrary to this court's holding in *Fischer v. SJB–P.D., Inc.*, 214 F.3d 1115 (9th Cir. 2000), by which we are bound. Moreover, the parties, in their settlement, agreed that the district court would retain jurisdiction over the issue of attorneys' fees, thus providing sufficient judicial oversight to justify an award of attorneys' fees and costs. *Barrios*, 277 F.3d at 1134 n. 5.

The thrust of our opinion in *Barrios* was that the district court had erred in concluding that the benefits Barrios obtained in the settlement agreement were *de minimis*. Id. at 1137.

There is language in *P.N. v. Clementon Bd. of Educ.*, 442 F.3d 848 (3d Cir. 2006), indicating that a consent decree entered by an administrative law judge may meet the judicial *imprimatur* prong of “prevailing party,” at least where the consent order is “enforceable through an action under 42 U.S.C. § 1983 and under state law.” Id. at 854–55. We need not consider the Third Circuit's approach as here the settlement agreement was only signed by the parties and no consent decree was entered by any administrative law judge or hearing officer. We further note that 20 U.S.C. § 1415 was amended subsequent to the underlying events in this case. We have no occasion to consider whether these amendments alter the statutory requirements for an award of attorneys' fees under the IDEA.