



GARRETT HEMANN ROBERTSON PC

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Topics

- FAPE Standard: Endrew F. and the Supremes
- Parent Participation: *RA v. WCCSD*
- Exhaustion of Remedies: Fry and the Supremes
- FAPE: Bullying and Harassment
- Meaningful Access
 - General Education Issues
- IEP Implementation
- Placement
- Removal from School
 - Shortened days, Behavior, Attendance and SB 263



Revisions to Oregon laws

- SB 263 Abbreviated school days
- Foster children residency and transportation
- SB 20 effect of Modified Diplomas
- SB 268 Notice of abuse to DRO
- SB 111 School Nurse and Medicaid bills
- HB 3318B FBAs and BIPs (July 1 2018)



Abbreviated days

- Not without IEP process (ORS 343)
- Document process
- Additional Notice to Parents
- Signed Acknowledgment (ODE form)
- Applicability to 504? 'pre-identified'?



Foster Students

- Definitions:
- Involvement of agencies:
- Transportation, other issues



ORS 339.115 Modified Diplomas

Revisions to the law regarding District obligations to a student who have earned a modified diploma:

- (2)(a) A district must admit an otherwise eligible person who has not yet attained 21 years of age prior to the beginning of the current school year if the person is:
 - (1) Receiving special education and has not yet received a high school diploma **or a modified diploma**...or has received an extended diploma or an alternative certificate.



Modified Diplomas (cont'd)

- (2)(b) A district may admit an otherwise eligible person who is not receiving special education and who has not yet attained 21 years of age prior to the beginning of the current school year if the person is shown to be in need of additional education in order to receive a high school diploma **or a modified diploma.**



National SPED Trends

- **Behavior:** USDOE 12/4/16 Guidance on Ensuring Equity and Providing Behavioral Supports to Students with Disabilities
 - <http://www2.ed.gov/policy/gen/guid/school-discipline/files/dcl-on-pbis-in-ieps--08-01-2016.pdf>wide Disability Rights Advocacy on Removal
- **Proactive: Child Find and Behavior.** More frequent determinations that school districts have a duty to investigate when students are academically and/or behaviorally unsuccessful;
- **Discipline:** OSERS Policy Memo 8/1/2016 Disciplinary Removals
 - <http://www2.ed.gov/policy/gen/guid/school-discipline/files/dcl-on-pbis-in-ieps--08-01-2016.pdf>



FAPE Standard

Endrew F. v. Douglas County School District RE-1, 137 S. Ct. 988, March 22, 2017

- *Rowley* standard challenged by parents of "Endrew F"
- Student diagnosed at early age with ASD, "exhibited multiple behaviors that inhibited ability to access education"
- Parents believed "functional progress had stalled" and the fact that the IEPs continued to have "the same basic goals and objectives" meant he was not making meaningful progress



Andrew F. v. Douglas County School District (cont'd)

- Parents wanted an “overhaul” of the District’s approach, but when the next IEP was presented it was, in their opinion, very similar to the past ones
- Parents enrolled him in a private placement, where he did “significantly better” based on the BIP, strategies, and ‘heftier’ academic goals
- Parents asserted a denial of FAPE under *Rowley*



Andrew F. v. Douglas County School District (cont'd)

- The 10th Circuit decided that although the Student’s performance “did not reveal immense educational growth,” annual modifications to the IEP were “sufficient to show a pattern of...minimal progress” and that their offer of the last IEP was therefore reasonably calculated to meet the *Rowley standard*
- Supremes indicated that although the IDEA imposed no explicit substantive standard, there was a substantive standard “implicit in the Act”



Andrew F. v. Douglas County School District (cont'd)

- *Rowley’s* facts were distinguishable. In *Rowley*, the Student was performing better than many peers, and the standard there was one of “sufficient to confer some education benefit;” not a standard of “adequacy”
- “The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created;” the absence of a bright line rule does not invite courts to substitute their own notions of sound educational policy; deference is based on the application of expertise and the exercise of judgment by school authorities



***Rachel H v. Dept. of Education
State of Hawaii***

- 10th grade student with Down Syndrome
- Claimed denial of FAPE for procedural error of not identifying the anticipated school for planned move to a new district.
- Demanded private placement due to 30-mile distance from prior high school
- Location



***Rachel H v. Dept. of Education
State of Hawaii (cont'd)***

- No new IEP meeting
- No identification of new school
- Repeated requests for new address; no response
- Filed a DP at time provided new address
- Meaning of "location" undefined in IDEA
- "Location" is the appropriate educational environment for the delivery of a specific special education service



***R.E.B. v. State of Hawaii
US Court of Appeals 9th Circuit***

- Kindergarten student, ASD
- Transition from private school to larger public school
- Insufficient detail on frequency, location, duration of services
- ABA methodology
- LRE "As deemed appropriate"



F.L. v. Board of Ed of The Great Neck UFSD (NY)

- Similarities in IEP over years do not necessarily establish student failed to make educational progress
- Critical issue whether the IEPs allowed student “to receive a meaningful educational benefit”
- Substantive adequacy
- Participation
- Individualization
- ESY



Pocono Mountain SD v. J.W.

- Used *Endrew* standard
- Failed to identify in SLD, severely below grade academic performance
- Behavior and work completion issues
- Failed to provide the intensity of supports
- “District did not conduct a serious inquiry into cognitive functioning” for years
- “At best, the District offered...de minimis academic progress” which was insufficient



**Placement; Parent Participation/
Parent Rights**

RA v. West Contra Costa Unified SD; 9th Cir. 2017

- District and parents subject to extended agreement on education
- District made repeated efforts to schedule a 3-year evaluation of a student for eligibility



RA v. West Contra Costa Unified SD

IDEA Requirements:

- Parental consent for re-eligibility;
- District develops and proposes reassessment plan. If parent does not provide consent, district can conduct reassessment only by instituting a due process; however, a parent is required to allow reassessment if parent want special education services and conditions require it.

Gregory K v. Longview Sch. Dist., (9th Cir. 1987).



RA v. West Contra Costa Unified SD (cont'd)

- Settlement agreement in place for home placement for 5 years, district then must re-evaluate and offer placement. Settlement agreement included parent consent.
- Parent cannot put conditions on evaluation process: demanded must see/hear evaluation



RA v. West Contra Costa Unified SD (cont'd)

- Placement: Parent wanted "one-on-one placement in a single student classroom;" district offered private ASD program with small class setting, not with gen ed peers.
- Evidence at hearing that Student had not been out more than a few times in 3 years, no real contact with any peers; gen ed too much of a transition
- Ruled: District placement was LRE; parents did not make student available for eval, and FAPE was offered



Exhaustion of Remedies: IDEA, Sec. 504 and TII

Fry v. Napoleon Community Sch., US Supreme Court Feb. 22, 2017

- Student qualified under IDEA
- Family asserting right for student to attend school with service animal
- Service animal not required for FAPE
- 6th Circuit determined that “educational nature” of claims required “exhaustion of administrative remedies” under IDEA



Fry (cont'd)

- Analysis of two questions to assess whether exhaustion of administrative remedies necessary:
 - Could Student assert same claim against *non-educational public facility*?
 - Could an individual other than a Student assert the same claim against the district?
 - If Yes to both, unlikely complaint relates to the provision of FAPE



School Response

- Series of reported issues, some by student and some by parent; all followed up on and typically EA or teacher in area, and provide objective perspective
- Student perceptions were often distorted, inaccurate
- Follow up on each incident with student, and with parent
- Worked with student on perceptions, how to address
- Student participated in ‘anti bullying’ class curriculum
- Break area identified
- Increased supervision, ‘cease and desist’ for perceived ‘bully’



MH Issues, Parent Placement

- Student taken to Lic. Marriage and Family Therapist
- Asperger's Disorder, Anxiety Disorder, Adjustment Disorder with Mixed Anxiety and Depressed Mood with r/o Acute Stress Disorder related to allegations of being a victim of bullying
- Treated for depression
- Communications over summer indicate parents refused to return; saw doctor, parent reported "bullied badly;" diagnoses of ASD, GAD and r/o PTSD
- Parents placed in private school for following year



Medical Claims

- "The fact that Student developed what Therapist diagnosed as Acute Stress Disorder and later PTSD does not mean the District denied Student a FAPE"
- Even if the situation with "other student" was a significant cause of Student's emotional distress at the end of the year, the school "satisfied its legal obligations under IDEA by investigating complaint and taking prompt and reasonable steps to prevent in the future"



Due Process Findings

- District reasonably addressed reported bullying, did not deprive FAPE
- Cite to *T.K. v. New York City* federal case: deliberate indifference standard or failure to take responsible steps to prevent bullying that substantially restricts child from educational opportunities: investigate, take appropriate steps to prevent
- 9th Circuit *M.L. v. Federal Way SD*, 394 F3d 634 (2005): 'deliberate indifference' that is so severe the child can derive no benefit; TIX standards for harassment: 'bars access to educational opportunity or benefit'



Reasonable Efforts Made

- Reference to 2010 DCL Harassment and Bullying responsible for incidents 'about which it "knows or reasonably should have known" and lists steps identified in DCL.
 - Not enough information to investigate/address many early claims; no incident reports completed; no names provided or details of where occurred
 - No school staff ever witnessed—(staff very present)
 - Reported incidents followed up when aware with "prompt and appropriate action"; "prompt and reasonable steps"
 - No evidence of bullying/harassment that was alleged



IEP Issues

- Appropriate parental participation:
 - The "team" input and discussion from parents and educators, the role of the district representative. Repeat as necessary.
- Involvement and roles of outside agencies: DHS, foster parents, advocates, court appointed special advocates, attorneys
- Transition planning and goals



Parent Participation continued...

- **ODE Order 15-054-037** District complied with the IDEA on all allegations: Re-Evaluation, IEP Content, accommodations provided, review and revision and student making progress. Except: did not respond to parent's request for IEE.
- **ODE Order 16-054-021** Inaccessible FBA/BIP and teachers 'unaware' of in addition to no listing of accommodations; did not consider ESY and rejected push in placement and no PWNs
- "Parent requests remedies that are beyond scope of an IDEA investigation"
- An IEP must provide a student with the opportunity to obtain meaningful educational benefits...not guarantee a student the best of educational experiences...Hence, must consider request but no obligation to provide every service or accommodation requested by parent.



Parent Participation (cont'd)

ODE 15-054-027

- Parent alleges did not have opportunity to participate
- Two pages of parent concerns sent by email prior to meeting
- District objected as issues outside the scope of the IEP
- "Discussion over the relevance ensued, ultimately leading to the Parent discussing those points raised in the Document"
- Parent felt they were related, asked to have included in IEP. District had them in meeting notes
- Parent contended counsel for district presented an obstruction to sharing information. (Family also had counsel)



Parent Participation (cont'd)

- Two-part test for denial of FAPE: procedural and substantive
 - Procedural inadequacies that result in the loss of educational opportunity...clearly result in the denial of FAPE (quoting *Rowley*)
 - Districts are required to consider "the concerns of the parent for enhancing the education of their child." 34 CFR 300.324
 - Needs and services are developed in consultation with parents; "the IEP is not a tool through which parties communicate, it is a tool to guide teachers and service providers in the delivery of services reasonable calculated to provide benefit to student"

Practice tip: Parent concerns should list accurate summary; Meeting minutes note comments including discussion or disagreements



Parent Participation (cont'd)

- "In cases where parents submit a lengthy statement or report...it would be reasonable for a district to ask parents to verbally summarize their main concerns so that the district may address those at the meeting." For a more comprehensive response, the district has a reasonable time for it to respond in detail.

Citing *Letter to Breton* (OSEP Sept. 24, 2013)

- IDEA does not expressly announce that the "parent concerns" portion of the IEP is the real estate of a parent. Consideration is required, not acceptance of all information or opinions of parents.

Citing *Letter to Northrop* (OSEP May 21, 2013)



OSEP

- “Additional Findings”
- ODE asserts authority to do this under its general supervisory authority;
- ODE: This has only been used in purely procedural matters, such as whether or not a PWN went out. This is not used for substantive violations.



Staffing

ODE Order 15-054-040

- Parent alleges District violated IDEA by “failing to provide consistent and adequate staff”
- District had agreed to keep prior staff with student, deviating from its quarterly rotation of staff to discourage over reliance on individuals and encourage generalization of skills
- No Substantiated findings, staff aware of and addressed students needs....but:
- **“Additional findings:**” IEP had not been finalized prior to annual date, ‘expired’. IEP meeting in December not appropriately documented or attended, no PWN



Evaluation

ODE 16-054-010

- District failed to timely evaluate within 60 days: ESD notified unable to complete based on staffing and District did not attempt to find another evaluator. Parent did not consent to extend timeline.
- Although District failed to include information from behavioral evaluation, it did have sufficient evidence of the issues to include meaningful, positive behavioral intervention, strategies or supports to address student issues.
- Additional findings: SPED Director provided copy of email with a list of 13 identifiable students and detailed information about students whose behavior services ‘were not being met at that time’ Violation of IDEA/FERPA

Practice tip: Written permission to extend 60-school day deadline to determine eligibility only applies for SLD per OAR 581-015-2110(5)(c)(C)



ODE 16-054-017

- Manifestation determination for violent and aggressive behavior
- Student IEP team met and agreed to shorten school days due to bipolar relapse; doctor indicated "current placement seems too stressful"
- Crisis/Intervention/Safety Plan, FBA, BSP developed
- Elopement and safety issues based on incident
- Met again for further modification of schedule: one hour per day separate setting, time determined by District
- Revised FBA/BSP adopted and created 'Step Up plan' suggested by parent and advocate



16-054-029 Parent Participation Issues

- Parent alleged violation when eval data not available: test protocols
- Alleged violation when eval data not considered; summative reports adequate
- Parent participation claim "interfered with ability to participate;" but related to work
- Student made "steady progress" on goals and improved until no SDI needed



Access to IEP and Accommodations

ODE 16-054-027

- Self-advocacy v. school responsibility: Student was expected to ask for accommodations, but if not self advocate then they weren't provided
- All staff were provided access provided to IEPs, with services and accommodations
- Summer program did not provide access to accommodations and absences determined disciplinary



Trends from Complaint Orders

- Do not use RTI as means to delay evaluation, do use RTI for data collection
- Ensure staff trained on documentation and timelines
- Follow up on attendance issues, patterns of medical absences for potential notice of a disability



Meaningful Access Title VI

- Title VI of the Civil Rights Act of 1964:
Prohibits discrimination based on race, color or national origin for Programs or activities which receive federal funds
 - ESSA provisions address as well
- English Learners/Limited English Proficiency:
 - Special Education students access to ELL classes
 - Child Find, Assessment determine language(s) appropriate
- Parents with Limited English under TVI + IDEA
 - Parent rights to meaningful participation include:
 - Qualified Interpreters
 - Translated documents



Communication

- DCL: Effective Communication Title II
- School districts must comply with both the IDEA and with Title II for purposes of communications needs (Deaf/Blind)
- Appropriate IEP for deaf or hard-of-hearing (DHH) students, and comply with the Americans with Disabilities Act (ADA) to ensure their needs for effective communication are met
- *K.M. v. Tustin Unified School District* (9th Cir. 2013) 725 F.3d 1088, *cert. denied*. Two school districts' compliance with legal requirements for DHH students under the IDEA did not also establish compliance with Title II of the ADA
- Students could assert claims under both IDEA and ADA



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