

WHAT'S NEW IN SPECIAL EDUCATION LAW



UL LAFAYETTE LOUISIANA K-12 SCHOOL LAW
CONFERENCE

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BACKGROUND

History

Training



Decisions from around the nation – 5th Circuit most important

Identification (Child Find), assessment, program, support, procedures

This is not legal advice, just a framework to help with decision-making

IMPACT OF ENDREW F

Rowley “Some benefit” vs. Andrew F. “Meaningful benefit”

Don't know impact on HOs now applying Andrew F.

Don't know impact on IEP team decisions applying Andrew F.

But we do know courts are talking about it and attorneys are arguing it raised the standard.

BERARDELLI VS. ALLIED SERVICES INSTITUTE OF REHABILITATION MEDICINE (3RD CIR. 2018)



ADA – use of Service Animals

Elementary student with dyslexia & Epilepsy – Dr. recommended service dog detect seizures

2nd grade OK, moved to different school for 3rd (Dyslexia) Principal said no, too much distraction

Mother kept home most of 3rd, 4th grade missed 65 days at 5th grade mother just showed up with dog, stopped at the door with Distraction concern and now told another student had dog allergies

Lots of messages with doctor, attorneys and teacher at the school who provided article on benefit of dogs to detect seizures PLUS parent of child with allergies said they did not want her to miss school and provided treatments for their child to remedy allergies.

Principal agreed but with “Buddy the dog” required to wear special therapeutic shirt to decrease allergies

Buddy overheated, panted and could not detect seizures, child slept on principals floor for hours due to no alert by Buddy of seizures. Child finally moved back to 4th grade due to missed education.

Result – ADA requires reasonable accommodations and court ruled Individuals with disabilities are permitted to be accompanied by their service animals is – *PER SE* – Reasonable.

K-12 STUDENTS WITH SERVICE ANIMALS - ADA

1. Service animal – dog or (miniature pony) trained to work or perform a specific task for the benefit of an individual with a disability. Titles II and II allow for use in schools.
2. Therapeutic or emotional support animals are not = to service animals
3. May be listed in IEP or 504 plan to show how used, but it is a separate right not dependent on the IEP or 504
4. Two questions (1) Is the animal needed because of a disability; and (2) what work or task is the animal trained to perform?
5. Service animals allowed if it allows the student to gain better access to the curriculum.

SERVICE ANIMAL CONSIDERATIONS

Balance student individual rights with school community's need for a safe learning environment.

1. Safety

2. Allergies

3. Risk of fundamentally altering programming

Some concerns include: Health impact on students with life threatening allergies; Liability and safety (bites student?); Student's ability to serve as the dog's handler; Assurances that the service animal has been trained.

If accepting the animal fundamentally alters the provisions of goods, services programs or activities, schools are not required to modify policies, practices or procedures. (Rare but possible – example with boarding school).

E.I.H. R.H. VS. FAIR LAWN BOARD **OF EDUCATION (3RD CIR. 2018)** **(NOT PRECEDENTIAL)**

Issue: IEP did not include nurse accompaniment on bus

Was it a related service necessary for inclusion?

Autistic child with out of district placement. Transportation to and from school is listed as a “related service” in the IEP.

Diagnosed with epilepsy and prescribed medication that must be administered rectally for seizures lasting more than 2 minutes

District provided an aide for the bus, BUT

Did not amend IEP to add nurse-transportation, instead added service to individualized health plan (medical vs. educational)



E.I.H. R.H CONTINUED

- 1. IEP is package of special educational & related services designed to meet the unique needs of the disabled child**
- 2. Sufficient support services [needed] to permit the child to benefit educationally from that instruction.**
- 3. If a “related service” it must be listed in the I.E.P.**
- 4. Transportation to and from school is a related service**
- 5. Transportation includes aides, equipment & assistive devices needed**
- 6. Service can be of limited duration and reviewed**
- 7. Bus is included as related service and nurse needed on the bus in order to safely get student to school.**
- 8. Remanded to determine attorney fees**

KRAWIETZ VS. GALVESTON
INDEPENDENT SCHOOL DISTRICT
(5TH CIR. 2018)



Child Find- identify, locate, and evaluate

Behavioral problems and disorders from early on. Age 8 identified as student with disability by GISD. Age 12 withdrew and homeschooled after she attempted to harm another student.

Age 17 returned as 9th grader at AIM College and Career Prep GISD could not find records and assumed she was dismissed from Special education services. 1 month at school and she was suspended and put in alternative placement.

504 team said she qualified for accommodations due to PTSD, ADHD and OCD. No behavioral plan established.

Finished 9th grade, but struggled in 10th; had individual evaluation and found eligible for special education services.

KRAWIETZ **CONTINUED**

Failed to provide FAPE due to fulfilling Child Find duty.

Not entitled to residential placement, but other relief ordered

Unreasonable delay in complying with Child Find duty may be procedural violation of IDEA.

Should have suspected need based on academic decline, hospitalization and incidents at school. Evaluation occurred 6 months later.

Prevailing party attorney fees because it “altered the legal relationship between district and child and fostered the purpose of IDEA”

PARRISH V. BENTONVILLE SCHOOL
DISTRICT, (8TH CIR. 2018)

4 different children each diagnosed with autism (all with behavior issues involving serious aggression).

Judges are not trained educators so review limited**

A) Reasonable steps to train teachers; B) Did not use physical force or seclusion that denied FAPE; C) Held programming conferences and informal meetings to propose, implement and modify and communicate behavior and academic progress; D) Collection of BIP data complied with IDEA; E) Strategies not perfect, but complied with IDEA; F) Parents allowed meaningful participation opportunity

Exclusion of expert report when witnessed identified in February, but report not disclosed until August. The failure to timely disclose warranted exclusion and only contained conclusory opinions with no specifics or details

LINCOLN-SUDBURY REGIONAL SCHOOL DISTRICT **V. MR. AND MRS. W. (D. MASS. 2018)**

1. HIGH SCHOOL STUDENT HAD A CONCUSSION. AS A RESULT, STUDENT MISSED TWO WEEKS OF SCHOOL AND, ALSO BASED ON DOCTOR'S ORDERS, HAD REDUCED SCHOOL ACTIVITIES FOR ANOTHER TWO WEEKS. SHE WAS A GOOD STUDENT BEFORE AND, WITH RATHER ROUTINE ACCOMMODATIONS ARRANGED BY THE GUIDANCE COUNSELOR, AFTER THIS LIMITED PERIOD. HOWEVER, AFTER THE PARENTS BECAME UPSET WITH THE MATH TEACHER'S RECOMMENDATION FOR AN ADVANCED BUT LESS RIGOROUS MATH CLASS FOR THE NEXT YEAR, THEY UNILATERALLY PLACED THEIR DAUGHTER IN A LOCAL PREP SCHOOL AND FILED FOR A DUE PROCESS HEARING, SEEKING TUITION REIMBURSEMENT.

2. PARENTS LOST THE HEARING AND FILED FOR JUDICIAL REVIEW FOR THEIR CLAIMS OF CHILD FIND, ELIGIBILITY, AND DENIAL OF FAPE. THE DEFENDANT DISTRICT COUNTER-CLAIMED ATTORNEYS' FEES FOR ALLEGED FRIVOLOUS CLAIM

3. RULING - RELATIVELY BRIEF EFFECTS OF THE CONCUSSION DID NOT COME CLOSE TO THE REQUISITE REASONABLE SUSPICION FOR CHILD FIND OR SPECIAL EDUCATION NEED FOR ELIGIBILITY.

AVOID OVER-GENERALIZING THIS CONCLUSION TO ALL CONCUSSION CASES, BUT IT ILLUSTRATES THAT PROACTIVE BUT PRUDENT ATTENTION TO THE SEVERITY AND DURATION OF THE CONCUSSION UNDER THE INDIVIDUAL CIRCUMSTANCES OF THE CHILD IS WARRANTED. IN SOME CASES, FOR EXAMPLE, AN INDIVIDUAL HEALTH PLAN MAY SUFFICE.



SCHOOL DISTRICT OF PHILADELPHIA V. KIRSCH **(3RD CIRCUIT 2018)**

ISSUE - FAILURE TO HAVE THE IEPS FOR TWINS WITH AUTISM IN EFFECT AT THE START OF THEIR INITIAL, KINDERGARTEN YEAR.

THE IEP TEAM MET DURING THE PRIOR JUNE BUT, DESPITE THE PARENTS' REPEATED INQUIRIES, DID NOT COMPLETE THE PROCESS DURING THE SUMMER. THE PARENTS UNILATERALLY PLACED THE TWINS IN A PRIVATE PROGRAM AFTER PROVIDING TIMELY NOTICE TO THE DISTRICT. THE DISTRICT FINALIZED THE IEPS IN DECEMBER. THE HEARING OFFICER RULED IN THE PARENTS' FAVOR FOR REIMBURSEMENT FOR THE BASIC TUITION AND TRANSPORTATION BUT NOT THE EXTRAS, SUCH AS A 1:1 AIDE, FROM SEPTEMBER TO DECEMBER, BUT CONCLUDED THAT THE FINAL IEPS WERE APPROPRIATE

1. VIOLATION IN THIS CASE SIGNIFICANTLY IMPEDED THE PARENTS' OPPORTUNITY FOR PARTICIPATION BECAUSE THE DISTRICT FAILED TO TIMELY PROVIDE THEM WITH IMPORTANT DETAILS REGARDING THE PROPOSED PLACEMENT.

2. HELD DISTRICT RESPONSIBLE FOR THE 4 YEAR STAY-PUT TIME AND ALSO COVERED THE PARENTS' OUT-OF-POCKET COSTS FOR THE 1:1 AIDE, WHICH THE DISTRICT HAD RECOGNIZED AS PART OF FAPE IN ITS DECEMBER IEPS. THE RESULTING TOTAL WAS APPROXIMATELY \$420K - ATTORNEYS' FEES AWARD OF APPROXIMATELY \$185K

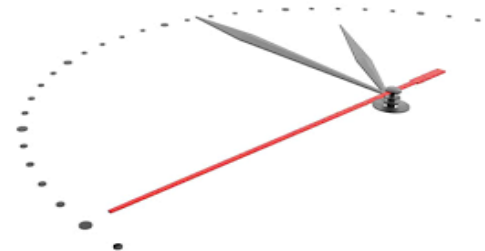
4. IDEA REQUIRES THE IEP TO BE IN EFFECT "AT THE BEGINNING OF EACH SCHOOL YEAR." THE SIGNIFICANT ADDITION HERE IS THAT THE COURT FOUND THE REQUISITE SECOND STEP LOSS TO BE IN TERMS OF PARENTAL PARTICIPATION.

MR. P. V. WEST HARTFORD BOARD OF EDUCATION(2ND CIRCUIT 2018)

WIDE VARIETY OF IDEA ISSUES, STARTING WITH CHILD FIND, FOR A STUDENT WHO RECEIVED (A) A 504 PLAN IN HIS SOPHOMORE YEAR AND (B) IEPS FOR EMOTIONAL DISTURBANCE (ED) IN HIS JUNIOR AND SENIOR YEARS AS THE RESULT OF SOCIAL, PSYCHOLOGICAL, AND PSYCHIATRIC PROBLEMS, INCLUDING HOSPITALIZATIONS FOR SUICIDAL AND HOMICIDAL IDEATIONS. THE IEPS SUCCESSIVELY INCLUDED HOMEBOUND TUTORING, PLACEMENT IN A DISTRICT ALTERNATIVE SCHOOL PROGRAM, AND A VOCATIONAL TRANSITION-SERVICES PROGRAM.

UPHELD REJECTION OF THE PARENTS' CHILD FIND CLAIM, CONCLUDING THAT IN THE SIX-MONTH PERIOD FROM THE STUDENT'S HOSPITALIZATION UNTIL HIS FIRST IEP THE DISTRICT MET THE "REASONABLE SUSPICION" AND "REASONABLE PERIOD" STANDARDS UNDER THE CIRCUMSTANCES

UPHELD REJECTION OF THE PARENTS' SUBSTANTIVE FAPE CHALLENGE TO THE IEPS UNDER ENDREW F., EVEN THOUGH THE HEARING OFFICER AND LOWER COURT HAD USED THE SECOND CIRCUIT'S PREVIOUS, "MEANINGFUL BENEFIT" INTERPRETATION OF THE ROWLEY STANDARD



POLLACK V. REGIONAL SCHOOL UNIT

(1ST CIRCUIT 2018)

ISSUE OF WHETHER A STUDENT WITH MULTIPLE DISABILITIES, INCLUDING AUTISM, WHO WAS UNABLE TO COMMUNICATE WITH HIS PARENTS ABOUT HIS EXPERIENCES AT SCHOOL WAS ENTITLED TO CARRY AN AUDIO RECORDING DEVICE DURING HIS TIME AT SCHOOL.

STUDENT HAD MADE SIGNIFICANT PROGRESS WITHOUT THE REQUESTED DEVICE AND THAT IT PROVIDED HIM WITH NO DEMONSTRABLE BENEFIT.

PARENTS HAD THE BURDEN TO PROVE THAT THE REQUESTED ACCOMMODATION WOULD BE AN EFFECTIVE BENEFIT IN THE FORM OF INCREASED ACCESS TO THE DISTRICT'S SERVICES FOR STUDENTS. AFFIRMING THE LOWER COURT'S DECISION, THIS APPELLATE COURT CONCLUDED THAT THE IDEA HEARING OFFICER'S FACTUAL FINDING THAT THE RECORDING DEVICE DID NOT PROVIDE THE STUDENT WITH THE REQUISITE BENEFIT PRECLUDED THE PARENTS FROM ESTABLISHING THIS ESSENTIAL ELEMENT OF THEIR ADA CLAIM

INDIVIDUAL CIRCUMSTANCES REVIEW – (SERVICE DOGS?)



B.E.L V. HAWAII (9TH CIRCUIT 2018)

ISSUE - LEAST RESTRICTIVE ENVIRONMENT (LRE) MANDATE OF IDEA, PARENTS' CONTENTED THAT THEIR CHILD'S IEP, WHICH PROVIDED FOR A SPECIAL EDUCATION CLASS FOR READING AND READING AND MATH AND A GENERAL EDUCATION CLASS FOR ALL OTHER SUBJECTS, DENIED THEIR CHILD FAPE BY BEING OVERLY RESTRICTIVE. THE CHILD WAS A SECOND GRADER WITH SPECIFIC LEARNING DISABILITY ("SLD") WHO, ACCORDING TO HIS FIRST AND SECOND GRADE TEACHERS, WAS FAILING TO MEET GRADE-LEVEL BENCHMARKS IN READING AND MATH DESPITE RECEIVING VARIOUS CLASSROOM INTERVENTIONS AND ACCOMMODATIONS. WHEN THE IEP TEAM REJECTED THE PARENTS' REQUEST FOR PLACEMENT IN A GENERAL EDUCATION CLASS WITH SUPPLEMENTARY AIDS AND SERVICES FOR THESE TWO SUBJECTS, THEY UNILATERALLY PLACED THEIR CHILD IN A PRIVATE SCHOOL SPECIALIZING IN DYSLEXIA AND SOUGHT TUITION REIMBURSEMENT.

COURT APPLIED A MULTI-FACTOR ANALYSIS TO DETERMINE IF THE PARENTS' HAD PROVEN THAT THE CHILD'S PLACEMENT WAS NOT IN THE LRE. PRIMARY FACTORS WERE (A) COMPARATIVE ACADEMIC AND NONACADEMIC BENEFITS, AND (B) THE EXTENT OF ANY DISRUPTIVE EFFECT. THE COURT DEFERRED TO THE TEACHERS' TESTIMONY FOR BOTH FACTORS, PARTICULARLY BECAUSE THE PARENTS' HAD NOT PRESENTED ANY EXPERT EVIDENCE AND THE CHILD WAS EFFECTIVELY INTEGRATED WITH NONDISABLED PEERS FOR THE REST OF THE SCHOOL DAY.

LRE FACTORS PRIMARILY RELY ON TWO FACTORS, WITH THE PRESUMPTION IN FAVOR OF THE PLACEMENT THAT MAXIMIZES INTERACTION WITH NONDISABLED STUDENTS WITH APPROPRIATE SUPPLEMENTARY AIDS AND SERVICES



BURNETT V. SAN MATEO-FOSTER CITY SCHOOL DISTRICT (9TH CIRCUIT 2018)

ISSUE- WHETHER E-MAILS CONCERNING A CHILD WITH A DISABILITY THAT ARE NOT PART OF THE CHILD' S FILE ARE "EDUCATION RECORDS" UNDER THE IDEA (AND, BASED ON ITS IDENTICAL DEFINITION, FERPA), WHICH ARE SUBJECT TO ACCESS (I.E., INSPECTION AND REVIEW) BY THE CHILD' S PARENTS (AND, AS A SEPARATE MATTER NOT AT ISSUE IN THIS CASE, THEIR CONSENT FOR RELEASE, WITH LIMITED EXCEPTIONS, TO OTHER PARTIES).

COURT CONCLUDED THAT THE DISTRICT' S FAILURE TO PROVIDE THE PARENTS WITH ACCESS TO THE EMAILS CONCERNING THEIR CHILD THAT WERE NOT PRINTED OUT AND ADDED TO THE CHILD' S PHYSICAL FILE WAS NOT A PROCEDURAL VIOLATION UNDER THE IDEA (OR FERPA), BECAUSE ALTHOUGH PERSONALLY IDENTIFIABLE TO THE CHILD, THE DISTRICT DID NOT "MAINTAIN" THESE EMAILS.

AT A TIME WHEN DIGITAL TECHNOLOGY IS CHANGING THE MEANING OF A CHILD' S FILE, THIS RULING NEEDS TO BE APPLIED WITH CARE. IF THE DISTRICT HAD MAINTAINED THE EMAILS IN A "PERMANENT SECURE ELECTRONIC DATA BASE," PER THE LANGUAGE OF THE SUPREME COURT' S UNDERLYING FERPA DECISION IN OWASSO INDEPENDENT SCHOOL DISTRICT V. FALVO (2002), THE OUTCOME MAY WELL HAVE BEEN THE OPPOSITE OF THE COURT' S DECISION IN THIS CASE.



COMMONWEALTH V. GEORDI G.

(MASS. APP. 2018)

JUVENILE DELINQUENCY PETITION FOR A 12-YEAR-OLD STUDENT WITH AN IEP. THE STUDENT HAD LOST CONTROL IN THE MIDDLE SCHOOL GYM. WHEN THE TEACHER TRIED TO CALM HIM DOWN, HE SWORE LOUDLY, PUNCHED THE WALL, AND PUSHED THE TEACHER OUT OF THE DOORWAY AS HE EXITED INTO THE HALL. BECOMING MORE AGITATED, HE PUNCHED LOCKERS AND THREATENED TO INJURE PEOPLE. THE PRINCIPAL ISSUED A “SOFT LOCKDOWN” OF THE SCHOOL AND MANAGED TO PERSUADE THE STUDENT TO ENTER THE OFFICE OF THE ADJUSTMENT COUNSELOR. HOWEVER, REMAINING UPSET, HE SWORE AT AND HIP-BUMPED THE PRINCIPAL UPON MOVING TO EXIT THE OFFICE. THE SCHOOL FILED A DELINQUENCY APPLICATION WITHOUT ANY MENTION OF THE STUDENT’ S SPECIAL EDUCATION STATUS.

STATEMENTS OF THE TEACHER, COUNSELOR, AND PRINCIPAL ACCOUNTS PROVIDE A SUFFICIENT SHOWING “TO WARRANT A PRUDENT PERSON IN CONCLUDING THAT THE JUVENILE COMMITTED ASSAULT AND BATTERY WHEN HE PUSHED THE TEACHER AND HIP-BUMPED THE PRINCIPAL.”

REMINDER OF THE IDEA REQUIREMENT THAT WHEN REPORTING A CRIME BY A STUDENT WITH AN IEP THE SCHOOL DISTRICT “SHALL ENSURE THAT COPIES OF THE SPECIAL EDUCATION AND DISCIPLINARY RECORDS OF THE CHILD ARE TRANSMITTED FOR CONSIDERATION BY THE APPROPRIATE AUTHORITIES TO WHOM THE [DISTRICT] REPORTS THE CRIME”

SCHOOL OFFICIALS NEED TO PROVIDE THIS SPECIAL EDUCATION INFORMATION “TO HELP DETERMINE WHETHER A CRIME HAS BEEN COMMITTED. . . THAT WARRANTS PROSECUTION AND [IF SO,] WHAT DISPOSITION WOULD BE APPROPRIATE.”



DISTRICT COMMUNICATION PROTOCOLS WITH PARENTS OF STUDENTS WITH DISABILITIES

FOREST GROVE SCHOOL DISTRICT (2018), A FEDERAL DISTRICT COURT IN OREGON RULED THAT THE SUCCESSIVE LIMITATIONS THAT THE SCHOOL PLACED ON THE E-MAILS OF A PARENT OF A CHILD WITH AUTISM, WHICH WERE BASED ON THEIR CONTINUING EXCESSIVE AMOUNT AND INCREASINGLY AGGRESSIVE TONE, DID NOT SIGNIFICANTLY DENY THEM THEIR OPPORTUNITY FOR PARTICIPATION IN THE IEP PROCESS.

L.F. V. LAKE WASHINGTON SCHOOL DISTRICT #414 (2018), A FEDERAL DISTRICT COURT IN WASHINGTON STATE RULED THAT THE SUCCESSIVE RESTRICTIONS THAT THE SCHOOL DISTRICT PLACED ON IN-PERSON MEETINGS WITH THE DIVORCED FATHER OF A CHILD WITH DISABILITIES IN RESPONSE TO HIS CONTINUING PATTERN OF ANGRY AND HOSTILE ENCOUNTERS WITH DISTRICT PERSONNEL DID NOT VIOLATE THE FREEDOM OF EXPRESSION UNDER THE FIRST AMENDMENT OR THE ANTI-DISCRIMINATION PROVISION OF THE STATE CIVIL RIGHTS ACT IN RELATION TO SEX AND MARITAL STATUS.

****BOTTOM LINE IS FOR SCHOOL DISTRICTS TO MAKE SURE THAT ANY LIMITATIONS ON COMMUNICATIONS FROM PARENTS WITH DISABILITIES (A) HAVE A LEGITIMATE, NONDISCRIMINATORY BASIS, AND (B) ARE TAILORED TO THE LEVEL OF DISRUPTIVENESS WITHOUT BEING ALL-ENCOMPASSING OR ABSOLUTE IN TERMS OF ACCESS AND INTERACTION.**



RESOURCES

1. Education Law Association (“ELA”) Membership

2. A Guide to Special Education Law published by ELA

1 / Special Education Legal Literacy - Janet R. Decker and Elizabeth A. Shaver

2 / The American Legal System - Charles J. Russo and Allan G. Osborne, Jr.

3 / Fundamentals of Federal Disability Law - Julie F. Mead

4 / Discrimination under Section 504 of the Rehabilitation Act and Americans with Disabilities Act - Allan G. Osborne, Jr.

5 / Qualifying for Special Education Services under IDEA - Elizabeth A. Shaver

6 / IEPs, Least Restrictive Environment, and Placement - Jean B. Crockett and Mitchell L. Yell

7 / Related Services under the IDEA - Jennifer A. Sughrue

8 / Secondary School Transition Planning - Stanley L. Swartz, Philip H. Swartz, and Cathleen A. Geraghty-Jenkinson

9 / Disciplining Students with Disabilities - Mark A. Paige

10 / Parental Rights - Susan G. Clark

11 / Procedural Safeguards: Resolving Family-School Disputes - Susan C. Bon

12 / Current Issues in Special Education - Allan G. Osborne, Jr. and Susan C. Bon

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