Fagen Friedman & Fulfrost LLP

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A popular speaker, Ms. Silverman presents throughout Northern California at the firm's bi-annual Special Education Symposium. In addition to lecturing at school districts and colleges throughout the state, Ms. Silverman has presented on myriad special education and student-related topics to national and state professional organizations such as the National School Boards Association, California Speech Language Hearing Association, California Assembly Charter Schools, and California Council of School Attorneys. A member of the firm's eMatters Practice Group, Ms. Silverman is a recognized leader in legal and education issues related to special education and emerging technologies.

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Her services to clients include representation in IEP meetings, mediation, due process hearings and federal court appeals. She effectively represents clients with complaints filed with the Office for Civil Rights and the California Department of Education. She is a frequent speaker on a variety of special education topics including autism, assessment, eligibility, discipline, transition, IEP development and private school student issues. In addition to her special education expertise, Ms. Sherlock advises districts on general education student services and charter school law.

A popular speaker, Ms. Sherlock has delivered presentations before the California School Boards Association, the Association of California School Administrators, the California Council of School Attorneys and the California Association of School Psychologists. She is a member of the National School Board Association Council of School Attorneys, California Council of School Attorneys, Sacramento Women Lawyers and the Sacramento County Bar Association.

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SPECIAL EDUCATION LEGAL UPDATE

Introduction. As always, the federal courts and administrative agencies, not to mention the legislature, has been active in developing the law governing special education policy and practice. This presentation will give you a guided tour of the recent decisions and legislation, including timely reminders regarding the fundamentals of special education as well as the most current updates on the development of new law and policy. Our topics will include:

- **New Case Law**. District Missteps, Reimbursement, High School Transition Plans and Eligibility.
- **Hot Topics**. Administering Anti-Seizure Medication, BIP/Hughes Bill, and Transitional Kindergarten.
- **Update on New and Proposed Legislation**. Mental Health, California Children's Services' (CCS) Medical Therapy Program (MTP), "Intellectual Disability" not "Mental Retardation," Health Care Coverage and ABA Therapy, and High School Graduation.

I. New Case Law.

A. District Missteps: Assessments, Litigious Parent, Staff Venting.

1. **Inadequate, Untimely Assessment - Ravenswood City School Dist. v. J.S.** (N.D.Cal., March 30, 2012, No. C-10-03950) ___ F.Supp.2d ___ [2012 WL 2510844], 59 IDELR 77.

   Facts. On February 5, 2007, District held an SST meeting regarding Student's academic issues. At the meeting, District decided that Parent was to obtain medical vision and hearing screening for Student because he failed a school nurse's screening in these areas. On March 21, 2007, the SST team reconvened and Parent requested Student receive a special education assessment. The SST team agreed to her request and referred Parent to the Initial Assessment Team ("IAT"), District's method for developing a special education assessment plan. The IAT meeting occurred on April 4, 2007 at which time District informed Parent that District could not assess Student until she provided the results of the medical vision and hearing screening. As a result of this meeting, Parent was not provided with an assessment plan until December 17, 2007, almost nine months after she initially requested the assessment. Student's Parent did not challenge the delay; she relied on District's representation that it could not proceed until she funded a medical vision and hearing screening.

District completed its academic assessment in March 2008, but due to staffing issues, Student was not assessed by a school psychologist until May 29, 2008.

District held Student's initial IEP meeting on September 11, 2008, almost 18 months after Parent's initial request for an assessment. At that time, the IEP team determined Student was eligible for special education due to a specific learning disability. The IEP team did not consider the category of mental retardation because all the team members who knew Student did not believe he was cognitively impaired. The four annual goals drafted did not include measurable baselines. In addition, the IEP was drafted by a district integrated services teacher ("IST") mistakenly believing that Student was cognitively impaired, but the IEP was never revised to account for this mistake.

The following year, the IST prepared for Student's annual IEP meeting by informally assessing Student's progress. This assessment produced no formal data and was in direct conflict with Student's teacher's testimony regarding Student's skills level at that time. As such, the present levels of performance constructed through this process were questionable.

District convened Student's annual IEP meeting on September 11, 2009. The IEP team discussed placement at another district elementary school, as well as a program in another school district, but District did not offer a specific placement or schedule a time to reconvene. Parent visited two programs inside District, but no out-of-district placements. At this meeting, Parent also raised questions regarding Student's academic abilities and District offered to conduct an educational assessment. As no assessment forms were available at the IEP meeting, the IST testified that he sent the forms home twice, but received no response. District did not follow up further, but did conduct an independent assessment during November and December 2009. (At some point after the September 11, 2009 annual IEP, Student's present levels of performance were modified to include sufficiently detailed and understandable baselines.)

On February 3, 2010, District held an IEP meeting to review the results of the independent assessment procured by District and a report from Lindamood-Bell Center provided by Parent. District offered placement in a general education classroom in District that was using the Inside Program, a reading intervention program, and an increase in intervention services. Parent consented to the increase in services, but objected to the recommended placement as too advanced.

On February 28, 2010, Parent requested a hearing with OAH alleging that District denied Student a FAPE since his entry into District. As Student was in fourth grade at the time the due process complaint was filed, much of the claim was outside the generally applicable two-year statute of limitations.

Following a nine-day due process hearing, the Administrative Law Judge ("ALJ") issued a 47-page decision finding District failed to provide Student with a FAPE for the 2007-2008, 2008-2009, and 2009-2010 school years and Student had suffered academically as a result. The ALJ ordered District to pay tuition, fees, and transportation costs for Student to attend Stellar Academy, a non-certified, private school, for the next three years as compensatory education.

District appealed the ALJ's decision to federal court.

Issues for District Court. On appeal, the district court examined four issues related to the OAH decision.

1. Did the ALJ have authority to place Student in a non-certified, private school?

2. Should the applicable statute of limitations apply to claims dated back more than two years?

3. Did the ALJ give due consideration to District's obligation to place Student in the LRE?

4. Did the ALJ err in finding District denied Student a FAPE?

Ruling. Student prevailed on all issues. First, the district court found the ALJ did not order Student placed at Stellar Academy. Rather, the ALJ ordered District to reimburse Parent for tuition, fees, and transportation for Student to attend Stellar Academy as compensatory education. Because the reimbursement was related to an order of compensatory education, not placement, the district court found the ALJ did not exceed her authority in requiring District to reimburse Parent for costs related to Student's attendance at a non-certified, private school for the next three years.

Second, the district court found that the usual two-year statute of limitations did not apply in this case because in 2007, District erroneously told Parent it could not assess Student without the results of a medical hearing and vision screening, and misled Parent into believing she had no grounds upon which to contest the delay. The district court found the ALJ did not err in extending the statute of limitations beyond the usual two-year period.

Third, as District presented no evidence at hearing to indicate that Stellar Academy was exclusively for disabled students, the ALJ could not consider whether Stellar Academy would or would not violate the least restrictive environment requirement of the IDEA, and any such discussion was not "germane" to the ALJ's decision.

Fourth, the district court found the ALJ had a proper basis upon which to find District denied Student a FAPE.

The ALJ's decision was affirmed.

Bottom Line. Do not let individual district procedures interfere with duties and timelines imposed by IDEA. Assessment requirements and timelines are not tolled by district-level policies and procedures. Continued violations can be costly!

2. **Litigious Parent Not An Excuse - Anchorage School Dist. v. M. P.** (9th Cir., July 19, 2012. No. 10-36065) 59 IDELR 91

Facts. Student was diagnosed with high-functioning autism, pervasive developmental delay, and sensory integration dysfunction. In August 2006, at the start of Student's second grade year, Parent consented to an IEP offered by District. During the 2006-2007 school year, District held approximately ten IEP meetings to address various concerns, including the teacher's long-term leave of absence and Student's writing instruction. In April 2007, Parent filed a due process complaint. The hearing officer ("HO") submitted a decision in June 2007, finding in favor of Parent on one of three issues, and ordering 15 hours of compensatory writing instruction. Parent believed this award was inadequate and appealed to superior court and then to the Alaska Supreme Court. Both courts affirmed the HO's decision.

In the meantime, Student's August 2006 IEP expired. In February 2008, about half way through Student's third grade year, District held an IEP meeting to draft a revised IEP. Parent was invited to this meeting, but did not attend. Instead, Parent provided written comments and suggestions Parent wanted incorporated into the draft. In addition, Parent asserted the right to "stay-put" as to certain elements of Student's placement, consistent with a stay-put order issued in the then-pending due process hearing. After receiving Parent's written response, District unilaterally postponed any further efforts to develop an updated IEP until after the appeals of the due process hearing were complete.

For the 2008-2009 school year, Parent enrolled Student in another elementary school where he repeated third grade. Parent declined

to meet with staff to discuss Student's transition to the new school. Staff at the new school relied on the 2006 IEP, but provided third grade lessons and materials. In August and September 2008, Parent filed four due process complaints related to the provision of FAPE for the 2008 calendar year. After an eight-day hearing, the HO concluded District had denied Student a FAPE because he regressed in two core subject areas – math and reading – and several behavioral goals. The HO awarded full reimbursement for tutoring obtained by Parent between January and December 2008; authorized Parent to submit bills from January to May 2009 for review by the IEP team and District to determine whether tutoring was assisting Student in meeting his goals; ordered an IEP meeting be convened within 20 days; and ordered the parties to participate in mediation to resolve their communication problems.

In September 2009, District appealed the HO's decision. The district court concluded that although the 2006 IEP was obsolete, District's failure to update the IEP was mostly attributable to Parent's litigious approach. Parent then appealed to the Ninth Circuit.

Ruling. The Ninth Circuit determined District denied Student a FAPE. The court found District had an affirmative duty to update Student's IEP annually, notwithstanding Parent's "zealous" advocacy for Student. The court stated that nothing in the IDEA makes a school district's obligations contingent on parental cooperation with the school district's preferred course of action. When District received Parent's extensive revisions to the February 2008 draft IEP, it had two options: (1) continue working with Parent to develop a mutually acceptable IEP, or (2) unilaterally revise the IEP and file for hearing. District could not ignore its affirmative duty to revise the outdated IEP regardless of Parent's lack of cooperation and pending legal proceedings. District's "take it or leave it approach" contravened the purpose of the IDEA, resulting in a denial of FAPE. In addition, Parent was entitled to reimbursement and consideration of reimbursement for the cost of private tutoring.

The Ninth Circuit acknowledged the tension between District's obligation to update the Student's IEP annually, and the fact District was bound to maintain certain elements of Student's placement as a result of the stay-put order. The court explained that "placement" generally refers to the educational setting of the student, and that updates to a student's present levels of performance and corresponding goals do not equate to a change in placement "so long as such revisions do not involve changes to the academic

setting in which instruction is provided or constitute significant changes in the student's educational program."

Bottom Line. A strained relationship with parents does not excuse non-compliance with the IDEA. Continue moving forward with the IEP process regardless of pending litigation.

3. **Staff Venting Leads to Discipline - Oxford PA Area High School. Special Education Today, July 18, 2012.**

The school principal was observed by a student advocate sending obscene and insulting text messages during an IEP meeting, including calling a bipolar student a "manipulator," psychopath," the next "Hinkley, Booth, or Oswald," and noted that "guilty people" have more rights than "the innocent."

Outcome. The principal was suspended, and later reinstated with a restriction that he no longer work with special education students. The principal also underwent a psychological evaluation and a drug test before being reinstated.

Bottom Line. Although not a legal decision, this news item is a good reminder for staff and administrators alike: if you need to vent, do it privately!

B. Reimbursement-Primary Purpose.

Munir v. Pottsville Area Sch. Dist. (M.D. Pa., June 14, 2012, No. 3:10-cv-0855), [2012 WL 2194543], 59 IDELR 35.

Facts. At that time of the decision, Student was a 17-year old boy with severe depression, at times requiring in-patient hospitalization due to threats of suicide and suicidal gestures. In 2005, at the recommendation of a hospital, District performed a psychoeducational evaluation to determine if Student had a specific learning disability. Cognitive and achievement testing showed that he did not. District also used behavior rating scales completed by Student's teachers and a psychiatric report to rule out eligibility based on an emotional disturbance. Between Student's return to school in 2005 and spring 2008, Student had no problem attending school, expressed no concerns about school generally and maintained grades in the B and C range.

In April 2008, Student was hospitalized again after he overdosed on prescription medicine. In July 2008, he was hospitalized two more times for extreme emotional upset with suicidal threats and gestures and a suicide attempt. Other suicide attempts followed. In August 2008, Parent notified District that Student was withdrawing from District to attend a private boarding school attended by Student's older brother. District wrote

a letter of recommendation for Student and supplied teacher evaluation forms. After one day at the boarding school, Parent withdrew Student after he indicated he felt depressed and was going to harm himself. Parent reenrolled Student in District before the 2008-2009 school year began.

A series of hospitalizations occurred beginning in September 2008. At that time, Parent requested an IEP for Student. Student was still receiving Bs and Cs, although Parent obtained private tutoring in areas in which he was having difficulty. In mid-October, letters from Student's treating physicians stated Student was being treated for depression and had a diagnosis of ADHD. In fall 2008, Parent began exploring residential facilities for Student.

In November 2008, District offered, and Parent accepted, a Section 504 Service Plan. Before school reopened in January 2009, Student threatened suicide again and Parent sent him to a residential treatment center in New Hampshire where he remained until July 2009. At the time, Parent did not request further evaluations from District or provide District with notice that he intended to seek reimbursement for the private placement from District. Testing by the residential facility in February 2009, found Student to be emotionally disturbed, but concluded that he did not have a learning disability. District held an IEP meeting in May 2009. District found Student eligible for special education and offered a program and services based on recommendations from the residential treatment facility, but to be provided in District. During summer 2009, District added additional emotional support services and specially designed instruction, including a cognitive behavioral curriculum for students experiencing anxiety and depression. District convened another IEP meeting in September 2009, increased social work and added counseling services, but Parent rejected both IEPs offered. Parent enrolled Student in a private boarding school for the 2009-2010 school year. Student began the private school repeating 11th grade, but moved up to 12th grade during the year. Student also received psychological counseling from a private therapist contracted by the school and counseling from the school social worker and/or school psychologist.

Issues. Both the HO and the district court examined four issues.

1. Did District fail to timely identify Student as eligible for special education?

2. Is Parent entitled to compensatory education for any period of time?

3. Is Parent entitled to reimbursement for Student's place at the residential treatment facility in 2009?

4. Is Parent entitled to reimbursement for Student's placement in the private boarding school for the 2009-2010 school year?

Hearing Officer's decision. The HO found in favor of District on all issues. The HO noted that it is not enough for parents to demonstrate that the student has a disability; parents must make the further showing that the disability impairs the student's ability to make educational progress. In this case, the HO found that there was no "convincing evidence that Student had persistent academic or social problems in the school setting." Moreover, because Parent unilaterally removed Student from District in January 2009, District did not have the opportunity to evaluate and serve Student had he qualified for special education.

With regard to the question of reimbursement for the parent-selected placements, the HO found that placement in the residential treatment facility in 2009 was based on medical/mental health crisis that required immediate treatment. Because the evidence showed that the placement was primarily for medical not educational purposes, there was no legal basis for making District financially responsible for the costs associated with the placement.

With regard to Student's private boarding school placement, the HO noted that such reimbursement is permissible only if District did not make FAPE available. The HO concluded District's offer of placement and services took into account Student's emotional support needs and incorporated virtually all of the recommendations from the residential facility. Further, although the evidence indicated that the symptoms of an emotional disturbance subsided when Student was placed residentially, there was "no legal basis for requiring District to pay for a services that amount to mental health treatment." The records also indicated that while Student's grades were slightly higher than when he attended public school, he still struggled with the effects of depression and math work and required a tutor. The HO concluded District had offered a FAPE and Parent was not entitled to tuition reimbursement because Parent preferred the advantages of a private school.

District Court's Decision. The district court agreed with the HO. Of note, the district court explained that not every therapeutic service can be construed as being educational. The district court stated that there are limits because ultimately any life support system or medical aid can be construed as related to a child's ability to learn. The inquiry for determining liability under the IDEA is whether the full-time placement may be considered necessary for educational purposes, or whether the residential placement is a response to medical, social or emotional problems that are segregable from the learning process.

In this case, the district court found that Student's placement in the residential facility, as well as the private boarding school, were to prevent harm to Student and educational benefits derived from such placement were secondary. Therefore, Parent was not entitled to reimbursement for either placement.

Ruling. The court affirmed the HO's decision District had offered FAPE and Parent was not entitled to any form of compensatory education or reimbursement for parentally-selected private placements.

Bottom Line. If a school district has offered a FAPE and the primary purpose of a parent-selected residential placement is to address an immediate crisis or primarily for therapeutic purposes, parents may not be entitled to reimbursement.

Keep in mind, however, that this case is different from those in which parents assert the right to reimbursement at the time they remove their child to a residential school. In this case, District was not guilty of a procedural error when it did not immediately assess Student in January 2009 because Parent gave no indication to District that he was interested in special education services or wished the placement to be at District's expense.

C. High School Transition Plans.

Student v. Los Angeles Unified School Dist. (OAH 2012) Case No. 2011110413, 112 LRP 27364.

Facts. Student was 19-years old at the time of the due process hearing and was eligible for special education under the eligibility category of other health impaired. Between the ages of two and 16, Student was diagnosed with a variety of congenital medical disorders and underwent multiple surgeries to address the physical manifestations of these conditions. In addition, Student carried a diagnosis of ADHD. Beginning in second grade and continuing through high school, Student attended a nonpublic school that served students with mild to moderate learning disabilities.

In September 2009, when Student was in eleventh grade, the IEP team convened for Student's triennial review. At this meeting, the team also discussed Student's individual transition plan ("ITP"). The ITP and goals were developed in collaboration with Student and the nonpublic school secondary transitions coordinator. The goals included obtaining a high school diploma, receiving post-secondary vocational training and earning his associate's degree. The plan identified two transition services to support these goals. Student also indicated a personal goal of working on his social skills. The secondary transitions coordinator identified a number of additional transition activities, including development of community

transportation skills; supported living skills, such as doing laundry; and movement toward supported employment.

Also at this meeting, the IEP team discussed whether to keep Student on the diploma track. Specifically, District explained that on the diploma track, Student would stop receiving services after earning his diploma. On the certificate of completion track, he would not receive a diploma, but could receive services to age 22. Parent advised they wanted to keep Student on the diploma track. The IEP noted Student would need to take the CAHSEE and participate in graduation exercises by September 2011.

District convened Student's annual IEP meeting in September 2010, when Student was 18-years-old and a senior in high school. The IEP team noted Student was on track to graduate at the end of the 2010-2011 school year, as he was current on the number of credits required to earn his diploma. No team member recommended Student be switched to the certificate track at that time.

During the 2010-2011 school year, Student attempted the CAHSEE on five separate occasions, but did not pass. Student's computer teacher assessed his computer skills and concluded that he would not be able to work independently in the field, but could participate in supported employment programs. Student's grades during his senior year ranged from an A to a C-. By the end of the year, he had earned 260 cumulative credits and had a 3.2 overall grade point average. In spring 2011, Parent was notified Student was qualified to graduate.

On June 7, 2011, the IEP team met for the purpose of exiting Student from special education due to his upcoming graduation with a high school diploma. District did not provide Parent with prior written notice of its proposed change in placement to graduate Student from high school. Parent stated that she wanted Student to continue to receive services, as she was unsuccessful in finding Student a post-high school placement and believed he required additional services to help him prepare for a post-high school program.

Student graduated on June 16, 2011, and District mailed Student his high school diploma. District ceased all special education instruction support and services.

Issues. Student contended District denied him a FAPE on three separate grounds.

1. Student alleged he was denied FAPE when District changed his placement by graduating him at the end of the 2010-2011 school year without prior written notice.

2. District's decision to graduate Student was inappropriate because he was not sufficiently prepared academically, socially, or functionally for graduation.

3. Student's post-secondary goals 1) did not include baseline information and were therefore not measurable, 2) were not individualized, and 3) were not based upon age appropriate transition assessments, and therefore, he was denied a FAPE.

Ruling/Rationale.

Change in Placement.

While District committed a procedural violation when it failed to provide prior written notice of its intent to change Student's placement by graduating Student from high school at the end of the 2010-2011 school year, District's procedural violation did not result in a denial of FAPE. It did not significantly impede Parent's opportunity to participate in the decision-making process, and did not cause a deprivation of educational benefits. Parent was on notice of District's intent to graduate Student at the end of the 2010-2011 school year, as Parent attended the 2009 and 2010 IEP meetings in which this plan was discussed and agreed upon.

Graduation was Appropriate.

The evidence showed District properly graduated Student at the end of the 2010-2011 school year. Student fully earned his high school diploma, substantiated by his successful passage of all of his courses – courses which met state standards. Moreover, Student earned above average grades in most classes taken in high school and earned all necessary credits for high school graduation. State law did not require successful passage of the CAHSEE for disabled students at the time of Student's graduation. In addition, the IDEA does not make achievement of IEP goals a prerequisite for achieving a high school diploma. A school district's obligation is limited to developing and providing an IEP reasonably calculated to provide education benefit up to the time of issuance of a high school diploma (or until a student ages out).

Student's ITP.

"Transition services" are defined as a coordinated set of activities for an individual with exceptional needs that:

(A) is designed within a results-oriented process that is focused on improving the academic and functional achievement of the individual with exceptional needs to facilitate the movement of the pupil from school to post-school activities, including post-secondary education, vocational education, integrated employment, including supported employment,

continuing and adult education, adult services, independent living, or community participation;

(B) is based upon the individual needs of the pupil, taking into account the strengths, preferences, and interests of the pupil, and

(C) includes instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, if appropriate, acquisition of daily living skills and provision of a functional vocational evaluation.

(20 U.S.C. § 1401(34); Ed. Code, § 56345.1, subd. (a).)

When a child with a disability turns 16 years of age, the IEP must include appropriate measurable post-secondary goals related to training, education, employment, and, where appropriate, independent living skills. However, school districts are not required to ensure that students are successful in achieving all of their transition goals, nor are they obligated to provide a transition plan that takes into account all possible post-secondary outcomes.

Student's IEP team, which included Parent and Student, developed appropriate transition plans in 2009 and 2010 that met the statutory requirements of the IDEA. Specifically, both plans accurately identified Student's post-secondary interests in working in the career field of computers, obtaining post-high school vocational training to learn more about computers, and obtaining his associate's degree. The plans also included measurable community experience goals related to public transportation, social activities and daily living skills. Thus, both plans were in compliance with the IDEA and included measurable post-secondary goals and activities related to training, education, employment, and independent living skills to address Student's needs sufficiently to satisfy the requirements of the IDEA. A student is not denied a FAPE simply because he did not achieve his post-secondary goals.

District prevailed on all issues.

Bottom Line. Remember that high school graduation constitutes a change in placement and requires prior written notice. Appropriate issuance of a high school diploma terminates special education services regardless of whether the student is fully "ready" for the post-high school world.

D. Eligibility.

Student v. San Rafael City Schools (OAH 2012) Case No. 2011080500, 112 LRP 12088.

Facts. At the time of hearing, Student was a 12-year-old boy with average to above-average intelligence. The parties agreed Student qualified for special education in the category of emotional disturbance, and suffered from extreme anxiety, fear of social situations and other people, and attention deficits. The parties agreed Student's disabilities were "complex and difficult to categorize."

Student was assessed on numerous occassions throughout his educational career, and had been diagnosed, at various times, with ADHD, depression, anxiety disorder, social phobia, PDD-NOS, oppositional defiance disorder ("ODD"), and possibly separation anxiety disorder. There was no agreement among Student's many assessors whether he met the criteria necessary to be diagnosed as autistic.

At hearing, the parties debated whether Student's May 2011 IEP should have included the additional eligibility category of autistic-like behavior. District believed it should, while Parent argued it should not. Parent argued that this miscategorization of Student's disability, and not including autistic-like behavior, resulted in an inappropriate offer of placement at a nonpublic school, which Parent believed was only appropriate for students with autism. As a result, Parent unilaterally enrolled Student in a nonpublic school chosen by Parent and sought reimbursement of tuition and related expenses from District.

Ruling. The ALJ determined it unecessary to resolve the dispute regarding the most appropriate category of eligibility for Student. The ALJ found that the additional classification of "autistic-like behaviors" was irrelevant, stating that "[e]ligibility categories serve as gatekeepers for special education. Once eligible, a student is entitled to an IEP that meets all his disability-related needs, whether those needs would separately qualify him for eligibility or not." The ALJ rejected Student's argument that an eligibility category "drives" a student's program. Noting that the U.S. Department of Education has advised that a child with a disability's entitlement is not to a specific disability classification or label, but to a FAPE, the ALJ held that whether an IEP offers a FAPE depends on whether the placement and services are tailored to the student's uniqueness, not on the category of eligibility the student is given.

In this case, the evidence presented by District indicated that it was not Student's eligibility category that led to District's programming and placement decision, but rather his individual needs. Student did not prove by a preponderance of the evidence that he could not be adequately educated at the proposed placement. The evidence showed instead that the proposed placement was appropriately sensitive to the need to shape its techniques and practices to address Student's individual needs.

District prevailed on all issues heard.

Bottom Line. The accuracy of a student's eligibility category is irrelevant as long as the student is receiving a FAPE.

II. Hot Topics.

A. Administration of Anti-Seizure Medication.

Emergency Regulations Issued for Administering Anti-Seizure Medication by Nonmedical School Personnel.

In October 2011, Governor Brown signed Senate Bill 161 ("SB 161") into law, which authorized nonmedical school employees to volunteer to administer FDA-approved anti-seizure medication to students with epilepsy suffering from seizures on school campuses pursuant to parental request and consent. SB 161 also required CDE to develop guidelines for the training and supervision of these volunteers. School districts, county offices of education and charter schools that elect to participate in this program must comply with these guidelines.

CDE's emergency regulations went into effect March 26, 2012, and initially were to remain in effect through September 25, 2012. On September 14, 2012, the emergency regulations were extended for 90 additional days while CDE finalizes the permanent regulations.

The emergency regulations provide that the training and supervision of volunteer nonmedical school personnel must be provided by one or more of the following licensed health care professionals: (1) a physician and surgeon; (2) a physician assistant; (3) a credentialed school nurse; (4) a registered nurse; or (5) a certificated public health nurse. (Cal. Code Regs., tit. 5, § 622.)

The emergency regulations provide further details on the content of volunteer training, which must include the following: recognizing different types of seizures, administration of emergency anti-seizure medication, follow-up procedures, pupil privacy, record keeping, and volunteer rights and responsibilities. (Cal. Code Regs., tit. 5, § 623.) The emergency regulations also contain specifications for training requirements, training timing, as well as the supervisory duties of the licensed health care provider to ensure compliance with the guidelines. (Cal. Code Regs., tit. 5, §§ 624, 625, 627.) Finally, the emergency regulations offer clarity regarding definitions, including, for example defining the “regular school day” to include time spent in before- and after-school programs, extracurricular activities and field trips. (Cal. Code Regs., tit. 5, § 621, subd. (d).)

Pursuant to these regulations, emergency provision of anti-seizure medication must be provided by a participating school district, county

office of education, or charter school when all of the following have occurred:

(a) A pupil with epilepsy has been prescribed an emergency anti-seizure medication by his or her health care provider;

(b) The parent or guardian of the pupil with epilepsy has requested that one or more volunteer nonmedical school employees be trained in the event a nurse is not available;

(c) The school has on file a written statement from the pupil's authorized health care provider, provided by the parent that includes specific information on dosage, symptoms, frequency, adverse responses, and follow-up protocol;

(d) The parent has provided all materials necessary to administer an emergency anti-seizure medication;

(e) The volunteer nonmedical school employee has completed training in the administration of an emergency anti-seizure medication approved by the FDA for administration by non-licensed personnel;

(f) The pupil is suffering from an epileptic seizure; and

(g) A credentialed school nurse or licensed vocational nurse is not available.

(Cal. Code Regs., tit. 5, § 626.)

What it Means. LEAs now have the ability to utilize volunteer nonmedical employees to administer FDA-approved emergency anti-seizure medication (i.e., Diastat). Many teachers and classified unions have negotiated or attempted to negotiate clauses in their contracts to preclude administration of medication, in particular, Diastat. If the LEA cannot secure a "volunteer" through the above process, the LEA will need to provide the services of a school nurse or licensed vocational nurse.

For more information see California Department of Education at www.cde.ca.gov.

B. Behavioral Intervention Plan ("BIP") Mandate - Hughes Bill.

Background. Education Code section 56523, also known as the Hughes Bill, became law in 1990 and its implementing regulations, title 5, California Code of Regulations, sections 3001 and 3052, were promulgated in 1993.

Under the legislation, school districts are required to develop Behavioral Intervention Plans ("BIP") for special education students with serious behavior problems (self-injurious, assaultive, property damaging). In 2000 the Commission on State Mandates determined that the BIP requirements were in excess of federal law and issued a decision finding the cost of implementing the requirements was reimbursable by the State. The State's Department of Finance ("DOF") appealed the decision in 2003 and the matter was ultimately settled in 2008, making reimbursement contingent on legislative funding. The legislature, however, did not provide funding and reimbursement has still not occurred.

A survey was conducted to establish the actual costs of the BIP mandate, which showed that implementing the mandate cost $10.64 per general education ADA. This figure was used to support a Reasonable Reimbursement Methodology ("RRM") proposal, which envisions school districts being reimbursed retroactively to 1993-94 and prospectively through 2021. This proposal is awaiting hearing before the Commission.

The Governor's Office proposed a suspension of the mandate until it could be permanently repealed. The legislature rejected this proposal and, more recently, rejected language in the education trailer bill that would have repealed most BIP provisions.

What's Next? A hearing before the State Mandate Commission on the proposed parameters and guidelines for reimbursement, including the proposed RRM ($10.64 per ADA) is now scheduled for January 2013. The California School Boards Association ("CSBA") is spearheading the issue. Even if the BIP legislation is ultimately repealed, the reimbursement rate will apply to the 20 years (1993/94 – 2012/13) school districts have been responsible for implementing BIPS.

C. Transitional Kindergarten.

In 2010, California enacted SB 1381 (Simitian, D-Palo Alto) “The Kindergarten Readiness Act of 2010,” which moved up the required birthday for starting kindergarten to September 1 through a multi-year phase-in (i.e., December 1 for the 2011-2012 school year, November 1 for the 2012-2013 school year, October 1 for the 2013-2014 school year and September 1 for the 2014-2015 school year and every year thereafter).

The law also created a new program called “Transitional Kindergarten,” which is intended to be the first year of a two-year kindergarten program. Transitional kindergarten uses a modified kindergarten curriculum that is age and developmentally appropriate. Pursuant the law, during the 2012-2013 school year, children having their fifth birthday between November 2 and December 2 are eligible for transitional kindergarten; during the 2013-2014 school year, children having their fifth birthday between October 2

and December 2 are eligible; during the 2014-2015 school year and each year thereafter, children having their fifth birthday between September 2 and December 2 are eligible. Pursuant to the new law, LEAs will be able to claim ADA funding for students participating in the LEAs transitional kindergarten program. However, LEAs will not be able to claim ADA for a student who attends more than two years in a combination of transitional kindergarten and kindergarten.

(See **Appendix** for CDE's Transitional Kindergarten FAQs (August 13, 2012) for additional information and Guidance.)

What This Means (for special education students). School districts should be aware that the requirement that school districts provide special education services for children three and older remains in effect. If school districts intend to place special education students in newly formed TK program, such placement must be consistent with the special education student's needs and the placement and services contained in the IEP.

III. Legislative Update.

A. Mental Health Updates. **On June 30, 2011, the repeal of AB 3632 became effective with the passage of AB 114. School districts are now solely responsible for ensuring that students with disabilities receive special education and related services. Recent developments related to the repeal of AB 3632 include:**

1. **General Funding.** For the 2012-2013 school year, $321.8 million has been allocated per ADA for educationally-related mental health services. Additional state entitlement funds of $51.75 million will be allocated to SELPAs using the CASEMIS funding formula and $46.5 million in federal funds will be allocated using ADA. A full phase-in to ADA allocation will occur in one year.

   What This Means. Funding allocation based on ADA means the money will no longer follow individual children with special needs. AB 114 assumes that special needs students are equally distributed among school districts.

2. **Proposition 98 Phase-In.** The Governor's budget proposed a $98.6 million increase in Proposition 98 funding to the SELPAs (as opposed to this funding going to county mental health agencies) to pay for educationally-necessary mental health services.

   What This Means. Mental Health funds are not contingent on passage of the Governor's tax initiative in November 2012. If the tax initiative fails, trigger cuts affect the general fund, not funds allocated for mental heath services.

3. **Early Mental Health Initiative (K-3).** The $15 million restoration of Proposition 98 funding to Early Mental Health Initiative was line-item vetoed by Governor Brown.

   (See Coalition for Adequate Funding for Special Education Memorandum: Govenor Signs 2012-2013 State Budget, June 28, 2012.)

4. **Accessing Medi-Cal Dollars for Mental Health Services.** LEAs may access Medi-Cal funding by contracting with mental health agencies that are already approved Early and Periodic Screening Diagnosis and Treatment ("EPSDT") providers. County Mental Health agencies and their contracted mental health providers are authorized through a state plan with the federal government to tap into these funds. Currently, there is a workgroup in place to determine alternative means of accessing Medi-Cal funds. Proposed solutions include changing the law to allow more liberal billing under Medi-Cal or giving educational institutions status as medical agencies to allow access to Medi-Cal dollars.

   What This Means. LEAs must weigh the benefits and pitfalls associated with accessing Medi-Cal funds for the provision of mental health services. Eligibility for Medi-Cal reimbursement is dependent upon the Medi-Cal provider finding that a student meets eligibility criteria. This requires a finding of "medical necessity." Assessment for Medi-Cal eligibility must not delay the delivery of educationally necessary mental health services.

   Times have changed! LEAs must understand the new landscape for the design and implementation of mental health services.

Cautionary Pointers.

1. **Day Treatment.** Day treatment has a specific meaning: Prior to AB 114, "Day Treatment" was a service defined in Division 9 of Title 2, Section 60020(i)) of the California Code of Regulations ("CCR") and was a service previously provided by County Mental Health agencies under AB 3632. A Day Treatment or "Day Rehabilitation" program eligible for Medi-Cal reimbursement must meet regulatory contact hour requirements, site requirements, staffing requirements, and requirements regarding minimum service components.

   An LEA may choose to incorporate many elements of a Day Treatment program into LEA administered programs such as a counseling enriched or intensive special day classes. (Ed. Code, § 56364.2.) These classes may incorporate many of the same

elements including treatment strategies and personnel as in the prior day treatment program. The services provided by the LEA program should be broken down specifically in the IEP showing frequency and duration for each service. This is in contrast to prior services provided by County Mental Health agencies under AB 2632 which were often "bundled." (See **Appendix** for CDE's guidance letter, June 27, 2012, Assembly Bill 114: Day Treatment.)

2. **Residential Placement.** If the LEA determines that a student requires residential placement in order to benefit from his or her education, the services that were previously provided by the county mental health agency must be noted on the IEP. This is another instance where services should be "unbundled." For example, counseling, therapy, education and other services should be identified with specificity on the IEP. (See **Appendix** for CDE's guidance letter, September 13, 2011, Assembly Bill 114: Residential Care for Students with Disabilities.)

3. **Wrap-around.** Wrap-around is not an IEP service or placement, but blanket restrictions on any particular service would be contradictory to the IEP. A student's IEP must include related services necessary to enable the student to benefit from special education. These services may include an array of coordinated services provided by the LEA or through continued contracts with a county-based California wrap-around provider. If deemed necessary to provide a student with a FAPE in the LRE, the services should be noted individually, with specificity, in the IEP. (See **Appendix** for CDE's guidance letter, July 26, 2012, Assembly Bill 114: Providing Coordinated Intensive Services Through an Individual With Disabilities Education Act Compliant Individualized Education Program.)

B. California Children's Services' ("CCS") Medical Therapy Program ("MTP").

On June 27, 2012, AB 1467 was signed into law amending Government Code section 7575 and repealing Government Code section 7582. The bill requires that the State Department of Education implement the changes required by the bill no later than October 1, 2012.

What is AB 1467 and what are the implications?

CCS has not been repealed. AB 1467 makes no changes to Government Code section 7570. There is still a joint responsibility under AB 3632 between the Superintendent of Public Instruction and the Secretary of Health and Human Resources. AB 1467 did not amend Government Code section 7572, which governs assessment and presentation of

assessment results to the IEP team, nor did it change the LEA's responsibility to "invite the responsible public agency to meet with the individualized education program team to determine the need for the service and participate in developing the individualized education program."

AB 1467 purports to require that, "when a child has an IEP, that all occupational therapy and physical therapy services assessed and determined to be educationally necessary by the IEP team and included in the IEP shall be provided in accordance with the federal IDEA and not paid for by the CCS program." (Legislative Counsel's Digest AB 1467 (Ch. 23 Statutes of 2012).)

While section 7575 attempts to distinguish between an LEA's obligation to provide educationally related OT and PT services and CCS's obligation to provide medically necessary services, it does not address the potential overlap of services when CCS services were placed in a student's IEP. Prior to the passage of AB 1467, LEAs often referred to CDE's 2010 Guidelines for Occupational Therapy and Physical Therapy in California Public Schools, which included excellent guidance and definitions to assist IEP teams in differentiating between educationally and medically necessary OT and PT services. The guidelines have been de-published.

What This Means. Until there is further clarity regarding CCS services, we have the following recommendations:

1. LEAs should continue to assess for and provide educationally-necessary OT and PT services.

2. If a student currently has CCS OT and/or PT services on his/her IEP, CCS remains legally obligated to attend the student's IEP team meetings and should be invited to attend the IEP team meetings by the LEAs. If CCS refuses to attend IEP team meetings, the LEA should document attempts to have CCS attend in person and through alternative routes such as telephone or webcam.

3. If a parent wishes for CCS to attend an IEP team meeting because the student is receiving medically necessary CCS services that are not on a student's IEP, the LEA should invite CCS to attend the IEP team meeting. If CCS refuses to attend the IEP team meeting, the LEA should document attempts to have CCS attend in person and through alternative routes such as telephone or webcam.

4. If a student is transitioning from a home to a school-based program and receives CCS services, CCS should be invited to the IEP team meeting to determine if CCS must provide the home health aide

services provided for in Government Code section 7575, subsection (f) to assist with the transition. If CCS refuses to attend the IEP team meeting, the LEA should document attempts to have CCS attend in person and through alternative routes such as telephone or webcam.

5. Prior to making any changes and/or removing CCS services from a student's IEP, the LEA should conduct its own evaluation to determine if OT and/or PT services are educationally necessary for the student. It is recommended that CCS should conduct an evaluation as well to examine the factors required by Government Code section 7575, subsection (b).

6. Regardless of whether the student receives any educationally necessary OT and/or PT services, if the student receives medically necessary OT and/or PT services from CCS, based on amended Government Code section 7575, subsection (c), the LEA should note the student's receipt of these services in the notes of the IEP team meeting. This should be a notation of the receipt and level of services, but the services should no longer be part of the LEA's description of its offer of FAPE. Moreover, CCS services should no longer appear on the services page and/or in the supports and services section of the IEP.

7. If a parent refuses to consent to a reduction and/or removal of CCS services and/or the placement of the services in the notes rather than in the services/supports and services section(s) of the student's IEP, such disagreement should be noted in the IEP notes and prior written notice should be provided in the IEP notes. Prior written notice can also be sent in letter format following the IEP team meeting.

8. If a parent refuses to consent to the removal of CCS services from the LEA's offer of FAPE (i.e., from the services and/or supports and services section(s) of the student's IEP), the LEA and CCS may need to jointly file a due process hearing complaint in order to show that the student does not require CCS services in order to receive a FAPE. (Ed. Code, § 56346.) Note that the student has the right to stay put in the last agreed upon and implemented placement, including CCS services, during the pendency of a due process proceeding. In order to invoke stay put, a parent may also file a due process proceeding against the LEA and/or CCS. If CCS is not joined to a proceeding regarding CCS services, the LEA should file a motion to join them as a party.

9. SELPAs should examine their interagency agreement with CCS to determine if, based on the foregoing, changes should be made to

reflect the amendment to the law in AB 1467. Caution should be utilized and legal counsel may be warranted to review the agreement given the portions of AB 3632 that remain in effect.

C. SB 1381 "Mental Retardation" Terminology Eliminated. (Anderson, Paley and Rubio)

Existing law refers to mental retardation or a mentally retarded person in provisions relating to, among other things, educational services. This bill would change references to mental retardation or a mentally retarded person to refer instead to intellectual disability or a person with an intellectual disability consistent with federal law. Nonsubstantive change.

D. SB 946 Health Care Coverage: Pervasive Developmental Disorder or Autism. (Evans and Steinberg)

Chaptered as 1374.73 of the Health and Safety Code; Section 10144.51 of the Insurance Code. Effective July 1, 2012.

This legislation requires, in part, health insurers to cover behavioral therapy, including applied behavior analysis ("ABA") therapy and evidence-based behavior intervention, for individuals with autism and pervasive developmental disorder ("PDD"). The law applies to health care service plans that provide hospital, medical, or surgical coverage and to health insurance plans. It does not apply to Medi-Cal, Healthy Families, CalPERS, or specialized insurance plans that do not deliver mental health or behavioral health services to its enrollees.

In drafting this law, the legislature was aware of and expanded on The Mental Health Parity and Addiction Equity Act of 2008, which created equal coverage between medical/surgical services and mental healthcare services, requiring group insurance plans to offer the same deductibles, copayments, frequency of treatments and days of outpatient services.

SB 946 makes clear that ABA therapy is a medically necessary service that insurance companies must provide.

The law does, however, reiterate a school district's requirement to continue to provide educationally necessary services:

> "This section shall not affect or reduce any obligation to provide services under an individualized education program, as defined in Section 56032 of the Education Code, or an individualized service plan, as described in Section 5600.4 of the Welfare and Institutions Code, or under the Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400, et seq.) and its implementing regulations." (Health & Safety Code, § 1374.73 (a)(4).)

What This Means. Without clearly defined "medically necessary" services, the effect of this legislation on special education services is unclear.

What is clear:

1. Services are reimbursable regardless of site of delivery.

2. But, medically necessary ABA services provided by private insurance companies on school sites would invoke liability issues and could have a negative impact in the education plan when medical and educational needs/services conflict.

3. Parents should request the services at home to avoid these complications until the implications are clear.

4. School districts are still responsible for educationally necessary services.

E. High School Graduation.

1. **CAHSEE Alternative.** California Education Code section 60852.3(b) states that students with disabilities are exempt from the CAHSEE requirement until the California State Board of Education ("SBE") makes a determination whether or not it is feasible to have alternative means to the CAHSEE for students with disabilities. At its March 9-11, 2011 meeting, the SBE authorized commencement of a pilot study prior to statewide implementation of alternative means.

   The alternative means is anticipated to be a two-tiered process. Under the first tier, the feasibility of using the Standardized Testing and Reporting ("STAR") Program California Standards Test ("CST") as an alternative score establishing equivalency to the CAHSEE for eligible pupils will be evaluated.

   (a) Tier I screening criteria include:

      (i) Eligible pupils must achieve a scale score of 300 on the CST in English language-arts ("ELA"), grade ten or a scale score of 269 on the CST in Algebra I to meet the CAHSEE requirement;

      (ii) Additional analyses will be performed on the California Modified Assessment in ELA, grade ten and Algebra I after performance level cut scores have been established; and

(iii) Eligible pupils not meeting Tier I requirements advance to Tier II (evaluation of evidence).

(b) Tier II consists of work samples that are task-based representations of a student's mastery of the state content standards assessed on the CAHSEE. Work sample formats being explored include:

(i) On-demand writing prompt;

(ii) On-demand classroom performance task;

(iii) Classroom-prepared task;

(iv) Computer presentation; and

(v) Audio/visual presentation

CDE anticipates bringing the results of the pilot study to the SBE this fall. If the two-tiered process is approved by the SBE, the CDE will contract for development of the statewide alternative means, which was implemented on July 1, 2012, beginning with the Class of 2013.

Status. Per the CDE, at this time, there is not an alternative test to the CAHSEE for students with disabilities.

2. **Pupil Assessment; High School Exit Examination; Eligible Pupils With Disabilities.** (AB 1705, Silva)

Background. Existing law provides an exemption from the requirement that eligible pupils with disabilities pass the CAHSEE as a condition of receiving a high school diploma. Existing law is set to sunset at the end of 2012. This bill extends that exemption through June 30, 2015, and also authorizes the State Board of Education to extend the exemption by up to one year.

Status. Chaptered.

Citation Index (aka B.U.M.)

1. Ravenswood City School Dist. v. J.S., (N.D.Cal., March 30, 2012, No. C-10-03950) F.Supp.2d [2012 WL 2510844], 59 IDELR 77

2. Anchorage School Dist. v. M. P. (9th Cir., July 19, 2012. No. 10-36065) 59 IDELR 91

3. Oxford PA Area High School. Special Education Today, July 18, 2012

4. Munir v. Pottsville Area Sch. Dist., (M.D. Pa., June 14, 2012, No. 3:10-cv-0855), [2012 WL 2194543], 59 IDELR 35

5. Student v. Los Angeles Unified School Dist., (OAH 2012) Case No. 2011110413, 112 LRP 27364

6. 20 U.S.C. § 1401(34)

7. Ed. Code, § 56345.1, subd. (a)

8. Student v. San Rafael City Schools (OAH 2012) Case No. 2011080500, 112 LRP 12088

9. Senate Bill 161 (Chapter 560, October 7, 2011)

10. Cal. Code Regs., tit. 5, §§ 622-625, 627, 621, subd. (d), 626; F3 NewsFlash No. 12-15, April 2012

11. Ed. Code, § 56523

12. Cal. Code Regs., tit. 5, § 3001

13. Cal. Code Regs., tit. 5, § 3052; Letter from D. McDonough to Abe Hajela, Gen. Counsel CSBA (August 25, 2011)

14. Senate Bill No. 1381 (Feburary 24, 2012)

15. Governor Signs 2012-2013 State Budget (June 28, 2012)

16. Cal. Code Regs., tit. 2, § 60020

17. Ed. Code, § 56364.2

18. Assembly Bill No. 1467 (Chapter 23, June 27, 2012)

19. CA Govt., § 7575

20. CA Govt. §7570

21. CA Govt., § 7572

22. Ed. Code, § 56346

23. Health & Safety Code, § 1374.73 (a)(4)

24. Insurance code, § 10144.51

25. Senate Bill No. 946 (Chapter , October 9, 2011)

26. Ed. Code, § 60850

27. Assembly Bill No. 1705 (Chapter 192, August 27, 2012); F3 NewsFlash No. 12-18, April 2012