



# Anacortes: Special Education Update

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**ESD 189**

# Agenda

- Burden of Proof
- Evaluation & IEP Fundamentals
- Statute of Limitations
  - BREAK
- Child Find
- Dyslexia
- Evaluation & Methodology Issues
  - BREAK
- HIB & IEPs
- Comparable Services
- Residential Placements
  - QUESTIONS

# 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 Bill 5883 – Effective 6/6/24
  - (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.

## Burden of Proof (cont'd)

- So, what may be different after June 6, 2024?
  - Record keeping
    - What we keep and for how long
  - Staff training
    - Procedural and substantive obligations
  - Increased number of due process hearings
    - Potential litigation on the meaning of HB 5883
  - Increased staff and admin turnover
    - Second-guessing of professionalism
  - Increased settlement budgets
    - Risk management approach

# Evaluation Fundamentals

- Duty to complete comprehensive evaluations
  - Of all areas related to the suspected disability(s) . . . .
  - Extent of that obligation?
    - Minimal v. maximal examples
- Are the right people there in planning & reviewing the assembled data?
  - E.g., think of SLD determinations
- Did we follow through on our eval plan?
  - Are all areas consented to assessed?
    - Documentation of those areas not able to be assessed?
- Have we answered our evaluation questions?
  - Eligibility, recommendations for services, and/or potential for changes in the same in the case of reevaluations
  - E.g., SLD include reading fluency?

# IEP Team Fundamentals

- Meeting scheduling
  - Mutual agreement
  - Draft documents v. **pre-determination**
- Attendees
  - Who is the District representative?
  - Excusals of team members?
- Contents
  - Track evaluation/reevaluation recommendations?
  - **Goals measurable?**
  - Required areas addressed, e.g., transition for 16+ year olds?
- Decision-making
  - Consensus v. veto rights
  - Signatures v. participation
- When to amend
  - Annual review, but prior to that?
  - **Apples to apples growth?**

# Statute of Limitations

- The IDEA has a 2 year statute of limitations, i.e., the time period in which parents can object to a district's compliance with the IDEA
  - That limitation period may not apply, however, if the parent can show that they were:  
Prevented from filing a due process hearing request due to:
    - (a) Specific misrepresentations by the district that it had resolved the problem forming the basis of the due process hearing request; or
    - (b) The district withholding information from the parent that was required to be provided to the parent.
- Procedural Safeguards & Goal Progress Reports
  - How has your district historically provided them to parents?
  - Do you have an ability to prove delivery of them over time?
  - Considerations for changing practice of delivery?



# Statute of Limitations (cont'd)

## • Prior Written Notice

(1) Written notice that meets the requirements of subsection (2) of this section must be provided to the parents of a student eligible for special education services, or referred for special education services a reasonable time before the school district:

- (a) Proposes to initiate or change the identification, evaluation, or educational placement of the student or the provision of FAPE to the student; or
- (b) Refuses to initiate or change the identification, evaluation, or educational placement of the student or the provision of FAPE to the student.

(2) The notice required under this section must include:

- (a) A description of the action proposed or refused by the agency;
- (b) An explanation of why the agency proposes or refuses to take the action;
- (c) A description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;
- (d) A statement that the parents of a student eligible or referred for special education services have protection under the procedural safeguards and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;
- (e) Sources for parents to contact to obtain assistance in understanding the procedural safeguards and the contents of the notice;
- (f) A description of other options that the IEP team considered and the reasons why those options were rejected; and
- (g) A description of other factors that are relevant to the agency's proposal or refusal.

BREAK

# Child Find

- WAC 392-172A-02040

(1) School districts shall conduct child find activities calculated to reach all students with a suspected disability for the purpose of locating, evaluating and identifying students who are in need of special education and related services, regardless of the severity of their disability. The child find activities shall extend to students residing within the school district boundaries whether or not they are enrolled in the public school system

(2) Child find activities must be calculated to reach students who are homeless, wards of the state, highly mobile students with disabilities, such as homeless and migrant students and students who are suspected of being a student with a disability and in need of special education services, even though they are advancing from grade to grade.

(emphasis added). Second paragraph = “two-factor test” for Child Find

## Child Find (cont'd)

- ***In re Sumner-Bonney Lake School District, (SEA WA, 2021)***
  - Parent raised Child Find claims after unilaterally placing Student in a residential facility in another state
  - The ALJ concluded that the District violated Child Find obligation by not referring Student for consideration of a special education evaluation
    - **Single-Factor Test = A disability is suspected, and must therefore be evaluated**, when a school district has notice that a student has displayed the symptoms of a disability.
    - Notice of disability in this case = identification of ADHD upon enrollment; discussions of anxiety and depression and childhood trauma; struggles at school
  - Procedural violation = a denial of FAPE?
    - **“By failing to evaluate the Student, the District effectively short-circuited the entire process under the IDEA to identify, evaluate, craft an appropriate IEP, and select a Least Restrictive Environment (LRE).”**

# Child Find re Dyslexia

- RCW 28A.320.260
  - (3)(a) If a student shows indications of below grade level literacy development or indications of, or areas of weakness associated with, dyslexia, **the school district must provide interventions** using evidence-based multitiered systems of support, consistent with the recommendations of the dyslexia advisory council under RCW **28A.300.710** and as required under this subsection.
  - (b) **The interventions must be evidence-based multisensory structured literacy interventions** and must be provided by an educator trained in instructional methods specifically targeting students' areas of weakness.
  - (c) Whenever possible, a school district must begin by providing student supports in the general education classroom. If screening tools and resources indicate that, after receiving the initial tier of student support, a student requires interventions, the school district may provide the interventions in either the general education classroom or a learning assistance program setting. **If after receiving interventions**, further screening tools and resources indicate that a student continues to have indications of, or areas of weakness associated with, dyslexia, **the school district must recommend to the student's parents and family that the student be evaluated for dyslexia or a specific learning disability.**

# Case Study # 1

- Student A is starting the 3<sup>rd</sup> grade. They have been enrolled in general education since kindergarten. Student A has, however, previously participated in the District's LAP support due to lower reading scores on the District's available reading diagnostics. Student A has been showing some degree of progress with their reading scores, particularly in the spring of 2022.
  - Over this past summer, Parents went to a private evaluator and obtained a dyslexia diagnosis for Student A. Parents mention the diagnosis to staff and ask whether the District has any dyslexia-specific supports available for Student A. Staff bring the question to you and ask how they should respond to Parents.
  - Discuss your potential responses to staff **and/or** to Parents.

## Case Study # 2

- Elsewhere in the District, Student B is a rising 2<sup>nd</sup> grader. They transferred into the District last fall from another state. Based upon that state's evaluation process, Student B is eligible for special education services under the Other Health Impaired category due to an ADHD diagnosis, with SDI only in Behavior.
- Student B participated in the District's LAP program last school year. Student B did not, however, respond positively to the LAP programming.
  - At the end of last school year, Parents of Student B asked whether LAP uses a multi-sensory structured literacy program. They heard about a private school in the area that reports great progress with their Orton-Gillingham based program and Parents asked the principal whether Student should attend that private school.
  - How would you respond to principal **and/or** Parents?

# Evaluation Issues

- ***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 SPED in reading and writing based upon severe discrepancy and professional judgment
    - Student did virtual Kindergarten in dual language program (90/10); 1<sup>st</sup> and 2<sup>nd</sup> grade within in-person dual-language (50/50)
    - Parents also required private vision therapy services as a related service
  - 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 concluded Student was 2E and needed SDI in multiple areas
  - The ALJ concluded that:
    - Team **not required to use GAI**, rather than FSIQ
    - Team appropriately declined to qualify Student under 3 prong test
      - Further rejected request for vision therapy services due to lack of evidence of need



# Evaluation Issues (cont'd)

- Duty to Complete Comprehensive Evaluations
  - ***D.S. and P.S. v. Bainbridge Island Sch. Dist.*, (W.D. WA, 2021)**
    - Parents' appeal of ALJ decision in favor of the District
    - Federal Court reversed and found for Parents
      - Issue on appeal – whether the District should have evaluated the student in the area of writing (dysgraphia) as part of District's special education reevaluation
      - Team had agreed and Parents consented only to reevaluation in areas of reading and cognition
    - Court focused on **internal staff comments of potential academic need** to second-guess the scope of the evaluation
      - Noted that Parents were unaware of these internal concerns prior to due process
      - Based upon Record, District violated Child Find & reevaluation obligations

# Evaluation Data & Methodology Issues

- *Crofts v. Issaquah Sch. Dist.*, (9<sup>th</sup> Cir. 2022)
  - Court rejected claim that district required to specifically evaluate for “dyslexia” where the district completed a comprehensive evaluation in the area of reading and student found eligible for SDI in reading under the SLD category
    - This evaluation included data/opinions from parent’s private evaluation of student
  - Court further rejected claim that district required to use a specific methodology where record established student had benefited from school district’s educational program
    - This included testimony of use of multi-sensory and other effective reading instructional strategies and approaches

# Evaluation Data (cont'd)

- “Consideration” of Private Evaluation Data
  - ***Rogich v. Clark County Sch. Dist.*, (D. Nev., 2021)**
    - Federal court reversed lower administrative decision in favor of the school district and found a denial of FAPE by the district in not fully adopting private evaluation recommendations on how to implement a specific reading curriculum (O-G)
    - Court found that two IEE reports recommended **consistent and exclusive use of O-G reading methodology** for student with multiple disabilities in order to benefit, and because the proposed IEPs **only** identified use of a “multi-sensory approach to instruction” that could potentially confuse Student if used inconsistently, the proposed IEPs denied Student a FAPE
      - District was never able to implement its proposed IEPs due to unilateral parent placements
    - Parents awarded almost \$500,000 in reimbursement for unilateral private placements

# Methodology Issues (cont'd)

- ***In re Peninsula School District***, (SEA WA, 2023)
  - 3<sup>rd</sup> grade student – eligible for special education since start of 2<sup>nd</sup> grade with SLD in reading
    - Parents suspected dyslexia and had Student privately evaluated at end of 2<sup>nd</sup> grade.
    - The private evaluator identified Student as having dyslexia, and made following recommendation:
      - Given [Student's] processing differences she will need an evidence-based intervention program designed for individuals with dyslexia. In determining the appropriateness for children with dyslexia, it is important that there is peer reviewed independent research showing its efficacy with children identified as dyslexic. Training and adherence to program components with fidelity is integral to achieving similar levels of efficacy as those evidenced in the research supporting each program. Evidence-based interventions rely heavily on a structured literacy learning approach.
      - The school team did not identify that instructional methodology in the IEP for 3<sup>rd</sup> grade despite Parents' concerns.
  - The ALJ concluded that the school team erred and denied Student a FAPE and ordered as a remedy:
    - Two years of compensatory education for Student,
    - Reimbursement to Parents for the private evaluation, a separate private consultant, and curricular purchases made by Parents,
    - A new private evaluation of Student and
    - District-wide staff training on iReady and RCW 28A.320.260

# IEP Team Composition

- Required Participants for IEP Team meetings
  - ***R.P. v. Prescott Unified Sch. Dist., (9<sup>th</sup> Cir., 2011)***
    - School districts are **not obligated to include “experts” in a particular disability at an IEP team meeting**
    - WAC 392-172A-03095(1) only requires the following participants:
      - The parents of the student;
      - Not less than one gen ed teacher of the student if the student is, or may be, participating in the gen ed environment;
      - Not less than one special ed teacher of the student, or where appropriate, not less than one special ed provider;
      - A representative of the public agency who:
        - Is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of students eligible for special education services;
        - Is knowledgeable about the general education curriculum; and
        - Is knowledgeable about the availability of resources of the school district.
      - An individual who can interpret the instructional implications of evaluation results, who may be a member of the team described above;
      - **At the discretion of the parent or the school district, other individuals who have knowledge or special expertise regarding the student, including related services personnel as appropriate; and**
      - Whenever appropriate, the student.
    - But, should districts consider inviting other personnel to contested team meetings where methodology is at issue?

BREAK

# HIB & IEPs

## ***Dear Colleague Letter: Responding to Bullying of Students with Disabilities (OCR 2014)***

- Bullying of a student with a disability on any basis can result in a denial of FAPE under the IDEA.
- School districts should promptly hold an IEP team meeting if a student with a disability has been bullied and is experiencing adverse changes in academic performance or behavior.
  - Per OCR, an IEP team meeting should be held unless it is clear that there was no effect on the student.

# Comparable Services

(4) If a student eligible for special education services transfers from one school district to another school district within Washington state and had an IEP that was in effect in the previous school district, the new school district, in consultation with the parents, must provide FAPE to the student including services comparable to those described in the student's IEP, until the new school district either:

- (a) Adopts the student's IEP from the previous school district; or
- (b) Develops and implements a new IEP that meets the applicable requirements in WAC 392-172A-03090 through 392-172A-03110.

WAC 392-172A-03105 (emphasis added).



## Comparable Services (cont'd)

(5) If a student eligible for special education services transfers from a school district located in another state to a school district within Washington state and had an IEP that was in effect in the previous school district, the new school district, in consultation with the parents, must provide FAPE to the student including services comparable to those described in the student's IEP, until the new school district:

(a) Conducts an evaluation to determine whether the student is eligible for special education services in Washington state, if the school district determines an evaluation is necessary to establish eligibility requirements under Washington state standards; and

(b) Develops and implements a new IEP, if appropriate, that meets the applicable requirements in WAC 392-172A-03090 through 392-172A-03110.

WAC 392-172A-03105 (emphasis added).

# Comparable Services (cont'd)

- What is “comparable”?
  - *In re Mercer Island Sch. Dist.*, (SEA WA, 2021)
    - “The IDEA does not define the term “comparable services.” The federal Department of Education (DOE) explained it was not necessary to provide a definition in the IDEA, as it interpreted comparable to mean “similar” or “equivalent.” 71 Fed Reg. 46,681 (2006). There is not an abundant amount of case law going to what constitutes comparable services. Similar to the DOE, courts have held that the IDEA does not require the new school district to provide an exact replica of the services a student received from their former school district. See, e.g., *Sterling A. v. Washoe County Sch. Dist.*, 51 IDELR 152 (D. Nev. 2008) (holding that a Nevada district could provide school-based services to a child with a cochlear implant who received home-based services from his former district).”
- What should districts do in response to IEP services not typically offered in WA?
  - Vision therapy
  - Auditory processing
  - Others?
- What should districts do in response to levels of services not available in your district?
  - What does that look like?

# Residential Placements

- The IDEA requires Parents establish that residential placement was both (1) “necessary for [the student] to receive benefit from [their] education,” and (2) was for educational purposes, rather than “a response to medical, social, or emotional problems . . . quite apart from the learning process.” *Clovis Unified Sch. Dist. v. Cal. Office of Admin. Hearings*, (9th Cir. 1990)).
- List of current out-of-state NPAs
  - <https://www.k12.wa.us/student-success/special-education/laws-and-procedures/current-nonpublic-agencies>

# School Refusal

- ***P.H. v. Seattle School District, (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 was isolated from his peers. 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, based in part upon the Court's determination that the ALJ:
  - Failed to give the District credit for engaging experts to develop an 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 properly analyze under the four-factor *Rachel H.* test whether residential placement was Student's LRE
    - Academic benefit; non-academic benefit; effect of student on classroom and staff; and cost

**More Questions?**