



Fagen Friedman & Fulfrost LLP

# Lessons Learned from Recent Court and OCR Decisions



**California Council of Administrators  
of Special Education**

May 19, 2022

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**I.**

**Teachers gotta teach**



# The Education of all Handicapped Children Act of 1975

- P.L. 94-142 was enacted after, and as a result of, two federal district court cases decided in Pennsylvania and District of Columbia
- Established requirement for “free appropriate public education” (FAPE)
- Act renamed in 1990: Individuals with Disabilities Education Act
- Revised and reauthorized in 1997 and 2004



# Rowley (1982)

- “The reviewing court first must examine whether the state has complied with the **procedures** established by the Act, and then must determine whether the IEP is reasonably calculated to enable the child to receive **educational benefits**.”
- “Noticeably absent from the language of the statute is any substantive standard prescribing the level of education to be accorded handicapped children.”



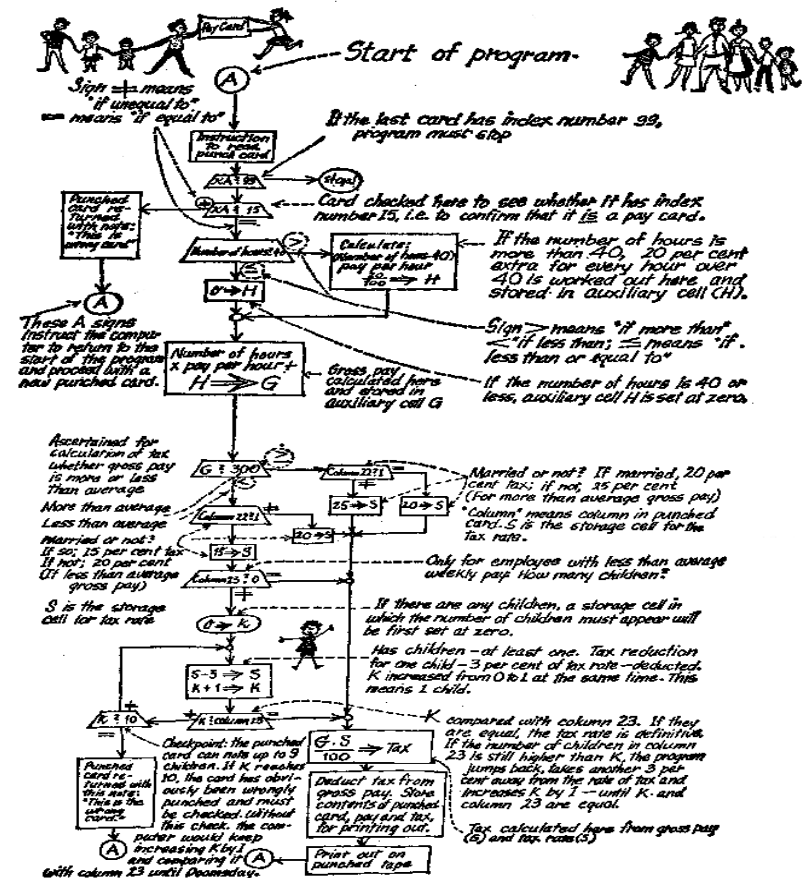
# Rowley (1982)

- “[T]he face of the statute evinces a congressional intent to bring previously excluded handicapped children into the public education systems of the States and to require the States to adopt **procedures** which would result in **individualized consideration** of and instruction for each child.”
- “[I]f personalized instruction is being provided with sufficient supportive services to permit the child to **benefit** from the instruction, and the other items on the definitional checklist are satisfied, the child is receiving a "free appropriate public education" as defined by the Act.”



# A New Era: Revitalizing Special Education for Children and Their Families (2002)

## 814 Procedural Requirements?



# IDEA 2004

“Almost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by . . . focusing resources on teaching and learning while **reducing paperwork** and requirements that do not assist in improving educational results.”

20 U.S.C. § 1400(c)(5)



# Andrew F. (2017)

- “By the time any dispute reaches court, school authorities will have had a complete opportunity to bring their expertise and judgment to bear on areas of disagreement. A reviewing court may fairly expect those authorities to be able to offer a **cogent and responsive explanation for their decisions** that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances”
- Absence of such bright-line rule should not be mistaken for “an invitation to the courts to substitute their own notions of sound educational policy **for those of the school authorities** which they review.”





# Points to Ponder . . .

- Limit IEPs to 7 elements
  - PLAAFP
  - Annual goals
  - Special education
  - Special education-related supports and services
  - General education-related supports and services
  - Accommodations
  - Modifications



# Points to Ponder . . .

- Update **definition of special education** to focus on teaching by a special education credentialed teacher
- “Fuzzy line” between general and special education
- One possible test:
  - Adaptations in content, delivery, or methodology;
  - Necessary, rather than beneficial, for student;
  - Not available regularly in general education; and
  - Designed or implemented by certified special education personnel.

(West Chester Area School Dist. (SEA PA 2001) 35 IDELR 235)



# Points to Ponder . . .

- Emphasize “that result from the disability” in the **definition of annual goals** and clarify the purpose
  - Goals are intended to determine, over a 12-month period, “whether the totality of services provided pursuant to the student’s IEP – including special education, related services, and supplementary aides and services – is appropriate to the student’s unique needs.” (Letter to Smith (OSEP 1995) 23 IDELR 344; Letter to Butler (OSERS 1988) 213 IDELR 118)



# Points to Ponder . . .

- In California, remove Education Code section 56346(e) and (f)
  - Conform “consent” to IDEA
  - Remove obligation to initiate litigation



# II.

# The Emergence of Implementation FAPE



# Van Duyn v. Baker School Dist. 5J

## Facts

- District developed IEP for 13-year-old Student with autism that provided:
  - 8-10 hours per week of math instruction
  - Behavior management plan modeled after plan used at Student's elementary school
- Significant shortfall in number of hours of weekly math instruction
  - District subsequently took corrective action per ALJ order
- Several elements of BMP were not implemented in same manner as in elementary school



# Van Duyn v. Baker School Dist. 5J

## Ruling

- 9th Circuit concluded that District did not deny FAPE by failing to implement certain provisions in Student's IEP
- Although initial five-hour per week shortfall in math instruction was material implementation failure, District took corrective actions to ensure Student received required hours
- Student was not harmed by District's minor deviations in implementing BMP



# Van Duyn v. Baker School Dist. 5J

## Ruling (cont'd)

“A material failure to implement an IEP occurs when the services a school provides to a disabled child fall significantly short of the services required by the child’s IEP. Applying that standard here, the services [District] provided did not fall significantly short of what was required by the IEP (. . . with the exception of the math instruction provided prior to the ALJ's order).”

(Van Duyn v. Baker School District 5J (9th Cir. 2007) 481 F.3d 770)





# Long Beach Unified School District

- District's IEP for high school Student with ID offered 5 hours of daily SAI
  - Due to COVID closure, District did not deliver any services from 3/16/20 to 3/22/20
  - District did not provide any direct services to Student from 3/23/20 to 4/9/20
  - After spring break (4/23/20) until Parents filed due process complaint (4/28/20), Student received 4 hours of daily blended instruction



# Long Beach Unified School District

- ALJ: Alternate delivery model was appropriate
- District remained responsible for materially implementing IEPs despite school closure, even if by alternate methods such as distance learning
  - But District denied FAPE by not providing any services to Student from 3/16/20 to 4/9/20, and from 4/20/20 to 4/22/20
  - 4 hours of daily blended instruction from 4/23/20 to 4/28/20 (80 percent of October 2019 IEP) was also material implementation failure

(Student v. Long Beach Unified School Dist. (OAH 2020) Case No. 2019100147)



# A more reasonable approach?

- IDEA does not contemplate scenario where public schools closures are required by a civil emergency
- District acknowledged that services during early pandemic were not equivalent to number of hours required by IEP, particularly when considering limited availability for synchronous remote instruction
- “Nonetheless, there is no legal requirement that any student's remote learning plan be fully equivalent to in-person learning - such an equivalency would be impracticable. Instead, the question is whether the District made every effort ...”

(Maine Admin. Dist. #61 (SEA ME 2020) 121 LRP 5757)



**If not FAPE,  
then what is  
the remedy?**



COURT OF COMMON PLEAS,  
WESTMINSTER HALL.

*London Pub. 12 June 1863 at R. Ackermann's Repository of Arts in Strand.*



# “Equity”

- The Court of Chancery was a court of equity in England and Wales that followed a set of loose rules to avoid the slow pace of change and possible harshness of the common law
- The court could employ notions of fairness (equity) in fashioning relief, not just relief prescribed by law, i.e.:
  - Making someone do something
  - Forbidding someone from doing something



# “Remedy”

- A remedy is form of court enforcement of legal right resulting from successful civil lawsuit
- Remedies fall into three general categories:
  - Damages
  - Coercive remedies (equitable remedies)
  - Declaratory judgment



# Parents of Student W. v. Puyallup School Dist.

## Facts

- Student was “learning disabled in math” and received special education math instruction, as well as behavior services
- Parents moved out of District and moved back several times, resulting in Student receiving no services during eighth and ninth grades
- Student, who was frequently suspended, was subsequently reassessed; District recommended self-contained classroom and counseling



# Parents of Student W. v. Puyallup School Dist.

## Ruling (cont'd)

- No showing that award of compensatory education was appropriate given those circumstances
  - Conduct of Parents could also be considered
- Courts have no obligation to provide day-for-day compensation for time missed
- “Compensatory education is not a contractual remedy, but an **equitable remedy**, part of the court’s resources in crafting ‘appropriate relief’”

(Parents of Student W. v. Puyallup School District, No. 3 (9th Cir. 1994) 31 F.3d 1489)





## **McLaughlin v. Torrance Unified School Dist. (C.D. Cal. 2021)**

- Student's IEP called for 314 minutes per day in an SDC, but Student spent most of day in individual classroom; IEP was not revised
- Although individual classroom "was likely a better fit for Student," ALJ and District Court determined that District's failure to implement IEPs, as written, was substantive IDEA violation under Van Duyn
- Parents sought comp ed for 1530 hours of SAI



## **McLaughlin v. Torrance Unified School Dist. (C.D. Cal. 2021)**

- Although IEPs should have been revised to indicate use of individual classroom, it “remains unclear to the Court how exactly Student suffered educational harm by the District's failure to implement the IEPs as written”
- Student would not have been able to tolerate 314 minutes per day in group setting, and District worked with Student to include him in group learning to the extent he could do so

(McLaughlin v. Torrance Unified School Dist. (C.D. Cal. 2021) 79 IDELR 75)



# Points to Ponder . . .

- Learning loss vs. compensatory education
- Should we take implementation cases up the courts?
  - E.g. recent OCR settlement with LAUSD
- How do we work through statute of limitations period?





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And thank you for all you do for





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