



Spring 2025 SPED Legal Update

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ESD 189

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Agenda

- Impacts of New Administration(s)
 - Federal & State
- Burden of Proof in Due Process Hearings
 - Applicable & evolving standards?
- Age 22
 - What is a “regular diploma”?
- Evaluations and IEPs for Parentally Placed Private School (PPPS) students
 - When to move forward?
- Eligibility
 - IDEA’s standards (and 504 too)
- IEP Development
 - Clear offers?
- LRE & Inclusion
 - *Holland* factors, weighing “academic benefit”, and paraeducator support
- Exclusionary Discipline
 - Comparable, Equitable & Appropriate (CEA) Educational Services

New Administration(s)

- Federal government
 - U.S. Department of Education
- Washington state government
 - SPED funding increases?
 - SB 5263
 - Isolation & Restraint restrictions?
 - SB 5654
 - Audio recording of IEP meetings?
 - HB 1051
 - I-2801 (Parents' Bill of Rights)
 - [Implementation of I-2081, the Parents' Bill of Rights](#)

Burden of Proof

- ***Schaffer v. Weast*, 546 U.S. 49 (2005)**

“Assigning the burden to schools might encourage them to put more resources into preparing IEPs and presenting their evidence, but IDEA is silent about whether marginal dollars should be allocated to litigation and administrative expenditures or to educational services. There is reason to believe that a great deal is already spent on IDEA administration, and Congress has repeatedly amended the Act to reduce its administrative and litigation-related costs. The Act also does not support petitioners’ conclusion, in effect, that every IEP should be assumed to be invalid until the school district demonstrates that it is not. Petitioners’ most plausible argument—that ordinary fairness requires that a litigant not have the burden of establishing facts peculiarly within the knowledge of his adversary, *United States v. New York, N. H. & H. R. Co.*, 355 U. S. 253, 256, n. 5—fails because IDEA gives parents a number of procedural protections that ensure that they are not left without a realistic chance to access evidence or without an expert to match the government.”

Burden of Proof (cont'd)

- SB 5883 – Effective 6/6/24 (RCW 28A.155.260)
 - (1) A LEA has the burden of proof, including the burden of persuasion and production, whenever it is a party to a due process hearing regarding the identification, evaluation, reevaluation, classification, educational placement, disciplinary action, or provision of a free appropriate public education for a student with a disability.
 - (2) A parent or person in parental relation seeking tuition reimbursement for a unilateral parental placement has the burden of proof, including the burden of persuasion and production, on the appropriateness of such placement.

Denial of FAPE - post SB 5883?

- ***In re Franklin-Pierce Sch. Dist.***, (SEA WA, 2025)
 - Parents unilaterally placed adult student at a residential program in NY, arguing that adult student required intensive reading instruction to be able to achieve their post-secondary goals. The ALJ disagreed, concluding:
 - IEP developed and offered to the adult student prior to the unilateral placement was “reasonably calculated” to confer educational benefit upon adult student, including making progress towards their post-secondary goals
 - Private evaluator’s opinions to the contrary were explicitly given less weight than school district staff and expert witnesses
 - Because FAPE was offered, parents were not entitled to reimbursement for their unilateral residential placement decision

Burden of Proof (cont'd)

- SB 5883's 2nd paragraph mirrors federal requirement that if 1) district's offered IEP denies a FAPE, parents may receive monetary reimbursement upon parents showing that they 2) provided a "proper" private placement for their student.
 - See *Florence Cnty. Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993).
- The Ninth Circuit has previously ruled that a private school need not meet a state's educational standards or furnish "every special service necessary to maximize [a student's] potential" to qualify as a "proper" placement for purposes of tuition reimbursement.
 - See *C.B. v. Garden Grove Unified Sch. Dist.*, (9th Cir. 2011).

“Appropriate” private placement under SB 5883?

- ***P.J. v. Northshore Sch. Dist.***, (W.D. WA, 2025)
 - Parents unilaterally placed Student at a 1:1 tutoring center, arguing that Student was not making sufficient reading progress and thus required private, 1:1 ELA services.
 - The ALJ agreed with Parents and ordered reimbursement for 1:1 tutoring services, but did not conclude the 1:1 tutoring center was Student’s prospective IEP placement.
 - The ALJ’s order was **overturned by the federal court**, based in part upon the Court’s determination that the ALJ:
 - Failed to properly analyze under the four-factor *Rachel H.* test whether Student was offered services within LRE
 - Academic benefit; non-academic benefit; effect of student on classroom and staff; and cost
 - Failed to determine whether the 1:1 tutoring center was a “proper” placement for purposes of reimbursement
 - No certificated teacher; untrained tutor; contrary to Parents’ own private provider recommendations; and no credible evidence that Student did better with 1:1 services
 - Note – this case was decided by the ALJ prior to SB 5883 being in effect

Age of Eligibility

WAC 392-172A-02000 Students' Right to a FAPE

(2) A student who is determined eligible for special education services shall remain eligible until one of the following occurs:

- (a) A group of qualified professionals and the parent of the student, based on a reevaluation, determines the student is no longer eligible for special education services; or
- (b) The student has met high school graduation requirements established by the school district pursuant to rules of the state board of education, and the student has graduated from high school with a regular high school diploma. . . ;
or
- (c) The student enrolled in the public school system or is receiving services pursuant to chapter 28A.190 or 72.40 RCW has reached age twenty-one. The student whose twenty-first birthday occurs on or before August 31 would no longer be eligible for special education services. The student whose twenty-first birthday occurs after August 31, shall continue to be eligible for special education and any necessary related services for the remainder of the school year

See *also* RCW 28A.155.020 (OSPI “shall require each school district in the state to insure an appropriate educational opportunity for all children with disabilities between the ages of three and twenty-one”).

Age of Eligibility (cont'd)

- OSPI's current written guidance:
 - Questions and Answers: Providing Special Education Services Until Age 22
 - <https://ospi.k12.wa.us/sites/default/files/2024-06/guidance-specialeducation-qa-svcs-until-22.pdf>
- (Still) open issues
 - Eligibility ends on 22nd birthday or end of that school year?
 - Funding for ongoing services past age 21, including Safety Net?
 - See discretion noted in OSPI's guidance above
 - How will comp ed be provided/funded for students exited at age 21 who had not yet received a regular diploma or been found via reevaluation to no longer qualify for special education?

Age of Eligibility (cont'd)

- What is a regular diploma?
 - See WAC 392-172A-02000(2)(b) (“A regular high school diploma **does not include** a certificate of high school completion, or a general educational development credential”).
- May be a disputed issue going forward
 - See, e.g., *In re Edmonds Sch. Dist.*, 2023-SE-0173 (Dec. 12, 2024) (rejecting claim that district **inappropriately issued adult student a “regular” diploma** and that adult student was entitled to additional services from the district)
 - Note Burden of Proof issue re: courses **“fully aligned with State standards”**
available at: <https://ospi.k12.wa.us/sites/default/files/2025-01/2023se0173fof.pdf>

Parentally-placed Private School (PPPS) Students

- Duty to Evaluate PPPS students
 - ***Newport-Mesa Unified Sch. Dist. v. DA***, (9th Cir., 2024)
 - 9th Circuit upheld decisions below that school district **not required to complete triennial reevaluation of private school student within 3-year timeline**
 - Timelines are a procedural obligation and subject to “harmless error” analysis
 - Delay in initiating the student’s reevaluation that caused district to exceed 3-year timeline was **harmless because Parents had already made deposit for continued private placement**
 - ***See also Letter to Eig*** (OSEP, 2009)
 - Duty to evaluate PPPS students – resident & non-resident district obligations

PPPS Students (cont'd)

- Duty to develop a new IEP for PPPS students
 - ***Capistrano Unified Sch. Dist. v. DA***, (9th Cir., 2021)
 - Agreeing that school district is **not required to develop a new IEP, i.e., offer a FAPE, to PPPS student within their residential boundaries unless the parents ask for a new IEP.**
 - “We hold that, if the student has been enrolled in private school by her parents, then the district need not prepare an IEP, even if a claim for reimbursement has been filed. To be sure, when parents withdraw a student from public school and place her in private school, all they have to do is ask for an IEP, and then the district must prepare one. But regardless of reimbursement, when a child has been enrolled in private school by her parents, the district only needs to prepare an IEP if the parents ask for one.”
(Emphasis added).

PPPS Students (cont'd)

- Duty to develop a new IEP for PPPS students (cont'd)
 - As summarized by the federal court in the *PJ v. NSD* decision:
 - “The purposes of the IDEA are not served by compelling public school districts to
 - (i) guess whether parents of disabled children who are attending private institutions want an IEP or components thereof, and/or
 - (ii) generate IEPs that such parents do not genuinely intend to consider, let alone implement.”
 - However, recognizing the distinction between “guessing” and “asking” by a parent with genuine intent may require additional staff training, particularly in non-traditional and non-SPED departments.
 - *E.g.*, registrars, counselors, front office staff, *etc.*

PPPS Students (cont'd)

- Proportionate Share - WAC 392-172A-04000 through -04070
 - “A [PPPS] student does not have an individual right to receive some or all of the special education and related services that the student would receive if enrolled full- or part-time in a public school. A services plan must be developed and implemented for each private school student eligible for special education who has been designated by the school district to receive special education and/or related services through the use of proportionate share funds. The services plan must, to the extent appropriate: (1) meet the requirements of WAC 392-172A-03090; and (2) be developed, reviewed, and revised consistent with WAC 392-172A-03090 – 03110. Depending upon the services to be provided to the student, not all sections of this services plan form may be applicable.”
 - OSPI, *available at* [8c-private-school-svcs-plan.docx](#)
 - DOE’s 2011 guidance document provides more detail on their expectations for PPPS students, *available at* [Questions and Answers on Serving Children with Disabilities Placed by Their Parents in Private Schools. \(PDF\)](#)

PPPS Students (cont'd)

- Proportionate Share (cont'd)
 - How much funding do you have for such students?
 - Math is hard
 - How are you determining ways to allocate, i.e., spend those funds?
 - When was the last time this was done?
 - What type(s) of special education services are you providing under proportionate share?
 - Direct v. indirect?
 - Distinction between FAPE, Partial Enrollment services, & ISP services
 - Who has the right to challenge such service provision?
 - SECC v. DPHR?

Eligibility

- *In re Northshore School District*, (SEA WA, 2023)
 - 2nd grade student – **not previously eligible** for special education
 - Parents **suspected dyslexia** and had Student privately evaluated **at end of 1st grade**.
 - Evaluator recommended GAI of +125 and need for IEP in reading and writing based upon severe discrepancy *and* professional judgment
 - Student did virtual Kindergarten in dual language program (90/10); 1st and 2nd grade within in-person dual-language (50/50)
 - District team **conceded severe discrepancy and ADHD**, but found under 3-prong test, **no adverse educational impact or need for SDI**
 - Parents retained another private evaluator who also concluded Student was **2E** and needed SDI in multiple areas
 - The ALJ concluded that:
 - Team **appropriately declined to qualify Student for an IEP** under 3 prong test

Eligibility (cont'd)

- **IDEA's 3-prong test**

- Disability,
- Averse educational impact, and
- Need for SDI

See WAC 392-172A-01035(1)

- Who makes that determination?

- **Weight** given to outside opinions post-*Rogich v. Clark Count Sch. Dist.*?
- What about **2e students**?

- **Section 504 Eligibility**

- Physical, mental impairment
- Substantially limits one or more major life activity (without consideration of mitigating measures, such as medicine)
 - **But who decides need for actual accommodations?**

IEP Development

- ***Los Angeles Unified Sch. Dist. v. AO***, (9th Cir., 2024)
 - Dispute over whether **frequency and duration** of district's offer of SLP and audiology services for DHH student provided a FAPE
 - **Range** of 1-10 sessions of SLP totaling 30 minutes **per week**
 - **Range** of 1-5 sessions of audiology totally 20 minutes **per month**
 - Court agreed that the offer was **too vague** for Parents to understand what was being proposed or assess whether the services were appropriate as developed (or **as implemented!**)
 - Court reiterated that **the district has affirmative duty** to make a “clear offer of services” and Parents could not be blamed for not seeking clarification
 - Court rejected claim that district needed that **degree of flexibility** given existing material **failure to implement standard** under *Van Duyn*

IEP Development (cont'd)

- ***P.H. v. Seattle Sch. Dist.*, (W.D. WA, 2024)**
 - Parents unilaterally placed Student at a residential program arguing that Student was refusing to attend school and thus required a residential program. The ALJ agreed, concluding:
 - . . . by the end of the 2021-22 school year, the need for residential placement as the Student's LRE was quite clear. By then, the Student had almost entirely stopped attending school. . . . He could not succeed at basic first steps to attend school. Rather, he intentionally urinated on his bed in the morning, assaulted his father, hit [staff], damaged property, ran down the block unsupervised, and disrobed after getting a reward for merely putting a shirt on over his pajama top. From March through June, the Student attended school on 10 out of 69 available days.
 - The ALJ's Order was overturned by the federal court, in part because the ALJ:
 - Failed to give the District credit for engaging experts to develop an undisputedly appropriate FBA and BIP, and second-guessed whether the new FBA and BIP would help improve Student's behavior
 - BIP was not implemented until 16 days before end of the school year and Student attended 4 of those days
 - Failed to analyze whether residential placement was Student's LRE using *Holland* factors
 - Academic benefit; non-academic benefit; effect of student on classroom and staff; and cost

LRE & Inclusion

- ***Sacramento City Unified Sch. Dist. v. Rachel H.***, (9th Cir. 1994)
 - Upheld lower court decision that rejected proposed placement of academic instruction in special education classroom and non-academics in general education classroom for student with intellectual disability (tested IQ of 44), in favor of full-time general education services requested by parents.
 - The so-called *Holland* factors that are to be **balanced against one another**:
 - the educational benefits* available for [the student] in a regular classroom, **supplemented with appropriate aids and services**, as compared with the educational benefits of a special education classroom;
 - the nonacademic benefits of interaction with children who were not disabled;
 - the effect of [the student's] presence on the teacher and other children in the classroom; and
 - the financial cost of mainstreaming.

LRE & Inclusion (cont'd)

- ***D.R. v. Redondo Beach Unified Sch. Dist.***, (9th Cir. 2022)
 - Overturning ALJ decision that agreed with district's proposal to move student with autism in 5th grade from 75% gen ed service model (as done from 2-4th grade) to 46% gen ed service model.
 - The district's rationale - "D.R. spent most of his time working **one-on-one with his aide** using a heavily modified curriculum and that he **lagged so far behind his non-disabled peers** that he could rarely participate in activities with the rest of the class."
 - The 9th Circuit's bases for rejecting that rationale:
 - Only disputed *Holland* factor was academic benefit – **all others favored gen ed inclusion**
 - "The IEP's academic goals therefore provide the relevant yardstick for assessing a child's academic progress by the end of his fourth-grade year, D.R. had **met four of his six academic goals** and had **made progress on the remaining two.**"
 - "But just as the IDEA is clear that a school district **may not penalize a child for relying on the supplementary aids and services** he receives, the law is also clear that a school district may not remove a child from the regular classroom **"solely because of needed modifications in the general education curriculum."**

LRE & Inclusion (cont'd)

- **Technical Assistance Paper (TAP) No. 6**

- For the commitment of services to be clear, the IEP must be specific about the type, frequency, and setting of the paraeducator support: special education setting, general education setting, all day, specific classes, 1:1, or assigned to a small group of students, etc. The IEP should clearly outline specific activities where the student requires the support of a paraeducator and those activities in which the student is able to engage without paraeducator support (e.g., what activities does the paraeducator need to remain within close physical proximity at all times vs. within line of sight).
- [T]he specific [1:1] paraeducator providing support may change throughout the day, as long as the ratio identified in the IEP remains consistent.
- Paraeducator support is an example of a supplementary aid and service that may be necessary to ensure a student has more access to a general education (less restrictive) setting. Paraeducator support is not a placement option on the continuum of alternative placements.
- Available at https://ospi.k12.wa.us/sites/default/files/2022-12/tap_6.pdf

IEP-based Limitations on Exc. Discipline

What is “change of placement” because of exclusionary discipline?

- (1) For purposes of removals of a student eligible for special education services from the student's current educational placement, because of disciplinary removals, a change of placement occurs if:
 - (a) The removal is for more than ten consecutive school days; or
 - (b) The student has been subjected to a series of removals that constitute a pattern:
 - (i) Because the series of removals total more than ten school days in a school year;
 - (ii) Because the student's behavior is substantially similar to the student's behavior in previous incidents that resulted in the series of removals; and
 - (iii) Because of such additional factors as the length of each removal, the total amount of time the student has been removed, and the proximity of the removals to one another.

WAC 392-172A-05155

So, 10 school days + 1 school day = change of placement?

CEA Educational Services

- During any suspension, expulsion, or emergency expulsion, the district must provide **the opportunity** to receive educational services in a **CEA setting**
- Exclusions for up to 5 days, at least:
 - Coursework, including homework, from all the student's subjects/classes
 - Opportunity to make up any missed assignments and tests

WAC 392-400-610

CEA Educational Services (cont'd)

- Exclusions for 6-10 days, at least:
 - Coursework, including homework, from **all subjects/classes**
 - **Access to school personnel** who can provide support in keeping the student current with assignments and course work, and
 - Opportunity to make up any missed assignments and tests
- Long-term suspensions and expulsions
 - Educational services in accordance with WAC 392-121-107
- CEA service opportunities need to be communicated by school – not the family's burden to seek this information out

Questions?