

# CLIENT NEWS BRIEF

## IDEA Procedural Requirements Warrant a Second Look After Recent Ninth Circuit Decision

The Ninth Circuit Court of Appeals recently issued a decision in *M.C. v. Antelope Valley Union High Sch. Dist.* (9th Cir., Mar. 27, 2017, No. 14-56344) \_\_\_ F.3d \_\_\_ [2017 U.S.App. LEXIS 5347] that expanded procedural requirements in special education cases and opened the door for parents to add issues during a special education due process hearing. This decision appears to shift the balance in favor of parents' attorneys throughout California and other Ninth Circuit states.

In *Antelope Valley*, the student suffered from a genetic disorder resulting in blindness and "a host of other deficits." His parent filed for a due process hearing, taking issue with the school district's Individualized Educational Program (IEP) documentation of "teacher of visually impaired" (TVI) services offered, the IEP's omission of the types of assistive technology (AT) devices offered, and the lack of a 10-day response to the parent's due process complaint, among other things. The Individuals with Disabilities Education Act (IDEA), the federal law governing special education, guarantees students with disabilities a free, appropriate public education (FAPE) and requires procedural and substantive compliance when crafting an IEP for a special education student.

Although the school district prevailed in the due process hearing and at the district court level, the Ninth Circuit overturned those decisions. In ultimately determining that the student was the prevailing party entitled to an award of attorney's fees with regard to the most recent appeal, the Ninth Circuit came to a number of additional conclusions primed to impact those who serve special education students, while also remanding the case back to the district court for additional proceedings. The issues of note are summarized below.

### Adequacy of Due Process Hearing Decision

First, the Ninth Circuit examined its standard of review of special education cases. The court decided that the duration of a due process hearing, the administrative law judge's (ALJ) active involvement in a hearing and the length of an ALJ's opinion issued did not necessarily determine that a "thorough and careful" fact finding had occurred. Even though the ALJ in the parties' three-day due process hearing had questioned witnesses and wrote a detailed 21-page opinion, the Ninth Circuit found that "no thorough and careful" fact finding had occurred because the ALJ had disregarded evidence and failed to address all issues. As a result, the Ninth Circuit reviewed the entire case anew, based on the evidence in the record from the underlying due process matter.

### Typographical Errors in IEP Documents and the IEP as a Contract

Second, the court concluded that a typographical error constituted a denial of FAPE, even though the error had resulted in no substantive loss of services. After the parent consented to the student's IEP, the school district realized that it had inadvertently written in the IEP 240 minutes of TVI services per *month*

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instead of the agreed-upon frequency of per *week*. The school district provided at least 240 minutes of TVI services per week. The school district corrected the IEP a month later, but the parent first learned of the correction during the due process hearing. The Ninth Circuit determined that although no substantive harm may have occurred with the student receiving additional minutes of TVI services, the parent nonetheless suffered procedural harm because the mistakes necessitated the parent incurring legal fees to determine the actual level of services provided. This constituted a form of prejudice denying educational benefit.

In reaching this conclusion, the Ninth Circuit also ruled that “an IEP is a contract,” and that making a unilateral amendment is legally impermissible. When the school district in this case learned that the IEP did not reflect the IEP team’s agreement, it was required to notify the parent and seek consent for amendment. “Absent such consent, the District was bound by the IEP as written unless it sought to re-open the IEP process and proposed a different IEP,” the court said. The “unilateral amendment” to the IEP was deemed a “per se procedural violation of the IDEA because it vitiates[d] the parents’ right to participate at every step of the IEP drafting process.”

Moreover, the court ruled that a unilateral IEP correction may serve as grounds for sanctions. Whether the school district had engaged in “mere bungling” or had deliberately attempted to mislead the parent by inaccurately recording the offer of FAPE must now be determined by the district court on remand. If it is the latter, the district court is ordered to impose sanctions on the school district sufficiently severe to deter any future such misconduct.

## **Monitoring and Enforcement of IEP as Part of Parental Participation**

The court also concluded that the IDEA provides parents a right to participate in every step of the IEP drafting process, which includes IEP monitoring and enforcement. Although the parent had participated in drafting the student’s IEP, the typographical error obfuscated her knowledge of the actual offer made, and without knowing the actual offer, she could not adequately use the IEP to monitor and enforce the services provided. This constituted another procedural violation of the IDEA. Likewise, even though the IEP team discussed the types of AT devices offered, the school district’s failure to provide that discussion in writing “rendered the IEP useless as a blueprint for enforcement.” Thus, the failure to identify the AT devices in the IEP was an additional violation.

## **Shifting of Burden of Proof at Due Process Hearing**

The court additionally held that failing to make a clear offer of FAPE can impact a party’s burden of proof in a due process hearing. The party alleging an IDEA violation typically bears the burden of proving that the services received did not amount to FAPE. Here, the court held that when procedural violations prevent parents from knowing the kind or duration of IEP services offered, it is impossible for them to assess the substantive reasonableness of those services, so the burden of proof must shift to the school district, even if it has not initiated the due process hearing.

## **Penalties for Failure to Provide Responses to Due Process Complaints**

In addition, *Antelope Valley* has created significant penalties for school districts that fail to provide a timely 10-day response to a parent’s due process complaint. The court held that in such circumstances an ALJ *must not go forward with the hearing* but instead order the school district to provide a response, and “shift the cost of the delay” to the school district, regardless of the ultimate prevailing party. *Antelope Valley* makes it clear that a school district has an obligation to commit to a position within the first 10 days after a complaint is filed. In order for the Office of Administrative Hearings (OAH) to enforce this ruling, school districts must now provide OAH with a copy of the district’s response to the complaint.

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## Issues to be Tried at Due Process Hearing

Finally, after this decision, a party's failure to object to an ALJ's restatement of the issues will not be deemed a waiver of any issue "arguably encompassed in a due process complaint." In this case, the school district argued that the parent had waived the issue of adequate TVI services because although alleged in the due process complaint, the ALJ had not included the issue in the subsequent framing of issues for hearing. The district court agreed, but the Ninth Circuit extended the concept that "issues are treated as if they were raised in the complaint if they are tried by consent" to the IDEA context, so as to find no waiver. In doing so, the Ninth Circuit admitted that "[w]hile we haven't previously recognized this practice in IDEA cases, it's often been applied in a variety of other agency adjudications ... We see no reason IDEA cases should be treated differently." Effectively, this means that any issue addressed at hearing without objection could be seen as "tried by consent," regardless of whether it is memorialized in any statement of issues.

*Antelope Valley* greatly expands and shifts school district obligations. It reminds those serving special education students of the need to accurately and clearly record in an IEP the offer of FAPE made, to communicate with the parents regarding monitoring and enforcement of the IEP, and to timely respond to due process hearing requests, among other things. If it is not challenged in an expanded Ninth Circuit review or an appeal to the United States Supreme Court, this case will likely alter special education legal processes in California and the rest of the Ninth Circuit for the foreseeable future.

For more information on the *Antelope Valley* decision, IEP drafting, responses to due process hearing requests or special education law in general, please contact the authors of this Client News Brief or an attorney at one of our [nine offices](#) located statewide. You can also visit our [website](#), follow us on [Facebook](#) or [Twitter](#) or download our [Client News Brief App](#).

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