

## **WHAT ARE THE COURTS SAYING ABOUT SPECIAL EDUCATION THIS YEAR?**

### **SPECIAL ARIZONA UPDATE: 2015**

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1. **Meridian Joint Sch. Dist. No. 2 v. D.A., 115 LRP 29286 (9<sup>th</sup> Cir. 2015).** An Idaho district avoided liability for attorney's fees not because of the timing of the parents' request, but because of its determination that their teenage son was ineligible for IDEA services. The 9th Circuit held that only the parents of "a child with a disability," as that term is defined in the IDEA, may use the statute's fee-shifting provision to recover legal expenses. The three-judge panel relied heavily on the 5th U.S. Circuit Court of Appeals' ruling in *T.B. v. Bryan Independent School District*, 55 IDELR 244 (5th Cir. 2010). In that case, the 5th Circuit noted that the plain language of the IDEA permits a court to award attorney's fees "to a prevailing party who is the parent of a child with a disability." The *T.B.* court interpreted that language to mean that fee awards are available only to the parents of a student found eligible for IDEA services. The 9th Circuit acknowledged the possibility that a district might become adversarial early in the identification or evaluation process if the parents did not have the ability to recover legal expenses. However, the court explained that a plain-language interpretation of the fee-shifting provision would not thwart the statute's purposes. "Limiting the award of attorneys' fees against school districts to instances where the child has been determined to need special education services is not inconsistent with [the provision of FAPE]," U.S. Circuit Judge Consuelo M. Callahan wrote. "Rather, it preserves public resources for those [children with disabilities] most in need of services." The 9th Circuit also held that the fee claims are independent actions under the IDEA, and therefore are not subject to the relevant statute of limitations for administrative appeals. It reversed the District Court's award of attorney's fees to the parents, and vacated a May 2013 decision that enjoined the student's high school graduation while his eligibility was in dispute. The 9th Circuit affirmed the District Court's ruling at 60 IDELR 282 that the district's failure to reevaluate the student after his September 2010 release from a juvenile detention facility required it to fund an IEE.
2. **Sam K. v. State of Hawaii Dept. of Educ., 65 IDELR 222 (9<sup>th</sup> Cir. 2015).** The fact that the Hawaii ED did not propose a placement for a teenager with disabilities until well into the second semester of the 2010-11 school year helped the parents to recover a full year's worth of private school costs. The 9th Circuit held that ED's tacit approval of the student's ongoing private placement made Hawaii's 180-day limitations period for reimbursement actions inapplicable. The decision turned on the

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<sup>1</sup> *Note: This presentation is designed to provide accurate and authoritative information in regard to the subject matter covered. It is provided with the understanding that the presenter is not engaged in rendering legal counsel. If legal advice is required, the services of a competent professional should be sought. Melinda Jacobs is licensed to practice law in Tennessee. Ms. Jacobs makes no representation that she is licensed to practice law in any other state.*

distinction between unilateral and bilateral placements. Under Hawaii law, the court observed, parents have only 180 days to seek reimbursement for a private placement made without ED's agreement or consent. The court recognized that ED did not explicitly consent to the student's continued private school placement, which ED had funded through the end of the 2009-10 year as part of a FAPE settlement. However, the court pointed out that an agreement may be tacit when a party remains silent or fails to act. The three-judge panel held that ED gave its unspoken consent for the placement when it failed to develop an IEP before the start of the school year. "The [ED] had not proposed anything else, and it presumably did not intend that [the student] would receive no educational services in the meantime," U.S. Circuit Judge Richard R. Clifton wrote for the majority. Because the placement was not "unilateral," the court explained, the parents' October 2011 request for a due process hearing was timely. The 9th Circuit affirmed the District Court's ruling at 60 IDELR 190 that the parents were entitled to tuition reimbursement, as well as the District Court's award of attorney's fees at 61 IDELR 139.

3. **D.B. v. Santa Monica-Malibu Unified Sch. Dist., unpublished, 115 LRP 23862 (9<sup>th</sup> Cir. 2015).** A California district made a costly mistake when it decided to hold an IEP meeting without a teenager's parents so that it could update her program before the end of the current school year. Holding that the parents' exclusion amounted to a procedural denial of FAPE, the 9th Circuit affirmed the District Court's award of private school costs. The 9th Circuit rejected the notion that the unavailability of certain IEP team members during the summer justified the district's decision to hold the meeting in the parents' absence. While the district might have a valid argument if the parents had refused to participate, the court observed, the parents had asked the district to reschedule the meeting for a date when they would be available. As the District Court previously noted at 115 LRP 24831, the parents had a right to participate in all decisions about the student's services and placement. "An agency can make a decision without the parents only if it is unable to obtain their participation, which is not the case here," the 9th Circuit wrote in an unpublished decision. The 9th Circuit further noted that the IDEA only required the district to have an IEP in effect for the student at the start of the school year. As such, the district could not demonstrate that the failure to review and revise the student's IEP before the start of the summer break would cause it to run afoul of another procedural requirement. The 9th Circuit explained that the parents' attendance had to take priority over the attendance of other team members.
  
4. **Fairfield-Suisun Unified Sch. Dist. v. State of California Dept. of Educ., 115 LRP 10958 (9<sup>th</sup> Cir. 2015).** Without deciding whether the California ED violated the IDEA's procedural safeguards when it investigated two state complaints alleging a denial of FAPE, the 9th Circuit held that the LEAs involved in those complaints could not sue the ED over its alleged procedural violations. The 9th Circuit affirmed rulings reported at 59 IDELR 106 and 59 IDELR 123 that IDEA does not confer an express or implied right to sue an SEA for noncompliance with IDEA's procedural protections. The three-judge panel relied on its prior ruling in *Lake Washington School District No. 414 v. Office of Superintendent of Public Instruction*, 56 IDELR 61 (9th Cir. 2011), that IDEA only gives districts the right to litigate issues raised in a due process complaint. Noting that the *Lake Washington* case involved an SEA's handling of due process hearings, which an adverse party may appeal in court, the 9th Circuit explained that the LEAs' challenge of the state's complaint investigation procedures was even weaker. "If school districts lack an implied right of action to

challenge a state's non-compliance with the IDEA's procedural protections in the context of due process hearings, they also lack such an implied right of action in the context of complaint resolution proceedings," U.S. Circuit Judge Paul J. Watford wrote for the panel. The 9th Circuit declined to decide whether parents have an implied right of action to sue a state ED for violating IDEA in the context of complaint resolution proceedings.

5. **Lainey C. v. Dept. of Educ. of State of Hawaii, unpublished, 65 IDELR 32 (9<sup>th</sup> Cir. 2015).** The parents of a fifth-grader with autism could not convince the 9th Circuit that the Hawaii ED denied their daughter FAPE when it declined to provide a one-to-one aide to assist with socialization. In an unpublished decision, the 9th Circuit affirmed a District Court ruling at [61 IDELR 77](#) that the proposed IEP met the student's needs with regard to social skills. The three-judge panel found no fault with the District Court's reliance on the testimony of the behavioral specialist who attended the August 2011 IEP meeting. According to the specialist, the presence of an aide would not necessarily help the student with socialization. In fact, the specialist opined, the presence of a dedicated aide might lead to the student becoming more socially isolated and less independent. Given the potential drawbacks of a one-to-one aide, the District Court observed in its April 2013 ruling, it was not unreasonable for the IEP team to recommend that the ED first try a social skills group and autism consultation services. "[The parents] have not shown that this finding of fact is clearly erroneous," the 9th Circuit wrote. The 9th Circuit also upheld the District Court's determination that the IEP goals addressed the student's socialization needs.
6. **Oskowis v. Sedona-Oak Creek Unified Sch. Dist., 65 IDELR 169 (D. Ariz. 2015).** Although the parent of a student with autism could not demonstrate a need for all notes and correspondence related to his son's IEP, he did convince the District Court to look into the authenticity of a prior written notice in the administrative record. The court gave the district 20 days to search for the emailed copy of the notice that the parent purportedly received in November 2012. Senior U.S. District Judge James A. Teilborg observed that the prior written notice in the administrative record "differ[ed] substantially in content" from the version the parent claimed to have received by email. He rejected the parent's claim that the discrepancy demonstrated a need to validate all information in the administrative record. However, the judge agreed that the notices required further review. "The Court cannot ignore [the parent's] allegations because if correct, an erroneous administrative record would be a valid basis for the Court to admit additional evidence," Judge Teilborg wrote. The court ordered the district to conduct a forensic search of its electronically stored data, including emails, computers, servers, and backup files, in an attempt to find the email. It instructed the district to produce the email and the attachment if it was able to do so. If the search proved unsuccessful, the district would have to file an affidavit describing its search procedures.
7. **Massimilla v. Higley Unified Sch. Dist. No. 60, 65 IDELR 99 (D. Ariz. 2015).** The parents of a student with a disability did not have to pursue their negligence claims against an Arizona district in federal court simply because their complaint reserved their right to an IDEA due process hearing. Observing that the parents were not currently seeking relief under the IDEA, the District Court granted their motion to return the negligence claims to state court. The parents argued that they were not seeking relief under the IDEA, as the district had claimed when it removed their

lawsuit to the District Court. Instead, the parents explained, the complaint stated that they were reserving their right to conduct appropriate proceedings under the IDEA. U.S. District Judge David G. Campbell agreed with the parents that the District Court did not have the authority to hear the case. "The allegations ... make clear that Count III merely references the IDEA; it does not assert a violation of any provision of the IDEA or seek relief under the statute," Judge Campbell wrote. The parents originally filed negligence claims in a state trial court to seek relief for an alleged incident of bullying at the student's school-sponsored science camp.